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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 and 2024 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 up to 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 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.

## 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. For the last decade, 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. Since FY2017, a different type of H-2B cap-related provision has been enacted annually to authorize DHS to issue additional H-2B visas (above the cap) subject to specified conditions.

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## Introduction

The H-2B visa is subject to a statutory annual numerical cap of 66,000, but demand for H-2B workers has often exceeded this cap. Each year since FY2017, Congress has authorized the U.S. Department of Homeland Security (DHS), after consultation with the U.S. Department of Labor (DOL), to make additional H-2B visas available beyond the cap, subject to certain conditions. For FY2026, DHS has exercised this authority and released 64,716 supplemental H-2B visas, the maximum allowable number.

## H-2B Nonagricultural Worker Visa

The Immigration and Nationality Act (INA) of 1952, as amended,<sup>1</sup> enumerates categories of aliens,<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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, housekeeper, forest worker, and amusement park worker.<sup>5</sup>

Bringing workers into the United States under the H-2B program is a multiagency process involving DOL, DHS, and the U.S. 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 and 2024 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.<sup>6</sup>

For work to qualify as temporary under the H-2B visa under DHS regulations, 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.<sup>7</sup> The

<sup>1</sup> 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.

<sup>2</sup> *Alien* is the term used in the INA to describe any person who is not a U.S. citizen or national.

<sup>3</sup> For a listing of nonimmigrant visa categories, see CRS Report R45938, *Nonimmigrant and Immigrant Visa Categories: Data Brief*.

<sup>4</sup> INA §101(a)(15)(H)(ii)(b), 8 U.S.C. §1101(a)(15)(H)(ii)(b).

<sup>5</sup> For additional information about the H-2B visa, see CRS Report R44849, *H-2A and H-2B Temporary Worker Visas: Policy and Related Issues*.

<sup>6</sup> DHS, “Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers,” 73 *Federal Register* 78104, December 19, 2008; DHS, “Modernizing H-2 Program Requirements, Oversight, and Worker Protections,” 89 *Federal Register* 103202, December 18, 2024; DHS and DOL, ETA, “Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,” 80 *Federal Register* 24146, April 29, 2015; DHS and DOL, ETA and WHD, “Temporary Non-Agricultural Employment of H-2B Aliens in the United States,” 80 *Federal Register* 24042, April 29, 2015 (hereinafter cited as “2015 DHS-DOL rule on H-2B employment”); DHS and DOL, ETA and WHD, “Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States,” 84 *Federal Register* 62431, November 15, 2019.

<sup>7</sup> 8 C.F.R. §214.2(h)(6)(ii)(B).

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. As part of this process, a prospective H-2B employer submits a temporary labor certification application to DOL in which it requests certification for a particular number of positions. At the same time, 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*.<sup>8</sup> 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.<sup>9</sup> H-2B employers also must pay worker visa fees and certain worker transportation costs. They are not required to provide health insurance coverage.<sup>10</sup>

After receiving labor certification, a prospective H-2B employer can submit an application, known as a petition, to DHS to bring in foreign workers; the number of workers an employer can petition for is limited to the number of positions for which the employer has received certification from DOL. If a foreign worker is already in the United States in another nonimmigrant status, the employer can request a change of status to H-2B status on the petition. In the typical case, however, the workers are outside the United States. If the petition is approved, a worker abroad can visit 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 can be used 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.<sup>11</sup>

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

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<sup>8</sup> “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); P.L. 116-260, Div. H, Title I, §111 (FY2021); P.L. 117-103, Div. H, Title I, §111 (FY2022); P.L. 117-328, Div. H, Title I, §111 (FY2023); P.L. 118-47, Div. D, §111 (FY2024); P.L. 119-4, Div. A, Title I, various provisions (FY2025); and P.L. 119-75, Div. B, Title I, §111 (FY2026).

<sup>9</sup> 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); P.L. 116-260, Div. H, Title I, §111 (FY2021); P.L. 117-103, Div. H, Title I, §111 (FY2022); P.L. 117-328, Div. H, Title I, §111 (FY2023); P.L. 118-47, Div. D, Title I, §111 (FY2024); P.L. 119-4, Div. A, Title I, various provisions (FY2025); and P.L. 119-75, Div. B, Title I, §111 (FY2026).

<sup>10</sup> H-2B workers, like nonimmigrants generally, are not eligible for most federally funded public assistance; they are eligible for Medicaid emergency services.

<sup>11</sup> H-4 visas are for the spouses and children of H-1B, H-1B-1, H-2A, H-2B, or H-3 visa holders.

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.<sup>12</sup> DHS has delegated that authority to DOL, and since 2009, DOL's WHD has had responsibility for enforcing compliance with the conditions of an H-2B petition and temporary labor certification.<sup>13</sup>

## **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 preamble 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."<sup>14</sup> 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,<sup>15</sup> and subsequently incorporated into the 2015 DHS-DOL interim final rule on H-2B employment,<sup>16</sup> 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 continued to be included in DOL appropriations acts for each year since FY2015.<sup>17</sup>

## **Numerical Limitations**

The H-2B program is subject to a statutory annual 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.<sup>18</sup> 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.<sup>19</sup> This INA amendment, enacted as part of the REAL

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<sup>12</sup> INA §214(c)(14)(B), 8 U.S.C. §1184(c)(14)(B).

<sup>13</sup> DOL, WHD, "H-2B Program."

<sup>14</sup> 2015 DHS-DOL rule on H-2B employment, p. 24060.

<sup>15</sup> P.L. 113-76, Div. H, Title I, §113.

<sup>16</sup> See 20 C.F.R. §655.15(f).

<sup>17</sup> P.L. 113-235, Div. G, Title I, §108 (FY2015); 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); P.L. 116-260, Div. H, Title I, §109 (FY2021); P.L. 117-103, Div. H, Title I, §109 (FY2022); P.L. 117-328, Div. H, Title I, §109 (FY2023); P.L. 118-47, Div. D, Title I, §109 (FY2024); P.L. 119-4, Div. A, Title I, various provisions (FY2025); and P.L. 119-75, Div. B, Title I, §109 (FY2026).

<sup>18</sup> 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.

<sup>19</sup> INA §214(g)(10), 8 U.S.C. §1184(g)(10).

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.<sup>20</sup>

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.”<sup>21</sup> In practice, however, in times of high demand for H-2B workers, employers whose start dates of need do not fall early in a semiannual period may not have an opportunity to secure 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.<sup>22</sup>

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;<sup>23</sup> 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.<sup>24</sup>

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.

