



H-2B Nonagricultural Temporary Worker Visa and Status

Fiscal Year 2012 Semiannual Report to Congress
Part 1: April 1, 2011 – March 31, 2012

November 30, 2012



Homeland
Security

*U.S. Citizenship and
Immigration Services*



**Homeland
Security**

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Foreword

On behalf of the Department of Homeland Security, I am pleased to present the first of two semiannual reports for Fiscal Year 2012 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.

Respectfully,

A handwritten signature in black ink, appearing to read "Nelson Peacock".

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, the Department of Labor, and three Components within DHS: U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement.

This report includes data for the second half of Fiscal Year (FY) 2011 and the first half of FY 2012. The data contained in this report is accurate as of July 2011.

Highlights

- The annual numerical limitation of 66,000 H-2B workers (the H-2B “cap”) was not reached in FY 2011.
- The numerical limitation of 33,000 H-2B workers was not reached during the first half of FY 2012.
- During the second half of FY 2011, a total of 25,020 workers were issued H-2B visas or otherwise acquired H-2B status.
- During the first half of FY 2012, a total of 30,107 workers were issued H-2B visas or otherwise acquired H-2B status (including those not subject to the semi-annual cap).

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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 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, as amended (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* 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 U.S. Citizenship and Immigration Services (USCIS) for H-2B workers, the employer must obtain a single, valid temporary labor certification from the U.S. Department of Labor (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 § 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;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* INA § 214(g)(2), 8 U.S.C. § 1184(g)(2); 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.

H-2B visa issuances to aliens 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 visa issuances did not exceed the cap.

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 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);
- 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 2011

During the second half of FY 2011 (the period from April 1, 2011, through September 30, 2011), 25,020 workers were issued H-2B visas or otherwise acquired H-2B status. This includes:

- 24,788 H-2B visas issued by DOS;
- 92 workers USCIS approved for a change of status to H-2B classification; and
- 140 crossings of visa-exempt H-2B workers that were processed by CBP³ (140 Canadians, 0 Bermudans, and 0 Bahamians).

First Half of FY 2012

During the first half of FY 2012 (the period from October 1, 2011, through March 31, 2012), 30,107 workers were issued H-2B visas or otherwise acquired H-2B status. This includes:

- 29,783 H-2B visas that were issued by DOS;
- 176 workers that USCIS approved for a change of status to H-2B classification; and
- 148 crossings of visa-exempt H-2B workers processed by CBP (148 Canadians, 0 Bermudans, and 0 Bahamians).

Table 1: H-2B Workers Approved from April 1, 2011, to March 31, 2012

	2nd Half of FY 2011	1st Half of FY 2012	Total
Total H-2B Workers Approved	25,020	30,107	55,127
Visas Approved by DOS	24,788	29,783	54,571
Changes of Status Approved by USCIS	92	176	268
Visa-Exempt Admissions by CBP	140	148	288

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

Second Half of FY 2011

During the second half of FY 2011, USCIS revoked or otherwise terminated 23 approved petitions, which would have authorized the admission of 574 H-2B workers. During that period,

³ 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.

CBP canceled the H-2B visas of 144 aliens who were found inadmissible at ports of entry, and ICE removed 41 H-2B aliens⁴ who were found deportable after admission to the United States.

DOS reported that it refused a total of 6,559 H-2B visa applications. However, since 3,437 of these visa refusals subsequently overcame the reason for visa denial and the affected aliens were granted H-2B visas, DOS refused⁵ the visa applications of a net total of 3,122 H-2B workers in the second half of FY 2011.

First Half of FY 2012

During the first half of FY 2012 (October 1, 2011, through March 31, 2012), USCIS revoked or otherwise terminated 23 approved petitions, which would have authorized the admission of 427 H-2B workers.

During this same period, CBP canceled the H-2B visas of 78 aliens who were found inadmissible at ports of entry, and ICE removed 21 H-2B aliens who were found deportable after admission to the United States.

DOS reported that it refused a total of 5,542 H-2B visa applications. However, since 2,209 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 3,333 H-2B workers in the first half of FY 2012.

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.

⁴ This statistic represents a revision from the previous semiannual report to Congress. The previous report indicated that, in the second half of FY 11, ICE removed 36 H-2B aliens who were found deportable after admission to the United States.

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.

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, 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	2nd Half of FY 2011	1st Half of FY 2012	Total
DOS (visa refusals)	3,122	3,333	6,455
USCIS (beneficiaries of revoked petitions)	574	427	1,001
CBP (cancelled visas)	144	78	222
ICE (removals)	41	21	62