

Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers
Under Section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116-260,
And Public Laws 117-43 and 117-70,
Form ETA-9142-B-CAA-5, General Instructions
U.S. Department of Labor



Please read these instructions carefully before completing the Form ETA-9142-B-CAA-5, *Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116-260, and Public Laws 117-43 and 117-70*. These instructions contain explanations of the attestations and information collection that make up the Form ETA-9142-B-CAA-5. In accordance with Federal Regulations at 8 CFR 214.2, 20 CFR 655.64, and 20 CFR 655.69, an eligible employer must prepare and file a completed Form ETA-9142-B-CAA-5 with the U.S. Department of Homeland Security's (DHS) U.S. Citizenship and Immigration Services (USCIS), at the appropriate service center in order to employ H-2B nonimmigrant workers pursuant to a certified temporary labor certification from the Department of Labor (DOL) which required that the worker(s) begin employment between October 1, 2021, and March 31, 2022. All required fields/items must be completed.

Public Burden Statement:

Members of the public are not required to respond to this collection of information unless it displays a currently valid OMB control number. Obligations to reply are required (Immigration and Nationality Act, 8 U.S.C. 1101, et seq.). Public reporting burden for this collection of information, which is to assist with program management and to meet Congressional and statutory requirements is estimated to average 9 hours per response, including the time to review instructions, complete and submit the form, comply with all requirements (e.g. recruitment; record keeping). Members of the public may send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, * 200 Constitution Ave., NW * Box N-5311 * Washington, DC * 20210 or by email to ETA.OFLC.Forms@dol.gov. (Paperwork Reduction Act OMB 1205-0549) **DO NOT send the completed attestation to this address.**

HOW TO FILE: The attestation must be filed on Form ETA-9142-B-CAA-5, *Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Division O of the Consolidated Appropriations Act, 2021 Public Law 116-260, and Public Laws 117-43 and 117-70* (OMB Approval Number 1205-NEW). Once the Form ETA-9142-B-CAA-5 is completed, the employer or its authorized attorney or agent must submit it to USCIS along with the approved Form ETA-9142B, *Final Determination: H-2B Temporary Labor Certification Approval*, and all forms, fees and documentation required by USCIS to support a petition with DHS USCIS under the H-2B visa classification. A petition may be filed with only a single Form ETA-9142-B-CAA-5.

In accordance with Federal Regulations at 8 CFR 214.2 and 20 CFR 655.64, an eligible employer must prepare and file a completed Form ETA-9142-B-CAA-5 directly with DHS USCIS at the appropriate service center in order to employ H-2B workers under this temporary final rule.

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ATTESTATIONS: The employer must carefully read and agree to attestation statements (A) through (M) on the form and demonstrate agreement to accuracy and compliance by signing the form. An employer completes this attestation to document its agreement to abide by certain requirements as a condition of receiving authorization to employ certain nonimmigrant workers under the H-2B visa classification. This signed attestation form, along with all other supporting documentation and information, must be retained by the employer in accordance with 20 CFR 655.69, 20 CFR 655.56, and 29 CFR 503.17.

Important Note: These attestations do not apply to workers who have already been counted under the first half of FY 2022 H-2B (33,000) visa cap or those who are exempt from the FY 2022 H-2B visa cap.

Attestation (A): The employer must verify that it received a certified Form ETA-9142B, *H-2B Application for Temporary Employment Certification and Final Determination: H-2B Temporary Labor Certification Approval*, including all appendices, issued by DOL.

Attestation (B): The employer must verify that the approved Form ETA-9142B, *H-2B Application for Temporary Employment Certification and Final Determination: H-2B Temporary Labor Certification Approval*, including all appendices, issued by DOL contains a completed footer indicating the H-2B Case Number, Case Status, Determination Date, and validity period (i.e., certified start and end dates of work) and that the certified start date of work occurs on or after October 1, 2021, and before March 31, 2022, and the certified end date of work has not elapsed.

