

Melancon Fact Sheet on the H2B Returning Worker Exemption

Provisions concerning the returning worker exemption are highlighted in red font.

Summary of the Save Our Small and Seasonal Business Act

(Courtesy of the Congressional Research Service)

The Save Our Small and Seasonal Businesses Act ([S. 352/H.R. 793](#)),⁽⁵⁶⁾ introduced respectively by Senator Mikulski and Representative Gilchrest for themselves and bipartisan groups of cosponsors, proposed to revise the H-2B program. During Senate consideration of the FY2005 Emergency Supplemental Appropriations bill ([H.R. 1268](#)) in April 2005, Senator Mikulski offered a floor amendment based on S. 352/H.R. 793. On April 19, 2005, the Senate adopted the Mikulski Amendment, as modified, by a vote of 94 to 6, and the amendment was included in the enacted measure ([P.L. 109-13](#)) as Division B, Title IV.

The H-2B title of [P.L. 109-13](#) caps at 33,000 the number of H-2B slots available during the first six months of a fiscal year. It also requires DHS to submit specified information to Congress on the H-2B program on a regular basis, imposes a new fraud-prevention and detection fee on H-2B employers, and authorizes DHS to impose additional penalties on H-2B employers in certain circumstances. **In addition, the H-2B title of P.L. 109-13 contained a temporary provision, initially scheduled to expire at the end of FY2006, that kept aliens who had been counted toward the H-2B cap in any of the past three years from being counted again. [This is commonly called the “returning worker exemption.”]**

In 2006, the John Warner National Defense Authorization Act for FY2007 ([P.L. 109-364](#); §1074) extended this returning H-2B worker exemption through FY2007. Thus, aliens who had been counted toward the H-2B cap in FY2004, FY2005, or FY2006 were not to be counted toward the FY2007 cap.

H.R.793 - Save Our Small and Seasonal Businesses Act

As Introduced in the House of Representatives in 2005

SEC. 2. NUMERICAL LIMITATIONS ON H-2B WORKERS.

(a) In General- Section 214(g) of the Immigration and Nationality Act (8 U.S.C. 1184(g)) is amended by adding at the end the following:

“(9) An alien counted toward the numerical limitations of paragraph (1)(B) **during any one of the 3 fiscal years prior to the submission of a petition for a nonimmigrant worker** described in section 101(a)(15)(H)(ii)(b) shall not be counted toward such limitation for the fiscal year in which the petition is approved.”.

(b) Effective Date-

(1) IN GENERAL- **The amendment in subsection (a) shall take effect as if enacted on October 1, 2004, and shall expire on October 1, 2006.**

(2) IMPLEMENTATION- Not later than the date of enactment of this Act, the Secretary of Homeland Security shall begin accepting and processing petitions filed on behalf of aliens described in section 101(a)(15)(H)(ii)(b), in a manner consistent with this Act and the amendments made by this Act.

FY2006 H2B Returning Worker Exemption

(Passed into law as part of H.R.1268, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005)

SEC. 402. NUMERICAL LIMITATIONS ON H-2B WORKERS.

(a) In General- Section 214(g) of the Immigration and Nationality Act (8 U.S.C. 1184(g)) is amended by adding at the end the following:

`(9)(A) Subject to subparagraphs (B) and (C), **an alien who has already been counted toward the numerical limitations of paragraph (1)(B) during any 1 of the 3 fiscal years prior to the fiscal year of the approved start date of a petition for a nonimmigrant worker** described in section 101(a)(15)(H)(ii)(b) shall not be counted toward such limitation for the fiscal year in which the petition is approved. Such an alien shall be considered a returning worker.

`(B) A petition referred to in subparagraph (A) shall include, with respect to a returning worker--
` (i) all information and evidence that the Secretary of Homeland Security determines is required to support a petition for status under section 101(a)(15)(H)(ii)(b);
` (ii) the full name of the alien; and
` (iii) a certification to the Department of Homeland Security that the alien is a returning worker.

