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The H-2B Visa and the Statutory Cap

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Summary

The Immigration and Nationality Act (INA) of 1952, as amended, enumerates categories of foreign nationals, 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 landscaping worker, housekeeper, and amusement park worker.

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 operates mainly under regulations issued by DHS in 2008 on H-2B requirements, by DHS and DOL jointly in 2015 on H-2B wages, and by DHS and DOL jointly in 2015 and 2019 on H-2B employment.

Bringing workers into the United States under the H-2B program is a multiagency 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.

H-2B Annual Numerical Limitations

By law, the H-2B visa is subject to an annual numerical cap. Under the INA, the total number of individuals 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. In addition, certain categories of H-2B workers are exempt from the cap. Among these categories are current H-2B workers who are seeking an extension of stay, change of employer, or change in the terms of their employment.

Employer demand for H-2B workers has varied over the years. In recent years, demand has exceeded supply, and special provisions have been enacted to make additional H-2B visas available. For FY2016, a temporary statutory provision exempted certain H-2B workers from the cap. It applied to H-2B workers who had been counted against the cap in any one of the three prior fiscal years and would be returning as H-2B workers in FY2016. For FY2017, FY2018, FY2019, and FY2020, a different type of H-2B cap-related provision authorized DHS to issue additional H-2B visas (above the cap) subject to specified conditions.

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Introduction

FY2020 is the fifth year in a row that Congress has enacted a special provision to allow for the issuance of H-2B visas beyond the annual statutory cap of 66,000 in response to high levels of employer demand for the visa. For FY2016, Congress exempted certain H-2B workers from the statutory cap. For the four most recent fiscal years (FY2017-FY2020), Congress has authorized the Department of Homeland Security (DHS) to make additional H-2B visas available subject to certain conditions. For FY2017 and FY2018, DHS used this authority to make an additional 15,000 H-2B visas available each year. For FY2019, DHS made an additional 30,000 H-2B visas available. As of the date of this report, DHS has not yet exercised this authority for FY2020.

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 landscaping worker, forest worker, housekeeper, amusement park worker, and meat cutter. By regulation, participation in the H-2B program is limited to designated countries, and DHS publishes a list of eligible countries each year.[4]

Bringing workers into the United States under the H-2B program is a multiagency 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 operates mainly under regulations issued by DHS in 2008 on H-2B requirements, by DHS and DOL jointly in 2015 on H-2B wages, and by DHS and DOL jointly in 2015 and 2019 on H-2B employment.[5]

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[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.

[3] INA §101(a)(15)(H)(ii)(b), 8 U.S.C. §1101(a)(15)(H)(ii)(b).

[4] For 2020, nationals of 81 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," 85 *Federal Register* 3067, January 17, 2020.

[5] U.S. Department of Homeland Security, "Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers," 73 *Federal Register* 78104, December 19, 2008; 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 (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 and Hour Division, "Modernizing Recruitment Requirements for the Temporary Employment of H–2B Foreign Workers in the United States," 84 *Federal Register* 62431- 62447, November 15, 2019; U.S. Department of Homeland Security and U.S. Department of Labor, Employment and Training Administration,

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.

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 the date of this report, however, DOL continues to make determinations about temporary need during the processing of labor certification applications.)[7]

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*.[8] 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.[9] 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]

"Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program," 80 *Federal Register* 24146-24190, April 29, 2015.

[6] 8 C.F.R. §214.2(h)(6)(ii)(B).

[7] According to the supplementary information to 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.

[8] *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. Language included in DOL appropriations acts since FY2016 prohibits the use of funds to enforce this definition of corresponding employment. P.L. 114-113, Div. H, Title I, §113 (FY2016); P.L. 115-31, Div. H, Title I, §113 (FY2017); P.L. 115-141, Div. H, Title I, §113 (FY2018); P.L. 115-245, Div. B, Title I, §112 (FY2019); P.L. 116-94, Div. A, Title I, §111 (FY2020).

[9] Language included in DOL appropriations acts since FY2016 prohibits the use of funds to enforce the three-fourths guarantee rule. P.L. 114-113, Div. H, Title I, §113 (FY2016); P.L. 115-31, Div. H, Title I, §113 (FY2017); P.L. 115-141, Div. H, Title I, §113 (FY2018); P.L. 115-245, Div. B, Title I, §112 (FY2019); P.L. 116-94, Div. A, Title I, §111 (FY2020).

[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*. Nonetheless, they may be eligible for coverage through a health insurance exchange. See archived CRS Report R43561, *Treatment of Noncitizens Under the Affordable Care Act*.

