

CRS Report for Congress

Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers

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Ruth Ellen Wasem
Specialist in Immigration Policy
Domestic Social Policy Division



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Summary

The economic prosperity of the 1990s fueled a drive to increase the levels of employment-based immigration. Both the Congress and the Federal Reserve Board then expressed concern that a scarcity of labor could curtail the pace of economic growth. A primary response was to increase the supply of foreign temporary professional workers through FY2003. When the H-1B annual numerical limits reverted to 65,000 in FY2005, that limit was reached on the first day. The FY2006 limit was reached before the fiscal year began. The U.S. Citizenship and Immigration Services announced that the FY2008 H-1B cap was reached within the first two days it accepted petitions — April 2-3, 2007.

The 106th Congress temporarily raised the number of H-1B visas for three years. The 107th Congress enacted provisions that allow H-1B workers to remain if their employers petitioned for them to become legal permanent residents. A provision in P.L. 108-447 exempted up to 20,000 aliens holding a master's or higher degree from the cap on H-1B visas. It also established a fraud-prevention-and-detection fee on petitioners. Provisions on H-1B visas also were part of Chile and Singapore Free Trade Agreements (P.L. 108-77 and P.L. 108-78).

The median annual compensation of the newly arriving H-1B nonimmigrants dropped from \$50,000 in FY2001 to \$44,803 in FY2003, but climbed back to \$50,000 in FY2005. Most H-1B new arrivals had earned a bachelor's degree or its equivalent (42.5%). More than one-third (39.3%) had master's degrees, and 17.1% had either professional degrees or doctorates. In FY2005, 45.3% of H-1B new arrivals were employed in computer-related fields, followed by educators (11.2%), architects, engineers and surveyors (11.1%), and administrative specializations (9.5%). India was the leading country of origin, comprising 49.0% of all new arrivals in FY2005. China followed with 9.16%, and Canada was third (3.6%).

Those opposing any further increases or easing of admissions requirements assert that there is no compelling evidence of a labor shortage in these professional areas that cannot be met by newly graduating students and retraining the existing U.S. work force. They argue further that the education of U.S. students and training of U.S. workers should be prioritized instead of fostering a reliance on foreign workers. Proponents of current H-1B levels assert that H-1B workers are essential if the United States is to remain globally competitive. Some proponents argue that employers should be free to hire the best people for the jobs, maintaining that market forces should regulate H-1B visas, not an arbitrary ceiling.

The 110th Senate is considering S.Amdt. 1150, which has been offered as a substitute to S. 1348, the Comprehensive Immigration Reform legislation. According to the May 18 discussion draft, it would increase the cap to 115,000 (and potentially to 180,000). S.Amdt. 1150 also draws on the labor market protections proposed in S. 1035, the H-1B and L-1 Visa Fraud and Abuse Prevention Act of 2007. Other H-1B bills include S. 1038/H.R. 1930, H.R. 1758, S. 1092, and S. 1351. This report tracks legislative activity and will be updated as needed.

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Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers

Latest Legislative Developments

The 110th Senate is considering S.Amdt. 1150, which has been offered as a substitute to S. 1348, the Comprehensive Immigration Reform legislation. According to the May 18 discussion draft of S.Amdt. 1150, it would increase the cap to 115,000 (and potentially to 180,000). S.Amdt 1150 also draws on the labor market protections proposed in S. 1035, the H-1B and L-1 Visa Fraud and Abuse Prevention Act of 2007 introduced by Senators Durbin and Grassley. Other H-1B bills include s.1038/H.R. 1930, H.R. 1758, S. 1092, and S. 1351.

Immigration Policy for Professional Workers

Introduction

The economic prosperity of the 1990s fueled a drive to increase the levels of employment-based immigration. The nation enjoyed its longest economic expansion, and the unemployment rate had remained low. Both the Congress and the Federal Reserve Board then expressed concern that a scarcity of labor could curtail the pace of economic growth. A primary legislative response was to increase the supply of foreign temporary professional workers through FY2003.

Although Congress enacted legislation in 1998 to increase the number of visas for temporary foreign workers who have professional specialties, commonly known as H-1B visas, that annual ceiling of 115,000 visas was reached months before FY1999 and FY2000 ended. Many in the business community, notably in the information technology area, once more urged that the ceiling be raised. Congress, again striving to balance the needs of U.S. employers with employment opportunities for U.S. residents, enacted legislation to raise the annual ceiling to 195,000 for three years and to expand education and training programs (P.L. 106-313, S. 2045; and P.L. 106-311, H.R. 5362).

In the early 2000s, the economic downturn in the information technology sector appeared to have diminished demand for H-1B workers in that sector and raised new questions about the lay-offs of H-1Bs nonimmigrants. When the H-1B annual numerical limits reverted to 65,000, the 108th Congress weighed whether to extend the increases as the admissions once again surpass the statutory limit. The FY2004 limit was reached in mid-February 2004, and the FY2005 limit was reached on

October 1, 2004, the first day of the fiscal year. The inclusion of H-1B provisions in free trade agreements (P.L. 108-77 and P.L. 108-78) as well as national security concerns sparked additional debate.

Title IV of P.L. 108-447, the Consolidated Appropriations Act for FY2005, exempts up to 20,000 aliens holding a master's or higher degree from the cap on H-1B visas. On August 12, 2005, USCIS announced that it has received enough H-1B petitions to meet the cap for FY2006. Concerns in the business community that a scarcity of qualified professional and technical workers may slow economic growth or encourage outsourcing of technical jobs has renewed effort to increase H-1B visas.

In the 109th Congress, Title IV of S. 2454, which Senate Majority Leader Bill Frist introduced, Title V in S.Amdt. 3192 to S. 2454 (offered by Senate Judiciary Chairman Specter), and Title V in the Comprehensive Immigration Reform Act (S. 2611/S. 2612) would have exempted aliens who have earned an advanced degree in science, technology, engineering, or math from an accredited university in the United States from the numerical limits of H-1Bs. In addition, S. 2611/S. 2612 would have raised the annual numerical limit on H-1B visas from 65,000 to 115,000 and would have established a formula on which to calculate future admissions.

Temporary Foreign Professional (H-1B) Workers

A nonimmigrant is an alien legally in the United States for a *specific purpose* and a *temporary period of time*. There are 70 nonimmigrant visa categories specified in the Immigration and Nationality Act (INA), and they are commonly referred to by the letter that denotes their section in the statute.¹ The major nonimmigrant category for temporary workers is the H visa. The largest classification of H visas is the H-1B workers in specialty occupations.²

Any employer wishing to bring in an H-1B nonimmigrant must attest in an application to the Department of Labor (DOL) that the employer will pay the nonimmigrant the greater of the actual wages paid other employees in the same job or the prevailing wages for that occupation; the employer will provide working conditions for the nonimmigrant that do not cause the working conditions of the other employees to be adversely affected; and, there is no strike or lockout. The employer also must post at the workplace the application to hire nonimmigrants. Firms categorized as H-1B dependent (generally if at least 15% of the workforce are H-1B workers) must also attest that they have attempted to recruit U.S. workers and that

¹ For a full discussion and analysis of nonimmigrant visas, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

² The regulations define "specialty occupation" as requiring theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, law, accounting, business specialties, theology and the arts, and requiring the attainment of a bachelor's degree or its equivalent as a minimum. Law and regulations also specify that fashion models deemed "prominent" may enter on H-1B visas.

they have not laid off U.S. workers 90 days prior to or after hiring any H-1B nonimmigrants.

DOL reviews the application for completeness and obvious inaccuracies. Only if a complaint subsequently is raised challenging the employer's application will DOL investigate. If DOL finds the employer failed to comply, the employer may be fined, may be denied the right to apply for additional H-1B workers, and may be subject to other penalties.

The prospective H-1B nonimmigrants must demonstrate to the U.S. Citizenship and Immigration Services Bureau (USCIS) in the Department of Homeland Security that they have the requisite education and work experience for the posted positions. USCIS then approves the petition for the H-1B nonimmigrant (assuming other immigration requirements are satisfied) for periods up to three years; an alien can stay a maximum of six years on an H-1B visa.³

Those H-1B applicants who live abroad must then obtain a visa to enter the United States from the Bureau of Consular Affairs in the Department of State. The Department of Commerce screens H-1B visa applicants from countries of concern (e.g., China, India, Iran, North Korea, Pakistan, Sudan, and Syria) to identify those who may be working in controlled technologies, such as advanced computer, electronic, telecommunications or information security technologies that could be used to upgrade military capabilities. Those already in the United States legally, typically foreign students, do not need to obtain another visa and simply change their immigration status to H-1B with the USCIS.⁴

Other Categories of Professional Foreign Workers⁵

Permanent Employment-Based Immigration. Many people confuse H-1B nonimmigrants with permanent immigration that is employment-based.⁶ If an employer wishes to hire an alien to work on a permanent basis in the United States,

³ At the end of FY2003, the provision requiring the employer to pay a \$1,000 fee for every H-1B nonimmigrant initially admitted, getting an extension, and changing employment or nonimmigrant status expired. This fee had been allocated to DOL for job training and to the National Science Foundation for scholarships and grants. For more on this issue see CRS Report RL31973, *Programs Funded by the H-1B Visa Education and Training Fee and Labor Market Conditions for Information Technology (IT) Workers*, by Linda Levine.

