



# **H-2B Usage and Recommendations**

*July 22, 2016*

**Fiscal Year 2016 Report to Congress**



**Homeland  
Security**

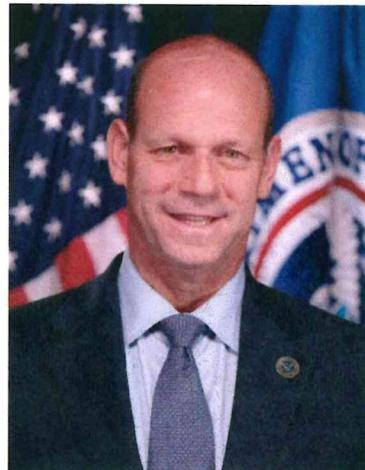
*U.S. Citizenship and Immigration Services*

## Message from the Director

I am pleased to present the following report, “H-2B Usage and Recommendations,” prepared by U.S. Citizenship and Immigration Services (USCIS).

This report was compiled pursuant to language set forth in Senate Report 114-68 accompanying the *Fiscal Year 2016 Department of Homeland Security (DHS) Appropriations Act* (P.L. 114-113).

Pursuant to congressional requirements, this report is being provided to the following Members of Congress:



The Honorable John R. Carter  
Chairman, House Appropriations Subcommittee on Homeland Security

The Honorable Lucille Roybal-Allard  
Ranking Member, House Appropriations Subcommittee on Homeland Security

The Honorable John Hoeven  
Chairman, Senate Appropriations Subcommittee on Homeland Security

The Honorable Jeanne Shaheen  
Ranking Member, Senate Appropriations Subcommittee on Homeland Security

I am pleased to respond to any questions you may have. Please do not hesitate to contact me at (202) 272-1000 or the Department’s Deputy Under Secretary for Management and Chief Financial Officer, Chip Fulghum, at (202) 447-5751.

Sincerely,

A handwritten signature in blue ink, appearing to read "Leon Rodriguez". The signature is stylized and somewhat abstract, with a long horizontal stroke extending to the right.

León Rodríguez  
Director  
U.S. Citizenship and Immigration Services

# Executive Summary

DHS has compiled this report on H-2B temporary nonagricultural worker petition usage and recommendations with information provided by the Department of State. This report includes data for the past 10 fiscal years and is current through November 30, 2015.

The Senate Committee directed USCIS to study the actual usage of H-2B visas in relation to the number of applications granted and to provide recommendations on how to ensure systematically that the number of visas granted is aligned more closely with the number of visas used by employers.

- The Immigration Act of 1990 limited the number of workers who may be granted H-2B classification in a fiscal year to 66,000 visas. The REAL ID Act of 2005 further separated the annual H-2B cap of 66,000 visas into two equal halves, and created a special temporary exemption for certain returning H-2B workers.
- USCIS is the Component within DHS that manages the H-2B cap.
- Actual usage of H-2B visas cannot be stated as an exact figure because of the differences in data maintained by USCIS and its federal partners in their respective roles in the H-2B program. Only USCIS is managing the H-2B cap directly on the basis of the approved H-2B beneficiary's employment start date. By necessity, Section 3.2 of this report provides only generalized usage information for each fiscal year.
- The factors used in USCIS's H-2B cap methodology are reviewed consistently and updated appropriately as more detailed information regarding the H-2B program becomes available.
- There are no known investigations or lawsuits related to the methodology used to determine the H-2B cap.



# H-2B Usage and Recommendations

## Table of Contents

I.	Legislative Requirement .....	1
II.	Background .....	2
	Overview .....	2
	The H-2B Program Process.....	2
	The H-2B Numerical Limitation.....	3
	REAL ID Act of 2005 .....	3
	Exemptions from the H-2B Cap.....	4
	Matching the Employment Start Date.....	5
III.	Data Report and Analysis.....	6
	Section 3.1 – The H-2B Cap Methodology.....	6
	Section 3.2 – Actual Usage Rates during the Last 10 Fiscal Years.....	11
IV.	Recommendations .....	15
	Recommendations for the Future .....	15
V.	Appendix .....	16
	Work Products Used to Develop the Cap Calculation Methodology for FY 2015 .	16
	Exhibit A: .....	16
	High Level H-2B Analysis of Petition Beneficiaries Needed to Subscribe the Cap based on DOS/USCIS Data for FY 2013, FY 2014, and FY 2015 .....	16
	Exhibit B: .....	17
	H-2B Analysis of Petitions and Beneficiaries based on DOS/USCIS Data for FY 2013, FY 2014, and FY 2015.....	17

