



Characteristics of H-2B Nonagricultural Temporary Workers

Fiscal Year 2009 Report to Congress

Annual Submission

January 19, 2011



Homeland
Security

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Security**

Foreword

On behalf of the Department of Homeland Security, I am pleased to present the fiscal year 2009 annual submission on the “Characteristics of H-2B Nonagricultural Temporary Workers.”

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 Jeff Sessions
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, appearing to read "Nelson Peacock".

Nelson Peacock
Assistant Secretary
Office of 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 Immigration and Customs Enforcement (ICE).

The data contained in this report is for Fiscal Year (FY) 2009 and is accurate as of February 2010.

Highlights

- On July 29, 2008, sufficient petitions were received by USCIS to reach the H-2B cap of 33,000 workers for employment beginning in the first half FY 2009.
- On January 7, 2009, sufficient petitions were received by USCIS to reach the H-2B cap of 33,000 workers for employment beginning in the second half of FY 2009.
- As of July 2009, only 40,640 of the available 66,000 H-2B visas had been issued.
- As a result of the unexpectedly low visa-issuance rate reported by DOS, USCIS announced on August 6, 2009 that it would accept additional petitions for H-2B workers up to the end of the fiscal year.
- A total of **45,914** workers were issued H-2B visas or otherwise acquired H-2B status in FY 2009.

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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, as amended by Section 406 of the REAL ID Act of 2005, 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 (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 the Immigration and Nationality Act (INA) 101(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,
- 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, the employer must have a single, valid temporary labor certification from the U.S. Department of Labor (DOL) or, in the case where the workers will be employed on Guam, from the Governor of Guam.

The H-2B Cap

The Immigration Act of 1990 created a numerical limitation of 66,000 for the number of workers who may be granted H-2B classification in a fiscal year (aka the "H-2B Cap"). See INA 214(g)(1)(B).

Subsequently, section 405 of the REAL ID Act of 2005, Title IV, "Save Our Small and Seasonal Businesses Act of 2005 (SOS Act)," provided that the H-2B cap be allocated semiannually, allowing for 33,000 H-2B workers in the first half of the fiscal year (October 1 – March 31), and 33,000 H-2B workers for the second half of the fiscal year (April 1 – September 30).

Obtaining H-2B Status

After USCIS approves an H-2B petition, a worker may be accorded H-2B status through:

- admission by CBP at a port of entry as an H-2B worker after issuance of an H-2B nonimmigrant visa by DOS;
- admission by CBP at a port of entry as an H-2B worker without a visa, in the case of certain Canadian, Bermudan and Bahamian residents; or
- change of status to H-2B status granted by USCIS.

III. Data Report and Analysis

Section 4.1 – H-2B visas issued and status provided

During the period from October 1, 2008 through September 30, 2009, a total of 45,914 workers were issued H-2B visas or otherwise acquired H-2B status. This figure includes a total of:

- 44,897¹ H-2B visas that were issued by DOS;
- 415 workers that were approved a change of status to H-2B classification by USCIS; and
- 602 crossings of visa-exempt H-2B workers that were processed by CBP (601 Canadians, 1 Bermudan, and 0 Bahamians)².

Spouses and children of H-2B workers are not included in any of these figures, since they fall under a separate visa classification (H-4). See 8 CFR 214.2(h)(8)(ii)(A). As such, H-4 spouses and children of H-2B workers are not counted against the numerical limit.

Section 4.2 – H-2B petitions approved by USCIS as a result of the resumption of H-2B petition acceptance and adjudication on August 6, 2009

On January 7, 2009, USCIS announced that it had accepted and approved a sufficient number of H-2B petitions to meet the H-2B cap for FY 2009. However, in July 2009, DOS reported that it had issued an unusually low number of H-2B visas; only about 40,640 of the available 66,000 H-2B visas had been issued. As a result, USCIS resumed acceptance of H-2B petitions on August 6, 2009.

A total of 242 H-2B petitions for 4,836 workers were approved by USCIS as a result of the resumption of H-2B petition acceptance and adjudication on August 6, 2009.

Of those, a total of 68 workers were approved a change of status to H-2B classification.

Section 4.3 – H-2B visas or status revoked or otherwise terminated

During the period of October 1, 2008 through September 30, 2009, USCIS revoked or otherwise terminated 62 approved petitions, which would have authorized a total of 1,788 H-2B workers.

¹ This figure is 438 workers higher than the 45,476 workers that comprise the sum total of the number of visas DOS reported it had issued by in mid-July 2009 (40,640) and the number of additional aliens granted H-2B status after August 6, 2009 (4,836). It is possible that these 438 workers were granted visas during the gap of time between when DOS announced its unexpectedly low visa issuance rate in July 2009 and when USCIS resumed acceptance of H-2B petitions on August 6, 2009.

² This figure may include multiple admissions by the same individuals.

During this same period, CBP canceled the visas of 116 aliens who were found inadmissible at a port of entry, and ICE removed 20 aliens who were found deportable after admission to the United States.

Additionally, DOS reported that a total of 19,639 H-2B visa applications were refused by DOS. However, taking into account that 4,837 of these visa applicants overcame the reason for visa denial and were ultimately granted H-2B visas, DOS ultimately refused the visa applications of 14,802 workers in FY 2009.³

Those 14,802 visa refusals are not included in the figure for total H-2B visas issued (44,897) reported in Section 4.1 above.

³ 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 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. 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.

Foreword

On behalf of the Department of Homeland Security, I am pleased to present the report for fiscal year 2009 on “H-2B Nonagricultural Temporary Worker Visa and Status.”

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Respectfully,

Nelson Peacock
Assistant Secretary
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