

Congress of the United States

Washington, DC 20515

January 11, 2018

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2018 JAN 11 PM 5:11

The Honorable Kirstjen Nielsen
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
Washington, DC 20210

Dear Secretary Nielsen and Secretary Acosta:

H-2B visas, which certify foreign workers to be temporarily employed in the United States, are heavily relied upon by Maine's many tourism and hospitality businesses that are in need of seasonal, temporary workers beyond the number that they can hire in our state and region. In many cases, the continued employment of their full-time, year-round workers also depends on the availability of temporary workers during peak seasons.

Many businesses have contacted our offices to express concern that the 33,000 numerical cap for H-2B visas for the first half of this fiscal year was reached on December 21, 2017. In addition, on January 1, 2018 – the first day on which employers could file for the second half of the fiscal year – the Department of Labor (DOL) received 4,500 H-2B visa applications covering more than 81,600 workers, or more than double the cap. This extremely high volume of applications highlights the importance of H-2B visas to businesses across the country.

We remain concerned that the number of applications received so far suggests that many employers with a date of need later than April 1, 2018, could be capped out of the program again this year. As Maine's tourism season starts later than that of many other businesses participating in the program, the cap will likely be met before many Maine businesses are able to get their workers. Combined with the low unemployment rate in our state, the effect could be extremely harmful for Maine's businesses and communities in which they are located.

Accordingly, we urge the Department of Homeland Security (DHS) to conduct an immediate audit of the number of unused visas from the first half of fiscal year (FY) 2018 – and if you find that the full 33,000 visas were not actually issued during the first half of FY 2018, to make sure that those visas are made available as soon as possible for the second half of the fiscal year. For reference, in 2015, after previously announcing that the statutory cap had been reached, DHS determined that more than 5,000 unused visas were available. Soon thereafter, the agency began accepting applications from businesses hoping to hire workers through the program.

In addition, we have heard that DOL is randomly processing applications received on January 1, without regard to the time the application was actually filed. Many Maine employers filed their applications just minutes after midnight to ensure they would be first in line to receive visas for the H-2B workers on which they depend. We are concerned that these employers could be locked out if the visa cap is reached because visas are being allocated to employers who filed their applications much later in the day. Accordingly, we urge DOL to ensure that priority for the allocation of visas be based on the time of application.

We would appreciate your prompt attention to this matter, as many tourism businesses in our state depend on the H-2B visa program. Should you have any questions, please contact us directly or have your staff contact Mark LeDuc (Collins) at (202) 224-2523, Sanjay Kane (King) at (202) 224-5344, Todd Stein (Pingree) at (202) 225-6116, or Allison Behuniak (Poliquin) at (202) 225-6306.

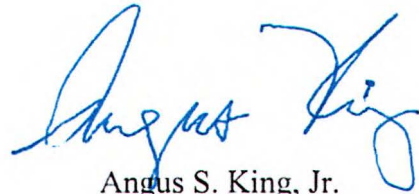
Sincerely,



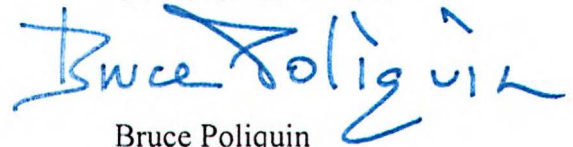
Susan M. Collins
United States Senator



Chellie Pingree
Member of Congress



Angus S. King, Jr.
United States Senator



Bruce Poliquin
Member of Congress



U.S. Citizenship
and Immigration
Services

February 26, 2018

The Honorable Susan M. Collins
United States Senate
Washington, DC 20510

Dear Senator Collins:

Thank you for your January 11, 2018 letter. Secretary Nielsen asked that I respond on her behalf.

Your letter expressed specific concerns with the H-2B temporary nonagricultural worker program, particularly the Fiscal Year (FY) 2018 numerical limit (the “cap”) and the impact that any H-2B cap closure could have on businesses in Maine. You also requested an audit of the number of unused H-2B visas from the first half of FY 2018.

