



## U.S. Citizenship and Immigration Services

To: Service Center Directors

From: Fujie Ohata /S/  
Director, Service Center Operations

Date: May 24, 2005

RE: H-2B Filings for FY 2005 and FY 2006 Pursuant to the Save Our Small and Seasonal Businesses Act of 2005 ("SOS Act")

### **Purpose**

The purpose of this memorandum is to provide guidance to Service Centers regarding accepting FY 2005 H-2B petitions pursuant to the "Save Our Small and Seasonal Businesses Act of 2005" ("SOS Act"), Title IV (sections 401-07) of the REAL ID Act of 2005, which is division B of Public Law 109-13, the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief," signed into law by President Bush on May 11, 2005. The provision became effective on May 11, 2005.

### **Background**

The SOS Act allows USCIS to exempt from the H-2B numerical cap for FY 2005 and FY 2006 "returning workers", i.e. H-2B workers who were counted against the numerical limit in one of the three fiscal years preceding the fiscal year for which the petition is filed. Also, pursuant to the SOS Act, USCIS is authorized to resume accepting H-2B filings for FY 2005 and to allocate approximately 35,000 additional H-2B numbers for FY 2005. This number is based on estimates from the Department of State of the number of aliens who were issued H-2B visas and previously counted towards the FY 2005 cap.

The SOS Act requires USCIS to begin accepting and processing these additional petitions within 14 days of enactment, as of May 25, 2005. USCIS will be posting a public notice on the USCIS website describing the process for allocation of the 35,000 additional H-2B numbers for FY 2005 and for allocation of H-2B numbers in FY 2006 for qualified returning workers. Federal Register publication is not envisioned.

### **Returning H-2B Workers**

As described in the Public Notice, a "returning worker" means an H-2B worker who previously counted against the H-2B annual numerical limit of 66,000 during any one of the three fiscal years preceding the fiscal year of the requested start date. This means:

1. In a petition for a work start date before October 1, 2005 (FY 2005), the worker must have been previously approved for an H-2B work start date between October 1, 2001 and September 30, 2004.
2. In a petition for a work start date on or after October 1, 2005 (FY 2006), the worker must have been previously approved for an H-2B work start date between October 1, 2002 and September 30, 2005.
3. If a petition was approved only for “extension of stay” in H-2B status, or only for change or addition of employers or terms of employment, the worker was not counted against the numerical limit at that time and, therefore, that particular approval cannot in itself result in the worker being considered a “returning worker” in a new petition.

### **Available H-2B Numbers**

- For FY 2005, approximately 35,000 additional slots will be made available to H-2B workers who need not have had H-2B status previously (i.e., not a “returning worker”).
- For FY 2005 and FY 2006, there is no numerical limit on the number of “returning workers” who may be allocated an H-2B number. As long as the employer establishes that the worker meets the criteria for “returning workers”, the alien may be allocated a number and not be counted against the cap for the relevant fiscal year.

### **Filing Requirements for FY 2005 and FY 2006 Petitions**

- The Form I-129 must include a certification from the petitioning employer, certifying that the requested worker(s) is a “returning worker”.
- The Form I-129 must list the full name of worker.
- For change of status requests, the Form I-129 must indicate which previous fiscal year qualifies the worker as a “returning worker” (e.g. a request for a returning H-2B worker for FY 2005 should reflect that the worker was counted against the H-2B cap during the preceding three fiscal years, meaning FY 2002 through FY 2004. Similarly a request for a returning H-2B worker for FY 2006 should reflect that the worker was counted against the H-2B cap during the preceding three fiscal years, meaning FY 2003 through FY 2005).
- For change of status requests, the Form I-129 must include evidence of the worker’s previous admission as an H-2B nonimmigrant, such as a copy of the I-94

admission document or the Form I-797 evidencing approval of change of prior change of status to an H-2B nonimmigrant.

- The Form I-129 must be accompanied by a labor certification that covers the entire period of requested employment or a statement from the Department of Labor (DOL) that it cannot process the certification at this time. A copy of the labor certificate will be acceptable in instances where the petitioner previously submitted the original labor certificate to USCIS. DOL has indicated that it will continue to and has been processing labor certifications without respect to the H-2B cap.
- Petitioners for these H-2B cases can avail themselves of Premium Processing Service.
- Please note that the revised Form I-129, OMB 1615-0009, version date 3-17-05, will be required beginning June 1, 2005. However, this version of the Form I-129 has not been updated to contain new SOS Act provisions, including the new \$150.00 Fraud Prevention and Detection Fee.