# I. Legislative Requirement

Senate Report 114-68, which accompanies the *Fiscal Year (FY) 2016 Department of Homeland Security (DHS) Appropriations Act* (P.L. 114-113), includes the following requirement:

The Committee directs USCIS to study the actual usage of H-2B visas in relation to the number of applications granted and provide recommendations on how to systematically ensure the number of visas granted is more closely aligned with the number of visas used by employers in the United States. The results of the study shall be provided to the Committee in a report within 90 days of the date of enactment of this act that describes:

- (1) any investigations or lawsuits related to the methodology used to determine the numerical limitation on H-2B visas;
- (2) any revisions to the cap calculation methodology during the past 10 fiscal years;
- (3) any work products used to develop or inform the cap calculation methodology during the past 10 fiscal years;
- (4) the current cap calculation methodology;
- (5) the number of “target beneficiaries” for the first 6 months and for the last 6 months of fiscal year 2015; and
- (6) actual usage rates, compared to the cap during the past 10 fiscal years, including the methodologies used to calculate actual usage rates.

## II. Background

### Overview

The H-2B program allows U.S. employers to bring foreign workers to the United States to fill temporary nonagricultural jobs.<sup>1</sup> To petition successfully for this nonimmigrant classification, the employer must establish that:

- its need for the prospective worker's labor or services is temporary in nature—that is, based on a one-time occurrence, a seasonal need, a peakload need, or an intermittent need;<sup>2</sup>
- there are not sufficient U.S. workers available who are willing and qualified to do the temporary work; and
- employment of the H-2B nonimmigrant worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

### The H-2B Program Process

Before filing Form I-129, Petition for a Nonimmigrant Worker, with U.S. Citizenship and Immigration Services (USCIS) for H-2B workers, the petitioner generally must obtain a single, valid temporary labor certification (TLC) from the Department of Labor or, if the worker(s) will be employed in Guam, from the Governor of Guam.<sup>3</sup> After receiving an approved TLC for H-2B employment, the petitioner must 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 the Department of State (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.

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<sup>1</sup> See Immigration and Nationality Act (INA), as amended, § 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

<sup>2</sup> See 8 CFR 214.2(h)(6)(ii)(B).

<sup>3</sup> See 8 CFR § 214.2(h)(6)(iii)(A) and (C).

## The H-2B Numerical Limitation

The Immigration Act of 1990 limited the number of workers who may be granted H-2B classification in a fiscal year to 66,000 (the H-2B “cap”).<sup>4</sup> On March 9, 2004, the annual H-2B cap was reached for the first time since the creation of the cap under the Immigration Act of 1990. The cap was then reached again for FY 2005 on January 4, 2005, just 3 months into the fiscal year.

## REAL ID Act of 2005

The early filling of the FY 2005 H-2B cap prevented many spring and summer seasonal employers from using the H-2B program. In response to this issue, special provisions for H-2Bs were included in the REAL ID Act of 2005. Under Title IV of this Act, also known as the “Save our Small and Seasonal Businesses Act of 2005” (SOS Act), two specific modifications of the H-2B cap were implemented: 1) the separation of the annual H-2B cap into two equal halves (with any unused H-2B visas from the first half of the fiscal year made available for use in the second half of the fiscal year); and 2) the creation of a special temporary exemption for certain returning H-2B workers.

Specifically, section 405 of the REAL ID Act of 2005 mandated that the H-2B cap be allocated semiannually, allowing for up to 33,000 H-2B workers in the first half of the fiscal year (October 1 – March 31), and for the remaining H-2B visas, including any unused H-2B visas from the first half of the fiscal year, to be allocated to workers during the second half of the fiscal year (April 1 – September 30).<sup>5</sup> The intent in separating the cap into equal halves was to allow more employers an equal opportunity to utilize the H-2B program throughout the entire year.

Additionally, section 402 of the REAL ID Act of 2005 allowed USCIS to exempt “returning workers” from the H-2B cap for FYs 2005 and 2006. A “returning worker” was defined as an H-2B worker who was previously counted against the H-2B annual numerical limit of 66,000 during any 1 of the 3 fiscal years preceding the fiscal year of the requested start date.<sup>6</sup> This meant:

1. In a petition for an employment start date in FY 2005, the H-2B worker, whether or not physically present in the United States, had to have been previously approved and granted an employment start date between October 1, 2001, and September 30, 2004.

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<sup>4</sup> See INA § 214(g)(1)(B), 8 U.S.C. § 1184(g)(1)(B).

<sup>5</sup> See INA § 214(g)(10), 8 U.S.C. § 1184(g)(10).

<sup>6</sup> DOS relied upon a special H-2R visa classification for H-2B workers exempted from the H-2B cap as “Returning Workers” from FY 2006 through FY 2008.