Attestation (C): The employer must attest that it ***is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss)*** without the ability to employ all of the H-2B workers requested on the Form I-129 petition filed pursuant to 8 CFR 214.2(h)(6)(xi) in the job opportunity certified by DOL. Additionally, the employer must agree to provide all documents and records, as described below, in the event of an audit, investigation, or other request by DOL or DHS. The documents and records must provide evidence establishing that the employer met its burden to demonstrate that if the employer's business is unable to employ all of the H-2B workers requested on the Form I-129 petition filed with DHS USCIS, it is suffering irreparable harm or will suffer impending irreparable harm.

While the employer need not submit supporting documents with this attestation and H-2B petition, the employer must retain and be able to provide, at the time of filing the Form I-129 petition or upon request from DHS or DOL, all applicable type(s) of evidence to establish that the employer meets the irreparable harm standard, and mark each box that corresponds to these applicable type(s) of evidence. Providing only one form of evidence will not necessarily meet the irreparable harm standard. Such evidence may include, but is not limited to:

- Executed work contracts - Select this option if the employer has retained evidence that the business is suffering irreparable harm or will suffer impending irreparable harm due to the inability to meet existing contractual obligations without the services or labor of the H-2B workers in the job opportunity certified by DOL, including evidence of executed work contracts where the work commences during the first half of FY 2022 that have been cancelled or would be cancelled without the ability to employ all of the requested H-2B workers.

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- Work orders, reservations, or other business arrangements - Select this option if the employer has retained evidence that the business is suffering irreparable harm or will suffer impending irreparable harm due to the inability to meet business commitments based on work orders with clients or customers necessitating the services or labor to be performed, sales or reservations, or any other business arrangements demonstrating a commitment to deliver the services or labor needed where such work commences during the first half of FY 2022 that have been cancelled or would be cancelled without the ability to employ all of the requested H-2B workers.
- Financial records - Select this option if the employer has retained evidence that the business is suffering irreparable harm or will suffer impending irreparable harm due to the inability to employ all of the requested H-2B workers in the job opportunity certified by DOL during the employer's period of need, as compared to prior years, such as financial statements (including profit/loss statements) comparing the period of need to prior years; bank statements, tax returns, or other documents showing evidence of current and past financial condition demonstrating an inability to pay debts/bills; and relevant tax records, employment records, or other similar documents showing hours worked and payroll comparisons from prior years to the current year;
- Payroll records or earnings statements - Select this option if the employer has retained payroll records or other earnings statements as evidence that the business is suffering irreparable harm or will suffer impending irreparable harm due to the inability to employ all of the requested H-2B workers in the job opportunity certified by DOL, such as evidence showing the number of workers needed in the previous three fiscal years (i.e., FY 2019, 2020, and 2021) to meet the employer's temporary need as compared to those currently employed or were expected to be employed at the beginning of the start date of need certified by DOL. Such evidence must show, at a minimum, the number of H-2B workers requested, the number of H-2B workers actually employed, the dates of their employment, and their hours worked, particularly in comparison to the weekly hours stated on the approved temporary labor certification from DOL. If the employer selects this option, and obtains authorization to employ H-2B workers under this rule for the first half of FY 2022, the employer must also retain evidence, at a minimum, showing the number of H-2B workers the employer's business claims are needed and the number of workers actually employed, including H-2B workers, the dates of their employment, and their hours worked, particularly in comparison to the weekly hours stated on the approved temporary labor certification from DOL.
- Evidence of reliance on a certain number of workers to operate, based on the nature and size of the business - Select this option if the employer has retained evidence that the business is suffering irreparable harm or will suffer impending irreparable harm due to its reliance on the services or labor to be performed by H-2B workers in the job opportunity certified by DOL, based on the nature and size of the employer's business, such as documentation showing the number of workers it has needed to maintain its operations in prior years; or will in the near future need, including but not limited to; a detailed business plan, copies of purchase orders or other requests for good and services, or other reliable forecast of an impending need for workers.

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- **Other types of evidence demonstrating irreparable harm** - Select this option if the employer has retained other evidence that the business is suffering irreparable harm or will suffer impending irreparable harm which is not covered by any one of the types of documents listed above. Once selected, the employer must use the free text field to identify the evidence retained, including the type(s) or name(s) of the documents, timeframes (e.g., year, service period) covered by the document(s), and a brief description of the business commitment or service transaction related to the document.

