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The H-2B Visa and the Statutory Cap: In Brief

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December 11, 2015

Congressional Research Service

7-....

www.crs.gov

R44306

Summary

The Immigration and Nationality Act (INA) of 1952, as amended, enumerates categories of aliens, known as nonimmigrants, who are admitted to the United States for a temporary period of time and a specific purpose. One of these nonimmigrant visa categories—known as the H-2B visa—is for temporary nonagricultural workers.

The H-2B visa allows for the temporary admission of foreign workers to the United States to perform nonagricultural labor or services of a temporary nature if unemployed U.S. workers are not available. Common H-2B occupations include landscape laborer, amusement park worker, and housekeeper. The H-2B program is administered by the U.S. Department of Homeland Security's (DHS's) U.S. Citizenship and Immigration Services (USCIS) and the U.S. Department of Labor's (DOL's) Employment and Training Administration. DOL's Wage and Hour Division also has certain concurrent enforcement responsibilities. The H-2B program currently operates under regulations issued by DHS in 2008 on H-2B requirements, DHS and DOL jointly in 2015 on H-2B employment, and DHS and DOL jointly in 2015 on H-2B wages.

Bringing workers into the United States under the H-2B program is a multi-agency process involving DOL, DHS, and the Department of State (DOS). A prospective H-2B employer must apply to DOL for labor certification. Approval of a labor certification application reflects a finding by DOL that there are not sufficient U.S. workers who are qualified and available to perform the work and that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. If granted labor certification, an employer can file a petition with DHS to bring in the approved number of H-2B workers. If the petition is approved, a foreign worker overseas who the employer wants to employ can go to a U.S. embassy or consulate to apply for an H-2B nonimmigrant visa from DOS. If the visa application is approved, the worker is issued a visa that he or she can use to apply for admission to the United States at a port of entry. H-2B workers can be accompanied by eligible spouses and children.

By law, the H-2B visa is subject to an annual numerical cap. Under the INA, the total number of aliens who may be issued H-2B visas or otherwise provided with H-2B nonimmigrant status in any fiscal year may not exceed 66,000. USCIS is responsible for implementing the H-2B cap, which it does at the petition receipt stage. Spouses and children accompanying H-2B workers are not counted against the H-2B cap.

Certain categories of H-2B workers are exempt from the cap. These categories include, for example, current H-2B workers who are seeking an extension of stay, a change of employer, or a change in the terms of their employment. In addition, a temporary statutory provision that was in effect from FY2005 through FY2007 exempted certain returning H-2B workers from the cap. It applied to returning H-2B workers who had been counted against the cap in any one of the three prior fiscal years. Legislation to reinstate a returning worker exemption has been introduced in the 114th Congress.

After several years of cap-exceeding demand for H-2B visas, issuances of H-2B visas fell to under 45,000 in FY2009 and remained below the 66,000 cap level through FY2013. The H-2B cap was reached in FY2014, and demand for the visas continues to exceed supply. For FY2015, USCIS announced that it had received a sufficient number of petitions to reach the H-2B cap as of June 11, 2015, and would not be accepting any more cap-subject H-2B petitions for work beginning prior to October 1, 2015.

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Introduction

The U.S. Department of Homeland Security (DHS) announced in mid-June 2015 that it had received a sufficient number of H-2B visa petitions to reach the statutory limit of 66,000 H-2B temporary nonagricultural workers for FY2015. After several years in which fewer than 66,000 H-2B visas were issued, the cap was reached in FY2014. With the demand for H-2B visas continuing to exceed the supply, congressional attention is once again focused on H-2B admissions and the statutory cap.