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 foreign workers are already in the United States, the employer can request a change of status to H-2B status on the petition. In the typical case, however, the workers are abroad. If the petition is approved, they can visit 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.[11]

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.[12] 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.

Seafood Industry Staggered Entry Provision

As part of the labor certification process, prospective H-2B employers must indicate the starting and ending dates of their period of need for H-2B workers. According to the supplementary information to 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 in the seafood industry 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. This provision has been reenacted in DOL appropriations acts for each year from FY2015 through FY2020.[16]

[11] H-4 visas are for the spouses and children of H-1B, H-1B-1, H-2A, H-2B, or H-3 visa holders.

[12] INA §214(c)(14), 8 U.S.C. §1184(c)(14).

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

[14] P.L. 113-76, Div. H, Title I, §113.

[15] See 20 C.F.R. §655.15(f).

[16] P.L. 113-235, Div. G, Title I, §108 (FY15); P.L. 114-113, Div. H, Title I, §111 (FY2016); P.L. 115-31, Div. H, Title I, §111 (FY2017); P.L. 115-141, Div. H, Title I, §111 (FY2018); P.L. 115-245, Div. B, Title I, §110 (FY2019); P.L. 116-94, Div. A, Title I, §109 (FY2020).

Numerical Limitations

The H-2B program is subject to an annual statutory numerical limit. Under the INA, as amended by the Immigration Act of 1990, 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] Since FY2006 there also has been a cap of 33,000 on the number of aliens subject to 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] This INA amendment, enacted as part of the REAL ID Act of 2005, effectively divided the annual H-2B cap of 66,000 into two semiannual caps of 33,000, respectively covering work in the first and second halves of the fiscal year.[19]

The intent of the semiannual caps was to establish "a fair allocation of visas." As explained in introductory remarks on a related Senate bill that included this same provision: "We reserve half of the visas for the winter and half for the summer. Allocating visas ensures that, until a long-term solution is reached, all employers will have an equal chance of getting the workers that they need."[20] In practice, however, in times of high demand for H-2B workers, employers whose start dates of need fall late in a semiannual period may not have a chance to get workers. In a 2018 report, prepared in response to a congressional reporting requirement, DHS provided Congress with options to improve late season access to H-2B workers. Among the options presented were moving from semiannual to quarterly H-2B caps and giving preferential access to H-2B visas to employers in industries determined to be in the national interest.[21]

Not all categories of H-2B workers are subject to the statutory cap. Certain categories are exempt, 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;[22] 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, 2029.

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.

[17] INA §214(g)(1)(B), 8 U.S.C. §1184(g)(1)(B). The Immigration Act of 1990 is P.L. 101-649. Section 205(a) of that law established the H-2B cap of 66,000.

[18] INA §214(g)(10), 8 U.S.C. §1184(g)(10).

[19] The REAL ID Act of 2005 is Division B of P.L. 109-13. The provision establishing the 33,000 semiannual cap is Div. B, Title IV, §405. If the 33,000 cap is not reached for the first half of the fiscal year, the unused numbers are made available for the second half of the fiscal year.

[20] Senator Barbara Mikulski, introductory remarks in the Senate on the Save Our Small and Seasonal Businesses Act of 2005 (S. 352), *Congressional Record*, daily edition, vol. 151 (February 10, 2005), pp. S1280-S1281.

[21] U.S. Department of Homeland Security, *Options for Reforming the H-2B Visa Program and Improving Late Season Employers' Access to Workers*, June 7, 2019. The reporting requirement can be found in U.S. Congress, House Committee on Appropriations, *Consolidated Appropriations Act, 2018*, committee print, 115th Cong., 2nd sess. (Washington: GPO, 2018), p. 996.

[22] P.L. 108-287, Title X, Chap. 4, §14006.

Special H-2B Cap-Related Provisions

Legislation is regularly introduced in Congress concerning the H-2B cap. In the 116th Congress, one such bill—the Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020 (H.R. 2740), as passed by the House—proposed to replace the current semiannual allocation of H-2B visas, as described above, with a type of quarterly allocation. In addition, in quarters in which requests for H-2B workers by employers (whose petitions met the requirements for approval) exceeded the availability of visas, H-2B visas would have been allocated proportionally among these employers.[23]

Several measures have been enacted since 2005 to provide for the issuance of H-2B visas or granting of H-2B status beyond the statutory cap. The enacted provisions have been of two main types.