Important Note: If an audit, investigation, or other request for documentation occurs, DHS or DOL will review all evidence to confirm that the employer properly attested and established to DHS its business needs. The attestation, however, only constitutes *prima facie* evidence that the employer satisfies the eligibility requirements for petitions filed under 8 CFR 214.2(h)(6)(xi). If DHS subsequently finds that the evidence does not support the employer's attestations, DHS may deny the petition or, if the petition has already been approved, revoke the petition at any time consistent with existing regulatory authorities. In addition, where the employer has not shown sufficient proof of irreparable harm, DOL may independently take enforcement actions, including, among other things, debarring the employer from the H-2B program for up to 5 years from the date of the final agency decision, which also disqualifies the debarred party from filing any labor certification applications or labor condition applications with DOL for the same period set forth in the final debarment decision.

Attestation (D): The employer must attest that it has a *bona fide* temporary need for the total number of H-2B worker positions certified on its certified Form ETA-9142B, *Final Determination: H-2B Temporary Labor Certification Approval*.

Attestation (E): If the employer submits a Form ETA-9142B-CAA-5 and I-129 petition to DHS USCIS, reflecting a start date of need 45 or more days after the certified start date of work, as shown on the approved labor certification from DOL, the employer must attest that it will complete a new assessment of the United States labor market to include the steps described below.

Attestation (E)(1): The employer must agree that it will place a new job order for the job opportunity with the State Workforce Agency (SWA) serving the area of intended employment not later than the next business day after submitting the I-129 petition for H-2B worker(s), and inform the SWA that the job order is being placed in connection with a previously submitted and certified *Application for Temporary Employment Certification* for H-2B workers by providing the SWA with the unique DOL case number identified on the certified Form ETA-9142B. The job order must contain the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 15 calendar days. The employer must also follow all applicable SWA instructions for posting job orders and receive applications in all forms allowed by the SWA, including online applications.

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Attestation (E)(2): During the period of time the SWA is actively circulating the job order for intrastate clearance, the employer must agree to contact, by email or other available electronic means, the nearest comprehensive American Job Center (AJC) serving the area of intended employment where work will commence or, if a comprehensive AJC is not available, the nearest affiliate AJC serving the area of intended employment where work will commence. Upon contacting the AJC, the employer must request staff assistance advertising and recruiting U.S. workers for the job opportunity, and provide to the AJC the unique identification number associated with the job order placed with the SWA or, if unavailable, a copy of the job order.

Important Note: DOL offers an online service for employers to locate the nearest AJC at <https://www.careeronestop.org/> and by selecting the “Find Local Help” feature on the main homepage. This feature will navigate the employer to a search function called “Find an American Job Center” where the city, state or zip code covering the geographic area where work will commence can be entered. Once entered and the search function is executed, the online service will return a listing of the name(s) of the AJC(s) serving that geographic area as well as contact option(s) and an indication as to whether the AJC is a “comprehensive” or “affiliate” center.

Employers must contact the nearest “comprehensive” AJC serving the area of intended employment where work will commence or, where a “comprehensive” AJC is not available, the nearest “affiliate” AJC. A “comprehensive” AJC tends to be a large office that offers the full range of employment and business services, and an “affiliate” AJC typically is a smaller office that offers a self-service career center, conducts hiring events, and provides workshops or other select employment services for workers. Because a “comprehensive” AJC may not be available in many geographic areas, particularly among rural communities, the employer must contact the nearest “affiliate” AJC serving the area of intended employment where a “comprehensive” AJC is not available.