⁴ For more on visa procedures and the grounds for exclusion, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

⁵ B-1 nonimmigrants are visitors for business purposes and are required to be seeking admission for activities other than purely employment or hire. To be classified as a visitor for business, an alien must receive his or her salary from abroad and must not receive any remuneration from a U.S. source other than an expense allowance and reimbursement for other expenses incidental to temporary stay. Foreign nationals who are treaty traders enter on the E-1 visa, while those who are treaty investors use the E-2 visa.

⁶ The other potentially confusing category is the "O" nonimmigrant visa for persons who have extraordinary ability in the sciences, arts, education, business or athletics demonstrated by sustained national or international acclaim.

the alien may petition to immigrate to the United States through one of the employment-based categories. The employer “sponsors” the prospective immigrant, and if the petition is successful, the alien becomes a legal permanent resident. Many H-1B nonimmigrants may have education, skills, and experience that are similar to the requirements for three of the five preference categories for employment-based immigration: priority workers — i.e., persons of extraordinary ability in the arts, sciences, education, business, or athletics, outstanding professors and researchers, and certain multinational executives and managers (first preference); members of the professions holding advanced degrees or persons of exceptional ability (second preference); and skilled workers with at least two years training and professionals with baccalaureate degrees (third preference).⁷

Employment-based immigrants applying through the second and third preferences must have job offers for positions in which the employers have obtained labor certification. The labor certification is intended to demonstrate that the immigrant is not taking jobs away from qualified U.S. workers, and many consider the labor certification process far more arduous than the attestation process used for H-1B nonimmigrants.⁸ More specifically, the employer who seeks to hire a prospective immigrant worker petitions USCIS and DOL on behalf of the alien. The prospective immigrant must demonstrate that he or she meets the qualifications for the particular job as well as the preference category. If DOL determines that a labor shortage exists in the occupation for which the petition is filed, labor certification will be issued. If there is not a labor shortage in the given occupation, the employer must submit evidence of extensive recruitment efforts in order to obtain certification.⁹

Intracompany Transfers (L Visas). There have been a series of media reports that firms are opting to bring in foreign professional workers on L-1 visas rather than the H-1B visa for professional specialty workers.¹⁰ Intracompany transferees who work for an international firm or corporation in executive and managerial positions or have specialized product knowledge are admitted on the L-1 visas. Their immediate family (spouse and minor children) are admitted on L-2 visas. The prospective L nonimmigrant must demonstrate that he or she meets the qualifications for the particular job as well as the visa category. The alien must have been employed by the firm for at least six months in the preceding three years in the capacity for which the transfer is sought. The INA does not require firms who wish

⁷ Third preference also includes 10,000 “other workers” (i.e., unskilled workers) with occupations in which U.S. workers are in short supply.

⁸ Certain second preference immigrants who are deemed to be “in the national interest” are exempt from labor certification.

⁹ See CRS Report RS21520, *Labor Certification for Permanent Immigrant Admissions*, by Ruth Ellen Wasem.

¹⁰ For examples, see “L1s Slip Past H-1B Curbs,” *eWeek*, January 6, 2003; “A Loophole as Big as a Mainframe,” *Business Week*, March 10, 2003; “Displaced Americans,” *Washington Times*, March 14, 2003; and, “Magna Cum Unemployed,” *Computerworld*, April 28, 2003.

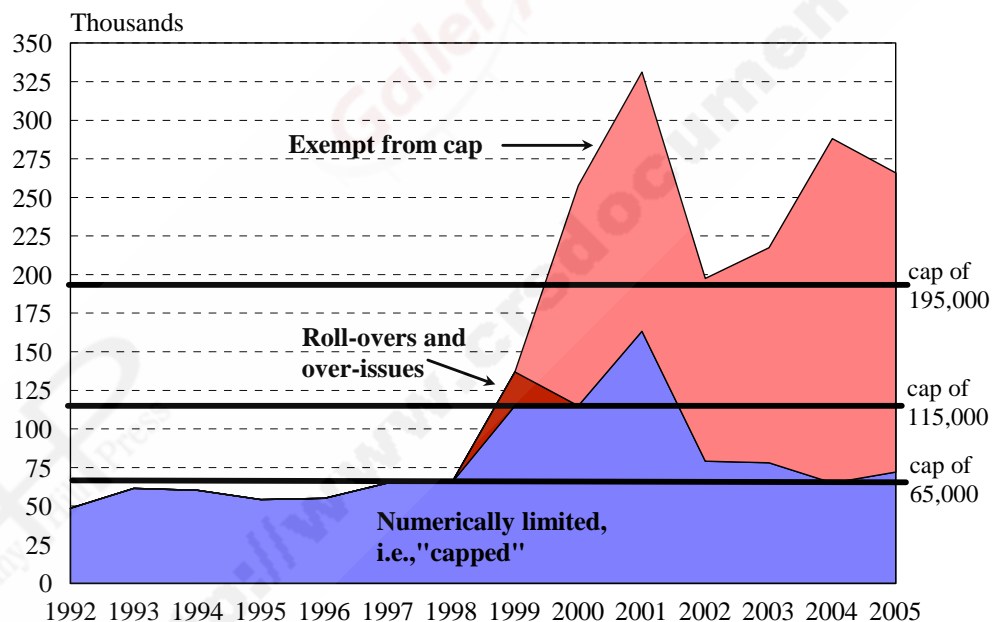
to bring L intracompany transfers into the United States to meet any labor market tests in order to obtain a visa for the transferring employee.¹¹

Analysis of H-1B Admissions

Trends in H-1B Entries

Preliminary data indicate that 266,000 H-1B petitions were approved in FY2005. The number of petitions approved for H-1B workers escalated in the late 1990s and peaked in FY2001 at 331,206 approvals (**Figure 1**). Data from the DHS Office of Immigration Statistics (hereafter referred to as DHS Immigration Statistics) illustrate that the demand for H-1B visas continued to press against the statutory ceiling, even after Congress increased it to 115,000 for FY1999-FY2000 and to 195,000 for FY2001-FY2003. The number of H-1B petitions approved dropped to 197,537 in FY2002.

Figure 1. H-1B Petitions Approved, FY1992-FY2005



Source: CRS presentation of data from the U.S. Citizenship and Immigration Services and the former Immigration and Naturalization Service. FY2004 and FY2005 data are preliminary, and subsequent years have not been released.

Because of statutory changes made by P.L. 106-313, which are discussed below, most H-1B petitions are now exempt from the ceiling, as **Figure 1** illustrates. Only 79,100 H-1B approvals fell under the cap in FY2002. DHS Immigration Statistics reports that 103,584 petitions were approved for newly arriving H-1B workers in

¹¹ For background and analysis on L visas, see CRS Report RL32030, *Immigration Policy for Intracompany Transfers (L Visa): Issues and Legislation*, by Ruth Ellen Wasem.

FY2002. There were also 93,953 petitions approved in FY2002 for H-1B workers who were continuing to be employed after their initial H-1B visa had expired. In FY2001, there were 163,200 approved petitions that counted under the cap. The former INS reported that 201,079 petitions for newly arriving H-1B workers were approved in FY2001. That year INS also reported that 130,127 H-1B workers already in the United States were approved for continuing employment, up from 120,853 continuing H-1B workers approved in FY2000. In FY2005, the 72,000 H-1Bs worked came in under the cap, which was higher than 65,000 because of roll-overs from FY2004.

The INA sets a 65,000 numerical limit on H-1B visas that was reached for the first time prior to the end of FY1997, with visa numbers running out by September 1997. The 65,000 ceiling for FY1998 was reached in May of that year, and — despite the statutory increase — the 115,000 ceiling for FY1999 was reached in June 2002. About 5,000 cases approved in FY1997 after the ceiling was hit were rolled over into FY1998. More than 19,000 cases that were approved in FY1998 after the ceiling was hit were rolled over to FY1999.

The former INS admitted in autumn 1999 that thousands of H-1B visas beyond the 115,000 ceiling were approved in FY1999, allegedly as a result of problems with the automated reporting system. Then INS hired KPMG Peat Marwick to audit and investigate how the problems occurred and how pervasive they may be. KPMG Peat Marwick determined that between 21,888 and 23,3385 H-1B visas (depicted in **Figure 1**) were issued over the ceiling in FY1999. Meanwhile, in mid-March 2000, INS announced the FY2000 ceiling of 115,000 would be reached by June. Ultimately, INS reported that 136,787 petitions for newly arriving H-1B workers were approved in FY2000.