Returning Worker Exemption

The INA was amended during the 109th Congress to add a provision establishing a temporary exemption from the H-2B statutory cap for certain H-2B returning workers. The provision, initially in effect for FY2005 and FY2006, exempted from the cap H-2B returning workers who had been counted against the cap in any one of the three prior fiscal years.[24] This H-2B returning worker provision was subsequently extended for FY2007,[25] and expired at the end of that fiscal year.[26] An H-2B returning worker exemption of the same type was reinstated for FY2016. It provided that an H-2B returning worker who had been counted against the statutory cap in FY2013, FY2014, or FY2015 would not be counted again in FY2016.[27] Multiple bills were introduced in the 115th Congress to enact temporary or permanent H-2B returning worker exemptions from the statutory cap.[28] At least one H-2B returning worker bill has been introduced in the 116th Congress as of the date of this report.[29]

Provision Authorizing Additional H-2B Visas

For FY2017, FY2018 and FY2019, a different type of H-2B cap-related provision was enacted. For each of these years, provisions in year-end omnibus appropriations laws authorized DHS to make additional H-2B visas available beyond the statutory cap after consultation with DOL and "upon the determination that the needs of American businesses cannot be satisfied" with available U.S. workers. Under these provisions, the number of additional aliens who could receive H-2B

[23] In the language of the bill, in quarters with excess demand, "the Secretary [of DHS] shall ensure that each such petition is approved for a minimum number of visas, which shall be calculated based on the ratio between the total number of visas requested by such employers and the total number of visas available." H.R. 2740, Division A, Title V, §525, as passed by the House. Other H-2B cap-related bills introduced in the 116th Congress include H.R. 798, H.R. 2658, and S. 135.

[24] P.L. 109-13, Div. B, Title IV, §402.

[25] P.L. 109-364, Div. A, Title X, §1074.

[26] For a discussion of legislative efforts to reenact an H-2B returning worker exemption in the 110th Congress, see archived CRS Report RL34204, *Immigration Legislation and Issues in the 110th Congress* (available to congressional clients upon request).

[27] P.L. 114-113, Div. F, Title V, §565.

[28] There were a variety of proposals. See, for example, H.R. 1941, H.R. 2004, H.R. 4207, S. 792, and S. 3125, as introduced in the 115th Congress.

[29] See H.R. 798, as introduced in the 116th Congress.

visas each year was limited to "not more than the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program in any fiscal year in which returning workers were exempt from such numerical limitation."[30] As discussed below, DHS and DOL jointly published final rules to implement the FY2017, FY2018, and FY2019 provisions.

The FY2020 Consolidated Appropriations Act, enacted on December 20, 2019, includes a provision of the same type for FY2020. Using the same language as its predecessors, the FY2020 provision authorizes DHS, after consultation with DOL and "upon the determination that the needs of American businesses cannot be satisfied" with available U.S. workers, to make additional H-2B visas available for FY2020 up to a maximum of "the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program in any fiscal year in which returning workers were exempt from such numerical limitation."[31] As of the date of this report, DHS and DOL have not issued a rule implementing the FY2020 provision. For comparison purposes, there was a two- to three-month gap between the enactment of the FY2017, FY2018, and FY2019 statutory provisions and DHS issuance of the associated implementing rules.

FY2017 Provision

In July 2017, DHS and DOL jointly published a final rule to implement the FY2017 provision.[32] The rule temporarily amended DHS regulations on the H-2B visa to state that for FY2017, DHS "has authorized up to an additional 15,000 aliens who may receive H–2B nonimmigrant visas."[33] In the supplementary information to the rule, DHS explained that the statutory provision applied only to H-2B workers entering the United States on visas and not to aliens in the United States who were seeking a change of status to H-2B status.[34]

The statutory definition of the maximum authorized number (i.e., "the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program in any fiscal year") can be interpreted in different ways, as DHS acknowledged in the supplementary information to the rule. However, the agency determined that 64,716 was the most appropriate maximum number of additional H-2B visas authorized under the special FY2017 provision, this being "the number of beneficiaries covered by H–2B returning worker petitions that were approved for FY 2007."[35]

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[30] P.L. 115-31, Div. F, Title V, §543 (FY2017); P.L. 115-141, Div. M, Title II, §205 (FY2018); P.L. 116-6, Div. H, Title I, §105 (FY2019).

[31] P.L. 116-94, Div. I, Title I, §105.

[32] U.S. Department of Homeland Security and U.S. Department of Labor, Employment and Training Administration, "Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program," 82 *Federal Register* 32987, July 19, 2017.

[33] See 8 C.F.R. §214.2 (h)(6)(x)(A) (effective July 19, 2017, through September 30, 2017) in ibid. p. 32998.

[34] Ibid. p. 32989 (footnote 11).