Attestation (E)(3): During the period of time the SWA is actively circulating the job order for intrastate clearance, the employer must agree to make reasonable efforts to contact, by mail or other effective means, its former U.S. workers who were furloughed and laid off during the period beginning January 1, 2020, until the date the I-129 petition is submitted to DHS, and those who were employed in the occupation at the place of employment during calendar years 2020 and 2021. However, employers are not required to contact U.S. workers who were terminated for cause or who abandoned the worksite, as defined in 20 CFR 655.20(y). The employer must provide each former U.S. worker a full disclosure of the terms and conditions of the job order, and solicit their return to the job. Employers are required to maintain documentation to be submitted in the event of an audit or investigation sufficient to prove contact with each former U.S. worker consistent with document retention requirements under 20 CFR 655.56. This documentation may, for example, consist of a copy of a form letter sent to all former employees, along with evidence of its transmission (postage account, address list, etc.).

Important Notice: The employer must agree to make the required contact(s), the disclosures, and solicitation to return, as required by this attestation, in a language understood by the worker, as necessary or reasonable. This requirement would apply, for example, in situations where one or more employees who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English in order to make informed decisions. Consistent with existing language requirements in the H-2B program, DOL intends to broadly interpret the necessary

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or reasonable qualification and apply the exemption only in those situations where having the job order translated into a particular language would both place an undue burden on an employer and not significantly disadvantage the employee.

Attestation (E)(4): During the period of time the SWA is actively circulating the job order for intrastate clearance, the employer must agree to provide written notice of the job opportunity to the bargaining representative(s), as required by any collective bargaining agreement, of the employer's employees in the occupation and area of intended employment, consistent with 20 CFR 655.45(a), or if there is no bargaining representative, to post the job order in the places and manner described in 20 CFR 655.45(b).

- **Contacting the Bargaining Representative:** If there is a bargaining representative for any of the employer's employees in the occupation and area of intended employment, the employer must provide written notice of the job opportunity, by providing a copy of the approved *Application for Temporary Employment Certification* and the job order. An employer governed by this notification requirement must include information in its recruitment report that confirms that the bargaining representative(s) was contacted, that the approved application and job order were sent, and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.
- **Posting Notice of the Job Opportunity:** If there is no bargaining representative, the employer must post the availability of the job opportunity in at least 2 conspicuous locations at the place(s) of anticipated employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H-2B workers. Electronic posting, such as displaying the notice prominently on any internal or external Web site that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. The notice must meet the requirements under 20 CFR 655.41 and be posted for at least 15 consecutive business days. The employer must maintain a copy of the posted notice and identify where and when it was posted in accordance with 20 CFR 655.56.

Important Notice: Consistent with the contact requirement under Attestation (E)(3), the employer must agree to make the required notification(s) and provide the disclosures required by this attestation in a language understood by the worker, as necessary or reasonable.

Attestation (E)(5): The employer must agree to offer the job to any qualified and available U.S. worker who applies or is referred for the job opportunity until the date on which the last H-2B worker departs for the place of employment, or 30 days after the last date on which the SWA job order is posted, whichever is later. The employer must attest that it understands that applicants can be rejected only for lawful job-related reasons, consistent with 20 CFR 655.40(a). If the employer wishes to interview U.S. applicants, DOL reminds the employer that it must conduct the interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. The employer must not provide H-2B workers with more favorable treatment in whether it requires or in how it conducts interviews.

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Attestation (F): The employer must attest that it will comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, health and safety laws and laws related to COVID-19 worker protections; any right to time off or paid time off for COVID-19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site; and must notify any H-2B workers approved under the supplemental cap, in a language the workers understand as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine distribution sites.

Attestation (G): The employer must attest that each of the workers it requests and/or instructs to apply for a nonimmigrant visa under the Form I-129 petition, whether currently named or unnamed, has been issued an H-2B visa or was otherwise granted H-2B status during one of the last 3 fiscal years (Fiscal Years 2019, 2020, or 2021), unless the Form I-129 petition submitted to DHS USCIS, as indicated in Box #5 of the attestation, requests a national(s) of El Salvador, Guatemala, Honduras, or Haiti who is not subject to a returning worker requirement, consistent with 8 CFR 214.2(h)(6)(xi)(A)(2).