USCIS data indicate that 217,340 H-1B petitions were approved in FY2003, but that only about 78,000 were subject to the cap of 195,000. The FY2004 limit of 65,000 was reached in mid-February. On October 1, 2004 — the first day of the fiscal year — USCIS announced that it had reached the cap, which that year was 58,200 because of visas set aside by the U.S.-Chile and U.S.-Singapore Free Trade Agreements (as discussed below). FY2006 data on H-1B admissions (capped and non-capped) are not available.

Recent H-1B Capped Petitions

USCIS determined that approximately 119,193 of the H-1B petitions received on April 2 and 3, 2007 (the first days it was accepting petitions) were subject to the FY2008 cap of 65,000. It conducted a computer-generated random selection of cap-subject petitions filed on April 2-3 to determine which cases would be accepted for processing.¹² This virtually immediate reaching of the cap has become the pattern. On August 12, 2005, USCIS announced that it has received enough H-1B

¹² Petitioners may re-submit petitions on April 1, 2008 when H-1B visas become available for FY2009. This is the earliest date for which an employer may file a petition requesting FY2009 H-1B employment with a start date of October 1, 2008. U.S. Citizenship and Immigration Services, Press Release, *USCIS Reaches FY 2008 H-1B Cap*, April 3, 2007.

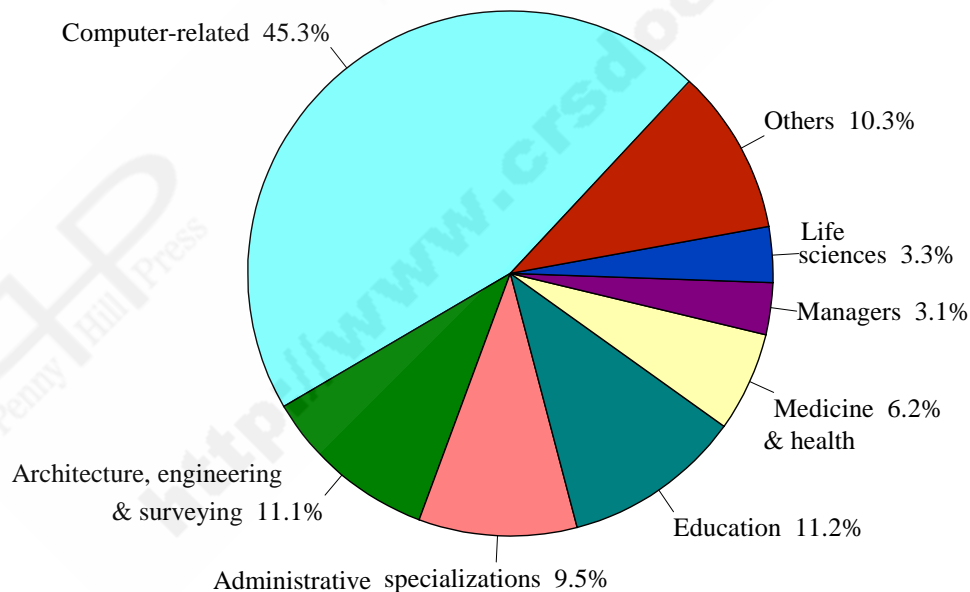
petitions to meet the cap for FY2006. On June 1, 2006, the U.S. Citizenship and Immigration Services announced that the FY2007 H-1B cap had been reached.

USCIS also receives enough H-1B petitions that qualify for the exemption from the H-1B numerical limitations for foreign workers with a U.S.-earned master's or higher degree that the 20,000 cap is quickly met. USCIS determined that the "final receipt date" for the FY2006 cap-exempt H-1B petitions was January 17, 2006.¹³ On May 4, 2007, USCIS announced that it has received enough H-1B petitions requesting exemptions from the FY2008 H-1B cap for "foreign workers who have earned a master's degree or higher from a U.S. institution of higher education" to meet the congressionally mandated exemption limit of 20,000. USCIS has determined that the "final receipt date" for these exempt H-1B petitions was April 30, 2007.¹⁴

Characteristics of Recent H-1B Nonimmigrants

According to data from the DHS Immigration Statistics for FY2001, over half (55.3%) of H-1B new arrivals (i.e., those who came in under the numerical cap) were employed in computer-related fields; however, this percentage fell to 27.6% in

Figure 2. Leading Occupations of Newly Arriving H-1B Workers



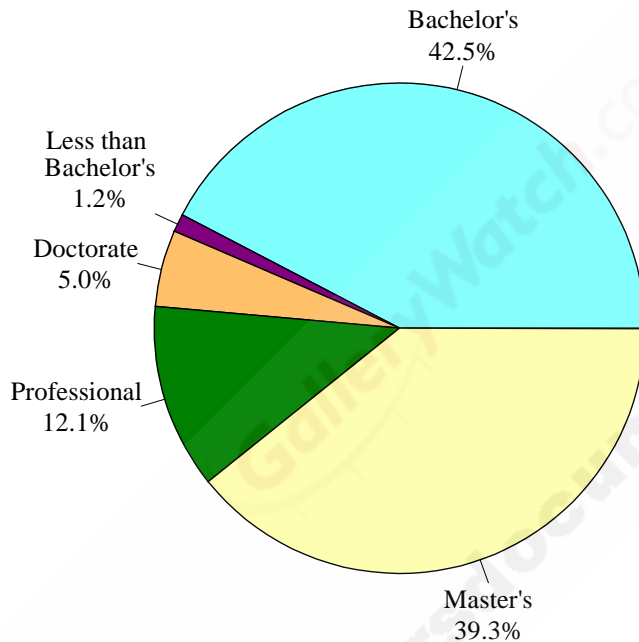
Source: CRS presentation of data from U.S. Citizenship and Immigration Services, *Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2005*.

¹³ U.S. Department of Homeland Security, Press Release, *USCIS Reaches H-1B Exemption Cap for Fiscal Year 2006*, January 18, 2006.

¹⁴ U.S. Citizenship and Immigration Services, Press Release, *USCIS Reaches H-1B Exemption Cap for Fiscal Year 2008*, May 4, 2007.

FY2003.¹⁵ By FY2005, as **Figure 2** illustrates, the trend reversed, and 45.3% of H-1B new arrivals were employed in computer-related fields. Educators follow with 11.2% of the newly approved H-1B petitions in FY2005. Architects, engineers and surveyors (11.1%), administrative specializations (9.5%), and those working in medicine and health (6.2%) and life sciences (3.3%) round out the occupations with notable numbers of H-1B new arrivals in FY2005.¹⁶

Figure 3. Educational Attainment of Newly Arriving H-1B Workers



Source: CRS presentation of data from U.S. Citizenship and Immigration Services, *Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2005*.

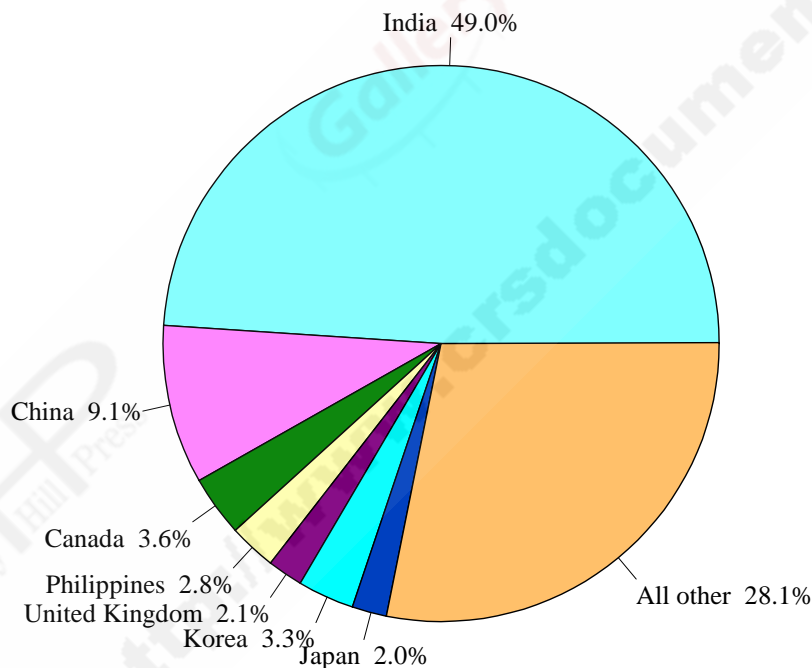
¹⁵ Prior to 1999, the only data available on the occupations filled by H-1B nonimmigrants were the labor attestation applications filed by prospective employers. These data were imperfect because they included multiple openings and did not reflect actual H-1B admissions. According to the DOL data on approved attestations, therapists — mostly physical therapists, but also some occupational therapists, speech therapists, and related occupations — comprised over half (53.5%) of those approved in FY1995. The number of attestations approved for therapists fell to one-quarter (25.9%) in FY1997. In FY1996 computer-related occupations became the largest category and continue to lead in job openings approved by DOL for H-1Bs, going from 25.6% in FY1995, to 41.5% in FY1996, to 44.4% of the openings approved in FY1997. The DOL data from October 1998 through May 1999 have systems analysts, programmers, and other computer-related occupations comprising 51% of all openings approved. For a fuller analysis of these DOL data and their limitations, see CRS Report 98-462, *Immigration and Information Technology Jobs: The Issue of Temporary Foreign Workers*, by Ruth Ellen Wasem and Linda Levine.