2. In a petition for an employment start date in FY 2006, the H-2B worker, whether or not physically present in the United States, had to have been previously approved and granted an employment start date between October 1, 2002, and September 30, 2005.
3. For a worker already in the United States who had not yet reached the 3-year maximum statutory limitation on H-2B stay,<sup>7</sup> if a petition was approved only for an “extension of stay” in H-2B status, or only for change or addition of employers or terms of employment, the worker was not again counted against the numerical limit,<sup>8</sup> and, therefore, that particular approval, in itself, could not result in the worker being considered a “returning worker” in a new petition.

This legislation commonly was referred to as the “Returning Worker” program.<sup>9</sup> Although initially set to expire on September 30, 2006, this program was extended for an additional year<sup>10</sup> by the National Defense Authorization Act for Fiscal Year 2007. Under the renewed returning worker program, in a petition for an employment start date in FY 2007, the H-2B worker, whether or not physically present in the United States, had to have been approved previously and granted an employment start date between October 1, 2003, and September 30, 2006.

Besides the general provisions for the H-2B cap discussed above, the SOS Act also provided authority to issue an additional 35,000 H-2B visas, effectively raising the cap to 101,000 for FY 2005 only. This increase was largely attributed to the hardship that many of the spring and summer seasonal employers experienced because of the early filling of the cap.

## Exemptions from the H-2B Cap

Generally, beneficiaries who are currently in H-2B status and are seeking an extension of stay in H-2B status, whether or not with the same employer, do not count toward the H-2B cap. In addition, the following workers are exempt from the H-2B cap:

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<sup>7</sup> See 8 CFR 214.2(h)(13)(iv).

<sup>8</sup> See 8 CFR 214.2(h)(8)(ii)(A).

<sup>9</sup> Effective December 18, 2015, the H-2B Returning Worker program was reauthorized for FY 2016, and H-2B workers identified as “returning workers” are exempted from the FY 2016 annual H-2B cap of 66,000 visas. See INA § 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A), as revised by the *FY 2016 DHS Appropriations Act* (P.L. 114-113). DOS did not reinstitute the H-2R visa classification in the FY 2016 iteration of the program and instead issued regular H-2B visas for such workers.

<sup>10</sup> See §1074 of the National Defense Authorization Act for Fiscal Year 2007 (H.R. 5122) amending §402(b)(1) of the SOS Act and extending the “returning worker” provision until September 30, 2007.

- fish roe processors, fish roe technicians, and supervisors of fish roe processing,<sup>11</sup> and
- workers performing temporary labor or services in the Commonwealth of the Northern Mariana Islands (CNMI) or Guam<sup>12</sup> from November 28, 2009, until December 31, 2019.

Spouses and children of H-2B workers fall under a separate visa classification (H-4) and are not counted against the H-2B cap.<sup>13</sup> Once the H-2B cap is reached, USCIS may accept only petitions for H-2B workers who are not subject to the cap.

## Matching the Employment Start Date

USCIS generally relies upon the employment start date requested for H-2B workers for purposes of managing the H-2B cap. Despite efforts to provide an equal opportunity for employers from all seasons to participate in the H-2B program, USCIS saw an increasingly disproportionate number of H-2B employers who changed the date of H-2B employment on Form I-129 from the employment start date on the TLC and potentially gained an unfair advantage in obtaining H-2B visas. To ensure the integrity of the H-2B program, on December 19, 2008, DHS published a rule in the Federal Register titled “Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers.”<sup>14</sup> This rule became effective on January 18, 2009, and, among other things, prohibited employers from requesting an employment start date on Form I-129 that is different from the date of need listed on the accompanying approved TLC.<sup>15</sup> To ease the initial difficulties in the administration of this new regulation, this provision did not take effect until FY 2010. This addition to the H-2B regulation was needed to curtail abuses in the H-2B program and otherwise prevent H-2B employers from circumventing the H-2B cap. Further, it was intended to ensure that prospective U.S. workers were aware of the actual employment start date, so that they could make an informed decision whether to apply for the job in question.

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<sup>11</sup> See P.L. No. 108-287, § 14006, 118 Stat. 951, 1014 (2004).

<sup>12</sup> See 48 U.S.C. § 1806(a)(2) as amended by P.L. 113-235 § 10; 48 U.S.C. 1806(b).

<sup>13</sup> See INA § 214(g)(2); 8 U.S.C. § 1184(g)(2); 8 CFR § 214.2(h)(8)(ii)(A)

<sup>14</sup> See 73 FR 78104.

