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Immigration of Foreign Workers: Labor Market Tests and Protections

Abstract
[Excerpt] Economic indicators confirm that the U.S. economy sunk into a recession in December 2007. Although some economic indicators suggest that growth has resumed, unemployment remains high and is projected to remain so for some time. Historically, international migration ebbs during economic crises; for example, immigration to the United States was at its lowest levels during the Great Depression. While preliminary statistical trends hint at a slowing of migration pressures, it remains unclear how the economic recession of the past two years has affected immigration. Addressing these contentious policy reforms against the backdrop of economic crisis sharpens the social and business cleavages and narrows the range of options.

Some employers maintain that they continue to need the "best and the brightest" workers, regardless of their country of birth, to remain competitive in a worldwide market and to keep their firms in the United States. While support for increasing employment-based immigration may be dampened by the high levels of unemployment, proponents argue that the ability to hire foreign workers is an essential ingredient for economic growth.

Those opposing increases in foreign workers assert that such expansions—particularly during a period of high unemployment—would have a deleterious effect on salaries, compensation, and working conditions of U.S. workers. Others question whether the United States should continue to issue foreign worker visas (particularly temporary visas) during a period of high unemployment and suggest that a moratorium on such visas might be prudent.

The number of foreign workers entering the United States legally has notably increased over the past decade. The number of employment-based legal permanent residents (LPRs) grew from under 100,000 in FY1994 to over 250,000 in FY2005, and dipped to 126,874 in 2009. The number of visas issued to employment-based temporary nonimmigrants rose from just under 600,000 in FY1994 to approximately 1.3 million in FY2007. In FY2009, the number of visas issued to employment-based temporary nonimmigrants dropped slightly to 1.1 million.

The Immigration and Nationality Act (INA) bars the admission of any alien who seeks to enter the U.S. to perform skilled or unskilled labor, unless it is determined that (1) there are not sufficient U.S. workers who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of similarly employed workers in the United States. The foreign labor certification program in the U.S. Department of Labor (DOL) is responsible for ensuring that foreign workers do not displace or adversely affect working conditions of U.S. workers.

The 111th Congress has addressed one element of the labor market test for foreign workers issue in §1611 of P.L. 111-5, the American Recovery and Reinvestment Act of 2009, which requires companies receiving Troubled Asset Relief Program (TARP) funding to comply with the more rigorous labor market rules of H-1B dependent companies if they hire foreign workers on H-1B visas. Also, §524 of division D of the Consolidated Appropriations Act, 2010 (P.L. 111-117) authorized the Department of Labor to use its share of the H-1B, H-2B, and L Fraud Prevention and Detection fees to conduct wage and hour enforcement of industries more likely to employ any type of nonimmigrants (not just H-1B, H-2B or L visaholders). Finally, P.L. 111-230 (H.R. 6080) authorized additional fees on firms who have more than 50% of their employees on H-1B or L visas.

This report does not track legislation and will be updated if policies are revised.

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Congressional Research Service

Immigration of Foreign Workers: Labor Market Tests and Protections

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CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

Economic indicators confirm that the U.S. economy sunk into a recession in December 2007. Although some economic indicators suggest that growth has resumed, unemployment remains high and is projected to remain so for some time. Historically, international migration ebbs during economic crises; for example, immigration to the United States was at its lowest levels during the Great Depression. While preliminary statistical trends hint at a slowing of migration pressures, it remains unclear how the economic recession of the past two years has affected immigration. Addressing these contentious policy reforms against the backdrop of economic crisis sharpens the social and business cleavages and narrows the range of options.

Some employers maintain that they continue to need the "best and the brightest" workers, regardless of their country of birth, to remain competitive in a worldwide market and to keep their firms in the United States. While support for increasing employment-based immigration may be dampened by the high levels of unemployment, proponents argue that the ability to hire foreign workers is an essential ingredient for economic growth.

Those opposing increases in foreign workers assert that such expansions—particularly during a period of high unemployment—would have a deleterious effect on salaries, compensation, and working conditions of U.S. workers. Others question whether the United States should continue to issue foreign worker visas (particularly temporary visas) during a period of high unemployment and suggest that a moratorium on such visas might be prudent.

The number of foreign workers entering the United States legally has notably increased over the past decade. The number of employment-based legal *permanent* residents (LPRs) grew from under 100,000 in FY1994 to over 250,000 in FY2005, and dipped to 126,874 in 2009. The number of visas issued to employment-based *temporary* nonimmigrants rose from just under 600,000 in FY1994 to approximately 1.3 million in FY2007. In FY2009, the number of visas issued to employment-based *temporary* nonimmigrants dropped slightly to 1.1 million.

The Immigration and Nationality Act (INA) bars the admission of any alien who seeks to enter the U.S. to perform skilled or unskilled labor, unless it is determined that (1) there are not sufficient U.S. workers who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of similarly employed workers in the United States. The foreign labor certification program in the U.S. Department of Labor (DOL) is responsible for ensuring that foreign workers do not displace or adversely affect working conditions of U.S. workers.

The 111th Congress has addressed one element of the labor market test for foreign workers issue in §1611 of P.L. 111-5, the American Recovery and Reinvestment Act of 2009, which requires companies receiving Troubled Asset Relief Program (TARP) funding to comply with the more rigorous labor market rules of H-1B dependent companies if they hire foreign workers on H-1B visas. Also, §524 of division D of the Consolidated Appropriations Act, 2010 (P.L. 111-117) authorized the Department of Labor to use its share of the H-1B, H-2B, and L Fraud Prevention and Detection fees to conduct wage and hour enforcement of industries more likely to employ any type of nonimmigrants (not just H-1B, H-2B or L visaholders). Finally, P.L. 111-230 (H.R. 6080) authorized additional fees on firms who have more than 50% of their employees on H-1B or L visas.

This report does not track legislation and will be updated if policies are revised.

Contents

Introduction 1
Key Elements 1
Brief History of Labor Certification 2
Permanent Employment-Based Admissions 3
LPR Labor Certification Process 5
Program Electronic Review Management (PERM) 6
Temporary Employment-Based Admissions 8
Overview 8
Temporary Workers 8
Multinational Executive and Specialist Employees and International Investors 8
Cultural Exchange 9
Outstanding and Extraordinary 9
Religious Workers 9
Trends in Temporary Employment-Based Visas 10
Labor Market Tests for Workers on H Visas 12
H-1B Visas and Labor Attestations 12
H-2A Visas and Labor Certification 14
Required Benefits for H-2A Workers 15
H-2B Visas and Labor Certifications 15
Investigating and Enforcing LCAs 17
Resources for Foreign Labor Certification 19
Funding the LCA Approval Process 19
Funding the LCA Enforcement Activities 21
Additional Fees on Firms with Majority H-1B and L Workers 23
Selected Issues for the 112th Congress 24
Unemployment Statistics and Other Economic Triggers 24
Global Competition for Talent 25
Certification Versus Attestation 26
Protections for U.S. Workers 26
Fraudulent Claims 27
Enforcement Tool 28
Small Business Concerns 28
Subcontractors and Multinational Companies 28
Conclusion 29

Figures

Figure 1. Permanent Employment-based Admissions for First, Second, and Third Preferences, 1994-2009 4
Figure 2. Temporary Employment-based Visas Issued, 1994-2009 10
Figure 3. Temporary Admissions for Selected Employment-based Visas 11
Figure 4. Funding to ETA for Foreign Labor Certification 20

Tables

Table 1. Summary of Foreign Temporary Worker Labor Market Tests and Protections 17
Table 2. Amounts from the Fraud Prevention and Detection Fees Allocated to DOL, FY2005-FY2009 22

Contacts

Author Contact Information 30

Introduction

Economic indicators confirm that the economy went into a recession at the close of 2007.[1] Although some economic indicators suggest that growth has resumed, unemployment remains high and is projected to remain so for some time.[2] Historically, international migration ebbs during economic crises (e.g., immigration to the United States was at its lowest levels during the Great Depression). While preliminary statistical trends hint at a slowing of migration pressures, it remains unclear how the economic recession of the past two years affected immigration. Addressing these contentious policy reforms against the backdrop of economic crisis sharpens the social and business cleavages and narrows the range of options.