[35] Ibid. p. 32988 (footnote 4). In the supplementary information to its subsequent rules implementing the FY2018 and FY2019 statutory provisions, DHS likewise maintained that 64,716 was the most appropriate maximum number of visas that it was authorized to make available. Others, however, take the position that 69,320 is the most appropriate maximum number authorized by the statutory language. This higher figure represents the number of visas issued to returning H-2B workers in FY2007, according to publicly available State Department data. See, for example, the comments of an executive in the landscaping industry in Janet H. Cho, "Area Employers Complain about Tightened Temp Visas," *Plain Dealer*, October 7, 2018, p. F1. State Department data on visa issuances to H-2B returning workers (available for FY2005-FY2007) can be found at https://travel.state.gov/content/dam/visas/Statistics/FY09AnnualReport_TableXVI_B.pdf.

The supplementary information to the rule included the following explanation for limiting the FY2017 numerical increase to 15,000:

> Most recently, in FY 2016, 18,090 returning workers were approved for H–2B petitions, despite Congress having reauthorized the returning worker program with more than three-quarters of the fiscal year remaining. Of those 18,090 workers authorized for admission, 13,382 were admitted into the United States or otherwise acquired H–2B status.... [T]he Secretary, in consideration of the statute's reference to returning workers, determined that it would be appropriate to use these recent figures as a basis for the maximum numerical limitation under section 543. This rule therefore authorizes up to 15,000 additional H–2B visas (rounded up from 13,382) for FY 2017.[36]

In addition, in implementing the statutory provision, DHS decided to limit eligibility for the additional H-2B workers to certain U.S. businesses. Under the FY2017 rule, the prospective H-2B employer must submit to DHS, along with the H-2B petition, a new attestation form "evidencing that without the ability to employ all of the H–2B workers requested on the petition ... its business is likely to suffer irreparable harm (that is, permanent and severe financial loss)."[37]

FY2018 Provision

In May 2018, DHS and DOL jointly published a final rule to implement the FY2018 H-2B cap-related provision.[38] The FY2018 rule, which is similar to the FY2017 rule, temporarily amended DHS H-2B regulations to state that for FY2018, DHS had authorized the issuance of up to 15,000 additional H–2B visas.[39] In supplementary information to the FY2018 rule, DHS explained its decision to authorize up to 15,000 additional visas despite the fact that all 15,000 additional visas authorized in FY2017 were not used.

> Out of a maximum of 15,000 supplemental H–2B visas for FY 2017, a total of 12,294 beneficiaries were approved for H–2B classification.... [T]he Secretary has determined that it is appropriate to authorize 15,000 additional visas again, as employers will have a longer period in which to submit their petitions due to the earlier publication date of this rule, thereby allowing for the possibility of more petitions being filed this fiscal year than in FY 2017.[40]

The FY2018 rule also included the same language as the FY2017 rule requiring an employer petitioning for supplemental visas to submit an attestation along with the H-2B petition evidencing that without the ability to employ all the requested H–2B workers the employer's business would likely suffer irreparable harm.

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[36] Ibid. p. 32990.

[37] See 8 C.F.R. §214.2 (h)(6)(x)(B)(2) (effective July 19, 2017, through September 30, 2017) in ibid. p. 32998.

[38] U.S. Department of Homeland Security and U.S. Department of Labor, Employment and Training Administration, "Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program," 83 *Federal Register* 24905, May 31, 2018.

[39] See temporary 8 C.F.R. §214.2 (h)(6)(x)(A) (effective May 31, 2018, through September 30, 2018) in ibid. p. 24917. In the supplementary information to the FY2018 rule, DHS explained that the statutory provision applied only to H-2B workers entering the United States on visas and not to aliens in the United States who were seeking a change of status to H-2B status. Ibid. p. 24908 (footnote 14).

[40] Ibid. p. 24908.

FY2019 Provision

In May 2019, DHS and DOL jointly published a final rule to implement the FY2019 provision.[41] The FY2019 rule temporarily amended DHS H-2B regulations to state that for FY2019, DHS has authorized the issuance of up to 30,000 additional H–2B visas.[42] As it did in the supplementary information to the FY2017 and FY2018 rules, DHS clarified in the supplementary information to this rule that the FY2019 provision only authorized DHS to increase the number of H-2B visas; it did not cover individuals in the United States changing to H-2B status.[43]

The supplementary information to the FY2019 rule, consistent with the supplementary information to the FY2017 and FY2018 rules, indicated that the most appropriate maximum number of additional H-2B visas authorized under the statutory provision was 64,716.[44] DHS explained its decision to allow 30,000 supplemental visas as follows:

> In setting the number of additional H–2B visas to be made available during FY 2019, DHS considered this number [i.e., 64,716], overall indications of increased need, and the time remaining in FY 2019, and determined that it would be appropriate to limit the supplemental cap to approximately half of the highest number for returning workers, or up to 30,000.[45]

Like its FY2017 and FY2018 predecessors, the FY2019 rule required an employer petitioning for supplemental visas to submit an attestation along with the H-2B petition evidencing that without the ability to employ all the requested H–2B workers the employer's business would likely suffer irreparable harm.

