



H-2B Nonagricultural Temporary Worker Visa and Status

Fiscal Year 2021 Semiannual Report to Congress

Part 1: April 1, 2020 – March 31, 2021

July 30, 2021



Homeland
Security

*U.S. Citizenship and
Immigration Services*



**Homeland
Security**

July 30, 2021

Foreword

On behalf of the U.S. Department of Homeland Security, I am pleased to present the first of two semiannual reports for Fiscal Year 2021 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 Richard Durbin
Chairman, Senate Committee on the Judiciary

The Honorable Chuck Grassley
Ranking Member, Senate Committee on the Judiciary

The Honorable Jerrold Nadler
Chairman, House Committee on the Judiciary

The Honorable Jim Jordan
Ranking Member, House Committee on the Judiciary

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

Sincerely,

A handwritten signature in black ink, appearing to read "Alex Carnes".

Alexandra Carnes
Assistant Secretary for Legislative Affairs

Executive Summary

The U.S. Department of Homeland Security (DHS) has compiled this report on H-2B temporary nonagricultural workers from information provided by the U.S. Department of State (DOS), U.S. 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) 2020 and the first half of FY 2021.

Highlights

- The annual numerical limitation of 66,000 H-2B workers (the “regular H-2B cap”) was not reached in FY 2020.¹
- USCIS estimated it received enough petitions to reach the semiannual numerical limitation of 33,000 H-2B workers for the second half of FY 2020 on February 18, 2020. A total of 23,325 workers² were issued H-2B visas or otherwise acquired H-2B nonimmigrant status during the second half of FY 2020.³

¹ INA § 214(g)(1)(B), 8 U.S.C. § 1184(g)(1)(B), requires that the total number of noncitizens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year “may not exceed” 66,000. We recognize that USCIS announced that, on February 18, 2020, the number of petitions received surpassed the total number of remaining H-2B visas available for the regular H-2B cap for the second half of FY 2020. It is important to note, however, that the process of estimating actual H-2B usage based on petition filings is inherently a predictive one. While USCIS uses its best efforts to estimate how many beneficiaries of cap-subject H-2B petitions will be granted H-2B visas, it is, as a practical matter, not possible in advance to determine that exact number since approval of an H-2B petition does not ensure that a worker covered by the petition will actually be granted H-2B status. In determining when it believes it has received a sufficient number of H-2B petitions such that the numerical limitation will be reached, but not exceeded, USCIS takes into account historical data related to actual visa approvals, denials, petition revocations, and other relevant factors.

² H-2B workers who are exempt from the regular H-2B cap are included in this number. This number may also include H-2B workers who were issued a visa by DOS, but approved by USCIS with a start date in the preceding half fiscal year or up to 10 days after the relevant period. INA § 214(g)(1)(B), 8 U.S.C. § 1184(g)(1)(B), requires that the total number of noncitizens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year “may not exceed” 66,000. USCIS will announce that it would no longer accept cap-subject H-2B petitions upon determining that it has received a sufficient number of petitions to meet, but not exceed, the statutory caps. In making this determination, USCIS takes into account historical data related to approvals, denials, revocations, and other relevant factors. 8 CFR 214.2(h)(8)(ii). USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the “final receipt date”). 8 CFR 214.2(h)(8)(ii).

³ On March 20, 2020, DOS temporarily suspended routine immigrant and nonimmigrant visa services at all U.S. Embassies and Consulates as a result of the global COVID-19 pandemic. DOS subsequently announced a phased resumption of visa services, while continuing to provide emergency and mission-critical visa services as much as possible, as permitted by post resources and local government restrictions. *See* <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html>. In addition, Presidential Proclamation 10052 temporarily suspended the entry of certain nonimmigrants, including certain H-2B nonimmigrants, through March 31, 2021. <https://travel.state.gov/content/travel/en/News/visas-news/update-on-presidential-proclamation-10052.html>. While the general suspension of visa issuances is not a factor in the USCIS

- USCIS estimated it received enough petitions to reach the semiannual numerical limitation of 33,000 H-2B workers for the first half of FY 2021 on November 16, 2020. A total of 42,991 workers⁴ were issued H-2B visas or otherwise acquired H-2B nonimmigrant status during the first half of FY 2021.

adjudication of Form I-129 H-2B petitions, it does have an impact on the number of visas that were issued by DOS and admissions granted by CBP referenced in this report.