Even as U.S. unemployment remains at a historically high level, some employers maintain that they continue to need the "best and the brightest" workers, regardless of their country of birth, to remain competitive in a worldwide market and to keep their firms in the United States. While support for increasing employment-based immigration may be dampened by the high levels of unemployment, proponents argue that the ability to hire foreign workers is an essential ingredient for economic growth.

Those opposing increases in foreign workers assert that such expansions—particularly during a period of high unemployment—would have a deleterious effect on salaries, compensation, and working conditions of U.S. workers. Others question whether the United States should continue to issue foreign worker visas (particularly temporary visas) at this time and suggest that a moratorium on such visas might be prudent.

Key Elements

The Immigration and Nationality Act (INA) bars the admission of a prospective immigrant who seeks to enter the United States to perform skilled or unskilled labor, unless the Secretary of Labor provides a certification to the Secretary of State and the Attorney General.[3] Specifically, the Secretary of Labor must determine that there are not sufficient U.S. workers who are able, willing, qualified, and available at the time of the alien's application for an LPR visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor. The Secretary of Labor must further certify that the employment of the alien will not adversely affect the wages and working conditions of similarly employed workers in the United States.[4] The foreign labor certification program in the U.S. Department of Labor (DOL) is responsible for ensuring that foreign workers do not displace or adversely affect working conditions of U.S. workers. Under current law, DOL adjudicates *labor certification* applications (LCA) for permanent employment-based immigrants.

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[1] The National Bureau of Economic Research (NBER) has declared the U.S. economy to be in recession since December 2007.

[2] CRS Report R41006, *Unemployment: Issues and Policies*, by Jane G. Gravelle, Thomas L. Hungerford, and Marc Labonte.

[3] The administration of immigration and citizenship policy was reorganized by Homeland Security Act of 2002 (P.L. 107-296), and the Secretary of Homeland Security now oversees this function that the INA assigns to the Attorney General.

[4] INA §212(a)(5).

As discussed in more detail below, many of the foreign nationals entering the United States on a temporary basis for employment are *not* subject to a labor market test (i.e., demonstrating that there are not sufficient U.S. workers who are able, willing, qualified, and available), and as a result, their employers do not file LCAs with the DOL. There are several groups of temporary foreign employees, however, that are covered by labor market tests. The DOL adjudicates the streamlined LCA known as *labor attestations* for temporary agricultural workers, temporary nonagricultural workers, and temporary professional workers. Foreign labor certification is one of the "national activities" within the Employment and Training Administration (ETA).[5]

Brief History of Labor Certification

Congress passed the contract labor law of 1885, known as the Foran Act, which made it unlawful to import aliens for the performance of labor or service of any kind in the United States.[6] That bar on employment-based immigration lasted until 1952, when Congress enacted the Immigration and Nationality Act (INA), a sweeping law also known as the McCarran-Walters Act that brought together many disparate immigration and citizenship statutes and made significant revisions in the existing laws.[7] The 1952 act authorized visas for aliens who would perform needed services because of their high educational attainment, technical training, specialized experience, or exceptional ability.[8] Prior to the admission of these employment-based immigrants, however, the 1952 act required the Secretary of Labor to certify to the Attorney General and the Secretary of State that there were not sufficient U.S. workers "able, willing, and qualified" to perform this work and that the employment of such aliens would not "adversely affect the wages and working conditions" of similarly employed U.S. workers.[9] This provision in the 1952 act established the policy of labor certification. The major reform of INA in 1965 included language that obligated the employers to file labor certification applications (LCAs).[10]

Within DOL, the former Bureau of Employment Security first administered labor certification following enactment of the policy in 1952. After the abolishment of Employment Security in 1969, the Manpower Administration handled labor certification. In 1975, the Manpower Administration became the Employment and Training Administration (ETA), and ETA continues to oversee the labor certification of aliens seeking to become legal permanent residents (LPRs). Currently, foreign labor certification is one of the "national activities" within ETA.

The current statutory authority that conditions the admission of employment-based immigrants on labor markets tests is found in the grounds for exclusion portion of the INA. It denies entry to the

[5] DOL is charged with other immigration-related responsibilities. Most notably, the Wage and Hour Division in DOL is tasked with ensuring compliance with the employment eligibility provisions of the INA as well as labor standards laws, such as the Fair Labor Standards Act, the Migrant and Seasonal Worker Protection Act, and the Family and Medical Leave Act.

[6] 23 Stat. 332.

[7] The McCarran-Walters Act (P.L. 82-414).

[8] §203(a)(1) of P.L. 82-414.

[9] §212(a)(14) of P.L. 82-414.

[10] *Interpreter Releases*, "The Lawyer's Guide to §212(a)(5)(A): Labor Certification from 1952 to PERM," by Gary Endelman, Oct. 11, 2004.

United States of aliens seeking to work without proper labor certification. The labor certification ground for exclusion covers aliens coming to live as LPRs.[11] The INA specifically states

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.[12]

The law also details additional requirements and exceptions for certain occupational groups and classes of aliens, some of which are discussed below.

Permanent Employment-Based Admissions

Immigrant admissions and adjustments for legal permanent resident (LPR) status are subject to a complex set of numerical limits and preference categories that give priority for admission on the basis of family relationships, needed skills, and geographic diversity. The INA establishes a statutory worldwide level of 675,000 LPRs annually, but this level is flexible and certain categories of LPRs are excluded from, or permitted to exceed, the limits. This permanent worldwide immigrant level consists of the following components: 480,000 family-sponsored immigrants; 140,000 employment-based preference immigrants; and 55,000 diversity immigrants.[13]

The employment-based preference categories are

- *first preference*: priority workers who are persons of extraordinary ability in the arts, sciences, education, business, or athletics; outstanding professors and researchers; and certain multinational executives and managers;
- *second preference*: members of the professions holding advanced degrees or persons of exceptional ability;
- *third preference*: skilled workers with at least two years training, professionals with baccalaureate degrees, and unskilled workers in occupations in which U.S. workers are in short supply;
- *fourth preference*: special immigrants who largely consist of religious workers, certain former employees of the U.S. government, and undocumented juveniles who become wards of the court; and
- *fifth preference*: investors who invest at least $1 million (or less money in rural areas or areas of high unemployment) to create at least 10 new jobs.

