

H-2B NONIMMIGRANT VISA PROGRAM

TALKING POINTS:

The 2017 H-2B Cap

- USCIS received a sufficient number of petitions to reach the 66,000 congressionally-mandated H-2B numerical limitation (or “cap”) for Fiscal Year (FY) 2017.
- January 10, 2017, was the final receipt date for new cap subject H-2B worker petitions requesting an employment start date before April 1, 2017. March 13, 2017, was the final receipt date for new cap subject H-2B worker petitions requesting an employment start date between April 1 and September 30, 2017. USCIS has confirmed from periodic visa issuance reports received from Department of State (DOS) that the FY 2017 cap was fully subscribed (that is, the 66,000 limit was reached).
- USCIS continues to accept and adjudicate H-2B petitions for beneficiaries that are not subject to the FY 2017 cap (see the Background section below for a list of these cap exempt workers).

The Supplemental Cap for FY 2017

- On May 5, 2017, Congress enacted the FY 2017 Consolidated Appropriations Act. Section 543 of this law authorized the Secretary of Homeland Security to increase the FY 2017 H-2B cap. On July 19, 2017, the Departments of Homeland Security and Labor published a joint final rule increasing the numerical limit (“cap”) on H-2B nonimmigrant visas by up to 15,000 additional visas through the end of FY 2017. These visas are available only to American businesses which attest that they will likely suffer irreparable harm without the ability to employ all the H-2B workers requested in their petition.
- This is a **one-time** increase based on a time-limited statutory authority. It does not affect the H-2B program in future fiscal years. It will expire at the end of the day on September 30, 2017.
- The Secretary’s decision to increase the cap was determined in accordance with Section 543 of the FY 2017 Consolidated Appropriations Act. Congress delegated its authority to the DHS Secretary to set a numerical cap for the remainder of the fiscal year. The Secretary consulted with the Secretary of Labor and considered the needs of American businesses and other factors, including the impact on U.S. workers and the integrity of the H-2B program.
- Only American businesses that are likely to experience irreparable harm (permanent and severe financial loss) without the ability to employ all of the H-2B workers that they request on their Form I-129 petition for this fiscal year may file under this one-time increase in the H-2B cap.
- The joint final rule does not apply to petitions that are not subject to the H-2B cap, including those petitions filed in connection with an H-2B extension of stay request or

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on behalf of certain fish roe producers. Such petitions may continue to be filed under the normal rules of the H-2B program.

H-2B Returning Workers

- In FYs 2005, 2006, 2007, and 2016, Congress exempted H-2B workers identified as “returning workers” from the H-2B cap.
- A returning worker is defined as an H-2B worker who was previously counted against the annual H-2B cap. For example, returning workers for FY 2016 needed to be counted against the cap during FYs 2013, 2014, or 2015.

Anti-Fraud Efforts

- USCIS is committed to detecting and preventing immigration fraud and abuse in the H-2B program and created a dedicated email address for the public to report fraud (b)(7)(e) (ReportH2BAbuse@uscis.dhs.gov)



BACKGROUND:

General Information

- The H-2B visa program is for nonagricultural workers coming to the United States to perform services or labor that are temporary in nature (such as construction and landscaping). To be considered temporary, the employer’s need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.
- A petitioning employer must also establish that there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work and that employing H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.
- Generally, a person who has held H-2B nonimmigrant status for a total of three years must depart and remain outside the United States for an uninterrupted period of three months before seeking readmission as an H-2B nonimmigrant.
- Unless determined to be in the interest of the United States, USCIS may only approve H-2B petitions for nationals of countries the Secretary of Homeland Security, in consultation with DOS, has designated as eligible to participate in the program.
- There is a congressionally-mandated cap of 66,000 foreign nationals who may be issued an H-2B visa or otherwise granted H-2B status during a fiscal year. This allocation is divided evenly between workers beginning employment in the 1st half (October 1 – March 31) and the second half (April 1 – September 30) of the fiscal year. Any unused visas from the first half are available in the second half. However, unused visas from one fiscal year do not carry over to the next fiscal year.

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- USCIS's role in managing the H-2B cap involves monitoring the number of beneficiaries requested on H-2B petitions and ensuring that the cap is not exceeded.
- The following H-2B petitions are not subject to the cap:
 - Current H-2B workers in the United States who are beneficiaries of petitions to extend their stay and, if applicable, change the terms of their employment or change their employers;
 - Fish roe processors, fish roe technicians or supervisors of fish roe processing; and
 - Workers performing labor or services from November 28, 2009, until December 31, 2019, in the Commonwealth of Northern Mariana Islands (CNMI) or Guam.
 - Note: The spouse and children of H-2B workers classified as H-4 nonimmigrants are also not counted against this cap.

The Overall Petition Process

- USCIS is the component of DHS that adjudicates H-2B petitions. Before filing Form I-129, Petition for a Nonimmigrant Worker, with USCIS for H-2B workers, petitioners must generally obtain a single, valid temporary labor certification (TLC) from the DOL or from the Governor of Guam.
- After receiving an approved TLC, petitioners file Form I-129 with USCIS. Once USCIS approves Form I-129, the prospective H-2B workers who are outside the United States must:
 - Apply for an H-2B visa with DOS at a U.S. embassy or consulate abroad and then seek admission to the United States with U.S. Customs and Border Protection (CBP) at a U.S. port of entry; or
 - Directly seek admission to the United States in H-2B classification with CBP at a U.S. port of entry in cases where an H-2B visa is not required.
- Note: If filing under the Supplemental Cap for FY 2017, petitioners must:
 - Meet all existing H-2B eligibility requirements (including obtaining an approved TLC from DOL that is valid for the entire employment period stated on the petition);
 - Conduct a fresh round of recruitment for U.S. workers if the TLC contains a start date of work before June 1, 2017; and
 - Submit an attestation on Form ETA 9142-B-CAA (PDF) in which the petitioner affirms, under penalty of perjury, its business will likely suffer irreparable harm if it cannot hire all the requested H-2B workers before the end of the fiscal year.

