



May 3, 2005

**Policy Brief.....H-2B Visas**

**H-2B VISAS: “THE SEASONAL WORKERS”**

**CURRENT LAW**

Under the direction of the Department of Labor (DOL), the H-2B visa program allows U.S. employers to hire foreign workers for temporary *nonagricultural* work, including one-time, seasonal, peak load or intermittent. Currently, 66,000 foreign workers are permitted each fiscal year (October 1<sup>st</sup> – September 30<sup>th</sup>) to receive the H-2B worker visas (Source: DOL <http://www.ows.doleta.gov/foreign/h-2b.asp>).

Current law, (8 US Code 1184, section 1101(a)(15)H(ii)(b)) includes under the definition of nonimmigrant alien, temporary and seasonal workers “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession.”

**SENATE ACTION:**

On April 19, 2005, the Senate passed, by a 94-6 vote, an amendment by Senator Barbara Mikulski (D-MD) regarding H-2B visas. The amendment was adopted to the Emergency Supplemental Appropriations Act, H.R. 1261. The amendment is identical to S.352, the Save Our Small and Seasonal Businesses Act. In her floor statement, Senator Mikulski stated the amendment, “is designed to be a 2-year temporary solution to the seasonal worker shortage that many coastal states and resort states are facing.” (CR April 13, 2005, p S3533). (The text is also identical to H.R. 793, a bill introduced in the House, and referred to the House Judiciary Committee.)

**BACKGROUND ON MIKULSKI AMENDMENT**

According to the sponsor and various news reports, the 66,000-person H-2B visa cap had already been reached a little over five months into fiscal year 2004, and three months into fiscal year 2005. Because the law specifies that H-2B petitions (applications) may not be filed more than 6 months before the proposed employment will begin or the extension of stay is required, those employers needing seasonal workers for the spring and summer have been closed out of the FY05 cap.

Year	Current Law # of H-2B Visas	If Sen. Mikulski's Amendment Becomes Law
FY04	66,000	66,000
FY05	66,000	66,000 + (H-2B visa holders from either FY04, FY03, or FY02) <sup>1</sup>
FY06	66,000	66,000 + (H-2B visa holders from either FY05, FY04, or FY03), of which no more than 33,000 may be granted in the first six months of the year <sup>2</sup>
FY07	66,000	66,000, of which no more than 33,000 may be granted in the first six months of the year
FY08	66,000	66,000, of which no more than 33,000 may be granted in the first six months of the year

## Raises the Cap for Two Years

- The amendment adds a provision to 8 U.S.C. 1184, exempting (in FY05 and FY06) returning seasonal workers from being included in the 66,000 yearly H-2B visa limit, if they had served under an H-2B visa for any one of the previous three fiscal years. **The modification is retroactive to “October 1, 2004, and shall expire on October 1, 2006.”** Thus, an individual who participated in the H-2B program in FY04, but has not already been accepted under the 66,000-person cap for FY05, will now be allowed in under the Mikulski amendment.
- According to the House Judiciary Committee, while the Mikulski amendment does not set a ceiling, **the Department of Homeland Security estimates that an additional 30,000 people a year, for the next two years, will be admitted under this expanded cap.** This estimate takes into consideration that many of the seasonal H-2B visa holders return year after year, and that it is not a different group of 66,000 people a year that qualify for the H-2B visa, but that there is significant overlap from year to year.

<sup>1</sup> SEC. 7002. NUMERICAL LIMITATIONS ON H-2B WORKERS.

(a) In General.--Section 214(g) of the Immigration and Nationality Act (8 U.S.C. 1184(g)) is amended by adding at the end the following:

“(9) An alien counted toward the numerical limitations of paragraph (1)(B) **during any one of the 3 fiscal years prior to the submission of a petition** for a nonimmigrant worker described in section 101(a)(15)(H)(ii)(b) **may not be counted toward such limitation** for the fiscal year in which the petition is approved” (emphasis added).

<sup>2</sup> SEC. 7005. ALLOCATION OF H-2B VISAS DURING A FISCAL YEAR.

“(j) The numerical limitations of paragraph (1)(B) shall be allocated for a fiscal year so that the total number of aliens who enter the United States pursuant to a visa or other provision of nonimmigrant status under section 101(a)(15)(H)(ii)(b) during the first 6 months of such fiscal year is not more than 33,000.”

- *If* in each of the past three years a completely different group of 66,000 H-2B visa holders had entered the U.S. (which is not the testimony of those involved with the program), theoretically, the number admitted *above* the 66,000-person cap in FY05 could be as high as 198,000 people, for a total of 264,000 H-2B visa holders. *If* 264,000 people were admitted in FY05, then in FY06, under the terms of the Mikulski amendment, none of the 264,000 workers would be counted under a cap and an additional 66,000 could be admitted, for a total of 330,000 H-2B visa holders.

### **Additional Provisions in the Mikulski Amendment:**

- The amendment creates a new \$150 “fraud prevention and detection fee” to be paid by employers filing H-2B petitions. The fee is to be deposited into the Fraud Prevention and Detection Account (an account created in the FY05 Omnibus), to be used for “programs and activities to prevent and detect fraud with respect to” the H-2B program. This provision shall take effect on October 1, 2005.”
  - Additionally, this provision permits the Secretary of Homeland Security to impose punishment upon H-2B visa employers for “failure to meet any of the conditions of the petition to admit or otherwise provide status” to an H-2B visa worker. If punishment is a monetary fine, it may not exceed \$10,000.
- The amendment adds a provision limiting distribution of H-2B visas to “not more than 33,000” during the first six months of the fiscal year, to account for the seasonal workers who work in the Spring and Summer months.
- Amends current law to clarify that the Secretary of Homeland Security will enforce these provisions, and requires the Secretary of Homeland Security to report to the Committees on the Judiciary in both the House and the Senate, no later than March 1, 2006, outlining the following information for the previous year:
  - Number of aliens granted or terminated from H-2B status or terminated from H-2B status, on a quarterly basis;
  - Countries of origin, occupations of, and compensation paid to aliens granted H-2B status; and
  - Number of aliens expired and/or revoked from H-2B status during both the fiscal year reported and the preceding fiscal year, on an annual basis.

Amendment text: [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S3533&dbname=2005\\_record](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S3533&dbname=2005_record)

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### **Frequently Asked Questions**

#### **Q. What is the H-2B visa?**

**A.** The H-2B visa is a nonimmigrant visa allowing foreign nationals to enter the U.S. temporarily and to engage in nonagricultural employment, which is seasonal, intermittent, a peak load need, or a one time occurrence. *Examples* include film workers, tourist season workers, and coastal workers.

#### **Q. To what privileges are H-2B visa workers entitled?**

**A.** An H-2B visa worker may enter the U.S. for temporary work and receive all employee benefits, travel freely in and out of the U.S., and change jobs with proof of new job offer. Additionally, the worker's dependents can stay with them in the U.S.

**Q. What are the limitations of the H-2B visa?**

**A.** The job must be temporary in nature (one year or less), and the employer bears the burden of establishing evidence that the need is a one-time occurrence, seasonal, peak load or intermittent need. H-2B time accrues whether the individual is in the U.S. or abroad, and the worker's dependents may not work in the U.S.

**Q. What are the requirements to obtain H-2B visa?**

**A.** The worker must have a valid job offer from a U.S. employer to perform temporary or seasonal nonagricultural work and provide evidence of an intent to return to their home country upon expiration of the visa.

Source: <http://www.ows.doleta.gov/foreign/h-2b.asp> and [www.visapro.com](http://www.visapro.com)

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