## Implementation of H-2B Numerical Limits

USCIS is responsible for implementing the numerical limits on 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

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<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> DHS, *Options for Reforming the H-2B Visa Program and Improving Late Season Employers' Access to Workers*, June 7, 2019, [https://www.uscis.gov/sites/default/files/document/reports/FY\\_2018\\_USCIS\\_H-2B\\_Congressional\\_Appropriations\\_Report.pdf](https://www.uscis.gov/sites/default/files/document/reports/FY_2018_USCIS_H-2B_Congressional_Appropriations_Report.pdf). The reporting requirement can be found in U.S. Congress, House Committee on Appropriations, *Consolidated Appropriations Act, 2018*, committee print, 115<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington, DC: GPO, 2018), p. 996.

<sup>23</sup> P.L. 108-287, Title X, Chap. 4, §14006.

<sup>24</sup> 48 U.S.C. §1806(b)(1)(a).

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”).<sup>25</sup>

The regulations provide for the use of random selection procedures (lotteries) “when necessary to ensure the fair and orderly allocation of numbers subject to the numerical limitations.” Under the regulations, “USCIS may randomly select from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals.” The regulations also direct USCIS to use random selection procedures when the final receipt date (the date on which the applicable H-2B cap is reached) falls on one of the first five business days on which cap-subject petitions can be filed. In such a case, “USCIS will randomly apply all of the numbers among the petitions received on any of those five business days.”<sup>26</sup>

In at least one 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.<sup>27</sup>

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 year (for employment beginning between April 1 and September 30). In a 2018 *Federal Register* notice (discussed below), DOL noted that its Office of Foreign Labor Certification (OFLC) “typically experiences a significant ‘spike’ in labor certification applications” from employers seeking H-2B workers for “temporary or seasonal jobs during the U.S.’s early spring and summer weather months.”<sup>28</sup> Evidencing this high demand, the final receipt date for new H-2B worker petitions fell

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<sup>25</sup> 8 C.F.R. §214.2(h)(8)(vii).

<sup>26</sup> 8 C.F.R. §214.2(h)(8)(vii).

<sup>27</sup> DHS, USCIS, “USCIS to Reopen H-2B Cap for the Second Half of Fiscal Year 2015,” June 5, 2015 (archived content), <https://www.uscis.gov/archive/uscis-to-reopen-h-2b-cap-for-the-second-half-of-fiscal-year-2015>.

<sup>28</sup> DOL, ETA, “Labor Certification Process for the Temporary Employment of Aliens in Non-Agricultural Employment in the United States,” 83 *Federal Register* 3189, January 23, 2018.

in February in each year from FY2018 to FY2023<sup>29</sup> and in March in FY2017, FY2024, FY2025 and FY2026.<sup>30</sup>

## Developments Since FY2018

Employer demand for H-2B workers reached new heights in the late 2010s, especially for the second half of the fiscal year. This growth particularly impacted DOL, which does not cut off labor certification application processing once DHS determines that the H-2B cap has been reached.

For FY2018, 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 (the first start date in the second half of FY2018). On January 1, DOL received about 4,498 applications requesting an April 1 start date; those applications covered 81,008 workers. In response, DOL announced a change in its procedures. 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 the “H-2B Nonagricultural Worker Visa” section), until February 20, 2018, and on that date, it would issue such certified applications in order of receipt.<sup>31</sup> 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 qualified and available U.S. workers, thus preserving the sequential order of filing that took place on January 1, 2018, to the extent possible.<sup>32</sup>

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. This was the first time that the final receipt date for H-2B petitions had fallen within the first five days of filing, thus triggering a lottery to randomly select a sufficient number of these petitions to meet the statutory cap.<sup>33</sup>

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<sup>29</sup> DHS, “DHS Announces Additional Visas for Foreign Workers to Assist American Businesses at Risk of Failing,” May 31, 2018 (archived content), <https://www.dhs.gov/news/2018/05/31/dhs-announces-additional-visas-foreign-workers-assist-american-businesses-risk>; DHS, USCIS, “H-2B Cap Reached for FY 2019,” February 22, 2019 (archived content), <https://www.uscis.gov/archive/h-2b-cap-reached-for-fy-2019>; DHS, USCIS, “H-2B Cap Reached for Second Half of FY2020,” February 26, 2020 (archived content), <https://www.uscis.gov/archive/h-2b-cap-reached-for-second-half-of-fy2020>; DHS, USCIS, “H-2B Cap Reached for Second Half of FY 2021,” February 24, 2021 (archived content), <https://www.uscis.gov/archive/h-2b-cap-reached-for-second-half-of-fy-2021>; DHS, USCIS, “H-2B Cap Reached for Second Half of FY 2022,” March 1, 2022 (archived content), <https://www.uscis.gov/archive/h-2b-cap-reached-for-second-half-of-fy-2022>; and “USCIS Reaches H-2B Cap for Second Half of FY 2023 and Announces Filing Dates for the Second Half of FY 2023 Supplemental Visas,” March 2, 2023.

<sup>30</sup> DHS, USCIS, “USCIS Reaches the H-2B Cap for Fiscal Year 2017,” March 16, 2017 (archived content), <https://www.uscis.gov/archive-alerts/uscis-reaches-the-h-2b-cap-for-fiscal-year-2017>; DHS, USCIS, “USCIS Reaches H-2B Cap for Second Half of FY 2024 and Announces Filing Dates for the Second Half of FY 2024 Supplemental Visas,” March 8, 2024; DHS, USCIS, “USCIS Reaches H-2B Cap for Second Half of FY 2025 and Filing Dates Now Available for Supplemental Visas,” March 26, 2025; and DHS, USCIS, “USCIS Reaches H-2B Cap for Second Half of FY 2026 and Filing Dates Now Available for Supplemental Visa Allocations,” March 20, 2026.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, p. 3190.

<sup>33</sup> DHS, USCIS, “USCIS Completes Random Selection Process for H-2B Visa Cap for Second Half of FY 2018,” March 1, 2018 (archived content), <https://www.uscis.gov/news/news-releases/uscis-completes-random-selection-process-h-2b-visa-cap-second-half-fy-2018-0>.