⁴ H-2B workers who are exempt from the regular H-2B cap are included in this number. This number may also include H-2B workers who were issued a visa by DOS but approved by USCIS with a start date in the preceding half fiscal year or up to 10 days after the relevant period. INA § 214(g)(1)(B), 8 U.S.C. § 1184(g)(1)(B), requires that the total number of noncitizens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year “may not exceed” 66,000. USCIS will announce that it would no longer accept cap-subject H-2B petitions upon determining that it has received a sufficient number of petitions to meet, but not exceed, the statutory caps. In making this determination, USCIS takes into account historical data related to approvals, denials, revocations, and other relevant factors. 8 CFR 214.2(h)(8)(ii). USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the “final receipt date”). 8 CFR 214.2(h)(8)(ii).



H-2B Nonagricultural Temporary Worker Visa and Status

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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. 2681-655, as amended by section 406 of the *REAL ID Act of 2005*, Pub. L. No. 109-13, div. B, 119 Stat. 231, 320, 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 [(INA)] (8 U.S.C. 1101(a)(15)(H)(ii)(b)); or

(B) had such a visa or such status 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)*, as amended, § 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 single, valid temporary labor certification from the U.S. Department of Labor (DOL) or, if the worker(s) will be employed in Guam, from the Governor of Guam. *See* 8 CFR § 214.2(h)(6)(iii)(A) and (C).

Additionally, on May 14, 2020, the U.S. Department of Homeland Security (DHS) published a temporary final rule to change certain H-2B requirements to help secure the U.S. food supply chain and reduce the economic impact of the coronavirus (COVID-19) public health emergency on H-2B employers.⁵ With the uncertainty inherent to confronting the COVID-19 public health emergency, this rule helped secure the U.S. food supply chain by providing a temporary and targeted exception to the 3-year limitation and broader work authorization for certain nonimmigrant workers who currently hold H-2B status and were requesting an extension of stay. The ability of H-2B petitioners and H-2B workers to take advantage of the flexibilities in the temporary final rule automatically terminated at the end of September 11, 2020. USCIS applied the provisions of this rule to H-2B petitions received on or before September 11, 2020, even if such petitions remained pending after the expiration of the temporary final rule.

The H-2B Cap

The *Immigration Act of 1990* limits the number of workers who may be issued an H-2B visa or otherwise provided H-2B nonimmigrant status in a fiscal year (the “regular 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 semiannually, allowing for up to 33,000 H-2B workers in the first half of the fiscal year (October 1 – March 31), and for the

⁵ 85 FR 28843 (May 14, 2020).

remaining H-2B visas 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). USCIS will announce that it will no longer accept H-2B petitions upon determining that it has received a sufficient number of petitions to meet, but not exceed, the statutory caps. In making this determination, USCIS takes into account historical data related to approvals, denials, revocations, and other relevant factors.⁶ Congress gave USCIS the authorization to grant supplemental visas for the fiscal year 2020 H-2B cap under section 105 of Division I of the Consolidated Appropriations Act, 2020, Public Law No: 116-94 (FY 2020 Omnibus). DHS, in consultation with DOL, planned to issue a temporary final rule authorizing up to an additional 35,000 H-2B visas for FY 2020 to American businesses that attested they would likely suffer irreparable harm without the ability to employ all of their requested H-2B workers. Due to economic circumstances resulting from the COVID-19 public health emergency, a temporary final rule authorizing the supplemental cap visas was never published.