¹⁶ Although there is a special visa (H-1C) for nurses, those registered nurses who have baccalaureate degrees also may qualify for H-1B visas. CRS Report RS20164, *Immigration: Temporary Admission of Nurses for Health Shortage Areas (P.L. 106-95)*, by Joyce Vialet.

To obtain H-1B visas, nonimmigrants must demonstrate they have highly specialized knowledge in fields of human endeavor requiring the attainment of a bachelor's degree or its equivalent as a minimum. As **Figure 3** depicts, the most common degree attained by most H-1B new arrivals is a bachelor's degree or its equivalent (42.5%). More than one-third (39.3%) have earned master's degrees. Another 17.1% have either professional degrees or doctorates.¹⁷ Of those with less than a bachelor's degree, many are presumed to be the "prominent" fashion models who also are admitted as H-1B nonimmigrants.

India was the leading country of origin for newly arriving H-1B workers, comprising almost half (49.0%) of all of the new arrivals in FY2005. (**Figure 4**). Data previously released by DHS Immigration Statistics further estimate that nearly three-fourths of all of the systems analysts and programmers are from India. In terms of overall H-1B new arrivals in FY2005, China followed with 9.16%, and Canada was third (3.6%). Other countries at or near 2%-4% were the United Kingdom, Philippines, Korea, and Japan.

Figure 4. Country of Origin of Newly Arriving H-1B Workers



Source: CRS presentation of data from U.S. Citizenship and Immigration Services, *Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2005*.

¹⁷ According to data published by the U.S. Department of Education's National Center for Education Statistics, there were 232,300 nonresident aliens (i.e., foreign students) in degree-granting graduate programs in 2000, comprising 12.6% of student enrollment. Data on how many H-1Bs workers were educated in the United States are not available, but it is presumed that many H-1B workers did attend U.S. colleges and universities.

The median annual compensation of the newly arriving H-1B nonimmigrants dropped from \$50,000 in FY2001 to \$44,803 in FY2003, but climbed back to \$50,000 in FY2005. Half of all H-1B workers who came in under the numerical cap in FY2003 had median annual compensations ranging from \$35,000 to \$60,000. By FY2005, the mid-range was from \$41,000 to \$60,000. Fashion models had the highest reported median compensation — \$100,000 annually. Although few H-1B nonimmigrants were admitted in law and jurisprudence occupations, they had the second highest median compensation of \$76,000. Newly arriving H-1B nonimmigrants in computer-related occupations had median annual salaries of \$50,000 in FY2005, down from \$55,000 in FY2001.

The median compensation for those H-1B workers approved for continuing employment was much higher — \$60,000 annually in FY2005. Likewise, the median compensation for those H-1B workers approved for continuing employment in computer-related occupations in FY2005 — \$68,000 — was higher than their newly arriving counterparts, but remained under the median of \$69,000 in FY2001.

Pathways to Permanent Residence

The H-1B visa often provides the link for the foreign student (F-1 visa) to become legal permanent residence (LPR).¹⁸ Many anecdotal accounts tell of foreign students who are hired by U.S. firms as they are completing their programs. The employers obtain H-1B visas for the recent graduates, and if the employees meet expectations, the employers may also petition for the nonimmigrants to become LPRs through one of the employment-based immigration categories.¹⁹ Some policy makers consider this a natural and positive chain of events, arguing that it would be foolish to educate these talented young people only to make them leave to work for foreign competitors. Others consider this “F-1 to H-1B to LPR” pathway an abuse of the temporary element of nonimmigrant status and a way to circumvent the laws and procedures that protect U.S. workers from being displaced by immigrants.²⁰

¹⁸ For more discussion of legal permanent residence, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

¹⁹ DOL reports that nearly half the permanent employment-based immigrants converted from H-1B status. See U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration and Claims. *Immigration and America's Workforce for the 21st Century*. Washington, April 21, 1998; and CRS Report 98-462, *Immigration and Information Technology Jobs: The Issue of Temporary Foreign Workers*, by Ruth Ellen Wasem and Linda Levine.

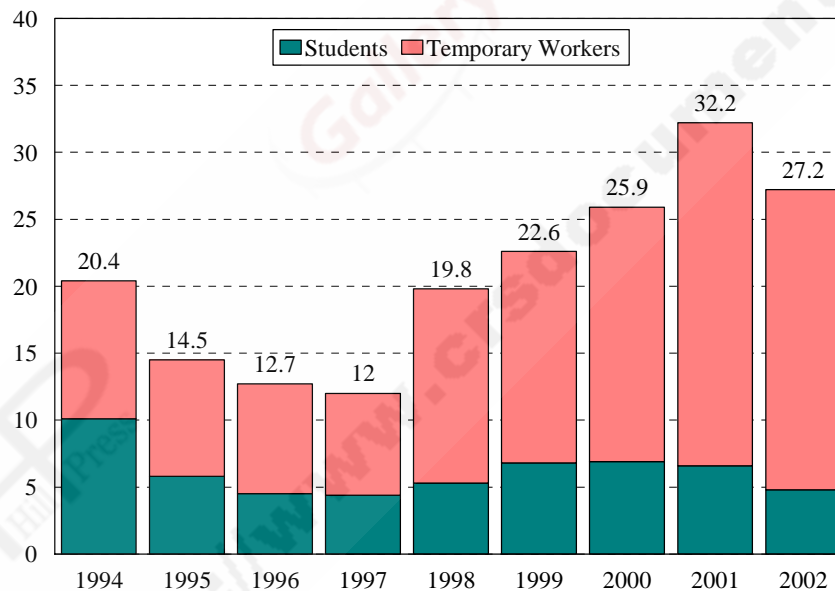
²⁰ During the 104th Congress and earlier, some observers maintained that many foreign students violate the intent of the provision that requires they have a foreign residence that they do not intend to abandon. Specifically, the practice of a foreign student petitioning to change status to nonimmigrant H-1B professional and specialty workers raised concerns. Fears that foreign students, as well as H-1Bs, were “leap frogging” the laws that protect U.S. workers from being displaced by immigrants prompted some to suggest that all foreign students and foreign temporary workers return home for two years to establish residency if they wish to return to the United States. This proposal circulated in the Senate, but it met with strong and varied opposition from the educational community and business interests.

(continued...)

Recent research by B. Lindsay Lowell of the Institute for the Study of International Migration estimates that approximately 7% of foreign students adjust to LPR status directly, and that additional 7% to 8% of students adjust to LPR status following a stint as an H nonimmigrant worker.²¹ In 2000, Lowell also conducted analysis of all H-1Bs who ultimately become LPRs and estimated that about half of them did so at that time.²²

In 1995, CRS analysis of INS data on employment-based admissions found that 43% of those adjusting status were either H-1Bs or accompanying H-4 immediate family members of the temporary worker. Another 14.4% of the employment-based adjustments were foreign students and the accompanying immediate family of foreign students. That analysis also found that H worker adjustments to LPR status had increased from 7,244 in FY1988 to 24,223 in FY1994 — an increase of more than 225% in six years — which was likely due in part to the change in the Immigration Act of 1990 to permit “dual intent” for H-1Bs.²³

Figure 5. Percent of LPRs Adjusting Status by Prior Student and Temporary Worker Category, FY1994-FY2002



Source: CRS presentation of DHS Office of Immigration Statistics data analyzed by Jeanne Batalova of the Migration Policy Institute (2006).

²⁰ (...continued)

Many argued it would just lead to abuses and increase incentives to manipulate the nonimmigrant visa process.

²¹ B. Lindsay Lowell, “Foreign Student Adjustment to Permanent Status in the United States,” Presentation at the International Metropolis Conference, 2005.

²² B. Lindsay Lowell, “H1-B Temporary Workers: Estimating the Population,” Institute for the Study of International Migration, Georgetown University, 2000.