In addition, the FY2019 rule imposed a limitation not applicable under the FY2017 and FY2018 rules. Under the FY2019 rule, an employer could request supplemental visas only for H-2B workers "who have been issued an H–2B visa or otherwise granted H–2B status in Fiscal Years 2016, 2017, or 2018."[46] DHS offered the following rationale for limiting the additional visas to H-2B returning workers:

> Such workers (i.e., those who recently participated in the H–2B program) have previously obtained H– 2B visas and therefore been vetted by DOS, would have departed the United States after their authorized period of stay as generally required by the terms of their nonimmigrant admission, and therefore may obtain their new visas through DOS and begin work more expeditiously.[47]

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[41] U.S. Department of Homeland Security and U.S. Department of Labor, Employment and Training Administration, "Exercise of Time-Limited Authority To Increase the Fiscal Year 2019 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program," 84 *Federal Register* 20005, May 8, 2019.

[42] See 8 C.F.R. §214.2 (h)(6)(x)(B)(*2*)(*ii*)) (effective May 8, 2019, through September 30, 2019) in ibid. p. 20020.

[43] DHS stated in the supplementary information that the supplemental cap was limited to workers who obtained visas abroad and then sought admission to the United States. See ibid. p. 20009 (footnote 17).

[44] The supplementary information to the FY2019 rule states, "The highest number of H–2B returning workers approved was 64,716 in FY2007." Ibid. p. 20009.

[45] Ibid. p. 20009.

[46] See 8 C.F.R. §214.2 (h)(6)(x)(B)(*2*)(*ii*)) (effective May 8, 2019, through September 30, 2019) in ibid. p. 20020. This language does not require the workers to have been counted against the H-2B cap in any of the three years, unlike the previous statutory returning worker provisions (see "Returning Worker Exemption"). See ibid. p. 20007 (footnote 11).

[47] Ibid. p. 20008.

The supplementary information to the rule highlighted the importance, in particular, of returning workers' proven "willingness to return home after they have completed their temporary labor or services or their period of authorized stay."[48] It stated:

> The returning workers condition therefore provides a basis to believe that H–2B workers under this cap increase will likely return home again after another temporary stay in the United States. That same basis does not exist for non-returning workers, not all of whom have a track record of returning home. Although the returning worker requirement limits the flexibility of employers, the requirement provides an important safeguard, which DHS deems paramount.[49]

Implementation of H-2B Numerical Limits

USCIS is responsible for implementing numerical limits on temporary worker visas (including the H-2B visa), 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").... If the final receipt date is any of the first five business days on which petitions subject to the applicable numerical limit may be received (i.e., if the numerical limit is reached on any one of the first five business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those five business days.[50]

In one recent fiscal year, the final receipt date announced by USCIS ended up being too early. 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 for FY2015 through March 26, 2015, which it believed to be sufficient to reach the annual 66,000 cap. In early June 2015, however, USCIS announced that it would reopen 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.[51]

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[48] Ibid.

[49] Ibid.

[50] 8 C.F.R. §214.2(h)(8)(ii)(B). For a discussion of USCIS implementation of the H-2B cap over the years, see U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *H-2B Usage and Recommendations*, Fiscal Year 2016 Report to Congress, July 22, 2016, https://www.dhs.gov/sites/default/files/publications/U.S.%20Citizenship%20and%20Immigration%20Services%20-%20H-2B%20Usage%20and%20Recommendations.pdf.

[51] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, archived content, "USCIS to Reopen H-2B Cap for the Second Half of Fiscal Year 2015," news alert, June 5, 2015, http://www.uscis.gov/news/

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

Since FY2015, the semiannual cap of 33,000 has been reached in each half of the fiscal year. Employer demand has been particularly strong for H-2B visas for the second half of the fiscal year (for employment beginning April 1 to September 30), with the final receipt date for new H-2B worker petitions falling in March in FY2017[52] and in February in FY2018, FY2019, and FY2020.[53] Since FY2018, in particular, the scale of employer requests for H-2B workers has triggered DOL and DHS to implement special procedures.