Attestation (H): The employer must agree to retain, for a period of 3 years from the date of certification, a copy of the signed attestation form, evidence establishing that its business meets the standard described in paragraph (C) of the attestation, and, if applicable, proof of recruitment efforts set forth in 20 CFR 655.64(a)(6)(i)-(v) and a recruitment report that meets the requirements set forth in 20 CFR 655.48(a)(1)-(4), and (7), consistent with the document retention requirements under 20 CFR 655.69, 20 CFR 655.56, and 29 CFR 503.17. In addition, the employer must agree to provide this documentation to a DHS or DOL official upon request.

Attestation (I): The employer must agree to retain documentary evidence establishing that each of the workers it is requesting on the Form I-129 petition, whether named or unnamed, are only workers who have been issued an H-2B visa or otherwise granted H-2B status during one of the last 3 fiscal years (Fiscal Years 2019, 2020, or 2021), unless the Form I-129 petition submitted to DHS USCIS, as indicated in Box #5 of the attestation, requests a national(s) of El Salvador, Guatemala, Honduras, or Haiti who is not subject to a returning worker requirement, consistent with 8 CFR 214.2(h)(6)(xi).

Attestation (J): The employer must agree to comply with all assurances, obligations, and conditions of employment set forth in the *Application for Temporary Employment Certification* (Form ETA-9142B and all Appendices) certified by the DOL for its job opportunity. Employers are reminded to review and ensure they understand the obligations and assurances of Appendix B of Form ETA-9142B.

Attestation (K): The employer must agree to fully cooperate with any compliance review, evaluation, verification or inspection conducted by DHS, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with immigration laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2022 supplemental allocation outlined in paragraph 8 CFR 214.2(h)(6)(xi)(B), as a condition for the approval of the H-2B petition.

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Attestation (L): The employer must agree to fully cooperate with any audit, investigation, compliance review, evaluation, verification or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2022 supplemental allocation outlined in paragraphs 20 CFR 655.64(a) and 655.69(a), as a condition for the approval of the H-2B petition. Pursuant to 20 CFR Part 655, Subpart A and 29 CFR 503.25, the employer must agree not to impede, interfere, or refuse to cooperate with an employee of the Secretary who is exercising or attempting to exercise DOL's audit or investigative authority.

DECLARATION UNDER PENALTY OF PERJURY STATEMENT AND SIGNATURE:

You must review and ensure that you are eligible and affirm all attestations prior to signing. When you sign Form ETA-9142-B-CAA-5, *Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Division O of the Consolidated Appropriations Act, 2021 Public Law 116-260 and Public Laws 117-43 and 117-70*, you are declaring under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Form ETA-9142-B-CAA-5 will not be considered complete and valid if the attestation is not signed and dated by an individual who has the authority to sign Form ETA-9142-B-CAA-5. An attorney or agent should not sign this section unless the attorney or agent is an employee of the employer and has authority to sign as the employer.

Anyone who knowingly and willingly furnishes any false information in the preparation and submission of the Form ETA-9142-B-CAA-5 and any supporting documentation, or aids, abets, or counsels another to do so is committing a federal offense, punishable by fine or imprisonment up to 5 years or both (18 U.S.C. §§ 2, 1001). Other penalties apply as well to fraud or misuse of this immigration document and to perjury with respect to this form (18 U.S.C. §§ 1546, 1621).

1. Enter the last (family) name of the person with authority to sign as the employer. Enter the first (given) name of the person with authority to sign as the employer.
2. Enter the case number for your DOL-certified Form ETA-9142B.
3. The person with authority to sign as the employer must sign the attestation. Read the entire attestation and verify all contained information prior to signing. The person with authority to sign as the employer must also date the attestation.
4. Enter the date on which the attestation is signed using a month/day/full year (MM/DD/YYYY) format.
5. With the Form I-129 petition supported by this attestation form, check Box #5 in this declaration section to indicate that the employer is requesting a national(s) of El Salvador, Guatemala, Honduras, or Haiti who is not subject to a returning worker requirement under 8 CFR 214.2(h)(6)(xi)(A)(2), and understands that the Form I-129 petition submitted to DHS USCIS may only request a national(s) of these countries. If Box #5 is checked and the Form I-129 petition is requesting workers from other countries, DHS USCIS may reject, deny, or take other adverse action with respect to the petition.