²³ CRS Memorandum, “Nonimmigrant Pathways to Permanent Residence,” by Ruth Ellen Wasem, September 1995. (Available by request from author)

Although the USCIS asks what the last nonimmigrant status was of aliens who are adjusting to LPR status, there has been a data quality problem in recent years. According to the DHS Office of Immigration Statistics, the data collected on last nonimmigrant status are missing on more than 40% of the adjustment of status records.²⁴ Nonetheless, Jeanne Batalova of the Migration Policy Institute recently published analysis of the limited data that are available. Batalova's analysis finds that the percentage of foreign students adjusting has remained rather flat, if not diminishing, but that the percentage of adjustments who are H nonimmigrant workers has grown, notably from FY1998 through FY2002, as **Figure 5** illustrates.²⁵

Legislative Issues in the 110th Congress

Main Issues of Debate

Global Competition for Talent. Proponents of expanding H-1B admissions argue that H-1B workers are essential if the United States is to remain globally competitive and that employers should be free to hire the best people for the jobs.²⁶ They say that the education of students and retraining of the current workforce is a long-term approach, and they cannot wait to fill today's openings. Some point out that many mathematics, computer science, and engineering graduates of U.S. colleges and universities are foreign students and that we should keep that talent here. Others assert that H-1B workers help create jobs, either by ultimately starting their own information technology firms or by providing a workforce sufficient for firms to remain in the United States. Proponents of the increase also cite media accounts of information technology workers from India who prefer to work for companies in India and warn that the work will move abroad if action to increase H-1B visas is not taken.²⁷

Effects on U.S. Labor Market. Those opposing any further increases assert that there is no compelling evidence of a labor shortage in these professional areas that cannot be met by newly graduating students and by retraining the existing U.S. work force. They argue that the education of U.S. students and training of U.S. workers should be prioritized. Opponents also maintain that salaries and compensation would be rising if there is a labor shortage and if employers wanted to attract qualified U.S. workers. Some allege that employers prefer H-1B workers because they are less demanding in terms of wages and working conditions and that an industry's dependence on temporary foreign workers may inadvertently lead the brightest U.S. students to seek positions in fields offering more stable and lucrative

²⁴ E-mail correspondence from the DHS Office of Immigration Statistics, March 3, 2006.

²⁵ Migration Policy Institute, *The Growing Connection Between Temporary and Permanent Immigration Systems*, by Jeanne Batalova, January 2006.

²⁶ For example, see U.S. Chamber of Congress and Information Technology Association of America, joint letter to U.S. Senators from Randel K. Johnson and Jeff Lande, October 18, 2005.

²⁷ Pamela Constable, "India's Brain Drain Eases Off," *Washington Post*, September 14, 2000.

careers.²⁸ Many opposed to an increase in H-1B visas cite the GAO reports that document abuses of H-1B visas and recommend additional controls to protect U.S. workers²⁹

Labor Market Protections. Alternatively, some maintain that the H-1B ceiling is arbitrary and would not be necessary if more stringent protections for U.S. workers were enacted. They argue the question is not “how many” but “under what conditions.” Some would strengthen the anti-fraud provisions and would broaden the recruitment requirements and layoff protections enacted in 1998 for “H-1B dependent” employers to all employers hiring H-1B workers.³⁰ Others would reform the labor attestation and certification process and would make the labor market tests for nonimmigrant temporary workers comparable to those for immigrants applying for one of the permanent employment-based admissions categories to level the playing field.

Enforcement Authority. GAO has issued reports that recommended more controls to protect workers, to prevent abuses, and to streamline services in the issuing of H-1B visas. GAO concluded that the DOL has limited authority to question information on the labor attestation form and to initiate enforcement activities. GAO also concluded that the former INS’s handling of H-1B petitions had potential for abuses.³¹ Some would expand the investigative and enforcement authority of DOL over H-1B employers and would increase the penalties for employers violating the H-1B provisions.

Inclusion in Free Trade Agreements. Negotiators for the Uruguay Round Agreements of the General Agreement on Tariffs and Trade (GATT), completed in 1994 and known as the General Agreement on Trade in Services (GATS), included specific language on temporary professional workers. This language references §101(a)(15)(H)(i)(b) of INA and commits the United States to admitting 65,000 H-1B visa holders each year under the definition of H-1B specified in GATS.³² Some have

²⁸ CRS Report RL30140, *An Information Technology Labor Shortage? Legislation in the 106th Congress*, by Linda Levine; and CRS Report 98-462, *Immigration and Information Technology Jobs: The Issue of Temporary Foreign Workers*, by Ruth Ellen Wasem and Linda Levine.

²⁹ For example, see AFL-CIO Legislative Alert, letter to U.S. Senators from William Samuel, October 19, 2005.

³⁰ According to the testimony of Jacquelyn Williams-Bridgers, Inspector General of the U.S. Department of State, “[F]raud involving the H-1 visa program often involves large scale and complex operations.” U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration and Claims, *Oversight Hearing on Nonimmigrant Visa Fraud*, May 5, 1999.

³¹ U.S. General Accounting Office, *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*, GAO/HEHS-00-157, September 2000; and U.S. General Accounting Office, *H-1B Foreign Workers: Better Tracking Needed to Help Determine H-1B Program’s Effects on U.S. Workforce*, GAO-03-883 September 2003.

³² General Agreement on Trade in Services (GATS), Uruguay Round Trade Agreements, Schedule of Specific Commitments. For legal analysis, see CRS Congressional Distribution (continued...)

expressed concern that trade agreements include language on temporary professional workers that bars the United States from future statutory changes to H-1B visas as well as other temporary business and worker nonimmigrant categories. Some assert that the Office of the U.S. Trade Representative (USTR) has overstepped its authority by negotiating immigration provisions in FTAs and are voicing opposition to trade agreements that would prevent Congress from subsequently revising immigration law on temporary professional nonimmigrants. Proponents of these trade agreements point out that they are merely reflecting current immigration law and policy. They argue that the movement of people is subsumed under the broader category of “provision of services” and thus an inherent part of any free trade agreement. Such agreements on the flow of business people and workers, they maintain, are essential to U.S. economic growth and business vitality.³³

National Security. Some concerns have been raised about the need to monitor H-1B workers, particularly those whose employment gives them access to controlled technologies (i.e., those that could be used to upgrade military capabilities). GAO found that 15,000 foreign nationals from countries of concern (e.g., China, India, Iran, Iraq, North Korea, Pakistan, Sudan, and Syria) had changed their immigration status to an H-1B visa in 2001 to obtain jobs that could have involved controlled technologies without the Department of Commerce screening and called for a reexamination of policies that give foreign nationals access to such technology.³⁴ Supporters of the current policy maintain that safeguards which are more than adequate are already in place and point out that all foreign nationals who seek to enter the United States are screened for potential national security risks by both the Department of State and the Department of Homeland Security.

Legislative Action

The legislation in the 110th Congress that would revise the H-1B visas builds on over a decade of legislative action on this issue. For a review of past legislative proposals and laws enacted, see **Appendix**, “Brief Legislative History of H-1B Visa.”

Comprehensive Immigration Reform. S. 1348, the Comprehensive Immigration Reform Act of 2007 (offered by Majority Leader Harry Reid as a placeholder for floor debate on comprehensive immigration reform), would raise the statutory limit on H-1B visas from 65,000 to 115,000 and would escalate this ceiling by 20% each year subsequent to a fiscal year when the numerical limits were reached. The bill also would exempt H-1Bs who had earned an advanced degree from an accredited university in the United States from the statutory numerical limits, and the

³² (...continued)

Memorandum, *U.S. Immigration-Related Obligations Under the WTO General Agreement on Trade in Services*, by Jeanne J. Grimmer, May 12, 1998.

³³ For further analysis, see CRS Report RL32982, *Immigration Issues in Trade Agreements*, by Ruth Ellen Wasem.

³⁴ U.S. General Accounting Office, *Export Controls: Department of Commerce Controls over Transfers of Technology to Foreign Nationals Needs Improvement*, GAO-02-972, September 2002.

exemption for up to 20,000 H-1B visas would change from aliens holding master's or higher degree from U.S. institutions to foreign institutions.³⁵

S. Amdt 1150, which Senators Ted Kennedy and Arlen Specter have offered as a substitute to S. 1348, includes a variety of revisions to the H-1B provisions in the INA, according to the May 18 discussion draft. Among other things, it reportedly would raise the FY2008 cap to 115,000 and provide that in subsequent years DHS may issue additional H-1B visas up to a 180,000 cap. It also would require the submission of W-2 forms of the Internal Revenue Service as part of the H-1B renewal petition.

In addition, S. Amdt 1150 (according to the May 18 discussion draft) draws on the labor market protections proposed in S. 1035, the H-1B and L-1 Visa Fraud and Abuse Prevention Act of 2007 introduced by Senators Durbin and Grassley. Specifically, both proposals would require that employers seeking to hire an H-1B visa holder pledge that they have made a good-faith effort to hire U.S. workers first and that the H-1B visa holder will not displace a U.S. worker. Both S. 1035 and S. Amdt 1150 would prohibit employers from hiring H-1B employees who are then outsourced to other companies and would prohibit companies from hiring H-1B employees if they employ more than 50 people and more than 50% of their employees are H-1B visa holders. Moreover, S. 1035 and S. Amdt 1150 would give DOL authority to review employers' H-1B applications for "clear indicators of fraud or misrepresentation of material fact" and would give DOL more authority to conduct employer investigations.

Other H-1B Legislation. Senator John Cornyn and Representative John Shaddeh have introduced companion bills — S. 1038/H.R. 1930, the Securing Knowledge, Innovation, and Leadership Act of 2007. This legislation would amend the INA to exempt from the annual H-1B visa cap an alien who has (1) earned a master's or higher degree from an accredited U.S. university; or (2) been awarded a medical specialty certification based on post-doctoral training and experience in the United States. The bills further would increase the annual H-1B cap, with an escalator clause that would provide a 20% increase for the following year if the previous year's ceiling is reached.

