



H-2B Nonagricultural Temporary Worker Visa and Status

Fiscal Year 2013 Semiannual Report to Congress
Part 1: April 1, 2012 – March 31, 2013



Homeland
Security

*U.S. Citizenship and
Immigration Services*



**Homeland
Security**

December 3, 2013

Foreword

On behalf of the Department of Homeland Security, I am pleased to present the first 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 the second half of fiscal year (FY) 2012 and the first half of FY 2013. The data contained in this report is accurate as of May 2013.

Highlights

- The annual numerical limitation of 66,000 H-2B workers (the H-2B “cap”) was not reached in FY 2012.
- The semi-annual numerical limitation of 33,000 H-2B workers was not reached in the first half of FY 2013.
- During the second half of FY 2012, a total of 22,690 workers were issued H-2B visas or otherwise acquired H-2B status.
- During the first half of FY 2013, a total of 32,876 workers were issued H-2B visas or otherwise acquired H-2B status (including those not subject to the semi-annual cap).

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 (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 § 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 USCIS for H-2B workers, the employer must obtain a single, valid temporary labor certification from the U.S. Department of Labor (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), (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 semiannually, 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. § 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 petition approvals on behalf of 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 H-2B visa issuances did not exceed the cap for the second half of fiscal year 2012 or the first half of fiscal year 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 Canadians and nationals and residents of certain Caribbean countries; 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

Second Half of FY 2012

During the second half of FY 2012 (the period from April 1, 2012 through September 30, 2012), 22,690 workers were issued H-2B visas or otherwise acquired H-2B status. This number includes:

- 22,434 ³H-2B visas issued by DOS;
- 178 workers that USCIS approved for a change of status to H-2B classification; and
- 78 crossings of visa-exempt H-2B workers⁴ who were processed by CBP.⁵

First Half of FY 2013

During the first half of FY 2013 (the period from October 1, 2012 through March 31, 2013), 32,876 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
- 35 crossings of visa-exempt H-2B workers⁶ who were processed by CBP.

Table 1: H-2B Workers Approved from April 1, 2012 to March 31, 2013

	2nd Half of FY 2012	1st Half of FY 2013	Total
Total H-2B Workers Approved	22,690	32,876	55,566
Visas Approved by DOS	22,434	32,704	55,138
Changes of Status Approved by USCIS	178	137	315
Visa-Exempt Admissions by CBP	78	35	113

³ The FY 2012 Semiannual Report to Congress, Part 2, on H-2B Nonagricultural Temporary Worker Visa and Status reported 25,904 H-2B visas issued by the Department of State. The number cited here is correct. The discrepancy is attributed to an error in FY 2012 in calculating the number of visas issued.

⁴ For the second half of FY 2012, all 78 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.

⁵ 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.

⁶ For the first half of FY 2013, all 35 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.

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

Second Half of FY 2012

During the second half of FY 2012 (April 1, 2012, through September 30, 2012), USCIS revoked or otherwise terminated 19 approved petitions, which would have authorized the admission of 332 H-2B workers. During that period, CBP canceled the H-2B visas of 132 aliens who were found inadmissible at ports of entry, and ICE removed 27 H-2B aliens who were found removable after admission to the United States.

DOS reported that it initially refused a total of 6,350 H-2B visa applications in the second half of FY 2012. However, 3,470 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 2,880 aliens were refused H-2B visas by DOS in the second half of FY 2012.⁷

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 20 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.

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.

⁷ 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	2nd Half of FY 2012	1st Half of FY 2013	Total
DOS (visa refusals)	2,880	2,890	5,770
USCIS (beneficiaries of revoked petitions)	332	527	859
CBP (cancelled visas)	132	75	207
ICE (removals)	27	20	47