FY2018

Until FY2018, the final receipt date for H-2B petitions had never fallen within the first five days of filing and, thus, the random selection process (lottery) described in the DHS regulatory provision in the preceding section had never been required.[54] That changed with petition filings by employers seeking to hire H-2B workers for the second half of FY2018, which began on April 1, 2018. DOL was also impacted by the high level of employer demand for H-2B workers for the second half of FY2018 since an employer must receive labor certification from DOL before filing an H-2B petition.

DOL Labor Certification Applications

In accordance with H-2B regulations, January 1, 2018, was the first date that employers could submit H-2B temporary labor certifications to DOL requesting a work start date of April 1, 2018. On January 1, 2018, DOL received about 4,498 applications requesting an April 1, 2018, start date; those applications covered 81,008 workers. In response, DOL announced a process change. It indicated in a *Federal Register* notice that it would not begin releasing certified H–2B applications, which employers need in order to petition USCIS for H-2B workers (see "H-2B Nonagricultural Worker Visa"), until February 20, 2018, and on that date, it would issue such certified applications in order of receipt.[55] DOL offered the following explanation for adopting this procedure:

> This process change will allow employers who filed promptly on January 1, 2018, sufficient time to meet regulatory requirements, including the recruitment and hiring of

alerts/uscis-reopen-h-2b-cap-second-half-fiscal-year-2015.

[52] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Reaches the H-2B Cap for Fiscal Year 2017," news alert, March 16, 2017, https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-fiscal-year-2017.

[53] U.S. Department of Homeland Security, "DHS Announces Additional Visas for Foreign Workers to Assist American Businesses at Risk of Failing," press release, May 31, 2018, https://www.dhs.gov/news/2018/05/31/dhs-announces-additional-visas-foreign-workers-assist-american-businesses-risk; U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "H-2B Cap Reached for FY 2019," news alert, February 22, 2019, https://www.uscis.gov/news/alerts/h-2b-cap-reached-fy-2019; U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "H-2B Cap Reached for Second Half of FY2020," news alert, February 26, 2020, https://www.uscis.gov/news/alerts/h-2b-cap-reached-second-half-fy2020.

[54] By contrast, lotteries have been regularly held under the separate H-1B visa for professional specialty workers. For information about the H-1B visa, see CRS Report R43735, *Temporary Professional, Managerial, and Skilled Foreign Workers: Policy and Trends*.

[55] U.S. Department of Labor, Employment and Training Administration, "Labor Certification Process for the Temporary Employment of Aliens in Non-Agricultural Employment in the United States," 83 *Federal Register* 3189, January 23, 2018.

qualified and available U.S. workers, thus preserving the sequential order of filing that took place on January 1, 2018, to the extent possible.[56]

DHS Petitions

On March 1, 2018, USCIS announced that in the first five business days of accepting H-2B petitions for the second half of FY2018, it had received petitions requesting about 47,000 cap-subject H-2B workers, more than could be accommodated under the 33,000 limitation for the second half of FY2018. It further reported that it had conducted a lottery on February 28, 2018, to randomly select a sufficient number of these petitions to meet the statutory cap.[57]

As discussed, on May 31, 2018, USCIS published a final rule authorizing the issuance of up to 15,000 additional H–2B visas for FY2018. In the first five business days of accepting petitions under this supplemental cap, USCIS received petitions for more beneficiaries than the number of H-2B visas available. As a result, it conducted a second FY2018 H-2B lottery on June 7, 2018, to randomly select a sufficient number of petitions to meet the supplemental cap.[58]

FY2019

Employer demand for H-2B workers for the second half of FY2019 reached new heights.

DOL Labor Certification Applications

January 1, 2019, was the first day that employers could file H-2B labor certification applications for the second half of FY2019. On January 2, 2019, DOL announced that due to high demand its iCERT online application filing system had "experienced a system disruption" on January 1, 2019, that prevented some employers from submitting their H-2B certification applications: "Within the first five minutes of opening the semi-annual H-2B certification process on January 1, 2019, the U.S. Department of Labor iCERT system had an unprecedented demand for H-2B certifications with more than 97,800 workers requested in pending applications for the 33,000 available visas."[59] When the system re-opened on January 7, 2019, it "handled the submission of approximately 4,749 H-2B applications covering more than 87,900 workers positions for an April 1, 2019, start date of work within the first one hour of operation."[60] This experience led DOL to announce additional process changes for FY2020, as described below.

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[56] Ibid. p. 3190.