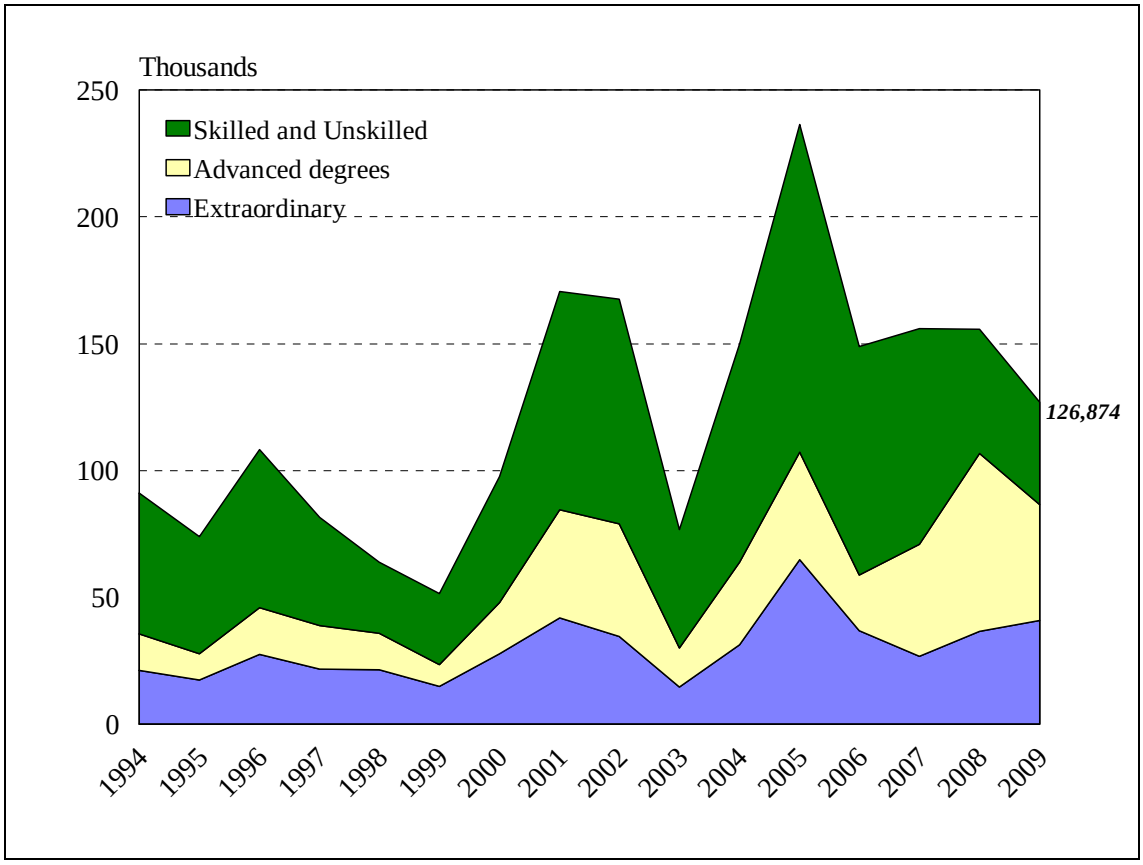
[11] LCAs are not required for aliens who are coming as priority workers, investors, refugees, or family-based immigrants.

[12] §212(a)(5) of INA; §1182(a)(5) 8 USC.

[13] CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

In 1990, Congress had amended the INA to raise the level of employment-based immigration from 54,000 LPR visas to more than 143,000 LPR visas annually. That law also expanded two preference categories into five preference categories and reduced the cap on unskilled workers from 27,000 to 10,000 annually. Although there have been major legislative proposals since the mid-1990s to alter employment-based immigration, these preference categories remain intact.[14]

Figure 1. Permanent Employment-based Admissions for First, Second, and Third Preferences, 1994-2009



Source: CRS analysis of data from the DHS Office of Immigration Statistics and the former INS.

Note: The 25,911 Chinese who adjusted under the Chinese Student Protection Act from 1994 to 1996 are not depicted even though they were counted under the "Skilled and Unskilled" category.

Currently, annual admission of employment-based preference immigrants is limited to 140,000 plus certain unused family preference numbers from the prior year. As **Figure 1** displays, LPR admissions for the first, second and third employment-based preferences have exceeded the ceilings several times in recent years.[15] Although there were almost the same number of first, second, and third preference employment-based LPRs in FY2007 and FY2008 (155,889 and 155,627, respectively), the number of employment-based LPRs in the extraordinary and

[14] CRS Report 96-149, *Immigration: Analysis of Major Proposals to Revise Family and Employment Admissions*, by Joyce C. Vialet and Ruth Ellen Wasem.

[15] For an explanation of these trends, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

exceptional categories rose in FY2008, particularly among those with advanced degrees. Despite the dip to 126,874 employment-based LPRs in FY2009, the first preference extraordinary category rose slightly. In FY2009, the number of skilled and unskilled LPRs was at its lowest level of admissions since FY1999.[16]

The dip and surge early in the 2000s depicted in **Figure 1** was not necessarily the result of labor market demand. In 2003, processing delays—largely due to the reorganization of immigration functions as the Department of Homeland Security (DHS) was established—reduced the number of LPRs to only 705,827. Because DHS's U.S. Citizenship and Immigration Services Bureau (USCIS) was only able to process 161,579 of the potential 226,000 family-sponsored LPRs in FY2003, an extra 64,421 LPR visas rolled over to the FY2004 employment-based categories and created the spike depicted in **Figure 1**.

Employers who seek to hire prospective immigrant workers petition with the USCIS. An eligible petitioner (in this instance, the eligible petitioner is the U.S. employer seeking to employ the alien) must file an I-140 for the alien seeking to immigrate. USCIS adjudicators determine whether the prospective LPR has demonstrated that he or she meets the qualifications for the particular job as well as the INA employment-based preference category.[17]

In terms of employment-based immigration, decisions of the Board of Immigration Appeals (BIA) have significantly affected the implementation of the law by offering clarification of the statutory language. While DOL draws on regulations that govern its role, the USCIS is more often guided through BIA decisions and procedures spelled out in the former Immigration and Naturalization Service's Operations Instructions.

LPR Labor Certification Process

Employment-based immigrants applying through the *second* and *third* preferences must obtain labor certification.[18] The intending employer may not file a Form I-140 with USCIS unless the intending employer has obtained this labor certification, and includes the approved LCA with the Form I-140.

Occupations for which the Secretary of Labor has already determined that a shortage exists and U.S. workers will not be adversely affected are listed in Schedule A of the regulations.[19] Conversely, occupations for which the Secretary of Labor has already determined that a shortage does not exist and that U.S. workers will be adversely affected are listed in Schedule B.[20] If there is not a labor shortage in the given occupation as published in Schedule A, the employer must submit evidence of extensive recruitment efforts in order to obtain certification.

Several elements are key to the approval of the LCA. Foremost are findings that there are not "available" U.S. workers or, if there are available workers, the workers are not "qualified."

[16] For detailed tables presenting these data, see Office of Immigration Statistics, *Yearbook of Immigration Statistics: 2009*, U.S. Department of Homeland Security, Table 6, http://www.dhs.gov/files/statistics/publications/LPR09.shtm.

[17] § 203(b) of INA; 8 U.S.C. § 1153.

[18] Certain second preference immigrants who are deemed to be "in the national interest" are exempt from labor certification.

[19] 20 C.F.R. Part 656.

[20] 20 C.F.R. Part 656.

