

United States Senate

WASHINGTON, DC 20510

January 11, 2018

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The Honorable Kirstjen Nielsen
Secretary of Homeland Security
U.S. Department of Homeland Security
3801 Nebraska Ave, NW
Washington, DC 20530

The Honorable R. Alexander Acosta
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Secretary Nielsen and Secretary Acosta,

We write concerning reports from our constituents that their processed and certified H2B visa applications have been rescinded without explanation. A number of Maryland small businesses submitted H2B visa applications to the U.S. Citizenship and Immigration Services, which were accepted.

However, after they had already prepared and planned to employ their approved H2B workers, they received follow-up correspondence that the acceptance e-mail was an error and, in fact, their applications were not approved because USCIS had already met the visa cap. Our constituents are understandably confused about this sudden reversal and facing few options for their near-term workforce needs.

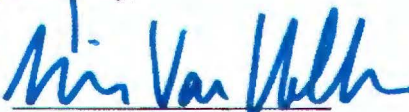
These businesses have indicated that they planned their operations with the understanding that their applications were accepted, and that they have spent considerable resources on the process. Without the expected workforce, Maryland small businesses face economic hardship and financial losses that jeopardize the jobs of Marylanders.

We write on behalf of our constituents to seek an explanation for why certified applications were rescinded, what remedy might be available to them to address their immediate workforce needs, and how the application process might be improved to prevent such errors in the future.

Given the urgency of this situation, we request an immediate response.

You can reach Virdina Gibbs at 202-224-4654 in Senator Van Hollen's office and Bill Van Horne at 202-224-4524 on Senator Cardin's office.

Sincerely,



Senator Chris Van Hollen



Senator Ben Cardin



U.S. Citizenship
and Immigration
Services

March 8, 2018

The Honorable Chris Van Hollen
United States Senate
Washington, DC 20510

Dear Senator Van Hollen:

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

Your letter expressed concerns about a number of Form I-129 petitions seeking H-2B classification (H-2B petitions) that were inadvertently accepted at the Vermont Service Center (VSC) after U.S. Citizenship and Immigration Services (USCIS) received enough petitions for the numerical limit (the "cap") for the first half of Fiscal Year (FY) 2018.

USCIS is responsible for managing the congressionally-mandated cap of 33,000 available H-2B visas for each half of a fiscal year.¹ As the USCIS Office of Legislative Affairs had previously communicated, on December 20, 2017, the VSC mistakenly receipted in, but did not approve, a number of H-2B petitions that arrived on December 18, 2017. The service centers were instructed to hold, not receipt in, all incoming H-2B petitions that arrived after December 15, 2017. The H-2B petitions that were erroneously receipted in could not be accepted without exceeding the statutory limit of 33,000 visas in the first half of the fiscal year.

As USCIS gets close to reaching the number of petitions that will exhaust the H-2B cap for each half of any fiscal year, the agency receives daily filing volume reports so that it can monitor the number of incoming petitions, including the number of potential beneficiaries, to ensure that the agency does not exceed the cap. USCIS ultimately determined that December 15, 2017, would be the final receipt date² for new cap-subject H-2B worker petitions requesting employment start dates before April 1, 2018. USCIS cannot accept new H-2B petitions that arrive at the service center after the final receipt date.

Once we learned of the VSC's error, USCIS issued an explanatory notice informing each affected petitioner that receipt notices were sent in error, and that their petitions and filing fees would be returned. These notifications were not denials, nor were they rescissions of approvals. Based on a thorough review, we have determined that no H-2B petitions were denied and no

¹ 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.

² See 8 C.F.R. 214.2(h)(8)(ii)(B).

approvals were rescinded as a result of VSC's error in receipting in petitions after the date the first half of the fiscal year cap was reached.

In light of the situation, the VSC has reviewed its petition in-take process and instituted internal measures to help ensure that this type of error is not repeated in the future. In regard to possible remedies for employers that were affected by the cap, Congress possesses the authority to provide potential avenues of relief, as it did in FY 2016³ and in FY 2017.⁴

Be assured that we understand the importance of the H-2B program to small businesses in Maryland and are committed to ensuring that the program functions as it was intended within the statutory and regulatory framework.

Thank you again for your letter and interest in this important issue. Senator Cardin, who co-signed your letter, will receive a separate, identical response. 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. 32987 (July 19, 2017).