Representative David Wu has introduced H.R. 1758, which would amend the INA to provide H-1B visas in each of FY2008 through FY2012 for 65,000 to persons who have a master's or Ph.D. degree and meet the requirements for such status. The employers of these additional H-1B workers would be required to make scholarship payments to institutions of higher education for undergraduate and postgraduate education.

Senator Chuck Hagel has introduced S. 1092, the High-Tech Worker Relief Act of 2007, which would amend the INA to increase the number of annual H-1B for to 115,000 in FY2007 and 195,000 in FY2008. It also would eliminate the 20,000 annual cap on aliens with master's or higher degrees who can enter the United States without being subject to H-1B visa limits.

³⁵ S. 1348 is almost identical to S. 2611, which the Senate passed in the 109th Congress.

Senator Judd Gregg has introduced S. 1351, the H-1B Visa Program Modernization Act of 2007, which would increase H-1b visas to 150,00 in FY2008 with an escalator clause for subsequent years. It would strengthen labor market protections for U.S. workers competing with potential H-1B workers and would expand the investigative and enforcement authority of DOL.



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Appendix. Brief Legislative History Of H-1B Visa

When Congress enacted the Immigration and Nationality Act of 1952, the H-1 nonimmigrants were described as aliens of “distinguished merit and ability” who were filling positions that were temporary.³⁶ Nonimmigrants on H-1 visas had to maintain a foreign residence. Over the years, Congress made a series of revisions to the H-1 visa category and in 1989, split the H-1 visa into (a) and (b).

The Immigration Act of 1990 (P.L. 101-649) established the main features of H-1B visa as it is known today. Foremost, §205 of P.L. 101-649 replaced “distinguished merit and ability” with the “specialty occupation” definition. It added labor attestation requirements and the numerical limit of 65,000 on H-1B visas issued annually. It also dropped the foreign residence requirement and allowed for “dual intent,” i.e., an exception to the INA for H-1B aliens to obtain an H-1B visa simultaneous with seeking LPR status.

American Competitiveness and Workforce Improvement Act³⁷

Enacted as the 105th Congress drew to a close, Title IV of the FY1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (P.L. 105-277) raised the H-1B ceiling by 142,500 over three years and contained provisions aimed at correcting some of the perceived abuses. Most importantly, the 1998 law added new attestation requirements for recruitment and lay-off protections, but only requires them of firms that are “H-1B dependent” (generally at least 15% of the workforce are H-1Bs). All firms now have to offer H-1Bs *benefits* as well as wages comparable to their U.S. workers. Education and training for U.S. workers was to be funded by a \$500 fee paid by the employer for each H-1B worker hired. The ceiling set by the new law was 115,000 in both FY1999 and FY2000, 107,500 in FY2001, and would revert back to 65,000 in FY2002.

The House (H.R. 3736) and the Senate (S. 1723) had offered proposals to raise the H-1B ceiling for the next few years, though each bill approached the increase differently. Each bill would have added whistle blower protections for individuals who report violations of the H-1B program and would have increased the penalties for willful violations of the H-1B program. Many considered the provisions aimed at protecting U.S. workers as the most controversial in H.R. 3736 as it was reported by the House Judiciary Committee. While S. 1723 as passed by the Senate did add provisions penalizing firms that lay off U.S. workers and replace them with H-1B workers if the firms have violated other attestation requirements, amendments that would have required prospective H-1B employers to attest that they were not laying off U.S. workers and that they tried to recruit U.S. workers failed on the Senate floor. H.R. 3736 as reported included lay-off protection and recruiting requirement provisions similar to those that the Senate rejected. On the other hand, S. 1723 included language that would have expanded the education and training of U.S.

³⁶ P.L. 414, 82nd Congress.

³⁷ For a full account, see CRS Report 98-531, *Immigration: Nonimmigrant H-1B Specialty Worker Issues and Legislation*, by Ruth Ellen Wasem.

students and workers in the math, science, engineering and information technology fields.

Pre-conference discussions between Senate and House Republicans late in July 1998 yielded a compromise on key points of difference, but it did not address all the Clinton Administration's concerns regarding the education and training of U.S. workers and reform of the existing program. After a presidential veto threat of the Republican compromise, Republicans began working out a compromise with the White House, and this language passed as the substitute when H.R. 3736 came to the House floor on September 24, 1998. The House-passed language was then folded into P.L. 105-277.

American Competitiveness in the Twenty-First Century Act

On October 3, 2000, both chambers of Congress passed the American Competitiveness in the Twenty-First Century Act of 2000 (S. 2045) with bipartisan support, and President Clinton signed the new law (P.L. 106-313) on October 17. The Senate had debated the legislation for several days, though much of the debate centered on procedural issues — specifically whether amendments that would legalize certain aliens (mostly Central Americans and Liberians) would be permitted.³⁸ The House passed S. 2045 under a suspension of the rules shortly after the Senate passed it.

The language that passed was a substitute version offered by Judiciary Committee Chairman Orrin Hatch with bipartisan support. It includes many of the same features as the version of the bill reported earlier by the Senate Judiciary Committee.³⁹ It raises the number of H-1B visas by 297,500 over three years, FY2000-FY2002. Specifically, it adds 80,000 new H-1B visas for FY2000, 87,500 visas for FY2001, and 130,000 visas for FY2002. It also authorizes additional H-1B visas for FY1999 to compensate for the excess inadvertently approved that year. In addition, P.L. 106-313 excludes from the new ceiling all H-1B nonimmigrants who work for universities and nonprofit research facilities. A provision that would have exempted H-1B nonimmigrants with at least a master's degree from the numerical limits was dropped from the final bill. The new law also makes a major change in the law governing the permanent admission of immigrants by eliminating the per-country ceilings for employment-based immigrants. It also has provisions that facilitate the portability of H-1B status for those already here lawfully and requires a study of the "digital divide" on access to information technology.

The new law makes changes in the use of the H-1B fees for education and training, notably earmarking a portion of DOL training funds for skills that are in information technology shortage areas and adding to the NSF portion a K-12 math, science and technology education grant program. Because S. 2045 originated in the Senate, it did not contain revenue provisions. Separate legislation to increase the H-1B fee from \$500 to \$1,000 (P.L. 106-311, H.R. 5362) passed the House on October

³⁸ For a fuller discussion and legislative tracking of these immigration issues, see CRS Report RS20836, *Immigration Legislation in the 106th Congress*, by Ruth Ellen Wasem.

³⁹ The Judiciary Committee report (S.Rept. 106-260) was filed on April 11, 2000.

6, the Senate on October 10, and was signed by President Clinton on October 17. The conference agreement on the FY2001 Commerce, Justice, State appropriations bill (H.R. 4942, H.Rept. 106-1005) includes a provision that would authorize another H-1B fee that employers would pay for expedited servicing of the petitions.

Prior to passage of S. 2045, the House Judiciary Committee had been taking a somewhat different approach to the H-1B issue. After mark-up considerations for several days, the House Judiciary Committee had ordered Chairman Lamar Smith's bill, the Technology Worker Temporary Relief Act (H.R. 4227), reported with amendments on May 17, 2000. H.R. 4227 would have eliminated the numerical limit on H-1B visas for FY2000 and would have allowed for temporary increases (i.e., enabling employers to hire H-1B workers outside of the numerical ceilings) in FY2001 and FY2002 if certain conditions were met. These conditions included demonstrating that there was a net increase from the previous year in the median wages (including cash bonuses and similar compensation) paid to the U.S. workers on the payroll. H.R. 4227 also would have revised the requirements employers of H-1B workers must meet, notably adding a \$40,000 minimum salary and new reporting requirements. Like S. 2045, universities, elementary and secondary schools, and nonprofit research facilities would have been exempt from most of these new requirements. H.R. 4227 would have required all H-1B employers to file W-2 forms and add anti-fraud provisions (including the requirement that the H-1B have full-time employment) funded by a \$100 fee. An additional \$200 processing fee would also have been collected and allocated to INS and DOL to expedite the processing of H-1B petitions and attestations. Like S. 2045, H.R. 4227 included provisions that would facilitate the portability of H-1B status for those already here lawfully. The bill also would have instructed the U.S. Government Accountability Office (formerly General Accounting Office, GAO) to study the recruitment measures — particularly among under-represented groups — and training efforts undertaken by employers. The House Judiciary Committee issued the bill report (H.Rept. 106-692) on June 23.

The House Committee on Education and the Workforce considered the education and training provisions of the H-1B statute and marked up legislation introduced by its chairman William Goodling (H.R. 4402) on May 10, 2000. As reported on May 25, 2000 (H.Rept. 106-642), H.R. 4402 would have directed the Secretary of Labor to use 75% of the funding she receives from the H-1B education and training fee account to provide training in the skilled shortage occupations related to specialty occupations (as defined under INA's H-1B provisions). The bill would have transferred 25% of the funds from the fee account to the Department of Education to augment a student loan forgiveness program for teachers of mathematics, science, and reading.