Equally important are findings that the hiring of foreign workers would not have an adverse affect on U.S. workers, which often hinges on findings of what the prevailing wage is for the particular occupation and what constitutes "similarly employed workers."[21]

Prior to the Program Electronic Review Management (PERM) regulations (which are discussed below), employers would first file an "Application for Alien Employment Certification" (ETA 750 form) with the state Employment Service office in the area of intended employment, also known as state workforce agencies (SWAs).[22] The SWAs did not have the authority to grant or deny LCAs; rather, the SWAs processed the LCAs. They also had a role in recruitment as well as gathering data on prevailing wages and the availability of U.S. workers. They then forwarded the LCA along with their report to the regional ETA office.[23]

DOL summarized the labor certification process to hire immigrant workers prior to the implementation of PERM as follows:

> requires employers to file a permanent labor certification application with the SWA serving the area of intended employment and, after filing, to actively recruit U.S. workers in good faith for a period of at least 30 days for the job openings for which aliens are sought. Job applicants are either referred directly to the employer or their resumes are sent to the employer. The employer has 45 days to report to either the SWA or an ETA backlog processing center or regional office the lawful job-related reasons for not hiring any referred qualified U.S. worker.... If, however, the employer believes able, willing, and qualified U.S. workers are not available to take the job, the application, together with the documentation of the recruitment results and prevailing wage information, is sent to either an ETA backlog processing center or ETA regional office. There, it is reviewed and a determination made as to whether to issue the labor certification based upon the employer's compliance with applicable labor laws and program regulations. If we determine there are no able, willing, qualified, and available U.S. workers, and the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, we so certify to the DHS and the DOS by issuing a permanent labor certification.[24]

Prior to the implementation of the procedural reforms discussed below, DOL acknowledged a backlog of more than 300,000 LCAs for permanent admissions in 2003 and projected an average processing time of 3½ years before an employer would receive a determination. At that time, DOL noted further that some states had backlogs that would lead to processing times of five to six years.[25]

Program Electronic Review Management (PERM)

The Program Electronic Review Management (PERM) regulations were published on December 27, 2004, after initially being proposed in May 2002. The stated goals of PERM are to streamline the labor certification process and reduce fraudulent filings. Now all LCAs for aliens becoming LPRs are processed through PERM.

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[21] §212(a)(5)(A) of INA.

[22] Employers also file immigration petitions with USCIS on behalf of the aliens they are recruiting and pay fees for each petitions they file.

[23] These forms are available at http://www.foreignlaborcert.doleta.gov/, accessed March 16, 2009.

[24] *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, p. 77325.

[25] CRS Report RS21520, *Labor Certification for Permanent Immigrant Admissions*, by Ruth Ellen Wasem.

Rather than SWAs receiving the LCAs, all PERM applications are processed by national processing centers (NPCs). There are currently NPCs in Chicago and Atlanta. With the exception of their role in determining prevailing wages and maintaining the job orders, the SWAs have been removed from the LCA adjudication process. To further streamline the process, PERM offers a 10-page attestation-based form that may be submitted electronically (i.e., using web-based forms and instructions) or mailed to one of the NPCs.[26]

In additional to centralized filing, PERM requires the employer to register so that they receive a personal identification number (PIN) and password. PERM also identifies employers by their federal employer identification number.

Recruitment must be completed prior to filing the labor certification, but the documentation for recruitment does not need to be submitted with the "Application for Permanent Employment Certification" (ETA Form 9089). Employers must attest that they met the mandatory recruitment requirements for all applications, which are

- two Sunday newspaper job advertisements;
- state workforce agency job order;
- internal posting of job; and
- in-house media (if applicable).

There are specified exceptions to these recruitment requirements—notably those involving college or university teachers selected through competitive recruitment and Schedule A occupations. The recruitment documentation may be specifically requested by the Certifying Officers (COs) through an audit letter. Audit letters may be issued randomly or triggered by information on the form.

PERM recruitment requirements also differentiate between professional and non-professional occupations. Professional occupation is defined in the final rule as "an occupation for which the attainment of a bachelor's or higher degree is a usual education requirement." If the application is for a professional occupation, the employer must conduct three additional steps that the employer chooses from a list published in the regulation.[27]

As a result of these regulatory reforms, DOL predicted that its COs will adjudicate PERM applications within 45-60 days. Since PERM provides specific recruitment and documentary requirements, less discretion is given to the COs to determine whether the recruitment requirements are met. Upon adjudication of an application, the CO will have three choices:

- certify the application,
- deny the application, or
- issue an audit letter.

[26] The new form, Application for Permanent Employment Certification (ETA Form 9089), is available at http://www.foreignlaborcert.doleta.gov/form.cfm , accessed on Apr. 23, 2007. DOL does not permit employers to submit applications by facsimile.

[27] *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp. 77325-77421.

Temporary Employment-Based Admissions

Overview

Currently, there are 24 major nonimmigrant (i.e., aliens who the United States admits on a temporary basis) visa categories, and over 70 specific types of nonimmigrant visas issued. These visa categories are commonly referred to by the letter and numeral that denote their subsection in the INA.[28] Several visa categories are designated for employment-based temporary admission. The term "guest worker" is not defined in law or policy and typically refers to foreign workers employed in low-skilled or unskilled jobs that are temporary.[29] While a variety of temporary visas—by their intrinsic nature—allow foreign nationals to be employed in the United States, the applications for these visas do not trigger the requirement for an LCA filing under §212(a)(5). Under current law, only employers hiring workers through the H visa categories are required to file an LCA, as discussed more fully later in the report.

Temporary Workers[30]

The major nonimmigrant category for temporary workers is the H visa, and an LCA is required for the admission of an H visa holder. The current H-1 categories include professional specialty workers (H-1B) and nurses (H-1C). Temporary professional workers from Canada and Mexico may enter according to terms set by the North American Free Trade Agreement (NAFTA) on TN visas. There are two visa categories for temporarily importing seasonal workers, that is, guest workers: agricultural guest workers enter with H-2A visas and other seasonal/intermittent workers enter with H-2B visas. The law sets numerical restrictions on annual admissions of the H-1B (65,000), the H-1C (500), and the H-2B (66,000); however, most H-1B workers enter on visas that are exempt from the ceiling. There is no limit on the admission of H-2A workers.

Multinational Executive and Specialist Employees and International Investors

Intracompany transferees who are executive, managerial, and have specialized knowledge, and who are employed with an international firm or corporation are admitted on the L 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 alien must be employed in an executive capacity, a managerial capacity, or have specialized knowledge of the firm's product to be eligible for the L visa. The INA does not require firms who wish to bring L intracompany transfers into the United States to demonstrate that U.S. workers will not be adversely affected order to obtain a visa for the transferring employee.

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[28] For a fuller discussion and analysis, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

[29] Some of the earliest nonimmigrant categories enacted are the C visa for aliens traveling through the United States en route to another destination and the D visa for alien crew members on vessels or aircraft. Those foreign nationals with D visas are typically employed by the carrier and those on C visas may be traveling as part of their employment.

[30] See CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem; and CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

Aliens who are treaty traders enter on E-1 visas, whereas those who are treaty investors use E-2 visas. An E-1 treaty trader visa allows a foreign national to enter the United States for the purpose of conducting "substantial trade" between the United States and the country of which the person is a citizen. An E-2 treaty investor can be any person who comes to the United States to develop and direct the operations of an enterprise in which he or she has invested, or is in the process of investing, a "substantial amount of capital." Both these E-class visas require that a treaty exist between the United States and the principal foreign national's country of citizenship.[31]

The E-3 treaty professional visa is a temporary work visa limited to citizens of Australia. It is usually issued for two years at a time. Occupationally, it mirrors the H-1B visa in that the foreign worker on an E-3 visa must be employed in a specialty occupation.[32]

Cultural Exchange

Whether a cultural exchange visa holder is permitted to work in the United States depends on the specific exchange program in which they are participating. The J visa includes professors, research scholars, students, foreign medical graduates, camp counselors and au pairs who are in an approved exchange visitor program. Participants in structured exchange programs enter on Q-1 visas. Q-2 visas are for Irish young adults from specified Irish border counties in participating exchange programs.