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H-2A VISA PROGRAM

TALKING POINTS:

- ***Program Improvements***
 - The Department is committed to strengthening the H-2A program for temporary agricultural workers, and is continually looking for ways to make the program more customer friendly, while at the same time protecting U.S. agricultural workers, including:
 - USCIS/DOS e-Approval
 - In 2016, USCIS and the Department of State (DOS) launched a new electronic process to allow USCIS to send approval information for H-2A petitions to DOS by the end of the next business day. DOS accepts this electronic information in place of a Form I-797 approval notice and allows its consular posts to proceed with processing an H-2A nonimmigrant visa application, including conducting any required interview.
 - e-Approval has reduced delays for U.S. employers, reduced the amount of required paperwork, made the visa process more efficient, and provided greater efficiency and consistency in transmitting information to DOS consular posts.
 - Expedited processing
 - Since 2007, the adjudication of H-2A petitions has been centralized at the USCIS California Service Center (CSC) and prioritized for expedited processing.
 - Although premium processing service is not available to H-2A employers, H-2A petitions are generally processed by USCIS within the 15-day premium processing guideline provided to other visa classifications. However, there is no requirement that USCIS process H-2A petitions within any specific period.
 - Also in 2016, to expedite the overall process, USCIS began using pre-paid mailers provided by petitioners to send out receipt notices for H-2A petitions.
- ***Growth in the H-2A Program***
 - USCIS has identified substantial growth in the number of approved H-2A petitions in FY 2017 over the same point in FY 2016. This continues an ongoing trend of growth over the last few years. Government and external stakeholders have also indicated that the H-2A program could continue to grow significantly in coming years. [See Appendix for H-2A receipts and approvals.]

BACKGROUND:

- The H-2A nonimmigrant visa program provides employers with temporary and seasonal workers to fill temporary agricultural jobs in the United States for which qualified U.S. workers are unavailable.
- There is no annual cap on the number of H-2A nonimmigrant visas issued.
- Generally, USCIS may grant the H-2A classification for up to the period of time authorized on the temporary labor certification (TLC), not to exceed ten months. H-2A classification may be

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extended for qualifying employment in increments of up to 1 year each. A new, valid TLC covering the requested time must accompany each extension request. The maximum period of stay in H-2A classification is 3 years.

- Generally, a person who has held H-2A nonimmigrant status for a total of 3 years must depart and remain outside the United States for an uninterrupted period of 3 months before seeking readmission as an H-2A nonimmigrant.
- USCIS generally may only approve H-2A petitions for nationals of countries the Secretary of Homeland Security, in consultation with DOS, has designated as eligible to participate in the program. However, USCIS may approve H-2A petitions for nationals of countries not on the list if it is determined to be in the interest of the United States. The notice listing eligible countries is published in the Federal Register on an annual or more frequent basis and remains valid for one year from the date of publication. Additionally, an alert listing the updated eligible countries list is posted on www.uscis.gov.
- Petition process:
 - Before filing Form I-129, Petition for a Nonimmigrant Worker, with USCIS for H-2A workers, petitioners must generally obtain a single, valid TLC from Department of Labor (DOL), even though the TLC may be filed on behalf of multiple prospective H-2A workers. The TLC constitutes a determination by DOL there are not sufficient able, willing, and qualified U.S. workers available to perform the temporary or seasonal agricultural employment; and the employment of the H-2A nonimmigrant workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The TLC is not binding on USCIS, but does constitute expert advice upon which USCIS will rely in adjudicating the actual H-2A petition.
 - After receiving an approved TLC, petitioners file Form I-129 with USCIS.
 - Petitioners need not, in most cases, name workers who are outside of the United States in the H-2A petition. These workers will be identified at the time they apply for an H-2A visa at a U.S. consulate abroad or at a U.S. port of entry, in the case of prospective workers (generally, Canadian nationals) who are not required to obtain visas.
 - Prospective H-2A workers who are already in the United States, and certain others, on the other hand, must be named in the H-2A petition.
 - If USCIS approves Form I-129, prospective H-2A workers who are outside the United States must:
 - apply for an H-2A visa with DOS at a U.S. Embassy or Consulate abroad and then seek admission to the United States with U.S. Customs and Border Protection (CBP) at a U.S. port of entry, or
 - (where permissible) directly seek admission to the United States in H-2A classification with CBP at a U.S. port of entry in cases where an H-2A visa is not required.
 - Workers who are in the United States must seek either an extension of nonimmigrant stay as an H-2A, or a change of status to H-2A in order to work for the petitioner.

APPENDIX:

United States Citizenship and Immigration Services (USCIS) I-129, Petition for a Nonimmigrant Worker Class Preference of H-2A Receipts and Approvals Fiscal Year 2012 - 2017 (As of May 3)		
Fiscal	Petitions	Number of Beneficiaries

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Year	Receipts	Approvals	Receipts	Approvals
2012	6,791	6,667	90,298	89,045
2013	7,340	7,278	105,305	104,698
2014	8,240	8,168	124,034	122,360
2015	9,167	9,038	157,720	153,534
2016	10,264	10,120	178,528	174,540
2017*	7,566	7,436	129,017	125,211
Grand Total	49,368	48,707	784,902	769,388