H-2B Nonagricultural Worker Visa

The Immigration and Nationality Act (INA) of 1952, as amended,¹ enumerates categories of aliens,² known as nonimmigrants, who are admitted to the United States for a temporary period of time and a specific purpose. Nonimmigrant visa categories are identified by letters and numbers, based on the sections of the INA that established them. Among the major nonimmigrant visa categories is the “H” category for temporary workers. Included in this category is the H-2B visa for temporary nonagricultural workers.³

The H-2B program allows for the temporary admission of foreign workers to the United States to perform nonagricultural labor or services of a temporary nature if unemployed U.S. workers are not available. H-2B workers perform a wide variety of jobs. Top H-2B occupations in recent years have included landscape laborer, groundskeeper, forest worker, amusement park worker, and housekeeper. By regulation, participation in the H-2B program is limited to designated countries.⁴

Bringing workers into the United States under the H-2B program is a multi-agency process involving the U.S. Department of Labor (DOL), DHS, and the Department of State (DOS). The program itself is administered by DHS’s U.S. Citizenship and Immigration Services (USCIS) and DOL’s Employment and Training Administration (ETA). DOL’s Wage and Hour Division (WHD) also has certain concurrent enforcement responsibilities. The H-2B program currently operates under regulations issued by DHS in 2008 on H-2B requirements, DHS and DOL jointly in 2015 on H-2B employment, and DHS and DOL jointly in 2015 on H-2B wages.⁵

¹ Act of June 27, 1952, ch. 477, codified at 8 U.S.C. §1101 *et seq.* The INA is the basis of current immigration law.

² *Alien* is the term used in the INA to describe any person who is not a U.S. citizen or national. In this report, the terms alien, foreign worker, and H-2B worker are all used to describe a foreign national who is admitted to the United States on an H-2B visa.

³ INA §101(a)(15)(H)(ii)(b).

⁴ For 2015, nationals of 68 countries are eligible to participate in the H-2B program. For a list of these countries, see U.S. Department of Homeland Security, “Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs,” 77 *Federal Register* 74735-74736, December 16, 2014.

⁵ U.S. Department of Homeland Security, “Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers,” 73 *Federal Register* 78104-78130, December 19, 2008 (final rule); U.S. Department of Homeland Security and U.S. Department of Labor, Employment and Training Administration, “Temporary Non-Agricultural Employment of H-2B Aliens in the United States,” 80 *Federal Register* 24042-24144, April 29, 2015 (interim final rule) (hereinafter cited as the 2015 DHS-DOL rule on H-2B employment); U.S. Department of Homeland Security and U.S. Department of Labor, Employment and Training Administration, “Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,” 80 *Federal Register* 24146-24190, April 29, 2015 (final rule).

For work to qualify as temporary under the H-2B visa, the employer's need for the duties to be performed by the worker must "end in the near, definable future" and must be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.⁶ The employer's need for workers generally must be for a period of one year or less, but in the case of a one-time occurrence, can be for up to three years.⁷

In order to bring H-2B workers into the United States, an employer must first receive labor certification from DOL. An interim final rule on H-2B employment that was issued jointly by DHS and DOL in April 2015 establishes a new registration requirement as a preliminary step in the labor certification process; once it is implemented, prospective H-2B employers would demonstrate their temporary need to DOL through this registration process before submitting a labor certification application. (As of this writing, however, DOL continues to make determinations about temporary need during the processing of labor certification applications.)⁸

At the same time that the employer submits the labor certification application to DOL, the employer must submit a job order to the state workforce agency (SWA) serving the area of intended employment. The job order is used to recruit U.S. workers. The employer also must conduct its own recruitment.

In order to grant labor certification to an employer, DOL must determine that (1) there are not sufficient U.S. workers who are qualified and available to perform the work, and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. To prevent an adverse effect on U.S. workers, H-2B employers must offer and provide required wages and benefits to H-2B workers and workers in "corresponding employment."⁹ H-2B employers must pay their workers the highest of the prevailing wage rate or the federal, state, or local minimum wage. They must provide a "three-fourths guarantee"; that is, they must guarantee to offer workers employment for at least three-fourths of the contract period. H-2B employers also must pay worker visa fees and certain worker transportation costs. H-2B employers are not required to provide health insurance coverage.¹⁰

After receiving labor certification, a prospective H-2B employer can submit an application, known as a petition, to DHS to bring in foreign workers. If the petition is approved, foreign workers who are abroad can then go to a U.S. embassy or consulate to apply for H-2B nonimmigrant visas from DOS. If the visa applications are approved, the workers are issued visas that they can use to apply for admission to the United States at a port of entry. H-2B workers can be accompanied by eligible spouses and children, who are issued H-4 visas.