Representatives David Dreier and Zoe Lofgren introduced H.R. 3983, which would have added an additional 362,500 over FY2001-FY2003. Specifically, it would have raised the ceiling by 200,000 for three years and would have set aside 60,000 visas annually through FY2003 for persons with master's degrees. It would have required employers to file W-2 forms with DOL for each H-1B worker employed. Like P.L. 106-313, H.R. 3983 would have eliminated the per-country ceilings for permanent employment-based admissions. It would have enabled employers to use Internet recruiting to meet labor market recruitment requirements and would have established an Internet web-based tracking system for immigration-

related petitions. Like P.L. 106-311, this bill would have increased the \$500 fee for education and training to \$1,000, and it would have modified the scholarship and training program requirements, including the addition of student loan forgiveness in special cases.

Representative Sheila Jackson-Lee, the ranking member of the House Judiciary Immigration and Claims Subcommittee, introduced H.R. 4200, which would have set the ceiling at 225,000 annually for FY2001-FY2003, with the condition that it would have fallen back to 115,000 if the U.S. unemployment rate exceeds 5% and 65,000 if the unemployment rate exceeds 6%. H.R. 4200 would have allocated 40% of the H-1B visas in FY2000 to nonimmigrants who have at least attained master's degrees and would have increased that allocation to 50% in FY2001 and 60% in FY2002 (with 10,000 set aside each year for persons with Ph.D. degrees). The bill also provided additional visas retroactively for those inadvertently issued in excess of the FY1999 ceiling. It would have added a sliding fee scale based upon the size of the firm seeking H-1B workers and would have revised the uses of the fees collected for education and training programs, including programs for children. Among other provisions, it further would have modified the attestation requirements of employers seeking to hire H-1B workers.

House Judiciary Immigration and Claims Subcommittee Chairman Lamar Smith had previously introduced H.R. 3814, which would have added 45,000 H-1B visas for FY2000 if the employer met certain conditions. It would also have raised the fee to \$1,000 for scholarships and training, with most of the revenue going to merit-based scholarships for students. H.R. 3814 also included provisions for expedited processing of H-1B petitions funded by a \$250 fee and would have added anti-fraud provisions (including the requirement that the H-1B have full-time employment) funded by a \$100 fee. It would have given the Secretary of State responsibility for maintaining records on H-1B nonimmigrants.

Other bills pertaining to the H-1B issues were introduced. The New Workers for Economic Growth Act (S. 1440/H.R. 2698) introduced by Senator Phil Gramm and Representative Dave Dreier would have raised the ceiling of H-1B admissions to 200,000 annually FY2000-FY2002. Those H-1B nonimmigrants who have at least a master's degree and earn at least \$60,000 would not have counted toward the ceiling. Those who have at least a bachelor's degree and are employed by an institution of higher education would have been exempted from the attestation requirements as well as the ceiling. Senator John McCain introduced S. 1804, which, among other initiatives, would have eliminated the H-1B ceiling through FY2006. Representative David Wu introduced H.R. 3508, which would have increased the ceiling by 65,000 annually through 2002 for those with master's or Ph.D. degrees, provided the employers establish scholarship funds.

The Bringing Resources from Academia to the Industry of Our Nation Act (H.R. 2687), introduced by Representative Zoe Lofgren, would have created a new nonimmigrant visa category, referred to as "T" visas, for foreign students who have graduated from U.S. institutions with bachelor's degrees in mathematics, science or engineering and who are obtaining jobs earning at least \$60,000. The Helping Improve Technology Education and Competitiveness Act (S. 1645), introduced by Senator Charles Robb, also would have created a "T" nonimmigrant visa category for

foreign students who have graduated from U.S. institutions with bachelor's degrees in mathematics, science, or engineering and who are obtaining jobs paying at least \$60,000. More stringent than H.R. 2687, S. 1645 included provisions aimed at protecting U.S. workers that are comparable to the provisions governing the H-1B visa.

Legislation in the 107th Congress

Several bills addressing the H-1B numerical limits were introduced in the 107th Congress. H.R. 2984 would have amended the INA to require the Attorney General to ensure that only H-1B visa holders who actually commence employment are counted toward the ceiling. Representative Tom Tancredo offered H.R. 3222, which would have set the upper limit of H-1B admissions at 65,000 and reduced it by 10,000 for each quarter percentage point by which the unemployment rate for the United States exceeded 6%. Emerging concerns of a shortage of nurses and other health care workers, however, prompted interest in the use of H-1Bs among health care professionals. The Senate Committee on the Judiciary Subcommittee on Immigration held hearings May 22, 2001, on "Immigration Policy: Rural and Urban Health Care Needs."⁴⁰

Although the 107th Congress did not alter H-1B admission levels, it did include provisions that allow H-1B visa holders to remain in that status beyond the statutory time limits of their temporary visas if their employers had filed applications for them to become legal permanent residents. Conferees on the Department of Justice Reauthorization Act (H.R. 2215, H.Rept. 107-685) included §11030A, which authorizes the Attorney General to extend the stay in one-year increments for H-1B nonimmigrants while their applications are pending. On October 3, 2002, Senator Orrin Hatch, ranking Republican on the Senate Committee on the Judiciary, introduced legislation (S. 3051) with the expressed purpose of extending H-1B status for aliens with lengthy adjudications, using language comparable to §11030A. The conference report on H.R. 2215 passed the House September 26, 2002, and the Senate October 3, 2002. President Bush signed the Department of Justice Reauthorization Act on November 2, 2002 as P.L. 107-272.

Legislation in the 108th Congress

Free Trade Agreements. The USTR's legislation implementing the Chile and Singapore FTAs was introduced July 15, 2003, as S. 1416/H.R. 2738 and S. 1417/H.R. 2739, respectively. The House passed H.R. 2738 and H.R. 2739 on July 24, 2003, and the Senate passed them on July 31, 2003 (P.L. 108-77 and P.L. 108-78 respectively). Title IV of each of these laws amends several sections of the Immigration and Nationality Act (INA, 8 U.S.C.). Foremost, the laws amend §101(a)(15)(H) of INA to carve out a portion of the H-1B visas — designated as the H-1B-1 visa — for professional workers entering through the FTAs. In many ways the FTA professional worker visa requirements parallel the H-1B visa requirements, notably having similar educational requirements. The H-1B visa, however, specifies

⁴⁰ For background, see CRS Report RL30974, *A Shortage of Registered Nurses: Is It on the Horizon or Already Here?* by Linda Levine.

that the occupation require *highly* specialized knowledge, while the FTA professional worker visa specifies that the occupation require only specialized knowledge.

The laws also amend §212 of INA to add a labor attestation requirement for employers bringing in potential FTA professional worker nonimmigrants that is similar to the H-1B labor attestation statutory requirements. The additional attestation requirements for “H-1B dependent employers” currently specified in §212 are not included in the labor attestation requirements for employers of the FTA professional worker nonimmigrants.

S. 1416/H.R. 2738 contains numerical limits of 1,400 new entries under the FTA professional worker visa from Chile, and S. 1417/H.R. 2739 contains a limit of 5,400 for Singapore. The bills do not limit the number of times that an alien may renew the FTA professional worker visa on an annual basis, unlike H-1B workers, who are limited to a total of six years. The bills count an FTA professional worker against the H-1B cap the first year he/she enters and again after the fifth year he/she seeks renewal. Although the foreign national holding the FTA professional worker visa would remain a temporary resident who would only be permitted to work for any employer who had met the labor attestation requirements, the foreign national with a FTA professional worker visa could legally remain in the United States indefinitely.

H-1B Reform. On July 24, 2003, Senator Christopher Dodd and Representative Nancy Johnson introduced the USA Jobs Protection Act of 2003 (S. 1452/H.R. 2849), which would have made several changes to current law on H-1B visas, as well as revised the L visa category. In § 4 of S. 1452/H.R. 2849, the lay-off protection provisions in current law pertaining to H-1B-dependent employers would have been broadened to cover all employers hiring H-1B workers. The lay-off protection period would have expanded from 90 days before and after hiring H-1B workers to 180 days. The bills also would have given DOL the authority to initiate investigations of H-1B employers if there is reasonable cause.

On April 2, 2004, Representative Lamar Smith introduced H.R. 4166, the American Workforce Improvement and Jobs Protection Act. It would have made permanent: the attestation requirement concerning nondisplacement of U.S. workers applicable to H-1B-dependent employers and willful violators; the filing fee applicable to H-1B petitioners; and the Secretary of Labor’s authority to investigate an employer’s alleged failure to meet specified labor attestation conditions. It also would have required the Secretary of Homeland Security to impose a fraud prevention and detection fee on H-1B or L (intracompany business personnel) petitioners for use in combating fraud and carrying out labor attestation enforcement activities.

Exemptions from H-1B Cap. H.R. 4166 would have amended the INA to exempt up to 20,000 aliens holding a master’s or higher degree from the numerical limitation on H-1B nonimmigrants in any fiscal year.