<sup>15</sup> See 8 CFR 214.2(h)(6)(iv)(D)

### III. Data Report and Analysis

#### Section 3.1 – The H-2B Cap Methodology

Pursuant to INA 214(g)(1), “[T]he total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year . . . under section 101(a)(15)(H)(ii)(b) of this Act may not exceed 66,000.” An individual would be considered to have been “otherwise provided” H-2B status upon direct admission into the United States without a visa or through change of status to H-2B while already in the United States. As noted, persons seeking an extension of H-2B stay, whether or not with the same employer, are not counted against the cap.<sup>16</sup>

In managing the H-2B cap, USCIS ensures that the total sum of Form I-129 H-2B petitions contain a sufficient number of approved beneficiaries to fill the cap each year without exceeding the cap. This approach is consistent with current laws and regulations in that the annual cap of 66,000 visas is not exceeded and that it is allocated evenly between the two halves of each fiscal year. It can be difficult, however, to estimate how many beneficiaries of an approved H-2B petition will seek H-2B status or be issued an H-2B visa by DOS.

Despite these challenges, USCIS strives to estimate the number of petitions and beneficiaries that may be approved before reaching the annual cap. In accordance with 8 CFR 214.2(h)(8)(ii)(B), USCIS takes into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS then will determine when it has received a sufficient number of petitions and, at that time, make an announcement that it will no longer accept further H-2B petitions (referred to as the “final receipt date”). This ensures that the statutory caps will not be exceeded.

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<sup>16</sup> See 8 CFR § 214.2(h)(8)(ii)(A).

A chart illustrating the H-2B cap history for the preceding 10 fiscal years is below.

**Total H-2B Cap Usage by Fiscal Year**

	<b>1st Half Final Receipt Date</b>	<b>2nd Half Final Receipt Date</b>
<b>FY 2006</b>	December 15, 2005	April 4, 2006
<b>FY 2007</b>	November 28, 2006	March 16, 2007
<b>FY 2008</b>	September 27, 2007	January 2, 2008
<b>FY 2009</b>	July 29, 2008	January 7, 2009 <sup>17</sup>
<b>FY 2010</b>	Cap not reached	Cap not reached
<b>FY 2011</b>	Cap not reached	Cap not reached
<b>FY 2012</b>	Cap not reached	Cap not reached
<b>FY 2013</b>	Cap not reached	Cap not reached
<b>FY 2014</b>	March 14, 2014	Cap not reached
<b>FY 2015</b>	January 26, 2015	March 26, 2015 <sup>18</sup>

Prior to FY 2014, USCIS used all factors described in 8 CFR 214.2(h)(8)(ii)(B), as well as the number of visas issued by DOS, to derive a target number of beneficiaries to accept prior to ceasing acceptance of H-2B petitions for a particular employment start date window. This target was used to determine the maximum number of petitions that USCIS would accept and approve to make sure that the maximum number of H-2B visas and grants does not exceed the cap. Because any unused visas from the first half of a fiscal year roll over into the second half of a fiscal year, the number of petitions and beneficiaries approved for the second half of a fiscal year always takes into account activity from the first half of the fiscal year.<sup>19</sup>

The USCIS cap calculation excluded those beneficiaries that were not subject to the H-2B cap. This includes requests that USCIS received for extension of stay, change in employment where the beneficiary continuously was maintaining H-2B status, amendments, fish roe processors, fish roe technicians, and supervisors of fish roe processing, and workers performing temporary labor or services in the CNMI or Guam. Additionally, between October 1, 2005, and September 30, 2007, H-2B nonimmigrants identified as “returning workers” were excluded from the H-2B cap count.

On January 7, 2009, USCIS announced that it had accepted and approved a sufficient number of H-2B petitions to meet the congressionally mandated H-2B cap for FY 2009. However, in July 2009, DOS reported that it had issued an unusually low number of

<sup>17</sup> Because of unexpectedly low visa issuance rates reported by DOS, USCIS resumed accepting H-2B petitions for the remainder of FY 2009 on August 6, 2009.

<sup>18</sup> Because of unexpectedly low visa issuance rates reported by DOS, USCIS resumed accepting H-2B petitions for the remainder of FY 2015 on June 5, 2015. USCIS again ceased accepting H-2B petitions on June 11, 2015.

<sup>19</sup> Note that any unused H-2B visas do not carry over from one fiscal year to the next.

H-2B visas; only about 40,640 of the available 66,000 H-2B visas had been issued.<sup>20</sup> As a result, on August 6, 2009, USCIS resumed accepting Form I-129 petitions for H-2B employment beginning in FY 2009.

Between FY 2009 and FY 2013, the semiannual and annual H-2B caps were not reached. However, on March 14, 2014, USCIS announced that it had accepted and approved a sufficient number of H-2B petitions to meet the congressionally mandated H-2B cap for employment commencing in the first half of FY 2014.<sup>21</sup> Although the H-2B cap was filled for the first half of FY 2014, the overall annual cap of 66,000 H-2B visas issued or grants of H-2B status was not reached in FY 2014.