Outstanding and Extraordinary

Persons with extraordinary ability in the sciences, arts, education, business, or athletics are admitted on O visas, whereas internationally recognized athletes or members of an internationally recognized entertainment group come on P visas. Generally, the O visa is reserved for the highest level of accomplishment and covers a fairly broad set of occupations and endeavors, including athletics and entertainers. The P visa has a somewhat lower standard of achievement than the O visa, and it is restricted to a narrower band of occupations and endeavors. The P visa is used by an alien who performs as an artist, athlete, or entertainer (individually or as part of a group or team) at an internationally recognized level of performance and who seeks to enter the United States temporarily and solely for the purpose of performing in that capacity. The law allows individual athletes to stay in intervals up to five years at a time, up to 10 years in total.

Religious Workers

Aliens working in religious vocations enter on R visas. The regulations define religious occupation as "an activity which relates to a traditional religious function." USCIS has proposed regulations further defining "religious denomination" to clarify that it applies to a religious group or community of believers governed or administered under some form of common ecclesiastical government. Under the proposed rule, the denomination must share a common creed or statement of faith, some form of worship, a formal or informal code of doctrine and discipline, religious

[31] See CRS Report RL32030, *Immigration Policy for Intracompany Transfers (L Visa): Issues and Legislation*, by Ruth Ellen Wasem; and CRS Report RL33844, *Foreign Investor Visas: Policies and Issues*, by Alison Siskin and Chad C. Haddal.

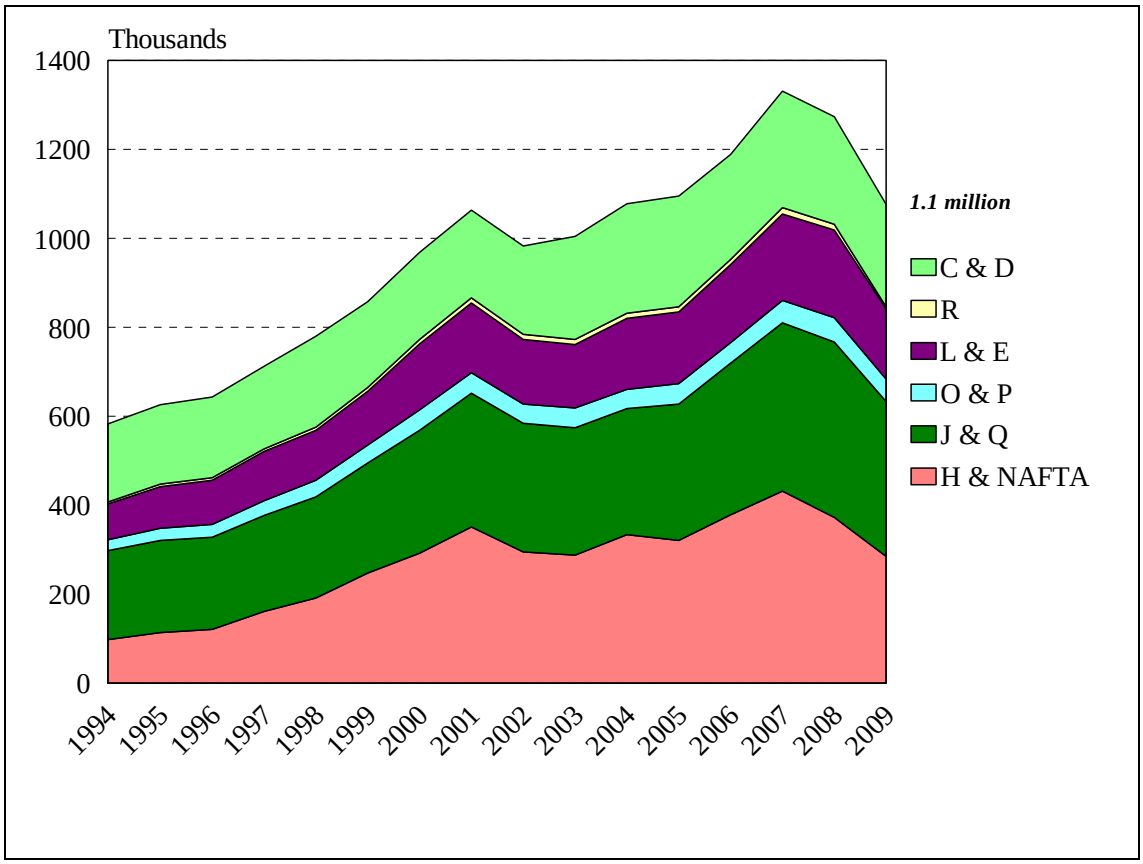
[32] §501 of P.L. 109-13, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005.

services and ceremonies, established places of religious worship, religious congregations, or comparable indicia of a bona fide religious denomination.[33]

Trends in Temporary Employment-Based Visas

As **Figure 2** illustrates, the issuances of temporary employment-based visas rose steadily over the past decade, then dropped in FY2009. In FY2009, there were 1.1 million temporary employment-based visas issued, down from a high of 1.3 million in FY2007. During the period FY1994-FY2007, the category with the largest percentage increase was the H and NAFTA workers (340.6%). The R visas also evidenced a noteworthy increase of 216.7% through FY2007. The E and L visas rose by 144.3% over this period, followed by the O and P visas, which increased by 104.5% through FY2007. The number of visas issued to H and NAFTA workers dropped by 33.4% from FY2007 to FY2009. The E and L visas fell by 18.7%, and the J and Q visas decreased by 8.1%. Only the numbers of O and P visas held steady, dipping only by 1.7%.

Figure 2. Temporary Employment-based Visas Issued, 1994-2009



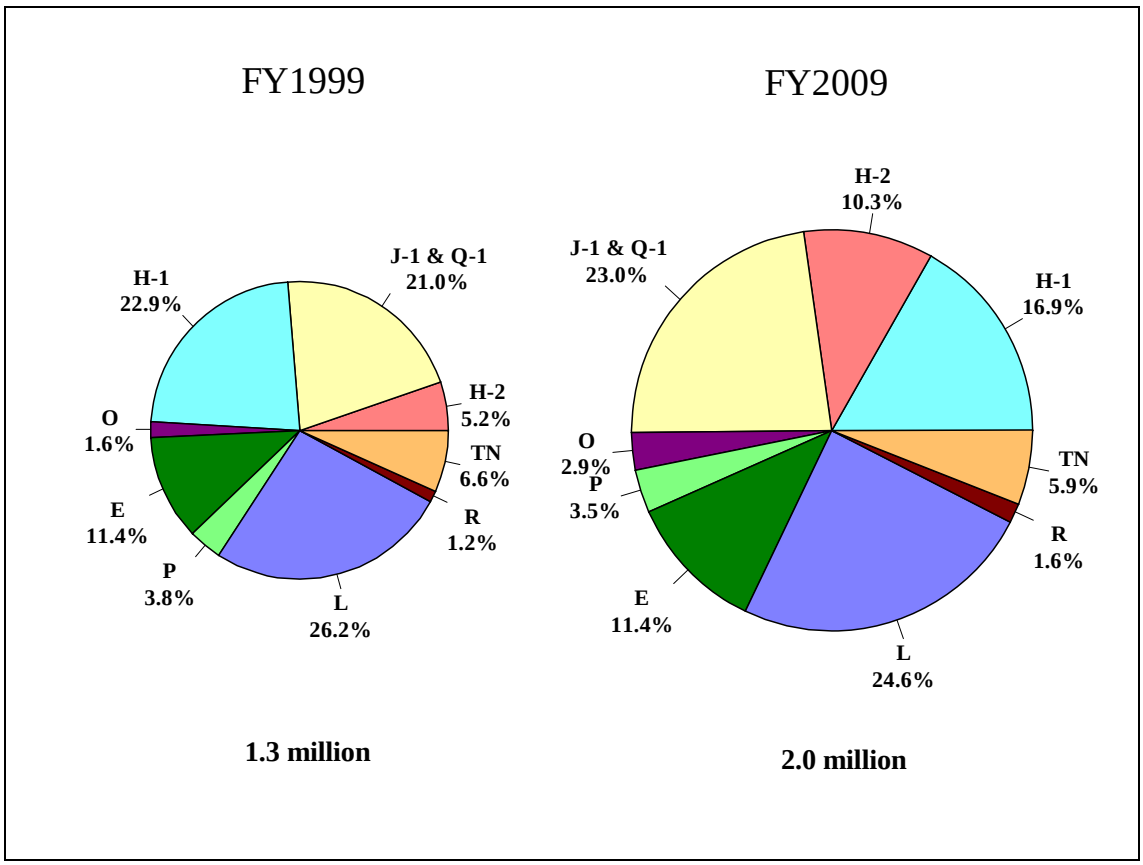
Source: CRS analysis of data from the U.S. Department of State, Bureau of Consular Affairs.