Demand for H-2B workers remained high in FY2019. 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.”<sup>34</sup> When the system reopened 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.”<sup>35</sup>

## Revised DOL Procedures

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.<sup>36</sup> 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 (e.g., July 3-5, 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 interest in ensuring that access to its filing system is equitable and occurs with no user disruption.”<sup>37</sup>

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.<sup>38</sup>

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 processing 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

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<sup>34</sup> DOL, ETA, Office of Foreign Labor Certification (OFLC), “January 2, 2019. Important Announcement Regarding the Availability of the iCERT System for H-2B Program Filings,” Announcements, <https://www.dol.gov/agencies/eta/foreign-labor/news>.

<sup>35</sup> DOL, ETA, OFLC, “January 7, 2019. OFLC Issues Status Update on the iCERT System,” Announcements, <https://www.dol.gov/agencies/eta/foreign-labor/news>.

<sup>36</sup> DOL, ETA, “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.

<sup>37</sup> *Ibid.*, pp. 7401-7402.

<sup>38</sup> DOL, ETA, OFLC, “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,” Announcements, <https://www.dol.gov/agencies/eta/foreign-labor/news>.

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.<sup>39</sup>

This same pattern of labor certification application filing and group assignment continued for FY2021, FY2022, and FY2023. For these years, as for FY2020, the number of requested positions on applications filed during the initial three-day filing window for the earliest work start date fell below the semiannual cap for the first half of the fiscal year (and associated applications were all assigned to the same group) and exceeded the cap for the second half (and associated applications were randomly assigned to multiple groups).

Since FY2024, the number of requested positions on applications filed during the initial three-day filing window for the earliest work start date for *each* half of the fiscal year has exceeded the semiannual cap. As a result, for each half of each year, DOL has randomly assigned applications to processing groups. For example, for the first half of FY2026, it randomly assigned 2,421 H-2B applications covering 47,488 worker positions to two processing groups (Groups A and B).<sup>40</sup> For the second half of FY2026, it randomly assigned 10,062 H-2B applications covering 162,603 worker positions to eight processing groups (Groups A-H).<sup>41</sup>

## H-2B Cap-Related Legislation

Legislation concerning the H-2B statutory cap has been regularly introduced in Congress. Many of the measures introduced in recent years have proposed to establish new exemptions from the cap. These exemptions would have variously covered H-2B returning workers (see the “Returning Worker Exemption” section), workers employed in rural or seasonal locations,<sup>42</sup> or workers employed in a state with an unemployment rate below a specified level,<sup>43</sup> among others. Other proposed exemptions would have applied to workers performing certain types of jobs, such as forestry workers,<sup>44</sup> landscaping or groundskeeping workers,<sup>45</sup> or workers employed on a commercial fishing vessel or shrimp trawler.<sup>46</sup>

Other measures have proposed changing the statutory cap more directly. For example, one bill would have increased the H-2B cap from the current 66,000 to 350,000.<sup>47</sup> Another measure proposed to set the H-2B annual statutory cap at the total number of H-2B worker petitions certified by DOL for the previous fiscal year.<sup>48</sup> As discussed, as part of the H-2B application process, a prospective H-2B employer must submit a temporary labor certification application to

<sup>39</sup> DOL, ETA, OFLC, “January 6, 2020. OFLC Conducts Randomization Process on H-2B Applications Requesting an April 1, 2020, Work Start Date,” Announcements; 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,” Announcements; both available at <https://www.dol.gov/agencies/eta/foreign-labor/news>.

<sup>40</sup> DOL, ETA, OFLC, “July 9, 2025. OFLC Publishes List of Randomized H-2B Applications Submitted July 3-5, 2025, for Employers Seeking H-2B Workers Starting October 1, 2025,” Announcements, available at <https://www.dol.gov/agencies/eta/foreign-labor/news>.

<sup>41</sup> DOL, ETA, OFLC, “January 5, 2026. OFLC Publishes List of Randomized H-2B Applications Submitted January 1-3 for Employers Seeking H-2B Workers Starting April 1, 2026,” Announcements, available at <https://www.dol.gov/agencies/eta/foreign-labor/news>.

<sup>42</sup> See, for example, H.R. 7574, as introduced in the 118<sup>th</sup> Congress.

<sup>43</sup> See, for example, S. 495, as introduced in the 117<sup>th</sup> Congress, and S. 2705, as introduced in the 118<sup>th</sup> Congress.

<sup>44</sup> See, for example, S. 2207, as introduced in the 117<sup>th</sup> Congress.

<sup>45</sup> See, for example, H.R. 401, as introduced in the 117<sup>th</sup> Congress.

<sup>46</sup> See, for example, H.R. 614, as introduced in the 118<sup>th</sup> Congress.

<sup>47</sup> See, for example, H.R. 4578, as introduced in the 117<sup>th</sup> Congress.

<sup>48</sup> See, for example, H.R. 7574, as introduced in the 118<sup>th</sup> Congress.

DOL requesting certification for a particular number of positions (see the “H-2B Nonagricultural Worker Visa” section).

## Enacted Provisions

Congress has enacted temporary H-2B cap relief—in all cases as part of larger appropriations or other bills—for various years since 2005. These provisions, which have authorized the issuance of H-2B visas and/or the granting of H-2B status beyond the statutory cap, have been of two main types.

### Returning Worker Exemption

The INA was amended during the 109<sup>th</sup> 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 persons who were returning to the United States as H-2B workers and had been counted against the H-2B cap in any one of the three prior fiscal years.<sup>49</sup> This H-2B returning worker provision was subsequently extended for FY2007,<sup>50</sup> and expired at the end of that fiscal year.<sup>51</sup> 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.<sup>52</sup> Several bills have been introduced in recent Congresses to enact a permanent H-2B returning worker exemption from the statutory cap.<sup>53</sup>

### Provisions Authorizing Additional H-2B Visas

Each year since FY2017, Congress has authorized a different type of H-2B cap relief. It has enacted provisions in appropriations laws that give DHS discretionary authority 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 workers who could receive H-2B visas annually 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.”<sup>54</sup> As discussed below, DHS has interpreted this maximum number of additional H-2B workers to be 64,716 (see the “Common Elements of Implementing Rules” section).

DHS and DOL jointly published final rules to implement these provisions for each year since FY2017 except FY2020. Regarding implementation of the FY2020 provision, DHS announced on March 5, 2020, that it would release 35,000 supplemental H-2B visas. It had planned to

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<sup>49</sup> P.L. 109-13, Div. B, Title IV, §402.

<sup>50</sup> P.L. 109-364, Div. A, Title X, §1074.

<sup>51</sup> For a discussion of legislative efforts to reenact an H-2B returning worker exemption in the 110<sup>th</sup> Congress, see archived CRS Report RL34204, *Immigration Legislation and Issues in the 110<sup>th</sup> Congress* (available to congressional clients upon request).

