



H-2B Nonagricultural Temporary Worker Visa and Status

Fiscal Year 2010 Semiannual Report to Congress
Part 1: April 1, 2009 – March 31, 2010



Homeland
Security

*U.S. Citizenship and
Immigration Services*



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NOV 30 2011

Foreword

On behalf of the Department of Homeland Security, I am pleased to present the first of two semiannual reports for Fiscal Year 2010 on "H-2B Nonagricultural Temporary Worker Visa and Status."

Pursuant to statutory requirements, this report is being provided to the following Members of Congress:

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee

The Honorable Charles Grassley
Ranking Member, Senate Judiciary Committee

The Honorable Lamar Smith
Chairman, House Judiciary Committee

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee

Inquiries relating to this report may be directed to me at (202) 447-5890.

Sincerely,

A handwritten signature in black ink, appearing to read "Nelson Peacock".

Nelson Peacock
Assistant Secretary
Office of Legislative Affairs

Executive Summary

The Department of Homeland Security (DHS) has compiled this report on H-2B nonagricultural temporary workers from information provided by the Department of State (DOS), the Department of Labor (DOL), and three Components within DHS: U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE).

This report includes data for the second half of Fiscal Year (FY) 2009 and the first half of FY 2010. The data contained in this report is accurate as of February 2011.

Highlights

- As a result of the unexpectedly low visa-issuance rate reported by DOS in the second half of FY 2009, USCIS announced on August 6, 2009 that it would accept additional petitions for H-2B workers to the end of the fiscal year.
- Beginning November 28, 2009 (midway through the first half of FY 2010), H-2B workers performing labor or services in the Commonwealth of the Northern Mariana Islands (CNMI) or Guam became exempt from the H-2B cap. This exemption will continue until December 31, 2014.
- During the second half of FY2009, a total of 14,991 workers were issued H-2B visas or otherwise acquired H-2B status.
- During the first half of FY 2010, a total of 28,605 workers were issued H-2B visas or otherwise acquired H-2B status.
- The annual numerical limitation (the “H-2B cap”) of 66,000 H-2B workers was not reached in FY 2009.
- The 6-month numerical limitation (the “H-2B cap”) of 33,000 H-2B workers was not reached in the first half of FY 2010.

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I. Legislative Requirement

This report was prepared in accordance with section 416(d)(1) of the American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, tit. IV, 112 Stat. 2681-641, as amended by section 406 of the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, which requires that:

Beginning not later than March 1, 2006, the Secretary of Homeland Security and the Secretary of State shall notify, on a semiannual basis, the Committees on the Judiciary of the House of Representatives and the Senate of the number of aliens who during the preceding 1-year period--

(A) were issued visas or otherwise provided nonimmigrant status under section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a)(15)(H)(ii)(b)); or

(B) had such a visa or such status be revoked or otherwise terminated.

II. Background

Overview

The H-2B program allows U.S. employers to bring foreign workers to the United States to fill temporary nonagricultural jobs. *See* Immigration and Nationality Act (INA) § 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b). To petition successfully for this nonimmigrant classification, the employer must establish that:

- its need for the prospective worker's labor or services is temporary in nature – that is, based on a one-time occurrence, a seasonal need, a peak load need, or an intermittent need;
- there are not sufficient U.S. workers who are able, willing, qualified, and available to do the temporary work; and
- the employment of the H-2B nonimmigrant worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Generally, before filing a petition with USCIS for H-2B workers, the employer must obtain a valid temporary labor certification from U.S. DOL or, in the case where the workers will be employed in Guam, from the Governor of Guam. *See* 8 CFR 214.2(h)(6)(iii)(A) and (C).

The H-2B Cap

The Immigration Act of 1990 limits the number of workers who may be granted H-2B classification in a fiscal year (the H-2B “cap”) to 66,000. *See* INA § 214(g)(1)(B), 8 U.S.C. § 1184(g)(1)(B).

Subsequently, section 405 of the REAL ID Act of 2005 mandated that the H-2B cap be allocated semi-annually, allowing for up to 33,000 H-2B workers in the first half of the fiscal year (October 1 – March 31), and for the remaining H-2B numbers to be allocated to workers during the second half of the fiscal year (April 1 – September 30). *See* INA § 214(g)(10), 8 U.S.C. § 1184(g)(10).

Exceptions to the H-2B Cap

Generally, a worker whose stay in H-2B status is extended will not be counted against the H-2B cap again. The following workers are exempt from the H-2B cap:

- Fish roe processors, fish roe technicians, and supervisors of fish roe processing;¹ and
- From November 28, 2009 until December 31, 2014, workers performing temporary labor or services in the Commonwealth of the Northern Mariana Islands (CNMI) or Guam.²

¹ *See* Pub. L. No. 108-287, § 14006, 118 Stat. 951, 1014 (2004).

² *See* section 6(b) of A Joint Resolution to Approve the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263, 48 U.S.C. §

Spouses and children of H-2B workers fall under a separate visa classification (H-4) and are not counted against the H-2B cap. *See* INA § 214(g)(2), 8 U.S.C. § 1184(g)(2); 8 CFR 214.2(h)(8)(ii)(A).

Once the H-2B cap is reached, USCIS may only accept petitions for H-2B workers who are cap-exempt.