Exemptions from 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. Additionally, the following workers are exempt from the regular H-2B cap:

- H-2B workers in the United States or abroad who have been previously counted toward the cap in the same fiscal year;
- Fish roe processors, fish roe technicians, and supervisors of fish roe processing;⁷ and
- From November 28, 2009, until December 31, 2029, H-2B workers in the Commonwealth of the Northern Mariana Islands or Guam.⁸

Spouses and children of H-2B workers fall under a separate visa classification (H-4) and are not counted against the regular 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 regular H-2B cap is reached, USCIS may only, during the relevant cap period, accept petitions for H-2B workers who are cap-exempt. H-2B petition approvals on behalf of workers who are exempt from the H-2B cap are included in the data provided in this report.

Obtaining H-2B Status

Approval of an H-2B petition does not ensure that a foreign worker covered by the petition will actually be granted H-2B status. After USCIS approves an H-2B petition, a foreign worker, if eligible, may be granted H-2B status through:

- admission as an H-2B worker by U.S. Customs and Border Protection (CBP) at a port of entry after issuance of an H-2B nonimmigrant visa by the U.S. Department of State (DOS);

⁶ *See* 8 CFR 214.2(h)(8)(ii) (effective April 1, 2019).

⁷ *See* Pub. L. No. 108-287, § 14006, 118 Stat. 951, 1014 (2004).

⁸ *See* 48 U.S.C. 1806(a)(2) as amended by sec. 3 of Pub. L. 115-218; 48 U.S.C. 1806(b).

- admission as an H-2B worker by CBP at a port of entry without a visa, in the case of certain Canadians and Bermudan citizens, Bahamian nationals, and residents of certain Caribbean islands;⁹ or
- change of status to H-2B or extension of H-2B status granted by USCIS.¹⁰

III. Data Report and Analysis

Section 3.1 – H-2B Visas Issued and Status Provided

Second Half of FY 2020

During the second half of FY 2020,¹¹ 23,325 workers were issued H-2B visas or otherwise provided H-2B status.¹² This number includes:

- 22,784 H-2B visas¹³ issued by DOS;
- 239 workers that USCIS approved for a change of status to H-2B classification; and
- 302 crossings of visa-exempt H-2B workers¹⁴ who were processed by CBP.

First Half of FY 2021

During the first half of FY 2021,¹⁵ 42,991 workers were issued H-2B visas or otherwise acquired H-2B status. This number includes:

⁹ See 8 CFR 212.1(a) for a list of noncitizens who are considered visa-exempt.

¹⁰ Certain workers who have already been granted H-2B status are also eligible for an extension of stay. Note that an extension of stay in the H-2B classification will not be re-counted against the annual or semiannual cap.

¹¹ The second half of FY 2020 began on April 1, 2020 and ended on September 30, 2020.

¹² On March 20, 2020, DOS temporarily suspended routine immigrant and nonimmigrant visa services at all U.S. Embassies and Consulates as a result of the global COVID-19 pandemic. DOS subsequently announced a phased resumption of visa services, while continuing to provide emergency and mission-critical visa services as much as possible, as permitted by post resources and local government restrictions. See <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html>. In addition, Presidential Proclamation 10052 temporarily suspended the entry of certain nonimmigrants, including certain H-2B nonimmigrants, through March 31, 2021. <https://travel.state.gov/content/travel/en/News/visas-news/update-on-presidential-proclamation-10052.html>. While the general suspension of visa issuances is not a factor in the USCIS adjudication of Form I-129 H-2B petitions, it does have an impact on the number of visas that were issued by DOS and admissions granted by CBP referenced in this report.

¹³ H-2B workers who are exempt from the H-2B cap are included in this number. This number may also include H-2B workers who were issued a visa by DOS but approved by USCIS with a start date in the preceding half of a fiscal year or up to 10 days after the relevant period.

¹⁴ For the second half of FY 2020, all 302 crossings of visa-exempt H-2B workers came from Canada. See 8 CFR § 212.1(a) for a list of noncitizens who are considered visa-exempt. This figure may include multiple admissions by the same workers.

