

February 8, 2017

The Honorable John Kelly
Secretary
Department of Homeland Security
Washington, DC 20528

Dear Secretary Kelly:

In recent weeks, numerous businesses across the United States have contacted our offices expressing concern that the H-2B statutory cap will be reached soon, jeopardizing their small businesses and their American workers. The 33,000 cap for the first half of the fiscal year was reached on January 10, 2017, and newly released Department of Labor (DOL) processing statistics suggest that many employers with a date of need later than April 1, 2017 could be capped out of the program this year¹. As a result, small and seasonal businesses across the country, such as seafood processors and other critical service businesses that are vital to the local economies in our states, will likely be locked out of a necessary program that they rely on during their busiest seasons. Failure to access these critical workers will harm small businesses, American workers, and the economy.

The United States Citizenship and Immigration Services (USCIS) is charged with running the administration of the H-2B program and ensuring that all of the 66,000 annual visas are made available to seasonal businesses. We understand that when USCIS deems the cap to be reached, it accounts for a certain number of withdrawals, denials, and revocations. It is very important, however, that as soon as it has information on the actual number of visas issued, USCIS immediately makes any unused visas available to seasonal businesses.

Because the repercussions of being capped out of the H-2B program are so severe for seasonal business, their American workers, and the U.S. economy, we request prompt answers to the following questions:

- What is the formula you are using to determine when the 33,000 cap is reached?

¹ As of February 9, 2017, the Department of Labor's Office of Foreign Labor Certification reports that between January 1 and February 4 of this year 4,505 temporary labor certifications have been submitted for 81,462 workers. (<https://icert.doleta.gov/>)

- What steps are you taking to ensure that you do not stop adjudicating petitions for H-2B visas prematurely and to ensure that the full 33,000 visas will be made available for each half of the fiscal year?
- If you find that the full 33,000 visas were not actually issued during the first half of fiscal 2017, what process will you use to make sure those visas are available as soon as possible for the second half of the fiscal year?
- In the event that additional visas are released, will you allow employers who were effected by the cap to use their original approved labor certification when re-submitting a petition, provided the request is submitted before the end date specified in the labor petition?

In 2015, after previously announcing that the statutory cap had been reached, USCIS determined that more than 5,000 unused visas were available. Soon thereafter, the agency began accepting applications from businesses still hoping to hire workers through the program. With that in mind, we respectfully request that your office conduct an immediate audit of the number of unused visas from the first half of the fiscal year and project the likely usage rate for the second half of the fiscal year. Please also report the methodology for conducting the audit, as well as the methodology and raw data used to determine when the cap has been reached. As with previous practice, any unused visas should be provided to eligible businesses that have been unable to secure an adequate number of workers due to the cap. Further, we request that USCIS return to the practice it followed until two years ago of posting its target beneficiaries and updating the cap count approximately every seven days.

We thank you in advance for your prompt attention to this matter, as the viability of many businesses in our state depends on the H-2B program. We look forward to an on-going dialogue with you and the Department about possible regulatory improvements to the H-2B program that can increase processing efficiency and predictability.