Obtaining H-2B Status

After USCIS approves an H-2B petition, a worker may be granted H-2B status through:

- admission as an H-2B worker by CBP at a port of entry after issuance of an H-2B nonimmigrant visa by DOS;
- admission as an H-2B worker by CBP at a port of entry without a visa, in the case of certain Canadian, Bermudan, and Bahamian residents; or
- change of status to H-2B granted by USCIS.

1801 note (1976), as added by section 702 of the Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 112 Stat. 754, 856.

III. Data Report and Analysis

Section 3.1 – H-2B visas issued and status provided

Second Half of FY 2009

During the second half of FY 2009 (the period from April 1, 2009 through September 30, 2009), 14,991 workers were issued H-2B visas or otherwise acquired H-2B status. This includes:

- 14,750 H-2B visas that were issued by DOS;
- 84 workers approved by USCIS for a change of status to H-2B classification; and
- 157 crossings of visa-exempt H-2B workers who were processed by CBP³ (157 Canadians, 0 Bermudans, and 0 Bahamians).

First Half of FY 2010

During the first half of FY 2010 (the period from October 1, 2009 through March 31, 2010), 28,605 workers were issued H-2B visas or otherwise acquired H-2B status. This includes:

- 28,197 H-2B visas that were issued by DOS;
- 288 workers approved by USCIS for a change of status to H-2B classification; and
- 120 crossings of visa-exempt H-2B workers who were processed by CBP³ (120 Canadians, 0 Bermudans, and 0 Bahamians).

Table 1: H-2B Workers Approved from April 1, 2009 to March 31, 2010.

	2nd Half of FY 2009	1st Half of FY 2010	Total
Total H-2B Workers Approved	14,991	28,605	43,596
Visas Approved by DOS	14,750	28,197	42,947
Changes of Status Approved by USCIS	84	288	372
Visa-Exempt Admissions by CBP	157	120	277

Section 3.2 – H-2B petitions approved by USCIS as a result of the August 6, 2009 resumption of H-2B petition acceptance and adjudication

In July 2009, DOS reported that it had issued an unusually low number of H-2B visas; only about 40,640 of the available 66,000 H-2B visas for the entire fiscal year had been issued. As a result, USCIS resumed acceptance of H-2B petitions during the second half of FY 2009 on August 6, 2009. Accordingly, from August 6, 2009 through September 30, 2009, USCIS

³ This figure may include multiple admissions by the same individuals. Although some individuals may cross the border numerous times (e.g., a Canadian residing in Windsor, Ontario and commuting daily to work in Detroit, Michigan), he or she only counts against the H-2B cap on his or her first admission based on an approved petition.

approved 242 H-2B petitions for 4,836 workers. Of those, USCIS granted change of status to H-2B classification for 68 workers.

Section 3.3 – H-2B visas or status revoked or otherwise terminated

Second Half of FY 2009

During the second half of FY 2009 (April 1, 2009 through September 30, 2009), USCIS revoked or otherwise terminated 35 approved petitions, which would have authorized the admission of 1,171 H-2B workers.

During this same period, CBP canceled the H-2B visas of 64 aliens who were found inadmissible at ports of entry, and ICE removed 21 H-2B aliens who were found deportable after admission to the United States.

DOS reported that it refused a total of 8,156 H-2B visa applications. However, since 2,312 of these visa refusals subsequently overcame the reason for visa denial and were granted H-2B visas, DOS refused⁴ the visa applications of a net total of 5,844 H-2B workers in the second half of FY 2009.

First Half of FY 2010

During the first half of FY 2010 (October 1, 2009 through March 31, 2010), USCIS revoked or otherwise terminated 48 approved petitions, which would have authorized the admission of 1,074 H-2B workers.

During this same period, CBP canceled the H-2B visas of 55 aliens who were found inadmissible at ports of entry, and ICE removed 30 H-2B aliens who were found deportable after admission to the United States.

DOS reported that it refused a total of 9,064 H-2B visa applications. However, since 2,678 of these visa refusals subsequently overcame the reason for visa denial and were granted H-2B visas, DOS refused the visa applications of a net total of 6,386 H-2B workers in the first half of FY 2010.

The visa refusals cited in this section are not included in the figure for total H-2B visas issued reported in Section 3.1 above.

⁴ Reasons for visa refusal may include matters outside the scope of USCIS adjudication. The USCIS adjudication process focuses on the validity of the employer-employee relationship, the nature of the job being offered, the petitioner's temporary need, and other factors. Issues involving admissibility of alien beneficiaries and possible waivers of inadmissibility are addressed on a face-to-face basis as part of the consular visa-issuance process or the port-of-entry inspection process. Additionally, in instances when DOS believes there is an error of law or derogatory information affecting the approvability of an underlying petition, DOS may return an approved petition to USCIS for additional review and possible revocation. In the event USCIS revokes the petition, DOS will refuse to issue the H-2B visa.

Table 2: H-2B Revocations and Terminations from April 1, 2009 to March 31, 2010

H-2B Revocations/Terminations	2nd Half of FY 2009	1st Half of FY 2010	Total
DOS (visa refusals)	5,844	6,386	12,230
USCIS (beneficiaries of revoked petitions)	1,171	1,074	2,245
CBP (cancelled visas)	64	55	119
ICE (removals)	21	30	51