



H-2B Nonagricultural Temporary Worker Visa and Status

Fiscal Year 2013 Semiannual Report to Congress
Part 2: October 1, 2012 – September 30, 2013



Homeland
Security

*U.S. Citizenship and
Immigration Services*



**Homeland
Security**

March 31, 2014

Foreword

On behalf of the Department of Homeland Security, I am pleased to present the second of two semiannual reports for Fiscal Year 2013 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 Committee on the Judiciary

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

The Honorable Robert W. Goodlatte
Chairman, House Committee on the Judiciary

The Honorable John Conyers, Jr.
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 that reads "Brian de Vallance".

Brian de Vallance
Acting Assistant Secretary for 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 both halves of Fiscal Year (FY) 2013. The data contained in this report is accurate as of November 2013.

Highlights

- The numerical limitation of 33,000 H-2B workers for the first half of the fiscal year was not reached in FY 2013, nor was the annual numerical limitation of 66,000 H-2B workers reached by the end of FY 2013.¹
- During the first half of FY 2013, a total of 32,884² workers were issued H-2B visas or otherwise acquired H-2B status (including those not subject to the semi-annual cap).
- During the second half of FY 2013, a total of 25,240 workers were issued H-2B visas or otherwise acquired H-2B status (including those not subject to the semi-annual cap).

¹ Note that unused H-2B numbers from the first half of the fiscal year (October 1 – March 31) are 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).

² This report revises CBP data from the previous semiannual report to Congress. The previous report stated that 35 visa-exempt H-2B workers were admitted by CBP for the first half of FY 2013. However, as noted in Section 3.1 of this report, 43 visa-exempt H-2B workers were actually admitted by CBP for the first half of FY 2013. This revision is attributed to logistical delays in manually entering I-94 information into CBP's computer system.

Table of Contents

I.	Legislative Requirement	1
II.	Background	2
III.	Data Report and Analysis	4
	Section 3.1 – H-2B visas issued and status provided	4
	Section 3.2 – H-2B visas or status revoked or otherwise terminated	5

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 (INA) (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* 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 available who are willing and qualified 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 DOL or, if the worker(s) will be employed in Guam, from the Governor of Guam. *See* 8 C.F.R. § 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 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).

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;³ 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.⁴

³ *See* Pub. L. No. 108-287, § 14006, 118 Stat. 951, 1014 (2004).

⁴ *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. § 1801 note (1976), as added by section 702 of the Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754, 856.

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 C.F.R. § 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.

H-2B visa issuances to those who are exempt from the H-2B cap may be included in the data provided in this report. However, even with the inclusion of exempt cases, the total number of H-2B visa issuances did not exceed the cap for FY 2013.

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 and Bermudan citizens, Bahamian nationals, and residents of certain Caribbean islands; or
- change of status to H-2B granted by USCIS.

III. Data Report and Analysis

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

First Half of FY 2013

During the first half of FY 2013 (the period from October 1, 2012 through March 31, 2013), 32,884 workers were issued H-2B visas or otherwise acquired H-2B status. This number includes:

- 32,704 H-2B visas that were issued by DOS;
- 137 workers that USCIS approved for a change of status to H-2B classification; and
- 43⁵ crossings of visa-exempt H-2B workers⁶ who were processed by CBP.

Second Half of FY 2013

During the second half of FY 2013 (the period from April 1, 2013, through September 30, 2013), 25,240 workers were issued H-2B visas or otherwise acquired H-2B status. This includes:

- 24,894 H-2B visas issued by DOS;
- 196 workers that USCIS approved for a change of status to H-2B classification; and
- 150 crossings of visa-exempt H-2B workers⁷ that were processed by CBP.

Table 1: H-2B Workers Approved in FY 2013

	1st Half of FY 2013	2 nd Half of FY 2013	Total
Total H-2B Workers Approved	32,884	25,240	58,124
Visas Approved by DOS	32,704	24,894	57,598
Changes of Status Approved by USCIS	137	196	333
Visa-Exempt Admissions by CBP	43	150	193

⁵ As noted in footnote 2, this statistic represents a revision from the previous semiannual report to Congress. The previous report stated that 35 visa-exempt H-2B workers were admitted by CBP for the first half of FY 2013. However, 43 visa-exempt H-2B workers were actually admitted by CBP for the first half of FY 2013.

⁶ For the first half of FY 2013, all 43 crossings of visa-exempt H-2B workers came from Canada. See 8 C.F.R. 212.1(a) for a list of aliens who are considered visa-exempt. This figure may include multiple admissions by the same individuals. Although an individual 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.

⁷ For the second half of FY 2013, all 150 crossings of visa-exempt H-2B workers came from Canada.

Section 3.2 – H-2B visas or status revoked or otherwise terminated

First Half of FY 2013

During the first half of FY 2013 (October 1, 2012 through March 31, 2013), USCIS revoked or otherwise terminated 14 approved petitions, which would have authorized the admission of 527 H-2B workers.

During this same period, CBP canceled the H-2B visas of 75 aliens who were found inadmissible at ports of entry, and ICE removed 22⁸ H-2B aliens who were found removable after admission to the United States.

DOS reported that it initially refused a total of 4,494 H-2B visa applications in the first half of FY 2013. However, 1,604 of the persons whose applications for visas were refused subsequently overcame the reason for visa denial and ultimately were granted H-2B visas. As a result, a net total of 2,890 aliens were refused H-2B visas by DOS in the first half of FY 2013.⁹

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

Second Half of FY 2013

During the second half of FY 2013, USCIS revoked or otherwise terminated 16 approved petitions, which would have authorized the admission of 461 H-2B workers. During that period, CBP canceled the H-2B visas of 115 aliens who were found inadmissible at ports of entry, and ICE removed 12 H-2B aliens who were found removable after admission to the United States.

DOS reported that it refused a total of 5,487 H-2B visa applications. However, since 2,713 of these visa refusals subsequently overcame the reason for visa denial and the affected aliens were granted H-2B visas, DOS refused the visa applications of a net total of 2,774 H-2B workers in the second half of FY 2013.

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

⁸ This statistic represents a revision from the previous semiannual report to Congress. The previous report indicated that, in the first half of FY13, ICE removed 20 H-2B aliens who were found removable after admission to the United States. (Note: Beginning in FY 2009, ICE began to “lock” removal statistics on October 5th at the end of each fiscal year and counted only the aliens whose removal or return was already confirmed. Aliens removed or returned in that fiscal year but not confirmed until after October 5th were previously excluded from the locked data and thus from ICE statistics.)

⁹ Reasons for visa refusal may include matters outside of the scope of USCIS adjudication. The USCIS adjudication process focuses on, among other things, the validity of the petitioner-beneficiary relationship, the nature of the job being offered, whether prohibited fees were assessed to the prospective H-2B worker, and the petitioner’s temporary need. Issues involving admissibility of alien beneficiaries and possible waivers of inadmissibility are addressed on an individual basis as part of the consular visa-issuance process or the port of entry inspection. 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 the 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

Type of Revocation or Termination	1st Half of FY 2013	2nd Half of FY 2013	Total
DOS (visa refusals)	2,890	2,774	5,664
USCIS (beneficiaries of revoked petitions)	527	461	988
CBP (cancelled visas)	75	115	190
ICE (removals)	22	12	34