[33] U.S. Citizenship and Immigration Services, "Special Immigrant and Nonimmigrant Religious Workers," 72 *Federal Register* 20442, April 25, 2007.

These data are from the Department of State Consular Affairs Bureau, which reports the number of visas issued annually by category. As noted above, many of these visas are valid for several years and may be used for multiple entries into the United States. While visa data offer a measure of labor market demand for a given year, they do not reflect the actual number of temporary employment-based foreign workers in the United States any given year.

Admissions data from the DHS Office of Immigration Statistics (OIS) offer a different perspective on foreign temporary workers in **Figure 3**. These data indicate that foreign temporary employment-based visa holders entered the United States approximately 2.0 million times in FY2009. This number has increased markedly from a total of 1.3 million times foreign temporary employment-based visa holders entered the United States in FY1999. Most of the visa categories comprised a comparable percentage in FY1999 and FY2009, with two notable exceptions. The number of entries by H-1 visaholders had decreased by 12.2%, and the number of entries by H-2 visaholders had increased by 202.0%.

Figure 3. Temporary Admissions for Selected Employment-based Visas



Source: CRS analysis of data from the DHS Office of Immigration Statistics.

Notes: The H-3 visaholders are too few to depict.

That the OIS admissions number is almost twice that of the visa issuances number is due to the fact that many of these visas are multiple entry for multiple years. It is not surprising that the percentages of Hs, Ls, and Es are disproportionately larger in the OIS data than the Consular Affairs data because H, L, and E visas are typically valid for longer periods of time than some of the other temporary employment-based visas. These data suggest that temporary foreign workers

who are on professional and managerial visas (e.g., H-1Bs and Ls) are more likely to exhibit circular migration patterns than less skilled temporary foreign workers in shortage occupations.[34]

The OIS admission data do not reflect the actual number of temporary employment-based foreign workers in the United States any given year.

Labor Market Tests for Workers on H Visas

Prospective employers of H-1B, H-2A, and H-2B workers (approximately one-third of the temporary foreign workers in the United States) must apply to the Secretary of Labor for labor certification before they can file petitions with DHS to bring in foreign workers.[35] Similarly with LCAs for LPRs, the determinations for H workers are made by DOL's Employment and Training Administration (ETA) on behalf of the Secretary or Labor. The INA requires that employers apply for a certification that there are not sufficient U.S. workers who are qualified and available to perform the work; and the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. As summarized below, the particular employer requirements to obtain labor certification differ under the three visas. H-2A and H-2B LCAs include an offer of employment. This job offer, which describes the terms and conditions of employment, is used in the recruitment of U.S. workers and H-2A or H-2B workers, as relevant. Under the H-2a and H-2B labor certification processes, as revised by regulations effective in January 2009, prospective employers must engage in specified recruitment activities filing the LCA.[36]

H-1B Visas and Labor Attestations

The largest number of H visas are issued to temporary workers in specialty occupations, known as H-1B nonimmigrants.[37] The regulations define a "specialty occupation" as requiring theoretical and practical application of a body of highly specialized knowledge in a field 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.[38] The

[34] This pattern is not surprising given that H-1B and L visas are among the few nonimmigrant visas that permit the holder to have dual intent, that is, renew a nonimmigrant visas while seeking an LPR visa.

[35] D-1 crew members on foreign vessels are generally forbidden to perform longshore work at U.S. ports. There is an exception in which an employer must file an attestation stating that it is the prevailing practice for the activity at that port, there is no strike or lockout at the place of employment, and that notice has been given to U.S. workers or their representatives. Another exception allows D-1 crewmen to perform longshore activities in the State of Alaska, if the employer also has made a bona fide request for and has employed U.S. longshore workers who are qualified and available in sufficient numbers from contract stevedoring companies, labor organizations recognized as exclusive bargaining representatives of United States longshore workers, and private dock operators. 20 CFR Part 655, Subparts F and G.

[36] U.S. Department of Labor Employment and Training Administration, "Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing ," 73 *Federal Register* 78019-78069, December 19, 2008.

[37] Portions of this section draw on CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem. (Hereafter cited as CRS Report RL30498, *Nonimmigrant Professional Specialty (H-1B) Workers*.)

[38] 8 C.F.R. §214.2(h)(4). Law and regulations also specify that fashion models deemed "prominent" may enter on H-1B visas.

prospective H-1B nonimmigrants must demonstrate to the USCIS that they have the requisite education and work experience for the posted positions. After DOL approves the labor attestation, USCIS processes 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.

The H-1B labor attestation, a three-page application form, is a streamlined version of the labor certification application (LCA) and is the first step for an employer wishing to bring in an H-1B professional foreign worker. As noted above, the attestation is a statement of intent rather than a documentation of actions taken.[39] In LCA's for H-1B workers, the employer must attest that the firm 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 firm will provide working conditions for the nonimmigrant that do not cause the working conditions of the other employees to be adversely affected; and that there is no applicable strike or lockout. The firm must provide a copy of the LCA to representatives of the bargaining unit or—if there is no bargaining representative—must post the LCA in conspicuous locations at the work site.[40]

H-1B Dependent

The law requires that employers defined as H-1B dependent (generally firms with at least 15% of the workforce who are H-1B workers) meet additional labor market tests.[41] These H-1B dependent employers must also attest that they tried to recruit U.S. workers and that they have not displaced U.S. workers in similar occupations within 90 days prior or after the hiring of H-1B workers. Additionally, the H-1B dependent employers must offer the H-1B workers compensation packages (not just wages) that are comparable to U.S. workers.[42] Employers recruiting the H-1C nurses must attest similarly to those recruiting H-1B workers, with the additional requirement that the facility attest that it is taking significant steps to recruit and retain U.S. registered nurses.

The American Recovery and Reinvestment Act of 2009 (also known as H.R. 1, the "Stimulus Act," P.L. 111-5) requires companies receiving Troubled Asset Relief Program (TARP) funding to comply with the more rigorous labor market rules.[43] Specifically, §1611 of P.L. 111-5 requires companies receiving TARP funding to follow the labor recruitment and attestation rules of H-1B dependent companies if they wish to hire foreign workers on H-1B visas. It does not, however, place any additional restrictions on companies receiving TARP funding that have other temporary foreign workers such as L-1s with specialized product knowledge or E-3 professional workers, or those petitioning for employment-based LPRs.