[57] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Completes Random Selection Process for H-2B Visa Cap for Second Half of FY 2018," news release, March 1, 2018, https://www.uscis.gov/news/news-releases/uscis-completes-random-selection-process-h-2b-visa-cap-second-half-fy-2018-0.

[58] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Completes Lottery for Temporary Increase in FY 2018 H-2B Cap," news alert, June 11, 2018, https://www.uscis.gov/news/alerts/uscis-completes-lottery-temporary-increase-fy-2018-h-2b-cap.

[59] U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Announcements, "January 2, 2019. Important Announcement Regarding the Availability of the iCERT System for H-2B Program Filings," https://www.foreignlaborcert.doleta.gov/.

[60] U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Announcements, "January 7, 2019. OFLC Issues Status Update on the iCERT System," https://www.foreignlaborcert.doleta.gov/.

DHS Petitions

On February 19, 2019, the first day of accepting H-2B petitions for the second half of FY2019, USCIS announced that it had received petitions for more H-2B workers than there were remaining H-2B numbers under the FY2019 cap. On February 21, 2019, USCIS conducted a lottery to randomly select a sufficient number of petitions to meet the cap.[61]

FY2020

DOL implemented new processing procedures for FY2020 in anticipation of continued high numbers of H-2B labor certification application submissions.

DOL Labor Certification Applications

In February 2019, in light of its experience with H-2B submissions in January 2019 and the resulting unanticipated "burdens" placed on "its electronic filing system, network infrastructure, and staff resources," DOL announced new H-2B temporary labor certification application processing changes for FY2020.[62] It indicated that beginning with H-2B certification applications for the first half of FY2020, it would randomly order and assign for processing all applications submitted within designated groups. The first group would consist of applications requesting the earliest start date of work (e.g., October 1, 2019, for the first half of FY2020) and filed during the first three calendar days of the filing period (which begins on July 3, 2019, for the first half of FY2020). DOL maintained that this new process "balances employers' interest in utilizing the H-2B program with OFLC's [DOL's Office of Foreign Labor Certification's] interest in ensuring that access to its filing system is equitable and occurs with no user disruption."[63]

These new DOL procedures took effect on July 3, 2019, the earliest filing date for the first half of FY2020. In the first three filing days, DOL received 493 H-2B labor certification applications requesting a work start date of October 1, 2019. These applications covered 12,098 worker positions, less than the 33,000 semiannual H-2B allotment for the first half of FY2020. DOL assigned all the applications to Group A for processing.[64]

During the first three filing days for the second half of FY2020 (January 2-4, 2020), DOL received 5,677 H-2B labor certification applications requesting the earliest work start date of April 1, 2020. These applications covered 99,362 worker positions. DOL randomly assigned these applications to assignment groups in accordance with its new procedures. It reported that Group A included a sufficient number of workers to reach the 33,000 allotment for the second half of FY2020. It also indicated that it had randomly assigned the remaining applications to four other groups (Groups B-E), each including no more than 20,000 worker positions.[65] DOL has published

[61] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "H-2B Cap Reached for FY 2019," news alert, February 22, 2019, https://www.uscis.gov/news/alerts/h-2b-cap-reached-fy-2019.

[62] U.S. Department of Labor, Employment and Training Administration, "Selection Procedures for Reviewing Applications Filed by Employers Seeking Temporary Employment of H-2B Foreign Workers in the United States," 84 *Federal Register* 7399, 7401, March 4, 2019.

[63] Ibid. pp. 7401-7402.

[64] U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Announcements, "July 15, 2019. OFLC Announces List of Randomized H-2B Applications Submitted July 3-5 for Employers Seeking H-2B Workers Starting October 1, 2019," https://www.foreignlaborcert.doleta.gov/.

[65] U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification,

a list of all the H-2B labor certification applications requesting a work start date of April 1, 2020, that were submitted January 2-4, 2020, with their group assignments.[66]

DHS Petitions

USCIS announced that as of February 18, 2020, it had received petitions for more H-2B workers than there were remaining H-2B numbers under the FY2020 cap. On February 20, 2020, the agency conducted a lottery to randomly select a sufficient number of petitions to meet the cap.[67]

Data on Grants of H-2B Status

In any year, most, but not all, foreign nationals who obtain H-2B status acquire that status through admission to the United States on H-2B visas. Those who obtain H-2B status but are not issued visas include H-2B workers who are admitted to the United States without visas (mostly Canadians) and individuals who change to H-2B status while in the United States.[68] Regarding the latter category, USCIS data show that between FY2009 and FY2018, the number of individuals who were approved for a change to H-2B status ranged from about 110 (in FY2017) to about 470 (in FY2010).[69]

H-2B Visa Issuances

Figure 1 provides data on H-2B visa issuances from FY1992 through FY2018. 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.