<sup>52</sup> P.L. 114-113, Div. F, Title V, §565.

<sup>53</sup> These bills include H.R. 3897 and H.R. 4578, as introduced in the 117<sup>th</sup> Congress, and H.R. 2758, as introduced in the 118<sup>th</sup> Congress.

<sup>54</sup> 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); P.L. 116-94, Div. I, Title I, §105 (FY2020); P.L. 116-260, Div. O, Title I, §105 (FY2021); P.L. 117-103, Div. O, Title II, §204 (FY2022); P.L. 117-328, Div. O, Title III, §303 (FY2023); P.L. 118-47, Div. G, Title I, §105 (FY2024); P.L. 119-4, Div. A, Title I, Sec. 1101(a)(6) (FY2025); and P.L. 119-75, Div. I, §5016 (FY2026).

designate 10,000 of these visas for nationals of the Latin American Northern Triangle countries of El Salvador, Guatemala, and Honduras “in support of these countries efforts to work with the U.S. to stem the flow of illegal migration in the region and encourage lawful migration to the United States.”<sup>55</sup> DHS, however, never exercised this authority.<sup>56</sup>

### *Allocation of Supplemental Visas in Implementing Rules*<sup>57</sup>

The number of H-2B supplemental visas authorized by DHS generally increased from FY2017 (15,000) to FY2026 (64,716) (see **Table 1** below). As also indicated in **Table 1**, there were no supplemental visas released for FY2020, the first year of the COVID–19 emergency.

The allocation of these supplemental visas has become more refined over time. The final rules issued for the first few years (FY2017-FY2019) each authorized a single general allocation of H-2B supplemental visas for use in the second half of the fiscal year. The FY2019 rule introduced a new requirement, retained in all subsequent rules to some extent, that the supplemental visas be limited to H-2B returning workers who had held H-2B status in one of the three preceding fiscal years.<sup>58</sup>

All of the rules since the FY2021 rule have authorized more than one allocation of H-2B supplemental visas. The FY2021 rule provided two visa allocations: (1) a general allocation for H-2B returning workers and (2) a set-aside for nationals of El Salvador, Guatemala, and Honduras (who did not have to be H-2B returning workers). All subsequent rules except the FY2026 rule have included both general allocations and set-asides for nationals of specified countries, with the number of set-aside beneficiary countries increasing over time.

For FY2022, for the first time, H-2B supplemental visas were made available for use in the first half of the year. FY2022 was also the only year that DHS and DOL issued two implementing rules—each covering one half of the fiscal year. For each half of FY2022, there were separate allocations for H-2B returning workers generally and for nationals of specified countries.

The FY2023 rule introduced other changes. It included four separate visa allocations: (1) General allocation for H-2B returning workers for the first half of FY2023; (2) General allocation for H-2B returning workers for the first part of the second half of FY2023; (3) General allocation for H-2B returning workers for the second part of the second half of FY2023; and (4) Set aside for nationals of specified countries for the entirety of FY2023 who did not have to be H-2B returning workers. The implementing rules for FY2024 and FY2025 incorporated this same four-part visa allocation scheme although the number of visas in the individual allocations varied (see **Appendix A**). FY2023 was also the first year that the maximum allowable number of H-2B supplemental visas (64,716) was released (see the “Common Elements of Implementing Rules” section). As shown in **Table 1**, this maximum number was similarly made available in FY2024, FY2025, and FY2026.

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<sup>55</sup> DHS, *DHS to Improve Integrity of Visa Program for Foreign Workers*, March 5, 2020 (archived content), <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>.

<sup>56</sup> According to a DHS tweet posted on April 2, 2020: “DHS’s rule on the H-2B cap is on hold pending review due to present economic circumstances. No additional H-2B visas will be released until further notice.” Between the March and April DHS announcements, then-President Trump issued Proclamation 9994 of March 13, 2020, *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*.

<sup>57</sup> This section and the following one analyze the DHS/DOL implementing rules in summary fashion. (For a more detailed discussion of the individual rules, see **Appendix A**.)

<sup>58</sup> Unlike under the returning worker provision in effect for FY2016, the workers were not required to have been counted against the H-2B cap in any of the past three years.

Although, like the FY2023, FY2024, and FY2025 rules, the FY2026 rule included several visa allocations, some of which were subject to a returning worker requirement, there were notable differences between it and its predecessors. Among them, the FY2026 rule did not set aside any H-2B visas for nationals of specified countries. It did, however, include one general allocation (for the second part of the second half of FY2026) that was not limited to returning workers (see **Appendix A**).

**Table I. Number of H-2B Supplemental Visas Released**  
FY2017-FY2026

<b>Fiscal Year</b>	<b>General Allocation</b>	<b>Set-Aside for Designated Nationalities</b>	<b>Total</b>
2017	15,000	N/A	15,000
2018	15,000	N/A	15,000
2019	30,000	N/A	30,000
2020	N/A	N/A	0
2021	16,000	6,000	22,000
		(El Salvador, Guatemala, Honduras)	
2022	37,000	18,000	55,000
		(El Salvador, Guatemala, Honduras, Haiti)	
2023	44,716	20,000	64,716
		(El Salvador, Guatemala, Honduras, Haiti)	
2024	44,716	20,000	64,716
		(El Salvador, Guatemala, Honduras, Haiti, Colombia, Costa Rica, Ecuador)	
2025	44,716	20,000	64,716
		(El Salvador, Guatemala, Honduras, Haiti, Colombia, Costa Rica, Ecuador)	
2026	64,716	N/A	64,716

**Source:** DHS/DOL final rules to Increase the numerical limitation for the H-2B temporary nonagricultural worker program, FY2017-FY2026.

***Common Elements of Implementing Rules***

While, as highlighted in the preceding section, there were key differences among the DHS/DOL final rules providing supplemental visa allocations, certain elements that were first introduced in the FY2017 rule have remained the same or similar in the subsequent rules. These commonalities include the exclusive use of the supplemental numbers for H-2B workers admitted from abroad, the interpretation of the statutory maximum number of visas, and the requirement that employers petitioning USCIS for supplemental visas submit an attestation evidencing irreparable harm if unable to employ the requested H-2B workers.