#### **Fraud Prevention and Detection Fee**

- A new fraud detention and detection fee of \$150.00 per petition is required for each H-2B petition filed for a FY 2006 start date, as of May 25, 2005. That fee is not required for a FY 2005 start date.

#### **Verification of Returning Worker Status and Processing of H-2B Petitions**

- Where a worker is outside of the United States, State Department or Customs and Border Protection (CBP) will verify if the alien is a “returning worker”.
- For change of status, Center employees should check CLAIMS and other relevant databases to see if the beneficiary was previously granted a change of status to H-2B and counted against the cap.
- If Service records reflect that the requested worker was admitted previously as an H-2B worker, but the Form I-129 is not accompanied by evidence of such admission, USCIS should only approve the Form I-129 if accompanied by a certification by the employer that the requested worker is a returning worker.
- If Service records clearly indicate that the beneficiary was previously granted H-2B status and counted against the cap since October 1, 2001, Center employees should accept this as evidence that the beneficiary is a returning worker.

**Returning Worker Verification by Department of State and Customs and Border Protection (CBP)**

- State Department will verify the information contained in the certification from the petitioning employer at the time of visa processing.
- For those cases that do not involve a change of status, USCIS will send all approved H-2B petitions to the Department of State (DOS), Kentucky Consulate Center (KCC). KCC will see the annotation "returning worker" next to the qualified beneficiary's name, on the approval notice, evidencing that USCIS considers the beneficiary to be a returning worker. KCC may check appropriate electronic records to verify issuance of a H-2B visa or change of status within the previous three years.
- CBP will need to follow a similar process for beneficiaries, such as Canadians, who do not require a visa to enter the United States. In order to determine if the alien was admitted or changed status within the three fiscal years preceding FY 2005 or FY 2006, CBP officers may look into entry/exit records, examine evidence of entry or change of status presented by the alien or accept the alien's claim of prior change of status or admission.

**Non-verification**

- If USCIS discovers, while adjudicating the petition for change of status, that the beneficiary is not a returning worker, in spite of the certification indicating otherwise, the request for change of status may be approved provided the cap for the relevant fiscal year has not been reached and that there is no evidence of fraud or willful misrepresentation of a material fact. If the change of status is approved in this instance, the beneficiary would be subject to the cap limitations of that fiscal year.
- If the DOS consular officers, in the course of reviewing the visa application, discover that the beneficiary is not a returning worker, in spite of the certification indicating otherwise, the H-2B visa may be granted as a "non returning" worker, if the cap for that fiscal year has not been reached. In this instance the beneficiary would be subject to the cap limitations of that fiscal year.
- DOS will notify USCIS of the number of workers, whose petition may have been annotated "returning worker", but at time of visa issuance were found to be ineligible for such qualification and instead issued a H-2B visa subject to the cap limitations.
- CBP will notify USCIS of the number of workers, whose petition may have been annotated "returning worker", but at time of admission were found to be ineligible

for such qualification and thus issued a H-2B visa or accorded H2-B status, subject to the cap limitations.

### **H-2B Approval Notices**

When the required certification from the employer is submitted with the filing of the H-2B petition, USCIS will data enter the information into CLAIMS to identify the beneficiary as a returning worker. Once the Form I-129 is approved the approval notice will be annotated “returning worker” next to each qualified beneficiary’s full name. Please note that petitioners must complete a certification, separate from the Form I-129, and list the full name of each returning worker in order for USCIS to identify them as such.

### **H-2B Caps**

For FY 2006 filings, the Act provides that the numerical limit for the first 6 months of the fiscal year shall be no more than 33,000, with the remaining 33,000 H-2B numbers to be allocated on or after April 1, 2006. Guidance on filing procedures for the second half of the fiscal year will be issued via a separate memorandum.

Also, pursuant to 8 CFR 214.2(h)(8), as recently amended by the H-1B interim rule, published at 70 FR 23775, when the H-2B numerical limitation has been reached for FY 2005 and FY 2006, USCIS will cut off any additional filings and notify the public of the final receipt date via the USCIS website. USCIS will reject any additional H-2B petition filings that are subject to the numerical limits (other than for “returning workers,” those seeking extensions of stay, change of employment or the terms of employment, or who are otherwise exempt) and return the petition with the associated filing fees.

\* \* \* \* \*

Questions regarding this memorandum should be directed to Service Center Operations via appropriate channels.