Also prior to FY 2014, DOS provided USCIS with a weekly update on the total number of visas issued to all H-2B workers. Although this information was considered in the H-2B cap methodology, USCIS learned that, because of technical limitations, the DOS report did not exclude those workers who are not subject to the H-2B cap,<sup>22</sup> which limited its efficacy in making more accurate cap determinations.

In June 2014, USCIS requested a more targeted data report from DOS, and asked DOS to exclude individuals not subject to the H-2B cap. Although DOS did not have the capacity to exclude individuals who were not subject to the cap, it started to provide USCIS with weekly H-2B visa issuance reports. These reports provided additional information to assist in more accurately managing the cap; specifically, the total number of visas issued and refused, the total number of beneficiaries who overcame an initial refusal, the adjusted refusal rate, and the overall total workload.

From the new information, USCIS refined its cap calculation methodology to consider the following factors:

- number of H-2B beneficiaries in the United States who were granted a change of status;
- total number of H-2B beneficiaries approved for consular processing by USCIS;
- number of visas issued by DOS;
- DOS visa approval rate (defined as the number of visas issued by DOS divided by the total number of individuals who applied for a visa);

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<sup>20</sup> The exact reason why so many H-2B visas remained unissued after the initial closing of the FY 2009 cap is unclear. Possibilities include petitioning employers overestimating their need for H-2B workers or their having unexpected difficulty recruiting H-2B workers from foreign countries.

<sup>21</sup> The first half of FY 2014 is defined as October 1, 2013, through March 31, 2014.

<sup>22</sup> These individuals include H-2B workers seeking an extension of stay, change in employment, or amendments, as well as fish roe processors, fish roe technicians, and supervisors of fish roe processing, and workers performing temporary labor or services in the CNMI or Guam.

- DOS refusal rate (defined as the number of visas refused by DOS divided by the total number of individuals who applied for a visa); and
- total number of beneficiaries pending with USCIS and DOS.

The DOS approval rate of USCIS-approved beneficiaries was an important factor that was added to the cap calculation methodology. Prior to this, the DOS approval rate was unavailable. These factors allowed USCIS to manage the cap more effectively.

On February 2, 2015, USCIS announced that it had received a sufficient number of petitions to reach the H-2B cap for the first half of FY 2015. January 26, 2015, was the final receipt date for new H-2B worker petitions requesting an employment start date prior to April 1, 2015. For the first half of FY 2015, USCIS approved petitions filed on behalf of a total of 42,530 H-2B beneficiaries in order to come as close as possible, on the basis of the above-described factors, to the 33,000 for the first half of the fiscal year limit. Although the H-2B cap had closed for the first half of FY 2015, USCIS continued to receive and analyze the weekly DOS report with the understanding that H-2B petitioners may file up to 120 days in advance of the employment start date.<sup>23</sup> Because of this, some approved H-2B beneficiaries may not have been issued a visa because their employment start date had not yet occurred.

Because the DOS refusal rate fluctuated, USCIS decided to apply the overall DOS refusal rate from FY 2014 as a constant factor in the FY 2015 cap counting methodology. USCIS used this factor to enhance the cap calculation methodology and allow for the maximum number of beneficiaries to be approved while still not exceeding the cap. By building a projection of visa refusals into the methodology, this change also raised the target number of beneficiaries needed to reach the cap. Although the DOS refusal rate from the previous fiscal year was applied, USCIS continued to monitor the current refusal rate to ensure that it was still a reasonable factor in the methodology.

On April 2, 2015, USCIS announced that it had accepted and approved a sufficient number of H-2B petitions to meet the congressionally mandated annual cap of 66,000. USCIS retained the FY 2014 methodology for the beginning of FY 2015 and continued to factor in the FY 2014 DOS refusal rate. On the basis of that methodology, USCIS believed that it accepted a sufficient number of beneficiaries to fulfill the FY 2015 cap.