Announcements, "January 6, 2020. OFLC Conducts Randomization Process on H-2B Applications Requesting an April 1, 2020, Work Start Date," and "January 8, 2020. OFLC Publishes List of Randomized H-2B Applications Submitted January 2-4 for Employers Seeking H-2B Workers Starting April 1, 2020," both available at https://www.foreignlaborcert.doleta.gov/.

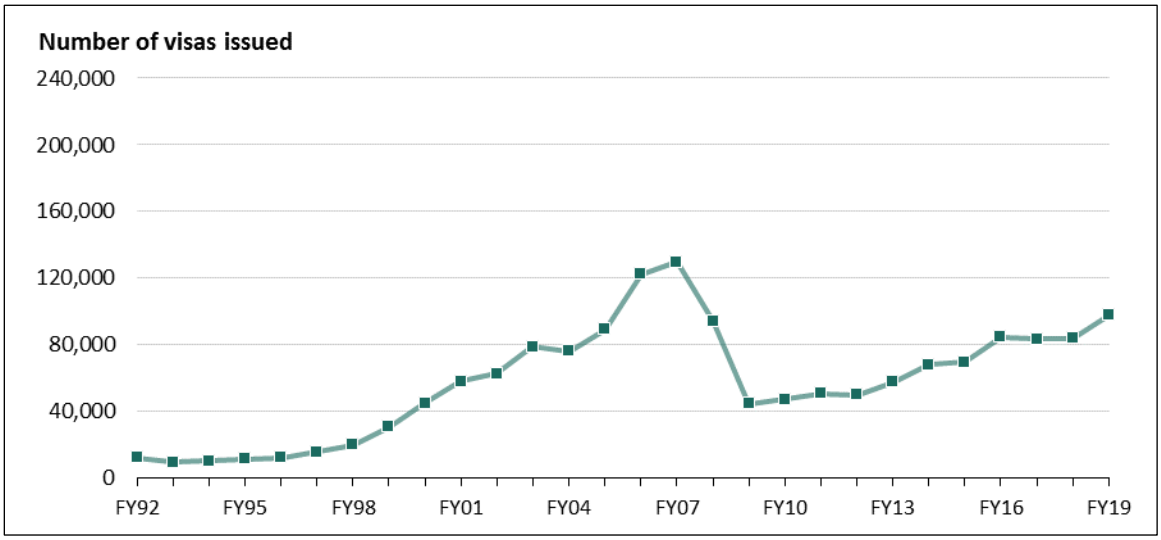
[66] The list, which is in alphabetical order by employer name and includes the worksite state, can be found at https://foreignlaborcert.doleta.gov/pdf/Disclosure%20of%20H-2B%20Applications%20Group%20Assignment%201.8.2020.pdf.

[67] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "H-2B Cap Reached for Second Half of FY2020," news alert, February 26, 2020, https://www.uscis.gov/news/alerts/h-2b-cap-reached-second-half-fy2020.

[68] Individuals in these categories are counted against the H-2B cap. Note, however, that a Canadian H-2B worker admitted without a visa may cross the U.S. border multiple times while working for an employer on the basis of an H-2B petition, but is only counted against the H-2B cap on the first U.S. admission.

[69] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Characteristics of H-2B Nonagricultural Temporary Workers* …, FY2009-FY2018; U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *H-2B Nonagricultural Temporary Worker Visa and Status* …, FY2009-FY2017. Reports available from USCIS at https://www.uscis.gov/tools/reports-studies/reports-and-studies.

Figure 1. H-2B Visas Issued, FY1992-FY2019



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

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 129,547 (see the **Appendix** for yearly visa issuance data). H-2B visa issuances fell after FY2007 with the start of the economic recession, but, as shown in **Figure 1**, have generally been increasing since FY2009.

In FY2005-FY2007 and FY2016-FY2019, as discussed, temporary provisions established exceptions to 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.[70]

Conclusion

With employer demand for H-2B visas exceeding supply, H-2B admissions and the statutory cap are once again receiving attention from policymakers. 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 workers, any legislative efforts to address the numerical limitations on nonagricultural guest workers in the near term seem likely to be focused on the existing H-2B program.

[70] 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.

Appendix. H-2B Visa Issuances

Table A-1. Number of H-2B Visas Issued, FY1992-FY2019

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
2015	69,684
2016	84,627
2017	83,600
2018	83,774
2019	97,623

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

Note: 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.

Author Information

Andorra Bruno
Specialist in Immigration Policy

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