⁶ 8 C.F.R. §214.2(h)(6)(ii)(B).

⁷ In addition, under DOL regulations at 20 C.F.R. §655.6: "Except where the employer's need is based on a one-time occurrence, the [certifying officer] will deny a request for an H-2B Registration or an Application for Temporary Employment Certification where the employer has a need lasting more than 9 months."

⁸ According to the supplementary information accompanying the 2015 rule, a future "announcement in the Federal Register ... will provide the public with notice of when DOL will initiate the registration process." 2015 DHS-DOL rule on H-2B employment, p. 24052.

⁹ "Corresponding employment" is defined in DOL regulations as "the employment of workers who are not H-2B workers by an employer that has a certified H-2B Application for Temporary Employment Certification when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H-2B workers," with exceptions for certain incumbent workers. 20 C.F.R. §655.5.

¹⁰ H-2B workers, like nonimmigrants generally, are not eligible for federally funded public assistance, with the exception of Medicaid emergency services. See CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview and Trends*. Nonetheless, they may be eligible for coverage through a health insurance exchange. See CRS Report R43561, *Treatment of Noncitizens Under the Affordable Care Act*.

An alien's total period of stay as an H-2B worker may not exceed three consecutive years. An H-2B alien who has spent three years in the United States may not seek an extension of stay or be readmitted to the United States as an H-2B worker until he or she has been outside the country for at least three months.

The INA grants enforcement authority with respect to the H-2B program to DHS, but allows for the delegation of that authority to DOL.¹¹ DHS has delegated that authority to DOL, and now DOL's WHD has responsibility for enforcing compliance with the conditions of an H-2B petition and temporary labor certification.

Legislation introduced in the 114th Congress would establish new statutory requirements and procedures for the H-2B visa. These measures include bills that would eliminate the existing H-2B labor certification process, as described in current regulations, among other changes.¹²

Seafood Industry Staggered Entry Provision

As part of the labor certification process, prospective H-2B employers must accurately indicate the starting and ending dates of their period of need for H-2B workers. According to the supplementary information accompanying the 2015 DHS-DOL interim final rule on H-2B employment: "An application with an accurate date of need will be more likely to attract qualified U.S. workers to fill those open positions, especially when the employer conducts recruitment closer to the actual date of need."¹³ If within a season an employer has more than one date of need for workers to perform the same job, the employer must file a separate labor certification application for each date of need. The employer is not allowed to stagger the entry of H-2B workers based on one date of need.

There is an exception to this prohibition on the staggered entry of H-2B workers, however, that applies to employers in the seafood industry. First enacted as part of the Consolidated Appropriations Act, 2014,¹⁴ and subsequently incorporated into the 2015 DHS-DOL interim final rule on H-2B employment,¹⁵ this provision permits an employer with an approved H-2B petition to bring in the H-2B workers under that petition any time during the 120 days beginning on the employer's starting date of need. In order to bring in the workers between day 90 and day 120, though, the employer must conduct additional U.S. worker recruitment. Legislation has been introduced in the 114th Congress to extend the H-2B seafood industry staggered entry provision to all H-2B employers.¹⁶

Numerical Limitations

The H-2B program is subject to an annual statutory numerical limit. Under the INA, the total number of aliens who may be issued H-2B visas or otherwise provided with H-2B nonimmigrant status in any fiscal year may not exceed 66,000.¹⁷ Also, by law, there is a cap of 33,000 on the

¹¹ INA §214(c)(14)

¹² See, for example, S. 2225 and H.R. 3918, both as introduced in the 114th Congress.

¹³ 2015 DHS-DOL rule on H-2B employment, p. 24060.

¹⁴ P.L. 113-76, §113, January 17, 2014.

¹⁵ See 20 C.F.R. §655.15(f).

¹⁶ See, for example, H.R. 3020 (§108), as reported by the House Appropriations Committee, in the 114th Congress. Also see CRS Report R44230, *Immigration Legislation and Issues in the 114th Congress*.