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[39] Attestation was part of a compromise package on H-1B visa that included annual numerical limits in the Immigration Act of 1990 (P.L. 101-649). See CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem.

[40] INA §212(n); 8 C.F.R. §214.2(h)(4). For a further discussion of labor attestations, see CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem.

[41] Title IV of P.L. 105-277 defined H-1B dependent employers as firms having 25 or less employees, of whom at least 8 are H-1Bs; 26-50 employees of whom at least 13 are H-1Bs; at least 51 employees, 15% of whom are H-1Bs; excludes those earning at least $60,000 or having masters degrees. CRS Report 98-531, *Immigration: Nonimmigrant H-1B Specialty Worker Issues and Legislation*, by Ruth Ellen Wasem (archived).

[42] INA §212(n).

[43] For a discussion of TARP, see CRS Report R40224, *Troubled Asset Relief Program and Foreclosures*, by N. Eric Weiss et al.

H-2A Visas and Labor Certification[44]

The H-2A program provides for the temporary admission of foreign agricultural workers to perform work that is itself temporary in nature, provided U.S. workers are not available. In contrast to the H-1B and H-2B nonimmigrant visas, the H-2A visa is not subject to numerical restrictions. An approved H-2A visa petition is generally valid for an initial period of up to one year. An H-2A worker's total period of stay may not exceed three consecutive years.

The INA provisions pertaining to the H-2A visa requires that employers conduct an affirmative search for available U.S. workers and that DOL determine that admitting alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.[45] The new regulations have replaced employer submitted recruitment documentation with an attestation-based process similar but not identical to the H-1B attestations.[46] Under the threat of penalties including fines and revocation of certification, employers are required to attest that they have fully complied with all program requirements.[47] Under the new regulations, employers of H-2A workers may file unnamed petitions that specify only the number of positions sought (i.e., not identifying the alien workers by name).[48]

On March 17, 2009, however, DOL published a Notice of Proposed Suspension of the H-2A Final Rule and solicited public comment for a 10-day period. According to DOL, all employers were expected to comply with the regulations effective as of January 17, 2009.[49] In February 2010, DOL published a new H-2A final rule to replace the December 2008 rule.[50]

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[44] For a fuller discussion of labor certification for H-2A temporary foreign workers, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

[45] INA §101(a)(15)(H)(ii)(a), §218(a)(1), (d)(1);

[46] U.S. Department of Labor Employment and Training Administration, "Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement," 73 *Federal Register*, December 16, 2008. Prior to these rules, the process was similar but not identical to the labor certification process required of employers who seek to bring in workers as permanent, employment-based immigrants (discussed above). In a 1998 audit, the Labor Department's Office of the Inspector General concluded that "the H-2A certification process is ineffective. It is characterized by extensive administrative requirements, paperwork and regulations that often seem dissociated with DOL's mandate of providing assurance that American workers' jobs are protected." *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*, Report 04-98-004-03-321, Mar. 31, 1998.

[47] Prior to January 19, 2009, the effective date of the new regulations, the application must have included a copy of the job offer used to recruit U.S. and H-2A workers. Under the old regulations, a prospective H-2A employer had to submit a plan for conducting independent, positive recruitment of U.S. workers as part of the LCA, and had to engage in such recruitment until the foreign workers have departed for the employer's place of work. H-2A employers' recruitment responsibilities had included assisting the Employment Service system in the preparation of local, intrastate, and interstate job orders; placing newspaper and/or radio advertisements; and contacting farm labor contractors, migrant workers, and other workers in other areas of the state or country. 20 CFR §655.100; §655.101(a), (b); §655.103.

[48] U.S. Department of Labor Employment and Training Administration, "Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement," 73 *Federal Register*, December 16, 2008.

[49] Department of Labor Employment and Training Administration and Wage and Hour Division, "Temporary Employment of H–2A Aliens in the United States," 74 *Federal Register* 11408-11440, March 17, 2009.

[50] U.S. Department of Labor, Employment and Training Administration and Wage and Hour Division, "Temporary Agricultural Employment of H-2A Aliens in the United States," 75 Federal Register 6884-6995, February 12, 2010.

Required Benefits for H-2A Workers

Beyond the procedural requirements mentioned above, the H-2A visa has requirements aimed at protecting the alien H-2A workers from exploitive working situations and preventing the domestic work force from being supplanted by alien workers willing to work for sub-standard wages. The H-2A visa requires employers to provide their temporary agricultural workers the following benefits.

- Employers must pay their H-2A workers and similarly employed U.S. workers the highest of the federal or applicable state minimum wage, the prevailing wage rate, or the adverse effect wage rate (AEWR).[51]
- The employer must provide the worker with an earnings statement detailing the worker's total earnings, the hours of work offered, and the hours actually worked.
- The employer must provide transportation to and from the worker's temporary home, as well as transportation to the next workplace when that contract is fulfilled.
- The employer must provide housing to all H-2A workers who do not commute. The housing must be inspected by DOL and satisfy the appropriate minimum federal standards.
- The employer must provide the necessary tools and supplies to perform the work (unless it is generally not the practice to do so for that type of work).
- The employer must provide meals and/or facilities in which the workers can prepare food.
- The employer must provide workers' compensation insurance to the H-2A workers.

H-2A workers, however, are exempt from the Migrant and Seasonal Agricultural Worker Protection Act that governs agricultural labor standards and working conditions as well as from unemployment benefits (Federal Unemployment Tax Act) and Social Security coverage (Federal Insurance Contributions Act). Farm workers in general lack coverage under the National Labor Relations Act provisions that ensure the right to collective bargaining.

H-2B Visas and Labor Certifications[52]

The H-2B program provides for the temporary admission of foreign workers to the United States to perform temporary non-agricultural work, if unemployed U.S. workers cannot be found. The work itself must be temporary. Under the applicable immigration regulations, work is considered to be temporary if the employer's need for the duties to be performed by the worker is a one-time occurrence, seasonal need, peakload need, or intermittent need.[53] The statute does not establish

[51] For a more complete explanation of this provision and how it works, CRS Report RL34739, *Temporary Farm Labor: The H-2A Program and the U.S. Department of Labor's Proposed Changes in the Adverse Effect Wage Rate (AEWR)*, by Gerald Mayer.

[52] This section is drawn, in part, from CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

[53] For definitions of these types of need, see 8 C.F.R. §214.2(h)(6)(ii).

specific skills, education or experience required for the visa, with some exceptions.[54] Foreign medical graduates coming to perform medical services are explicitly excluded from the program. An approved H-2B visa petition is generally valid for an initial period of up to 10 months.[55] An alien's total period of stay as an H-2B worker may not exceed three consecutive years.[56]

Regulations that became effective January 19, 2009, revise the definition of temporary or seasonal job for one occurrence lasting less than 10 months to one occurrence lasting up to three years, reportedly so that additional sectors of the economy (e.g., construction firms and shipyards) could use H-2B workers. Under the new regulations, employers of H-2B workers may filed unnamed petitions that specify only the number of positions sought (i.e., not identifying the individual aliens).[57]

Like prospective H-2A employers, prospective H-2B employers must apply to DOL for a certification that U.S. workers capable of performing the work are not available and that the employment of alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.[58] Under the new regulations, H-2B employers attest that they tried to recruit U.S. workers at prevailing wages.[59] Unlike H-2A employers, they are not subject to the AEWR and do not have to provide housing, transportation,[60] and other benefits required under the H-2A program.

Table 1 summarizes key labor market tests for employers to meet and immigration-related protections for workers that are required for the admission of the foreign temporary workers. For employers seeking H temporary workers, only two labor market elements apply to all: (1) some form of a comparable wage requirement and (2) some affirmation that the working conditions for similarly employed U.S. workers will not be adversely affected.