`(C) An H-2B visa or grant of nonimmigrant status for a returning worker shall be approved only if the alien is confirmed to be a returning worker by--
` (i) the Department of State; or
` (ii) if the alien is visa exempt or seeking to change to status under section 101 (a)(15)(H)(ii)(b), the Department of Homeland Security.'

(b) Effective Date-

(1) IN GENERAL- **The amendment in subsection (a) shall take effect as if enacted on October 1, 2004, and shall expire on October 1, 2006.**

FY2007 Extension of Returning Worker Exemption

(Passed into law as part of H.R. 5122, the John Warner National Defense Authorization Act for Fiscal Year 2007)

SEC. 1074. EXTENSION OF RETURNING WORKER EXEMPTION TO H-2B NUMERICAL LIMITATION.

(a) In General- Section 214(g)(9) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(9)) is amended--

(1) by amending the first sentence of subparagraph (A) to read as follows: `Subject to subparagraphs (B) and (C), **an alien who has already been counted toward the numerical limitation of paragraph (1)(B) during fiscal year 2004, 2005, or 2006 shall not again be counted toward such limitation during fiscal year 2007.'**; and

(2) in subparagraph (B), by striking `referred to in subparagraph (A)' and inserting `to admit or otherwise provide status under section 101(a)(15)(H)(ii)(b).'

(b) Deletion of Prior Sunset Provision- Section 402(b)(1) of the Save Our Small and Seasonal Businesses Act of 2005 (title IV of division B of Public Law 109-13; 119 Stat. 318; 8 U.S.C. 1184 note) is amended by striking `2004,' and all that follows through the period at the end and inserting `2004.'

(c) Effective Date- The amendments made by this section shall take effect on October 1, 2006. If this section is enacted after October 1, 2006, the amendments made by this section shall take effect as if enacted on such date.

FY2008 Extension of Returning Worker Exemption

Two bills have been introduced, but neither has been passed into law.

The Save Our Small and Seasonal Businesses Act of 2007 (H. R. 1843)

Introduced by Rep. Bart Stupak (D-MI)

SEC. 2. EXTENSION OF RETURNING WORKER EXEMPTION TO H-2B NUMERICAL LIMITATION.

(a) In General- Section 214(g)(9)(A) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(9)(A) is amended, by striking `an alien who has already been counted toward the numerical limitation of paragraph (1)(B) during fiscal year 2004, 2005, or 2006 shall not again be counted toward such limitation during fiscal year 2007.' and **inserting `an alien who has been present in the United States as an H-2B nonimmigrant during any 1 of the 3 fiscal years immediately preceding the fiscal year of the approved start date of a petition for a nonimmigrant worker described in section 101(a)(15)(H)(ii)(b) shall not be counted toward such limitation for the fiscal year in which the petition is approved. Such alien shall be considered a returning worker.'**

(b) Effective Date- The amendment made by subsection (a) shall take effect as if enacted on October 1, 2007. *[There is no "sunset" or expiration date, meaning workers who receive an H2B visa in "any 1 of the 3 fiscal years immediately preceding" could be a continuously expanding group of people, potentially increasing by tens of thousands of foreign workers each year.]*

The Seasonal Workforce Assistance Act (H.R. ???)

Introduced by Rep. Charlie Melancon (D-LA)

SECTION 1. EXTENSION OF RETURNING WORKER EXEMPTION TO H-2B NUMERICAL LIMITATION.

(a) IN GENERAL.—The first sentence of section 214(g)(9)(A) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(9)(A)) is amended to read as follows: “Subject to subparagraphs (B) and (C), **an alien who has already been counted toward the numerical limitation of paragraph (1)(B) during fiscal year 2005, 2006, or 2007 shall not again be counted toward such limitation during fiscal year 2008.**” *[This language mirrors the returning worker exemption provision that was passed for FY2007 as part of H.R. 5122]*

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect as if enacted on September 30, 2007.