¹⁷ INA §214(g)(1)(B).

number of aliens subject to the H-2B numerical limits who may enter the United States on an H-2B visa or be granted H-2B status during the first six months of a fiscal year.¹⁸

Certain categories of H-2B workers are exempt from the cap, including the following:

- current H-2B workers seeking an extension of stay, change of employer, or change in the terms of employment;
- H-2B workers previously counted toward the cap in the same fiscal year;
- fish roe processors, fish roe technicians, and/or supervisors of fish roe processing;¹⁹ and
- H-2B workers performing labor in the U.S. territories of the Commonwealth of the Northern Mariana Islands (CNMI) and/or Guam until December 31, 2019.

As noted, spouses and children who are accompanying H-2B workers are issued H-4 visas and, as such, are not counted against the H-2B cap.

Returning Worker Exemption

The 109th Congress amended the INA to add a provision establishing a temporary exemption from the H-2B statutory cap for certain returning H-2B workers. The provision, initially in effect for FY2005 and FY2006, exempted from the cap returning H-2B workers who had been counted against the cap in any one of the three prior fiscal years.²⁰ This provision was subsequently extended for FY2007,²¹ and expired at the end of that fiscal year.²² Legislation to reinstate an H-2B returning worker exemption from the H-2B cap is under consideration in the 114th Congress.²³

Implementation of the Cap

DHS's USCIS is responsible for implementing the H-2B numerical limits, which it does at the petition receipt stage. Under DHS regulations:

When calculating the numerical limitations ... USCIS will make numbers available to petitions in the order in which the petitions are filed. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the "final receipt date").²⁴

For FY2015, USCIS announced on April 2, 2015, that March 26, 2015, was the final receipt date for new H-2B petitions. The agency had accepted about 3,900 H-2B petitions (covering some 77,000 workers) for FY2015 through March 26, 2015, which it believed was sufficient to reach

¹⁸ INA §214(g)(10).

¹⁹ P.L. 108-287, §14006, August 5, 2004.

²⁰ P.L. 109-13, Div. B, Title IV, §402, May 11, 2005.

²¹ P.L. 109-364, Div. A, Title X, §1074, October 17, 2006.

²² For a discussion of legislative efforts to re-enact an H-2B returning worker exemption in the 110th Congress, see archived CRS Report RL34204, *Immigration Legislation and Issues in the 110th Congress*.

²³ See, for example, H.R. 3128 (§561), as reported by the House Appropriations Committee, in the 114th Congress. Also see CRS Report R44230, *Immigration Legislation and Issues in the 114th Congress*.

²⁴ 8 C.F.R. §214.2(h)(8)(ii)(B).

the annual 66,000 cap. In early June 2015, however, USCIS announced that it would re-open the H-2B cap for the second half of FY2015 and accept additional petitions for new H-2B workers. It offered the following public explanation:

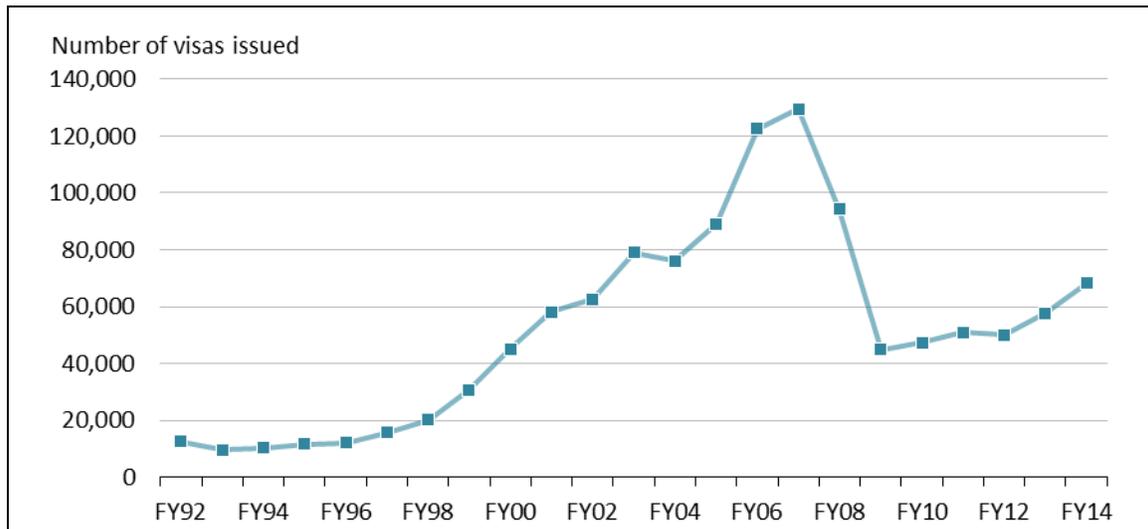
USCIS continues to work in collaboration with DOS to monitor the issuance of H-2B visas and has determined that as of June 5, 2015, DOS received fewer than the expected number of requests for H-2B visas. A recent analysis of DOS H-2B visa issuance and USCIS petition data reveals that the number of actual H-2B visas issued by DOS is substantially less than the number of H-2B beneficiaries seeking consular notification listed on cap-subject H-2B petitions approved by USCIS. In light of this new information, USCIS has determined that there are still available H-2B visa numbers remaining for the second half of the FY15 cap.²⁵

