



H-2B Nonagricultural Temporary Worker Visa and Status

Fiscal Year 2011 Semiannual Report to Congress
Part 1: April 1, 2010 – March 31, 2011



Homeland
Security

*U.S. Citizenship and
Immigration Services*



Assistant Secretary of Legislative Affairs
U.S. Department of Homeland Security
Washington, DC 20528

**Homeland
Security**

June 29, 2012

Foreword

On behalf of the Department of Homeland Security, I am pleased to present the first of two semiannual reports for Fiscal Year 2011 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, which appears to read "Nelson Peacock". The signature is fluid and cursive.

Nelson Peacock
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 the second half of Fiscal Year (FY) 2010 and the first half of FY 2011. The data contained in this report is accurate as of June 2011.

Highlights

- During the second half of FY 2010, a total of 19,526 workers were issued H-2B visas or otherwise acquired H-2B status.
- During the first half of FY 2011, a total of 33,604 workers were issued H-2B visas or otherwise acquired H-2B status (including those not subject to the semi-annual cap).
- The numerical limitation of 33,000 H-2B workers (the H-2B “cap”) was not reached in the second half of FY 2010 or the first half of FY 2011.

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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 one-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 been 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* the Immigration and Nationality Act (INA), as amended, section 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 peakload 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 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 section 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).

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, therefore, are not counted against the H-2B cap. *See* 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, 122 Stat. 754, 856.

III. Data Report and Analysis

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

Second Half of FY 2010

During the second half of FY 2010 (the period from April 1, 2010 through September 30, 2010), 19,526 workers were issued H-2B visas or otherwise acquired H-2B status. This includes:

- 19,199 H-2B visas issued by DOS;
- 186 workers USCIS approved for a change of status to H-2B classification; and
- 141 crossings of visa-exempt H-2B workers that were processed by CBP² (141 Canadians, 0 Bermudans, and 0 Bahamians).

First Half of FY 2011

During the first half of FY 2011 (the period from October 1, 2010 through March 31, 2011), 33,604 workers were issued H-2B visas or otherwise acquired H-2B status. This includes:

- 33,273 H-2B visas that were issued by DOS;³
- 284 workers that USCIS approved for a change of status to H-2B classification; and
- 47 crossings of visa-exempt H-2B workers processed by CBP⁴ (47 Canadians, 0 Bermudans, and 0 Bahamians).

Table 1: H-2B Workers Approved from April 1, 2010 to March 31, 2011

	2nd Half of FY 2010	1st Half of FY 2011	Total
Total H-2B Workers Approved	19,526	33,604	53,130
Visas Approved by DOS	19,199	33,273	52,472
Changes of Status Approved by USCIS	186	284	470
Visa-Exempt Admissions by CBP	141	47	188

³ DOS may issue more than 33,000 visas in the first half of a fiscal year when petitioners obtain H-2B approval from USCIS during the previous half-year, but seek visa issuance in the current half-year. Visa issuance during a particular half-year does not indicate that beneficiaries were admitted during the same half-year, or at all.

⁴ 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.

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

Second Half of FY 2010

During the second half of FY 2010 (April 1, 2010 through September 30, 2010), USCIS revoked or otherwise terminated 36 approved petitions, which would have authorized the admission of 794 H-2B workers.

During this same period, CBP canceled the H-2B visas of 80 aliens who were found inadmissible at ports of entry, and ICE removed 9 H-2B aliens who were found deportable after admission to the United States.

DOS reported that it refused a total of 7,121 H-2B visa applications. However, since 2,646 of these visa refusals subsequently overcame the reason for visa denial and were granted H-2B visas, DOS refused⁵ the visa applications of a net total of 4,475 H-2B workers in the second half of FY 2010.

First Half of FY 2011

During the first half of FY 2011 (October 1, 2010 through March 31, 2011), USCIS revoked or otherwise terminated 31 approved petitions, which would have authorized the admission of 1,012 H-2B workers.

During this same period, CBP canceled the H-2B visas of 109 aliens who were found inadmissible at ports of entry, and ICE removed 22 H-2B aliens who were found deportable after admission to the United States.

DOS reported that it refused a total of 6,212 H-2B visa applications. However, since 2,405 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 3,807 H-2B workers in the first half of FY 2011.

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.

⁵ Reasons for visa refusal may include matters outside of 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 factors other than the beneficiary's admissibility to this country. 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 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	2nd Half of FY 2010	1st Half of FY 2011	Total
DOS (visa refusals)	4,475	3,807	8,282
USCIS (beneficiaries of revoked petitions)	794	1,012	1,806
CBP (cancelled visas)	80	109	189
ICE (removals)	9	22	31