After the April 2, 2015, announcement, USCIS requested and obtained new, more comprehensive information from DOS. This information allowed USCIS to match DOS visa approvals to specific USCIS petitions. USCIS used this information to determine the percentage of cap-subject beneficiaries approved by USCIS for FYs 2013, 2014, and 2015 who actually applied for and obtained H-2B visas. For ease of reference, USCIS will refer to this percentage as the “DOS visa issuance rate.” The DOS visa issuance rate

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<sup>23</sup> See 8 CFR 214.2(h)(9)(i)(B).

revealed that a substantial number of USCIS-approved beneficiaries had not applied for H-2B visas. Specifically, USCIS found DOS visa issuance rates of 80.70 percent for FY 2013, 83.20 percent for FY 2014, and 80.00 percent in FY 2015 (data from May 27, 2015). These DOS visa issuance rates were unexpectedly low in relation to the DOS visa approval rate, which was already an established factor in the cap calculation methodology. As noted above, the DOS visa approval rate is the number of visas issued and approved by DOS divided by the total number of individuals who applied for a visa. The DOS approval rate, however, did not account for the number of USCIS-approved H-2B workers from whom no visa application resulted. The DOS visa approval rate also did not distinguish between those visa issuances that are subject to the H-2B cap and those that are cap-exempt. Please refer to Exhibit A in the Appendix for additional information.

Prior to this analysis, comprehensive data were not available. To fulfill the FY 2015 cap, USCIS chose to add the DOS visa issuance rate as a refining variable to its cap counting methodology. Specifically, USCIS applied the FY 2013 visa issuance rate of 80.70 percent because USCIS believed this percentage was the most reasonable approach on the basis of the trend from the past 3 fiscal years. Please refer to Exhibits A and B in the appendix for examples of work products. Please note that these exhibits are internal work documents for operational purposes only and do not constitute official reporting.

Taking into account the visa issuance rate of 80.70 percent, USCIS adjusted its projections of the number of positions requested on H-2B petitions required to meet the cap. On the basis of the adjusted projections, USCIS reopened the H-2B cap on June 5, 2015. On June 11, 2015, less than 1 week after the H-2B cap was reopened, the FY 2015 H-2B cap once again closed. With the addition of the visa issuance rate, USCIS determined that a sufficient number of beneficiaries was accepted and approved to ensure that the maximum number of H-2B positions permissible by statute was made available to qualified workers without exceeding the cap.

On the basis of its initial projections as to cap-subject visa issuances, USCIS's original target beneficiary count for FY 2015 was 78,738 for the entire year. On the basis of DOS's report of lower-than-expected H-2B visa issuances,<sup>24</sup> USCIS actually approved 82,254 H-2B beneficiaries for employment start dates in FY 2015. Accounting for this progression, the current H-2B cap counting methodology for FY 2016 includes the following factors:

- actual number of H-2B petitions received;
- number of H-2B beneficiaries covered on each petition;

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<sup>24</sup> The exact reason why so many H-2B visas remained unissued after the initial closing of the FY 2015 cap is unclear. Possibilities include petitioning employers overestimating their need for H-2B workers or their having unexpected difficulty recruiting H-2B workers from foreign countries.

- approval rate of H-2B petitions for change of status and consular notification;
- denial rate of H-2B petitions;
- number of petitions pending adjudication;
- DOS visa refusal rate for H-2B visa applicants, including adjustment for those beneficiaries overcoming previous DOS refusal; and
- DOS visa issuance rate.

This calculation continues to exclude those beneficiaries who were not counted against the H-2B cap.<sup>25</sup> To date, there are no known investigations or lawsuits related to the methodology used to determine the H-2B cap.

### Section 3.2 – Actual Usage Rates during the Last 10 Fiscal Years

Figures 1 and 2 display the total H-2B cap usage and the rates of H-2B cap usage for each of the preceding 10 fiscal years (FY 2006–FY 2015). In Figure 1, the total H-2B cap usage for each fiscal year is defined as the sum of all H-2B visa issuances by DOS, admissions without visa by CBP, and changes of status approved by USCIS. For FYs 2006, 2007, and 2008, this total H-2B cap usage figure also includes H-2R visa issuances by DOS under the H-2B Returning Worker provision that was then in effect.

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<sup>25</sup> These individuals include H-2B workers seeking an extension of stay, a change in employment while remaining in H-2B status, or an amendment of the terms and conditions of their employment in H-2B classification, as well as fish roe processors, fish roe technicians, supervisors of fish roe processing, and workers performing temporary labor or services in the CNMI or Guam.

Figure 1:

**Total H-2B Cap Usage by Fiscal Year**

	<b>DOS H-2B Visas Issued<sup>26</sup></b>	<b>DOS H-2R Visas Issued<sup>27</sup></b>	<b>CBP Admissions<sup>28</sup></b>	<b>USCIS Changes of Status<sup>29</sup></b>	<b>Total H-2B Cap Usage</b>
<b>FY 2006</b>	71,538	50,854	2,699	1,944	127,035
<b>FY 2007</b>	59,974	69,320	3,295	2,218	134,807
<b>FY 2008</b>	92,437	1,054	909	636	95,036
<b>FY 2009</b>	44,256		602	415	45,273
<b>FY 2010</b>	47,252		261	474	47,987
<b>FY 2011</b>	50,689		449	376	51,514
<b>FY 2012</b>	49,973		227	354	50,554
<b>FY 2013</b>	57,527		193	333	58,053
<b>FY 2014</b>	67,843		223	358	68,424
<b>FY 2015</b>	69,488		268	228	69,984