In the preamble to the FY2017 rule and each subsequent rule, DHS explained that the statutory provision applied only to H-2B workers entering the United States on visas and not to persons in the United States who were seeking a change of status to H-2B status.<sup>59</sup>

DHS acknowledged in the preamble to the FY2017 rule that 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”) could be interpreted in different ways. It determined, however, that 64,716 was the most appropriate maximum number of additional H-2B visas authorized under the statutory provision, this being “the number of beneficiaries covered by H-2B returning worker petitions that were approved for FY 2007.”<sup>60</sup> All subsequent rules have likewise cited 64,716 as the statutorily allowable maximum.

In implementing the FY2017 statutory provision, DHS decided to limit eligibility for the additional H-2B workers to certain U.S. businesses. The FY2017 rule required each prospective H-2B employer to submit to DHS, along with the H-2B petition, a new DOL 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).”<sup>61</sup> Each subsequent rule has included a version of this requirement, with the rules for FY2022 and later years requiring an employer to attest that “its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss)” without the ability to employ all the requested workers.<sup>62</sup>

## Data on Grants of H-2B Status

In any year, most, but not all, foreign nationals who obtain H-2B status do so 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.<sup>63</sup> Regarding the latter category, USCIS data show that about 1,900 persons in FY2006 and about 2,200 in FY2007 were approved for a change to H-2B status; since then, from FY2008 to FY2024, the number of individuals approved for a change to H-2B status each year ranged from about 110 (in FY2017) to about 900 (in FY2024).<sup>64</sup>

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<sup>59</sup> See DHS and DOL, ETA, “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, 32989 (footnote 11), July 19, 2017 (hereinafter cited as “2017 final rule”).

<sup>60</sup> 2017 final rule, p. 32988 (footnote 4). Some other interested parties, 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](https://travel.state.gov/content/dam/visas/Statistics/FY09AnnualReport_TableXVI_B.pdf).

<sup>61</sup> See 8 C.F.R. §214.2(h)(6)(x)(B)(2) in 2017 final rule, p. 32998.

<sup>62</sup> See 8 C.F.R. §214.2(h)(6)(xi)(B)(2)(i) in DHS and DOL, ETA, “Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers,” 87 *Federal Register* 4722, 4759, January 28, 2022 (hereinafter cited as “FY2022 final rule, January 28, 2022”).

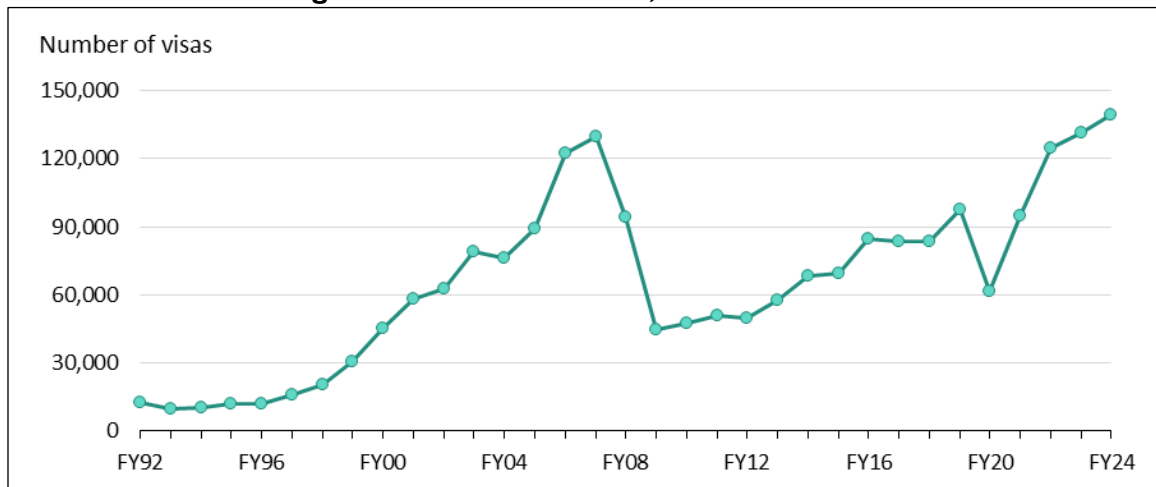
<sup>63</sup> Individuals in these categories are counted against the H-2B cap.

<sup>64</sup> DHS, USCIS, *Characteristics of H-2B Nonagricultural Temporary Workers ...*, FY2007-FY2024. Reports are available from USCIS at <https://www.uscis.gov/tools/reports-studies/reports-and-studies> (under the “Program Reports: H-2B” tab).

## H-2B Visa Issuances

**Figure 1** provides data on H-2B visa issuances from FY1992 to FY2024. 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-FY2024**



**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 **Appendix B** 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. The dip in FY2020 corresponded with the COVID-19 pandemic.

## Conclusion

With employer demand for H-2B visas continuing to exceed supply, H-2B admissions and the statutory cap remain issues of interest to lawmakers. While some past 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, legislative efforts to address the numerical limitations on nonagricultural guest workers in the near term may focus mainly on the existing H-2B program.

## Appendix A. DHS/DOL Rules Authorizing H-2B Supplemental Visas

In each year from FY2017 to FY2026 (except FY2020), DHS and DOL jointly issued temporary final rules to implement statutory provisions to make H-2B supplemental visas available (see the “Provisions Authorizing Additional H-2B Visas” section above). These rules are discussed below.

### FY2017 Rule

In July 2017, DHS and DOL jointly published a final rule to implement the FY2017 H-2B cap-related provision. 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.”<sup>65</sup>

The preamble 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.<sup>66</sup>

### FY2018 Rule

In May 2018, DHS and DOL jointly published a final rule to implement the FY2018 provision.<sup>67</sup> The FY2018 rule temporarily amended DHS H-2B regulations to authorize the issuance of up to 15,000 additional H-2B visas.<sup>68</sup> In the preamble to the rule, DHS explained its decision to authorize up to 15,000 additional visas despite the fact that all of the 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.<sup>69</sup>

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<sup>65</sup> See 8 C.F.R. §214.2(h)(6)(x)(A) in 2017 final rule, p. 32998.

<sup>66</sup> 2017 final rule, p. 32990.

<sup>67</sup> DHS and DOL, ETA, “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 (hereinafter cited as “2018 final rule”).

<sup>68</sup> See 8 C.F.R. §214.2(h)(6)(x)(A) in 2018 final rule, p. 24917.

<sup>69</sup> 2018 final rule, p. 24908.