¹⁵ The first half of FY 2021 began on October 1, 2020 and ended on March 31, 2021.

- 41,769 H-2B visas¹⁶ issued by DOS;
- 467 workers that USCIS approved for a change of status to H-2B classification; and
- 755 crossings of visa-exempt H-2B workers¹⁷ who were processed by CBP.

Table 1: H-2B Workers Approved from April 1, 2020 to March 31, 2021

	2 nd Half of FY 2020	1 st Half of FY 2021	Total
Total H-2B Workers Approved¹⁸	23,325	42,991	66,316
Visas Issued by DOS	22,784	41,769	64,553
Changes of Status Approved by USCIS	239	467	706
Visa-Exempt Admissions by CBP	302	755	1,057

Section 3.2 – H-2B Visas or Status Revoked or Otherwise Terminated

Second Half of FY 2020

During the second half of FY 2020, USCIS revoked or otherwise terminated seven approved petitions, which had authorized the classification of 90 beneficiaries as H-2B workers.¹⁹ During that period, CBP canceled the H-2B visas of 34 workers who were found inadmissible at ports of entry, and U.S. Immigration and Customs Enforcement (ICE) removed 81 H-2B workers who were found removable after admission to the United States.²⁰

DOS reported that it refused a total of 5,263 H-2B visa applications in the second half of FY 2020. However, 2,010 of these visa applicants subsequently overcame the reason for visa denial and were granted H-2B visas. DOS thus refused a net total of 3,253 visa applications of H-2B workers in the second half of FY 2020.

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

¹⁶ H-2B workers who are exempt from the H-2B cap are included in this number. This number may also include H-2B workers who were issued a visa by DOS but approved by USCIS with a start date in the preceding half of a fiscal year or up to 10 days after the relevant period.

¹⁷ For the first half of FY 2021, all 755 crossings of visa-exempt H-2B workers came from Canada. See 8 CFR § 212.1(a) for a list of noncitizens who are considered visa-exempt. This figure may include multiple admissions by the same workers.

¹⁸ H-2B workers who are exempt from the H-2B cap are included in these figures. These figures may also include H-2B workers who were issued a visa by DOS but approved by USCIS with a start date in the preceding half of a fiscal year or up to 10 days after the relevant period.

¹⁹ This figure may include revocations or terminations after the approved validity of the H-2B petition and after the beneficiaries' authorized admission had already expired.

²⁰ ICE defines removed H-2B workers as those individuals removed with a most recent admission class code of "H2" or "H-2B." As such, this figure may include individuals admitted in the H-2A classification as temporary or seasonal nonagricultural workers who could also have a most recent admission class code of "H2." ICE also indicates that admission class code is not a mandatory field, so this figure could be incomplete.

First Half of FY 2021

During the first half of FY 2021, USCIS revoked or otherwise terminated 39 approved petitions, which had authorized the classification of 1,162 beneficiaries as H-2B workers. During that period, CBP canceled the H-2B visas of five individuals who were found inadmissible at ports of entry, and ICE removed 59 H-2B workers who were found removable after admission to the United States.²¹

DOS reported that it refused a net total of 4,166 visa applications of H-2B workers in the first half of FY 2021.

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

Table 2: H-2B Revocations and Terminations

Type of Revocation or Termination	2 nd Half of FY 2020	1st Half of FY 2021	Total
DOS (visa refusals)	3,253	4,166	7,419
USCIS (beneficiaries of revoked petitions)	90	1,162	1,252
CBP (cancelled visas)	34	5	39
ICE (removals)	81	59	140

¹⁸ ICE defines removed H-2B workers as those individuals removed with a most recent admission class code of “H2” or “H-2B.” As such, this figure may include individuals admitted in the H-2A classification as temporary or seasonal nonagricultural workers who could also have a most recent admission class code of “H2.” ICE also indicates that admission class code is not a mandatory field, so this figure could be incomplete.