Figure 2 provides two alternate usage rates for the H-2B cap in each fiscal year. The total H-2B cap usage defined in Figure 1 is first compared to the statutory H-2B numerical limitation of 66,000 to produce a percentage of use for each fiscal year. This same total H-2B cap usage then is compared to the total number of approved H-2B beneficiaries who are considered subject to the cap by USCIS in its management of the H-2B cap for each fiscal year. These approved H-2B beneficiaries do not include those seeking an extension of stay or a change in employment while in current H-2B status. It is this comparison of the total H-2B cap usage with the approved H-2B cap beneficiaries that USCIS considers the closest approximation of the requested “actual usage rate,” calculated as a percentage of those approved H-2B beneficiaries counted toward the cap who were actually granted H-2B status.

<sup>26</sup> As reported by DOS to USCIS on November 30, 2015.

<sup>27</sup> As reported by USCIS to Senate and House Judiciary Committees based on data provided by DOS in each fiscal year.

<sup>28</sup> As reported by USCIS to Senate and House Judiciary Committees based on data provided by CBP in each fiscal year. This column represents CBP admissions of H-2B workers who do not require a visa. *See* 8 CFR 212.1(a).

<sup>29</sup> As reported by USCIS to Senate and House Judiciary Committees based on internal data in each fiscal year.

Figure 2:

**Rates of H-2B Cap Usage by Fiscal Year**

	<b>Total H-2B Cap Usage</b>	<b>Annual H-2B Cap Limit</b>	<b>Usage Rate of Cap Limit</b>	<b>H-2B Cap Beneficiaries<sup>30</sup></b>	<b>Usage Rate of Beneficiaries</b>
<b>FY 2006</b>	127,035	66,000	192.5%	53,790	236.2%
<b>FY 2007</b>	134,807	66,000	204.3%	179,819	75.0%
<b>FY 2008</b>	95,036	66,000	144.0%	107,920	88.1%
<b>FY 2009</b>	45,273	66,000	68.6%	79,371	57.0%
<b>FY 2010</b>	47,987	66,000	72.7%	70,341	68.2%
<b>FY 2011</b>	51,514	66,000	78.1%	70,339	73.2%
<b>FY 2012</b>	50,554	66,000	76.6%	64,588	78.3%
<b>FY 2013</b>	58,053	66,000	88.0%	70,963	81.8%
<b>FY 2014</b>	68,424	66,000	103.7%	79,258	86.3%
<b>FY 2015</b>	69,984	66,000	106.0%	82,254	85.1%

It is important to note that DOS and CBP do not distinguish between those visa issuances and admissions that are subject to the H-2B cap and those that are cap-exempt. As such, their numbers reported in Figure 1 will include beneficiaries who are exempt from the H-2B cap and those who have already been counted toward the H-2B cap but are seeking multiple admissions or H-2B visa renewals. These numbers also are reported according to the actual date of DOS visa issuance or CBP admission of visa-exempt individuals rather than the approved employment start date relied upon by USCIS in managing the H-2B cap for each fiscal year.<sup>31</sup> This is a fundamental distinction that warns against overreliance upon the data provided in Figure 1 and the subsequent computations in Figure 2, because there will be individual H-2B beneficiaries who were counted toward the H-2B cap in one fiscal year but their visa issuance or admission without visa would be reported in the next. This spillover between fiscal years is a critical limitation that requires caution and makes clear that all reported rates of use and trends between fiscal years can be understood only as approximations based on the best available data.

USCIS now has the means to monitor H-2B cap usage more directly than in the past, relating new visa issuance data to the specific H-2B petition and the employment start date by which that petition was considered toward the H-2B cap. This is now possible because of the new data sharing between DOS and USCIS effective in FY 2015, as discussed in Section 3.1. This matching of data is used only internally for operational purposes and is not reported officially. Although extremely valuable for comparison with projections, these matched DOS and USCIS data also are unsuitable for producing an

<sup>30</sup> As reported by USCIS Office of Performance and Quality on December 10, 2015.

<sup>31</sup> Delays between the approved employment start date and the date of DOS visa issuance or CBP admission may occur due to a variety of factors, such as questions as to an individual's admissibility and delays beyond the control of the visa-issuing post or CBP port of entry.

actual usage rate because they are not reported in real time and fail to include the more limited, but nonetheless necessary, data on CBP admissions.