In overseeing and managing the H-2B cap, U.S. Citizenship and Immigration Services (USCIS) accepts a sufficient number of H-2B petitions (Form I-129, Petition for a Nonimmigrant Worker) to make certain USCIS completely fills, but does not exceed, the statutory cap.¹ Specifically, USCIS determines whether such petitions request a sufficient number of cap-subject beneficiaries likely to be issued a visa or otherwise granted H-2B status. This approach is consistent with current laws and regulations requiring the annual cap of 66,000 visas is not exceeded and that it is allocated evenly between both halves of each fiscal year.²

Estimating how many beneficiaries of an approved H-2B petition will seek H-2B status or will ultimately be issued an H-2B visa by the U.S. Department of State (DOS) is predictive and poses some inherent challenges. USCIS strives to best forecast the number of petitions and beneficiaries that may be approved before reaching the annual cap and its respective halves for each fiscal year. Accordingly, USCIS takes into account historical data related to approvals, denials, revocations, and other relevant factors. These other factors include:

- The number of H-2B petitions received;
- The number of H-2B beneficiaries requested on each petition;
- The number of H-2B beneficiaries pending adjudication; and
- DOS visa refusal and visa issuance rates for H-2B visa applicants.

¹ See INA § 214(g)(1)(B), 8 U.S.C. § 1184(g)(1)(B); see also 8 C.F.R. 214.2(h)(8)(i)(C). The USCIS H-2B cap calculation excludes those beneficiaries that are exempt or otherwise not subject to the H-2B cap. This includes requests that USCIS receives for extension of stay, change in employment where the beneficiary was continuously maintaining H-2B status, amendments to a previously authorized stay, certain fish roe processing positions, and workers performing temporary labor or services in the Commonwealth of the Northern Mariana Islands or Guam.

² By statute, the total number of beneficiaries subject to the H-2B cap who may be issued an H-2B visa or otherwise be accorded H-2B status may not exceed 33,000 during the first half of the fiscal year. See INA § 214(g)(1)(B) and (10), 8 U.S.C. § 1184(g)(1)(B) and (10). Any unused visas from the first half of a fiscal year roll over into the second half of a fiscal year. However, unused H-2B visas do not carry over from one fiscal year to the next.

To fulfill its statutory responsibility for managing the H-2B cap, USCIS continuously monitors this information and refines its projections based on changes in the program. USCIS also relies upon periodic visa issuance reports from DOS to continually assess the progress towards reaching the cap. Through this auditing process, USCIS maintains flexibility to adjust its projections and exercise reasonable discretion based on the best and most current information available.

USCIS is confident in the projections by which it managed the first-half cap for FY 2018 and will continue to take all of the information listed above, including DOS's most recent visa issuance reports, into account in managing the H-2B cap for the second half of the fiscal year. Looking back at the annual cap for FY 2017, it is worth noting that approved petitions subject to this cap had an ultimate visa usage rate of greater than 90 percent. This was several percentage points higher than the rates in any of the four preceding fiscal years, requiring USCIS to exercise caution in managing the H-2B cap for FY 2018 to prevent it from being exceeded.

Noting your reference to the decision to reopen the cap in June of 2015, USCIS subsequently broadened the relevant factors by which it manages the H-2B cap so that a repeat of that decision should not be necessary. USCIS therefore encourages employers with a date of need later than April 1, 2018, who might be "capped out" of the H-2B program in FY 2018 not to rely on the possibility of a cap reopening as a form of relief. Congress, of course, possesses authority to provide potential avenues of relief for such employers, as it did in FY 2016³ and in FY 2017.⁴

As for your concern with the processing of the H-2B temporary labor certifications, USCIS respectfully defers to the U.S. Department of Labor, the agency responsible for adjudicating requests for temporary labor certifications.

Please be assured that USCIS understands the significance to seasonal employers of the H-2B nonagricultural worker program and is committed to ensuring that the program functions as it was intended.

Thank you for your interest in this important matter. The co-signers of your letter will receive separate, identical responses. Should you require any additional assistance, please have your staff contact the USCIS Office of Legislative Affairs at (202) 272-1940.

Respectfully,



L. Francis Cissna
Director

³ For FY 2016, H-2B nonimmigrants certified and confirmed as "returning workers" were exempted from the H-2B cap. See INA § 214(g)(9)(A), 8 U.S.C. § 1184(g)(9)(A), as revised by the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015).

⁴ For FY 2017, the Secretary of Homeland Security was authorized to increase the total number of available H-2B visas "after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in fiscal year 2017 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor." See Sec. 543 of the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 (2017), as implemented by Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program, 82 Fed. Reg. 32,987 July 19, 2017).