Following a brief re-opening, USCIS announced that June 11, 2015, was the final receipt date for new H-2B worker petitions for FY2015.

H-2B Visa Issuances

Figure 1 provides data on H-2B visa issuances from FY1992 through FY2014. These data offer one way to measure the growth of the H-2B program over the years. As explained above, the visa application and issuance process occurs after DOL has granted labor certification and DHS has approved the visa petition.

Figure 1. H-2B Visas Issued, FY1992-FY2014



Source: CRS presentation of data from U.S. Department of State, Bureau of Consular Affairs.

Notes: In FY2005-FY2007, certain returning H-2B workers were exempt from the statutory cap on the H-2B visa.

As illustrated in **Figure 1**, the number of H-2B visas issued generally increased from FY1992 until FY2007, when H-2B visa issuances reached a highpoint of over 129,000 (see the **Appendix** for yearly visa issuance data). In FY2007 and the two prior years, as discussed, a temporary

²⁵ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “USCIS to Reopen H-2B Cap for the Second Half of Fiscal Year 2015,” news alert, June 15, 2015, <http://www.uscis.gov/news/alerts/uscis-reopen-h-2b-cap-second-half-fiscal-year-2015>.

provision was in effect that exempted certain returning H-2B workers from the statutory annual cap of 66,000. In some other years in which visa issuances surpassed 66,000, it seems reasonable to assume that the H-2B cap was exceeded given the magnitude of the numbers.²⁶ H-2B visa issuances fell after FY2007 but, as shown in **Figure 1**, have been increasing since FY2009.

Conclusion

With demand for H-2B visas exceeding supply, H-2B admissions and the statutory cap are once again receiving attention. While previous Congresses considered broad immigration reform bills that included proposals for new temporary worker programs to address any perceived shortfalls in the supply of foreign temporary workers, any legislative efforts to address the admissions of nonagricultural guest workers in the near term are likely to be focused on the existing H-2B program. As discussed, bills under consideration in the 114th Congress would re-enact an H-2B returning worker exception to the statutory cap and extend the H-2B seafood industry staggered entry provision to all H-2B employers. It remains to be seen whether Congress will take further action on these or other possible proposals related to H-2B admissions and numerical limitations.

²⁶ It should be noted, however, that for various reasons not all visas issued during a fiscal year necessarily count against that year's cap or, in some cases, any year's cap. USCIS acknowledged that the H-2B cap was exceeded in FY2003.

Appendix. H-2B Visa Issuances

Table A-1. Number of H-2B Visas Issued, FY1992-FY2014

Fiscal Year	H-2B Visas Issued
1992	12,552
1993	9,691
1994	10,400
1995	11,737
1996	12,200
1997	15,706
1998	20,192
1999	30,642
2000	45,037
2001	58,215
2002	62,591
2003	78,955
2004	76,169
2005	89,135
2006	122,541
2007	129,547
2008	94,304
2009	44,847
2010	47,403
2011	50,826
2012	50,009
2013	57,600
2014	68,102

Source: CRS presentation of data from U.S. Department of State, Bureau of Consular Affairs.

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