## FY2019 Rule

In May 2019, DHS and DOL jointly published a final rule to implement the FY2019 provision.<sup>70</sup> The FY2019 rule temporarily amended DHS H-2B regulations to authorize the issuance of up to 30,000 additional H-2B visas.<sup>71</sup> DHS explained this decision 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.<sup>72</sup>

The FY2019 rule imposed a limitation not applicable under the FY2017 or FY2018 rules. It stipulated that an employer could request supplemental visas only for H-2B workers “who were issued H-2B visas or were otherwise granted H-2B status in Fiscal Years 2016, 2017, or 2018.”<sup>73</sup> DHS offered the following rationale for limiting the additional visas to these 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.<sup>74</sup>

The preamble 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.”<sup>75</sup> 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.<sup>76</sup>

## FY2021 Rule

In May 2021, DHS and DOL jointly published a final rule to implement the FY2021 provision.<sup>77</sup> In the preamble, DHS explained that, despite the COVID-19 emergency, it thought it was

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<sup>70</sup> DHS and DOL, ETA, “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 (hereinafter cited as “2019 final rule”).

<sup>71</sup> See 8 C.F.R. §214.2(h)(6)(x)(A) in 2019 final rule, p. 20020.

<sup>72</sup> 2019 final rule, p. 20009.

<sup>73</sup> See 8 C.F.R. §214.2(h)(6)(x)(A) in 2019 final rule, 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 the “Returning Worker Exemption” section). See 2019 final rule, p. 20007 (footnote 11).

<sup>74</sup> 2019 final rule, p. 20008.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> DHS and DOL, ETA, “Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers,” 86 *Federal Register* 28198, May 25, 2021 (hereinafter cited as “2021 final rule”).

“appropriate to increase the H-2B cap coupled with additional protections.”<sup>78</sup> The FY2021 rule temporarily amended DHS H-2B regulations to authorize the issuance of up to 22,000 additional H-2B visas.<sup>79</sup> DHS characterized this decision as the product of “a balancing of a number of factors,” among them “the demand for H-2B visas for the second half of FY 2021; current economic conditions; the increased demand for supplemental visas from FY2017 to FY 2019; H-2B returning worker data;” and congressional concern about “the unavailability of H-2B visas for late-season employers.”<sup>80</sup>

In a change from prior rules, the FY2021 rule’s 22,000 supplemental visas were divided into two separate allocations. One allocation (of 16,000 visas) was limited to returning workers who had been issued H-2B visas or otherwise granted H-2B status in FY2018, FY2019, or FY2020.<sup>81</sup>

The remaining 6,000 visas comprised a separate allocation, which was reserved for nationals of El Salvador, Guatemala, and Honduras.<sup>82</sup> As noted, DHS had planned to set aside supplemental H-2B visas for these Northern Triangle countries in FY2020 but did not end up authorizing any supplemental visas that year. In the preamble to the FY2021 rule, DHS discussed its reasons for choosing the number 6,000, describing it as “a number significantly higher than the average annual number of visas issued to such persons in the past 6 fiscal years.”<sup>83</sup> According to DHS, this set-aside

will encourage U.S. employers who face a likelihood of irreparable harm to seek out workers from such countries, while, at the same time, increase interest among nationals of the Northern Triangle countries seeking temporary employment in the United States.<sup>84</sup>

The 6,000 visas allocated for the Northern Triangle under the FY2021 rule were not subject to the returning worker requirement. The rule required, however, that petitions for these visas be received by July 8, 2021. After that date, any remaining visas would be made available to H-2B returning workers of any nationality eligible to participate in the H-2B program.

The FY2021 rule included more expansive attestation requirements than its predecessors for employers petitioning for supplemental visas. In addition to attesting that without the requested H-2B workers its business was likely to suffer irreparable harm, an employer seeking supplemental visas had to attest that it would “comply with all Federal, State, and local employment-related laws and regulations, including health and safety laws and laws related to COVID-19 worker protections” and “fully cooperate with any audit, investigation, compliance review, evaluation, verification, or inspection conducted by DOL,”<sup>85</sup> among other items.

## **FY2022 Rule**

In January and May of 2022, DHS and DOL jointly published final rules to implement the FY2022 provision and make supplemental H-2B visas available for the first and second halves of

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<sup>78</sup> 2021 final rule, p. 28202.

<sup>79</sup> See 8 C.F.R. §214.2(h)(6)(x)(A) in 2021 final rule, p. 28230.

<sup>80</sup> 2021 final rule, p. 28205.

<sup>81</sup> See 8 C.F.R. §214.2(h)(6)(x)(A)(1) in 2021 final rule, p. 28230. The rationale provided in the FY2021 rule preamble for restricting these visas to returning workers echoed the arguments provided for this same restriction in the FY2019 rulemaking.

<sup>82</sup> See 8 C.F.R. §214.2(h)(6)(x)(A)(2) in 2021 final rule, p. 28230.

<sup>83</sup> 2021 final rule, p. 28208.

<sup>84</sup> *Ibid.*

<sup>85</sup> See 8 C.F.R. §214.2(h)(6)(x)(B)(2) in 2021 final rule., pp. 28230-28231; and 20 C.F.R. §655.64(a)(1), (a)(4) in 2021 final rule., pp. 28232-28233.

the fiscal year, respectively.<sup>86</sup> This marked the first time that DHS had authorized supplemental H-2B visas for the first half of a fiscal year. Taken together, these rules temporarily amended DHS H-2B regulations to authorize the issuance of up to 55,000 additional H-2B visas for FY2022.

The first FY2022 rule authorized the issuance of up to 20,000 additional H-2B visas for employment starting on or before March 31, 2022 (the last day of the first half of FY2022). As under the FY2021 rule, these supplemental visas were divided into two separate allocations: up to 13,500 visas for returning workers who had been issued H-2B visas or otherwise granted H-2B status in one of the last three fiscal years; and up to 6,500 visas for nationals of El Salvador, Guatemala, Honduras, or Haiti.<sup>87</sup> Also consistent with the FY2021 rule, the latter allocation was not subject to a returning worker requirement.

The second FY2022 rule authorized the issuance of up to 35,000 additional H-2B visas for employment starting in the second half of FY2022. As under the first FY2022 rule, there were two separate allocations: up to 23,500 visas for H-2B returning workers; and up to 11,500 visas for nationals of El Salvador, Guatemala, Honduras, or Haiti, who were not subject to a returning worker requirement.<sup>88</sup> Notably, unlike the FY2021 rule, neither of the FY2022 rules provided for any unused visas in the allocation for El Salvador, Guatemala, Honduras, and Haiti to be made available for returning workers.