## IV. Recommendations

### Recommendations for the Future

As USCIS continues to work with its federal partners to evaluate current filing trends and to ensure that the number of visa petitions granted more closely aligns with the actual number of H-2B visas used by workers, it recommends the following actions:

- Continue to collaborate with DOS and CBP regarding H-2B program information;
- Conduct routine analyses of DOS visa issuance data, matching them with USCIS petition data to produce a current visa usage rate for comparison with projections and more data-driven management of the H-2B cap; and
- Update the factors used in the H-2B cap methodology on the basis of current and available data, as appropriate.

## V. Appendix

### Work Products Used to Develop the Cap Calculation Methodology for FY 2015

#### Exhibit A: High-Level H-2B Analysis of Petition Beneficiaries Needed to Subscribe the Cap based on DOS/USCIS Data for FY 2013, FY 2014, and FY 2015

Scenario	Visa Issuance Rate	Projected Yield from Current Inventory	Delta from 66,000	Additional USCIS Approvals Required	USCIS H2B Approval Rate	USCIS Receipt Target
FY 2013 Based	80.70%	60,817	5,183	6,423	98.20%	<b>6,541</b>
FY 2014 Based	83.20%	60,833	5,167	6,210	98.20%	<b>6,324</b>
FY 2015 YTD	80.00%	60,812	5,188	6,485	98.20%	<b>6,604</b>

#### H2B Cap History, Analysis, and Forward Plan to Reopen FY 2015 Cap (Using FY 2013 Visa Issuance Rates)

USCIS Approvals	Beneficiary	Notes
USCIS Approved	75,371	
USCIS Pending	382	As of June 3, 2015
Estimated Approved	375	98.2 percent Approval Rate
<b>Total Approvals</b>	<b>75,746</b>	<b>Approved + Estimated Approved</b>

DOS Visa Issued	59,916	Matching Receipt numbers from DOS as of May 27, 2015
USCIS Change of Status (COS) Approved	91	
USCIS Approved, Awaiting Employment Start Date	221	Employment Start Date of June 2015 or later, so H2B worker can still effect entry in future - multiplied by 80.7 percent
Estimated Visas From USCIS Pending	303	Estimated Approved * 80.7 percent (FY 2013 Visa Issuance Rate) multiplied with estimated approved above (375)
Est CBP Visa Exempt Admissions	286	FY 2013 and FY 2014 Avg. of Canadian Border Crossers tracked by CBP throughout fiscal year. No numbers yet available this year, utilizing last 2 years averages.
Visas Issued	60,817	Total of DOS, COS, Awaiting Start Date, USCIS Pend, and CBP Visa Exempt
Total number of unissued, approved H2B visas based on USCIS FY approvals	14,876	Total approvals minus Visas Issued

<b>Cap Target</b>	<b>66,000</b>	
Visas needed to reach cap	5,183	Cap Target - Total Estimated Visas Issued
FY 2013 Visa Issuance Percentage	80.7%	Must divide FY 2013 Visa Issuance Percentage by Visa needed to reach cap
Beneficiary Approvals Required to meet cap	6,423	Required Visas / Visa Issuance rate
USCIS H2B cap Approval Percentage	98.2%	Must divide H2B Cap Denial Percentage by Approvals required to meet cap
<b>Total USCIS H2B cap Beneficiary Receipts Needed To Meet FY Cap</b>	<b>6,541</b>	

**Exhibit B: H-2B Analysis of Petitions and Beneficiaries based on DOS/USCIS Data for FY 2013, FY 2014, and FY 2015**

H-2B  FISCAL YEAR	USCIS APPROVED		DOS ISSUED		USCIS CHANGE OF STATUS		CBP ADMISSIONS	VISA USAGE				VISA PERCENTAGES			PETITIONS WITH NO VISA ISSUED	
	PETITIONS	BENEFICIARIES	PETITIONERS	BENEFICIARIES	PETITIONERS	BENEFICIARIES	BENEFICIARIES	TOTAL VISAS USED	UNUSED VISAS	REFUSALS	UNUSED (NOT REFUSED)	% VISAS ISSUED	% VISAS REFUSED	% VISAS UNUSED	PETITIONERS	BENEFICIARIES
<b>2013</b>	3,692	70,592	3,456	56,534	76	271	193	56,998	13,594	2,520	11,074	80.7%	3.6%	15.7%	236	1,795
<b>2014</b>	4,233	78,993	3,992	65,102	95	217	378	65,697	13,296	1,253	12,043	83.2%	1.6%	15.2%	241	1,994
<b>2015</b>	4,102	82,491	3,995	68,973	46	131		69,104	13,387	2,396	10,991	83.8%	2.9%	13.3%	147	1,439