H-1B Elimination/Moratorium. On June 25, 2003, Representative Sam Graves introduced H.R. 2235, which would have suspended the issuances of certain nonimmigrant visas — including H-1B visas — until a set of conditions pertaining to the full implementation of specified immigration and homeland security laws was

met. On July 9, 2003, Representative Tom Tancredo introduced H.R. 2688, which would have repealed the statutory authority to admit H-1B workers.

Provisions in Omnibus Appropriations Bill. Title IV of P.L. 108-447 (H.R. 4818), the Consolidated Appropriations Act for FY2005, exempts up to 20,000 aliens holding a master's or higher degree from the cap on H-1B visas. It reinstates: the attestation requirement concerning nondisplacement of U.S. workers applicable to H-1B-dependent employers and willful violators; the filing fee applicable to H-1B petitioners; and the Secretary of Labor's authority to investigate an employer's alleged failure to meet specified labor attestation conditions. It also requires the Secretary of Homeland Security to impose a fraud prevention and detection fee on H-1B or L (intracompany business personnel) petitioners for use in combating fraud and carrying out labor attestation enforcement activities.

Legislation in the 109th Congress

Emergency Supplemental (P.L. 109-13). The FY2005 supplemental appropriations for military operations in Iraq and Afghanistan, reconstruction in Afghanistan and other foreign aid includes a provision that touched on the nexus of H-1B visas and FTAs. Specifically, §501 of the legislation as enacted would add 10,500 visas for Australian nationals to perform services in specialty occupations under a new E-3 temporary visa. The Senate had adopted a provision during the floor debate on H.R. 1268 that would have created a new E-3 temporary visas that would have been capped at 5,000 per year.⁴¹ This language was included in REAL ID Act of 2005 (P.L. 109-13, Division B).

Budget Reconciliation (P.L. 109-171). On October 20, 2005, the Senate Committee on the Judiciary approved compromise language that would have recaptured up to 30,000 H-1B visas that had not been issued in prior years (see **Figure 1**). An additional fee of \$500 would have been charged to obtain these recaptured visas. This language was forwarded to the Senate Budget Committee for inclusion in the budget reconciliation legislation. On November 18, 2005, the Senate passed S. 1932, the Deficit Reduction Omnibus Reconciliation Act of 2005, with these provisions as Title VIII. These provisions were not included in the House-passed Deficit Reduction Act of 2005 (H.R. 4241).

The conference report (H.Rept. 109-362) on S. 1932, which was renamed the Deficit Reduction Act of 2005, was reported on December 19 (during the legislative day of December 18). It did not include the Senate provisions that would have recaptured H-1B visas unused in prior years. On December 19, the House agreed to the conference report by a vote of 212-206. On December 21, the Senate removed extraneous matter from the legislation pursuant to a point of order raised under the "Byrd rule," and then, by a vote of 51-50 (with Vice President Cheney breaking a tie vote), returned the amended measure to the House for further action. The measure was signed into law on February 8, 2006, as P.L. 109-171.

⁴¹ U.S. Congress, House, *Conference Report on H.R. 1268*, H.Rept. 109-72, May 3, 2005.

Securing America's Borders Act (S. 2454). Title IV of S. 2454, which Senate Majority Leader Bill Frist had introduced on March 16, 2006, as well as Title V in the draft of Senate Judiciary Chairman Specter's mark circulated March 6, 2006 (Chairman's mark) would have added a new exemption from the numerical limits for H-1Bs who earned an advanced degree in science, technology, engineering, or math from an accredited university in the United States.

Title IV of S. 2454 and Title V of the Chairman's mark had foreign student provisions that, if enacted, would have provided employers an attractive alternative to the H-1B visas. The bills would have extended foreign students' practical training (and F-1 status) from 12 to 24 months. They also would have created a new "F-4" student visa for advanced degree candidates studying in the fields of math, engineering, technology or the physical sciences at the end of their course of study. The proposed visa would have allowed eligible students to either return to their country of origin or remain in the United States for up to one year and seek employment in their relevant field of study.⁴²

The Senate debated immigration reform from late March through early April 2006, but efforts to invoke cloture failed. At that time the leading proposals included S. 2454, the Securing America's Borders Act, which Senate Majority Leader Bill Frist introduced on March 16, 2006, and S.Amdt. 3192 to S. 2454, the Comprehensive Immigration Reform Act, which Judiciary Chairman Arlen Specter offered on March 30, 2006.⁴³ Title IV of S. 2454 and Title V of S.Amdt. 3192, which were essentially equivalent, would have substantially increased legal permanent immigration and would have restructured the allocation of the family-sponsored and employment-based visas.

Comprehensive Immigration Reform Act (S. 2611). The Senate passed major immigration legislation (S. 2611) on May 25, 2006, by a vote of 62-36.⁴⁴ The Senate-passed bill was based on a compromise that Senators Chuck Hagel and Mel Martinez shaped and introduced on April 7, 2006, along with co-sponsors Sam Brownback, Lindsey Graham, Ted Kennedy, John McCain and Arlen Specter. The identical language was introduced by Senator Specter (S. 2611) and Senator Hagel (S. 2612). S. 2611 would have raised the statutory limit on H-1B visas from 65,000 to 115,000 and would have escalated this ceiling by 20% each year subsequent to a fiscal year when the numerical limits were reached. Provisions by Senator John Cornyn revising the H-1B visa were also added during the floor amendments. The major House-passed immigration bill (H.R. 4437) did not revise the H-1B visa.

Senate-passed S. 2611, moreover, would have exempted H-1Bs who had earned an advanced degree from an accredited university in the United States from the statutory numerical limits. The exemption for up to 20,000 H-1B visas would have

⁴² For more analysis, see CRS Report RL31146, *Foreign Students in the United States: Policies and Legislation*, by Chad C. Haddal.

⁴³ S.Amdt. 3192 was based on the legislative language that the Senate Committee on the Judiciary approved on March 27, 2006.

⁴⁴ For background and legislative tracking, see CRS Report RL33125, *Immigration Legislation and Issues in the 109th Congress*, coordinated by Andorra Bruno.

been changed from aliens holding master's or higher degree from U.S. institutions to foreign institutions. The exemption for H-1Bs employed by nonprofit research institutions would have been broadened to include all nonprofit institutions, and the exemption for H-1Bs employed by governmental organizations would have included "Federal, State, or local" governmental research organizations.

S. 2611 was among those bills that would have eased opportunities for temporary workers to ultimately adjust to LPR status. More specifically, S. 2611 would have exempted aliens who had worked in the United States for three years and who had earned an advanced degree in science, technology, engineering, or math from the numerical limits on permanent admissions. S. 2611 also would have created visa categories (e.g., F-4) for advanced degree candidates studying in the fields of math, engineering, technology or the physical sciences at the end of their course of study. The proposed visa would have allowed eligible students to either return to their country of origin or remain in the United States for up to one year and seek employment in their relevant field of study. In S. 2611, the proposed foreign students would then have been able to adjust to LPR status outside of the statutory numerical limits on employment-based LPRs.

H-1B Reform. On July 18, 2005, Representative Nancy Johnson introduced the USA Jobs Protection Act of 2005 (H.R. 3322), which would have made several changes to current law on H-1B visas, as well as revised the L visa category. In H.R. 3322, the lay-off protection provisions in current law pertaining to H-1B-dependent employers would have been broadened to cover all employers hiring H-1B workers. In addition, the lay-off protection period would have been expanded from 90 days before and after hiring H-1B workers to 180 days. The bill also would have given DOL the authority to initiate investigations of H-1B employers if there was reasonable cause.

As introduced by Representative Bill Pascrell on November 17, 2005, the Defend the American Dream Act of 2005 (H.R. 4378) would have made substantial changes to the H-1B visa. Among other reforms, it would have : required employers of H-1B nonimmigrants to use one of three specified methods (whichever results in the highest wages) to determine wages for purposes of required wage attestations; required employers to actively engage in recruitment efforts and, required employers who previously employed one or more H-1B nonimmigrants to submit with their labor condition application (LCA) a copy of the W-2 Wage and Tax Statement filed with respect to those nonimmigrants. It also would have extended to 180 days the period during which certain H-1B employers must show nondisplacement of U.S. workers. It further would have prohibited employers from outsourcing or otherwise contracting for the placement of an H-1B nonimmigrant with another employer, regardless of whether the other employer is H-1B dependent employer. It would have reduced the period of H-1B authorized admission from six to three years and would have eliminated the exemption from H-1B numerical admission limitations aliens with a U.S. master's or higher degree. It would have required the Secretary of Labor to be responsible for investigations of wage complaints and allegations of fraud in the filing of LCAs and would have created a private right of action for persons harmed by an employer's violation of labor condition requirements.

H-1B Repeal. On March 15, 2005, Representative Tom Tancredo introduced H.R. 1325, which would have repealed the authority for H-1B nonimmigrants in the INA.

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