Like its predecessors, the FY2022 rules included attestation requirements for H-2B petitioners, including one concerning irreparable harm. As discussed, under the prior rules, an employer petitioning for H-2B workers under the supplemental allocations had to attest that without the ability to employ the requested workers, its business was “likely to suffer irreparable harm” (see the “Common Elements of Implementing Rules” section). The FY2022 rules revised this language to require a petitioner to submit a DOL attestation evidencing that “its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H-2B workers requested.”<sup>89</sup> According to the preamble to the first FY2022 rule:

This change is designed to focus more directly on the actual irreparable harm employers are suffering or the impending irreparable harm they will suffer as a result of their inability to employ H-2B workers, rather than on just the possibility of such harm.<sup>90</sup>

This preamble also noted that “the ‘likely to suffer irreparable harm’ standard has been difficult to assess and administer in the context of prior supplemental cap rules.”<sup>91</sup>

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<sup>86</sup> FY2022 final rule, January 28, 2022; DHS and DOL, ETA, “Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers,” 87 *Federal Register* 30334, May 18, 2022 (hereinafter cited as “FY2022 final rule, May 18, 2022”).

<sup>87</sup> See 8 C.F.R. §214.2(h)(6)(xi)(A) in FY2022 final rule, January 28, 2022, p. 4758. Regarding the inclusion of Haiti, the preamble stated, “DHS recognizes the recent challenges, such as political instability, increasing gang-related violence, and a 7.2 magnitude earthquake that have occurred in that country, and believes that the H-2B program will provide a stabilizing lawful channel for Haitian nationals seeking to enter the United States for economic opportunities.” FY2022 final rule, May 18, 2022, p. 4728.

<sup>88</sup> See 8 C.F.R. §214.2(h)(6)(xii)(A) in FY2022 final rule, May 18, 2022, p. 30375.

<sup>89</sup> See 8 C.F.R. §214.2(h)(6)(xi)(B)(2)(i) in FY2022 final rule, January 28, 2022, p. 4759; 8 C.F.R. §214.2(h)(6)(xii)(B)(2)(i) in FY2022 final rule, May 18, 2022, p. 30375.

<sup>90</sup> FY2022 final rule, January 28, 2022, p. 4734.

<sup>91</sup> *Ibid.*

## FY2023 Rule

In December 2022, DHS and DOL jointly published a final rule to implement the FY2023 provision and make supplemental H-2B visas available for both halves of the fiscal year.<sup>92</sup> This rule temporarily amended DHS H-2B regulations to authorize the issuance of up to 64,716 additional H-2B visas—the maximum allowable number—for FY2023.<sup>93</sup>

For the first half of FY2023, the rule authorized the issuance of up to 18,216 supplemental visas to returning workers who had been issued an H-2B visa or granted H-2B status in FY2020, FY2021, or FY2022. For the remainder of the fiscal year, the rule authorized up to 26,500 supplemental visas for H-2B returning workers, which it divided between FY2023’s “early second half” (up to 16,500 visas for employment starting from April 1 to May 14, 2023) and “late second half” (up to 10,000 visas for employment starting from May 15 to September 30, 2023).<sup>94</sup> In addition, for the entirety of FY2023, the rule authorized the issuance of up to 20,000 supplemental visas to nationals of El Salvador, Guatemala, Honduras, or Haiti; these nationals were not required to be returning workers.<sup>95</sup>

Consistent with the FY2022 rules, the FY2023 rule did *not* provide for visas reserved for nationals of the El Salvador, Guatemala, Honduras, or Haiti that went unused by a specified cut-off date to be added to the separate allocation for returning workers (as had the FY2021 rule). The preamble to the FY2023 rule explained the rationale for this decision:

[N]ot permitting rollover into the returning worker allocation provides employers with more time to petition for, and bring in, workers from these countries and encourages full use of the 20,000 allocation for nationals of El Salvador, Guatemala, Honduras, and Haiti to meet employer needs. This, in turn, contributes to our country’s efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States.<sup>96</sup>

## FY2024 Rule

In November 2023, DHS and DOL jointly published a final rule to implement the FY2024 provision and make supplemental H-2B visas available in several allocations, as in FY2023.<sup>97</sup> This rule temporarily amended DHS H-2B regulations to authorize the issuance of up to 64,716 additional H-2B visas for FY2024.<sup>98</sup>

For the first half of FY2024, the rule authorized the issuance of up to 20,716 supplemental visas to returning workers who had been issued an H-2B visa or granted H-2B status in FY2021, FY2022, or FY2023. For the remainder of the fiscal year, the rule authorized up to 24,000 supplemental visas for H-2B returning workers, which it divided between FY2024’s “early second half” (up to 19,000 visas for employment starting from April 1 to May 14, 2024) and “late

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<sup>92</sup> DHS and DOL, ETA, “Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers,” 87 *Federal Register* 76816, December 15, 2022 (hereinafter cited as “2023 final rule”).

<sup>93</sup> See 8 C.F.R. §214.2(h)(6)(xiii)(A) in 2023 final rule, p. 76874.

<sup>94</sup> See 8 C.F.R. §214.2(h)(6)(xiii)(A)(I) in 2023 final rule, p. 76874.

<sup>95</sup> See 8 C.F.R. §214.2(h)(6)(xiii)(A)(2) in 2023 final rule, p. 76874.

<sup>96</sup> 2023 final rule, p. 76824

<sup>97</sup> DHS and DOL, ETA, “Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers,” 88 *Federal Register* 80394, November 17, 2023 (hereinafter cited as “2024 final rule”).

<sup>98</sup> See 8 C.F.R. §214.2(h)(6)(xiv)(A) in 2024 final rule, p. 80456.

second half” (up to 5,000 for employment starting from May 15 to September 30, 2024).<sup>99</sup> In addition, for the entirety of FY2024, the rule authorized the issuance of up to 20,000 supplemental visas to nationals of seven countries—the four previous set-aside beneficiary countries (El Salvador, Guatemala, Honduras, and Haiti) and three new countries (Colombia, Costa Rica, and Ecuador); nationals of these seven countries were not required to be returning workers.<sup>100</sup> Consistent with the FY2022 and FY2023 rules, the FY2024 rule did not allow for the rollover of unused visas set aside for nationals of these countries into the returning worker allocation.

