



July 28, 2006

# Public Notice

## **USCIS CLARIFIES H-2B FILING AND PROCESSING PROCEDURES AND CAP COUNTING METHODS FOR THE REMAINDER OF FY 2006 AND FY 2007**

*Urges that H-2B Employers Continue to Identify “Returning Workers” when Filing Petitions*

Washington, D.C.– U.S. Citizenship and Immigration Services (USCIS) today reminded employers who use the H-2B nonimmigrant visa program to fulfill their temporary labor workforce needs that the “returning worker” provisions of the Save Our Small and Seasonal Businesses Act of 2005 (SOS Act), section 214(g)(9) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(9)), are currently set to expire on October 1, 2006. That date is the first day of fiscal year (FY) 2007. In order to ensure accurate H-2B cap counting for FY 2007, USCIS must prepare for several scenarios: (1) the “returning worker” provisions are not extended; or (2) the “returning worker” provisions are extended by future legislation, either before or after the scheduled sunset of these provisions at the close of FY 2006. Bills extending the “returning worker” provisions have been passed by the Senate (section 753 of S. 2611 and section 1091 of H.R. 5122) but whether they will be extended by Congress in enacted legislation, and if so, when, is a matter entirely within the discretion of Congress.

The “returning worker” provisions of the SOS Act exempt from the annual H-2B fiscal year cap those aliens who were counted toward the H-2B numerical limit during any one of the three fiscal years preceding the fiscal year of the requested employment start date. As noted, these H-2B “returning worker” provisions will not apply to FY 2007 under the SOS Act’s sunset provision.

USCIS has already begun to receive petitions from employers requesting H-2B workers for employment start dates in FY 2007. Because it is uncertain whether the H-2B “returning worker” provisions of the SOS Act will be reauthorized by Congress, USCIS urges prospective H-2B employers to continue to identify and certify those workers who qualify as “returning workers” under current law when filing petitions for employment start dates in FY 2007 as well as FY 2006. This will enable USCIS to maintain an accurate cap count of H-2B nonimmigrant workers for FY 2007 regardless whether the “returning worker” provisions expire or are reauthorized.

### **FILING REQUIREMENTS**

Petition forms and processing will follow current rules, with these additional requirements for “returning workers:”

1. ***In the Petition:*** The petition must include a certification from the petitioner (employer) signed by the same person who signed the Form I-129 stating, “As a supplement to the certification made on the attached Form I-129, I further certify that the workers listed below have entered the United States in H-2B status or changed to H-2B status during one of the last three fiscal years.” The list must set forth the full name of the worker. If the petition seeks change of status of the worker within the United States, it must

include evidence of previous H-2B admissions, such as a visa or a copy of I-94 admission document. A sample “returning worker” attestation produced by USCIS was first made available for use by H-2B employers on March 16, 2006, and may be found at [http://www.uscis.gov/graphics/formsfee/forms/files/H2B\\_Attestation.pdf](http://www.uscis.gov/graphics/formsfee/forms/files/H2B_Attestation.pdf).

2. **Multiple Workers:** A single petition may benefit more than one worker, including unnamed workers in “special filing situations” for business reasons. However, any returning workers must be listed in a certification as described above. For multiple named workers, including returning workers, “Attachment 1” to Form I-129 must be included and completed.

3. **After the Petition:** A petition approval notice will list any returning workers, who must be prepared to show to the U.S. consulate (when requesting an H-2B visa) or CBP port inspector (if visa exempt) proof of the worker’s previous H-2B admissions, such as a visa or a copy of I-94 admission document. The State Department will confirm prior visas through its electronic system, and that alone may be sufficient, but failure to show these documents may result in denial of visa or admission.

### **CAP COUNTING PROCEDURES FOR H-2B WORKERS**

USCIS notes that the controlling date for H-2B fiscal year cap counting is the requested employment start date. Therefore, petitions filed by prospective H-2B employers for “returning workers” with requested employment start dates of September 30, 2006 or earlier will continue to be approved by USCIS if all other eligibility requirements are met, and those “returning workers” identified and certified within such petitions will be deemed exempt from the FY 2006 cap despite the fact that their work for the H-2B employer will almost certainly extend into FY 2007, even if the SOS Act is not extended.

As a result of the expiration of the “returning worker” provisions of the SOS Act, however, all petitions requesting H-2B workers for new employment with an employment start date of October 1, 2006 or later (e.g. FY 2007 employment) must be counted toward the annual H-2B cap of 66,000 for FY 2007, whether or not they would be recognized as H-2B “returning workers” under the provisions of law currently applicable to FY 2006 start dates. In the event that the “returning worker” provisions of the SOS Act are reauthorized for FY 2007, and if employers continue to identify and certify “returning workers” in their H-2B filings, USCIS will be able to identify appropriate individuals as cap exempt and thus adjust its running cap counts for H-2B accordingly, making more numbers available to other workers. If Congress has not extended the SOS Act by the time USCIS reaches the 33,000 cap for H-2B workers (including those provisionally designated as “returning workers”) for the first half of FY 2007, USCIS will give notice that the cap has been reached and will reject further cap-subject H-2B filings.

Petitions for current H-2B workers do not count towards the congressionally mandated H-2B cap. Accordingly, USCIS will continue to process petitions filed to:

- Extend the stay of a current H-2B worker in the United States.
- Change the terms of employment for current H-2B workers.
- Allow current H-2B workers to change or add employers.

– USCIS –

On March 1, 2003, U.S. Citizenship and Immigration Services became one of three legacy INS components to join the U.S. Department of Homeland Security. USCIS is charged with fundamentally transforming and improving the delivery of immigration and citizenship services, while enhancing our nation’s security.