The preamble to the FY2024 rule discussed the benefits of the country-specific allocation. It stated, for example, that this set-aside “furthers the U.S. foreign policy objective of managing irregular migration with partner countries through expanding access to lawful pathways.”<sup>101</sup> It also noted:

Several of these countries have extensively collaborated with the United States on migration issues such as through endorsing the L.A. Declaration, joining the United States to ramp up efforts to address the irregular migration flows through the Darien and hosting Safe Mobility Offices (SMOs) to facilitate access to lawful pathways to the United States and other countries.<sup>102</sup>

The FY2024 rule revised the petitioner attestation requirements by removing the COVID-19 pandemic requirements, which had been added by the FY2021 rule. As stated in the rule’s preamble:

As the public health emergency is no longer in effect, the Departments no longer believe it is necessary to include the requirements that are specific to COVID–19.... The Departments remind all H–2B employers that they must comply with all Federal, State, and local employment-related laws and regulations, including health and safety laws. To the extent that Federal, State, or local laws and regulations relating to COVID–19 remain in effect, the Departments note that an employer remains obligated to comply with them.<sup>103</sup>

## FY2025 Rule

In December 2024, DHS and DOL jointly published a final rule to implement the FY2025 provision and make supplemental H-2B visas available in several allocations, as in FY2024.<sup>104</sup> This rule temporarily amended DHS H-2B regulations to authorize the issuance of up to 64,716 additional H-2B visas for FY2025.<sup>105</sup>

For the first half of FY2025, the rule authorized the issuance of up to 20,716 supplemental visas to returning workers who had been issued an H-2B visa or granted H-2B status in FY2022, FY2023, or FY2024. For the remainder of the fiscal year, the rule authorized up to 24,000 supplemental visas for H-2B returning workers, which it divided between FY2024’s “early second half” (19,000 visas for employment starting from April 1 to May 14, 2025) and “late

<sup>99</sup> See 8 C.F.R. §214.2(h)(6)(xiv)(A)(I) in 2024 final rule, p. 80456.

<sup>100</sup> See 8 C.F.R. §214.2(h)(6)(xiv)(A)(2) in 2024 final rule, p. 80456.

<sup>101</sup> 2024 final rule, p. 80417.

<sup>102</sup> *Ibid.*

<sup>103</sup> 2024 final rule, p. 80423.

<sup>104</sup> DHS and DOL, ETA, “Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2025 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,” 89 *Federal Register* 95626, December 2, 2024 (hereinafter cited as “2025 final rule”).

<sup>105</sup> See 8 C.F.R. §214.2(h)(6)(xv)(A) in 2025 final rule, p. 95681.

second half” (5,000 visas for employment starting from May 15 to September 30, 2025).<sup>106</sup> In addition, for the entirety of FY2025, the rule authorized the issuance of up to 20,000 supplemental visas to nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica, the same seven countries that had benefitted from the FY2024 set-aside.<sup>107</sup> The preamble to the FY2025 final rule included the following about the usage of the set-aside in that prior year:

In FY 2024, the inclusion of nationals from the additional countries of Colombia, Ecuador, and Costa Rica increased the likelihood that the 20,000 visas would be used and the data show a continued trend of increased usage of the country-specific allocation.

Nationals of the set-aside beneficiary countries did not have to be H-2B returning workers. Also consistent with the rules for the past several years, the FY2025 rule did not allow for unused visas in the set-aside to be rolled over into the returning worker allocation.

## FY2026 Rule

In February 2026, DHS and DOL jointly published a final rule to implement the FY2026 provision and make supplemental H-2B visas available in several allocations.<sup>108</sup> This rule temporarily amended DHS H-2B regulations to authorize the issuance of up to 64,716 additional H-2B visas for FY2026.<sup>109</sup>

For the first half of FY2026, the rule authorized the issuance of 18,490 supplemental visas to returning workers who had been issued an H-2B visa or granted H-2B status in FY2023, FY2024, or FY2025. For the second half of the fiscal year, the rule provided two supplemental visa allocations. It authorized 27,736 visas, plus any unused visas from the allocation for the first half on FY2026, for H-2B returning workers for work beginning in the month of April 2026. For work beginning from May 1 to September 30, 2026, the rule authorized 18,490 visas, plus any unused visas from the two earlier allocations; these visas were *not* limited to H-2B returning workers.<sup>110</sup>

While the number of supplemental H-2B visas authorized in the DHS/DOL rules, both in total and in individual allocations, has varied over the years, the FY2026 supplemental allocations incorporated additional differences. For example, the earlier rules had authorized “up to” a specified number of supplemental visas in its various allocations. By contrast, the FY2026 rule allocated fixed numbers of supplemental visas and provided for unused visas to roll over into later allocations. According to the preamble to the FY2026 rule:

DHS believes the established filing windows after which it will make any remaining visas available to the next immediate allocation will provide sufficient opportunity for their use by employers who need these H-2B workers while also providing a greater likelihood that supplemental H-2B visas do not go unused.<sup>111</sup>

Unlike the other rules issued since a returning worker requirement was first included in the FY2019 rule, the FY2026 rule exempted one of its general allocations (for work beginning from May 1 to September 30, 2026) from this requirement. (Other rules exempted their country-

<sup>106</sup> See 8 C.F.R. §214.2(h)(6)(xv)(A)(I) in 2025 final rule, p. 95681.

<sup>107</sup> See 8 C.F.R. §214.2(h)(6)(xv)(A)(2) in 2025 final rule, p. 95681.

<sup>108</sup> DHS and DOL, ETA, “Exercise of Time-Limited Authority To Increase the Fiscal Year 2026 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program,” 91 *Federal Register* 5040, February 3, 2026 (hereinafter cited as “2026 final rule”).

<sup>109</sup> See 8 C.F.R. §214.2(h)(6)(xvi)(A)(I) in 2026 final rule, p. 5071.

<sup>110</sup> *Ibid*, pp. 5071-5072.

<sup>111</sup> 2026 final rule, p. 5047.

specific allocations, but not their general allocations, from the returning worker requirement.) The preamble to the FY2026 rule explained that DHS, in consultation with DOL, had decided on the exemption because “American businesses who need workers to fill temporary or seasonal labor during the summer months of May 1 through September 30 have historically been shut out of receiving H–2B workers under the statutory cap.”<sup>112</sup>

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<sup>112</sup> *Ibid.*

## Appendix B. H-2B Visa Issuances

**Table A-1. Number of H-2B Visas Issued, FY1992-FY2024**

<u>Fiscal Year</u>	<u>H-2B Visas Issued</u>
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
2020	61,865
2021	95,053
2022	124,644
2023	131,704
2024	139,541

**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.

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