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[54] 8 CFR §214.2(h). There are special requirements for professional athletes, for example. See CRS congressional distribution memorandum, *Temporary Admission of Foreign Professional Athletes*, by Ruth Ellen Wasem, Feb. 15, 2005 (available upon request from the author).

[55] See 8 C.F.R. §214.2(h)(9)(iii)(B).

[56] Included in this three-year period is any time an H-2B alien spent in the United States under the "H" (temporary worker) or "L" (temporary intracompany transferee) visa categories.

[57] U.S. Department of Labor Employment and Training Administration, "Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing ," 73 *Federal Register* 78019-78069, December 19, 2008; and U.S. Department of Homeland Security U.S. Citizenship and Immigration Services, "Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers," 73 *Federal Register* 78103, December 19, 2008. These rules also permit the Secretary of Homeland Security, in consultation with the Secretary of State to designate nationals of certain countries for receipt of H-2B visas.

[58] Prior to January 19, 2009, the effective date of the new regulations, DOL policy guidance on the H-2B labor certification process required a prospective H-2B employer to advertise the job opportunity in a newspaper or other appropriate publication for three consecutive days and to provide the SWA with proof of publication; and to document that union and other recruitment sources were contacted.

[59] U.S. Department of Labor Employment and Training Administration, "Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing ," 73 *Federal Register* 78019-78069, December 19, 2008.

[60] While not subject to the broader transportation requirements of the H-2A program, H-2B employers are required by law to pay the reasonable costs of return transportation abroad for an H-2B worker who is dismissed prior to the end of his or her authorized period of stay.

Table 1. Summary of Foreign Temporary Worker Labor Market Tests and Protections

Requirements	H-1B Professional	H-1B Dependent	H-2A Agricultural	H-2B Non-agricultural
Efforts to recruit U.S. workers	no	yes	yes	yes
Offering comparable or prevailing wages	yes	yes	yes	yes
Offering comparable benefits	no	yes	no	no
U.S. working conditions not adversely affected	yes	yes	yes	yes
No strikes or lockouts of U.S. workers	yes	yes	yes	yes
Protection from retaliation (whistleblower)	yes	yes	yes	no
Lay-off protections for U.S. workers	no	yes	yes	no
Work site postings of intent to hire foreign workers	yes	yes	no	no
Housing, insurance and transportation	no	no	yes	no
Numerical caps	65,000 plus exceptions		no	66,000 plus exceptions

Source: CRS summary of INA §212(a)(5), §212(g), §212(n), §218(b) and (c)(4); 8 C.F.R §214.2; and 20 C.F.R. §655-Subparts A, B.

Investigating and Enforcing LCAs

The INA does not delineate a standard policy to investigate and enforce violations of the LCAs, and the statutory authority for such investigations and enforcement actions varies across visa categories. The enforcement responsibilities for violations of these adverse effect provisions, however, are variously assigned to the Department of Homeland Security (DHS) or the Department of Justice (DOJ) as well as to DOL.

As discussed at the outset of this report, the INA requires the Secretary of Labor to certify that the employment of an employment-based LPR will not adversely affect the wages and working conditions of similarly employed workers in the United States.[61] The DOL Certifying Officer (CO) who learns that an LCA for an employment-based LPR is possibly fraudulent refers that case to DHS or DOJ for investigation.[62] Presumably, DOJ and DHS could also investigate such cases as document fraud under §274C of the INA.[63] DOL has the authority to revoke the LCA if

[61] INA §212(a)(5).

[62] 20 C.F.R. § 656.31(b).

[63] CRS Report RL34007, *Immigration Fraud: Policies, Investigations, and Issues*, by Ruth Ellen Wasem; and CRS Report RL32657, *Immigration-Related Document Fraud: Overview of Civil, Criminal, and Immigration Consequences*, by Michael John Garcia.

an employer is subsequently found in violation. DOL also may debar an employer for three years if the employer is found to have violated the LCA requirements.[64]

In the case of H-1B labor attestation, however, the Secretary of Labor has statutory authority to investigate and enforce LCA violations of H-1B petitions, which she has delegated to the Administrator of the Wage and Hour Division (WHD).[65] More precisely, the WHD is charged with investigating the complaints.[66] The WHD Administrator may assess back wages and benefits for the H-1B worker, civil penalties against the employer, and other administrative remedies.[67] If an employer is found to have willfully violated the INA, the WHD may conduct random investigations of that employer over the next five years. A DOL administrative law judge would decide the case if the employer charged with an H-1B violation requests a hearing. The WHD is also responsible for informing ETA and USCIS of employer violations. It is DHS, however, that has the authority to charge a fee of $500 to H-1B (and L visa) employers for H-1B visa (and L visa) fraud detection and prevention.

The INA provisions governing the enforcement of LCAs for H-2A workers offer yet another approach. "The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section."[68] The INA authorizes appropriated funding for DOL to carry out these actions.[69] The Secretary of Labor has delegated this enforcement authority to the WHD.[70]

DHS has the investigative and enforcement authorities for H-2B labor certifications. The INA authorizes the DHS to charge a fee of $150 to H-2B employers for fraud detection and prevention.[71] The Secretary of DHS may delegate to the Secretary of Labor, with the agreement of the Secretary of Labor, any of the authority given to the Secretary of DHS given to impose administrative remedies (including civil monetary penalties in an amount not to exceed $10,000 per violation) for H-2B violations. The H-2B violations cited are substantial failure to meet the LCA conditions or a willful misrepresentation of a material fact in the LCA.[72] DOL recently promulgated regulations that state that DHS had formally delegated this authority to impose penalties to the WHD as part of an revision in H-2B procedures. The new regulations have added

[64] 20 C.F.R. § 656.31(f).

[65] The Wage and Hour division is located in the Employment Standards Division of DOL.

[66] 20 C.F.R. § 655.800 implementing INA §212(n) and (t).

[67] 20 C.F.R. § 655.810 implementing INA §212(n) and (t).

[68] §218(g) of the INA.

[69] §218(g) of the INA.

[70] U.S. Department of Labor Employment and Training Administration, "Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing ," 73 *Federal Register* 78019-78069, December 19, 2008; and U.S. Department of Homeland Security U.S. Citizenship and Immigration Services, "Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers," 73 *Federal Register* 78103, December 19, 2008.

[71] P.L. 109-13, §403; 8 U.S.C. §1184(c). This provision states that fraud collection and prevention fees should also go towards "programs and activities to prevent and detect fraud pertaining to H-2B visa petitions.

[72] §214(c)(14) of the INA.

post-adjudication audits that WHD will conduct as well procedures for penalizing employers who fail to comply the LCAs.[73]

Resources for Foreign Labor Certification

Funding the LCA Approval Process

As **Figure 4** shows, funding for foreign labor certification has fluctuated over the past dozen years despite the steady upward trends in employment-based immigration (**Figure 1** and **Figure 2**). In 1997, DOL projected that its backlog of applications for permanent LCAs would grow from 40,000 to 65,000 during FY1998. By 2003, however, the backlog of LCAs for permanent admissions was 300,000, and DOL projected an average processing time of 3½ years before an employer received a determination. The Bush Administration sought and received funding increases in FY2004 and FY2005 to reduce the backlog of LCAs that were pending at that time.[74] PERM's online filings are also credited with reducing the LCA processing times. The conference report on the FY2008 Consolidated Appropriations Act (P.L. 110-161) included $42.2 million "to improve the timeliness and quality of processing applications under the foreign labor certification program."[75]

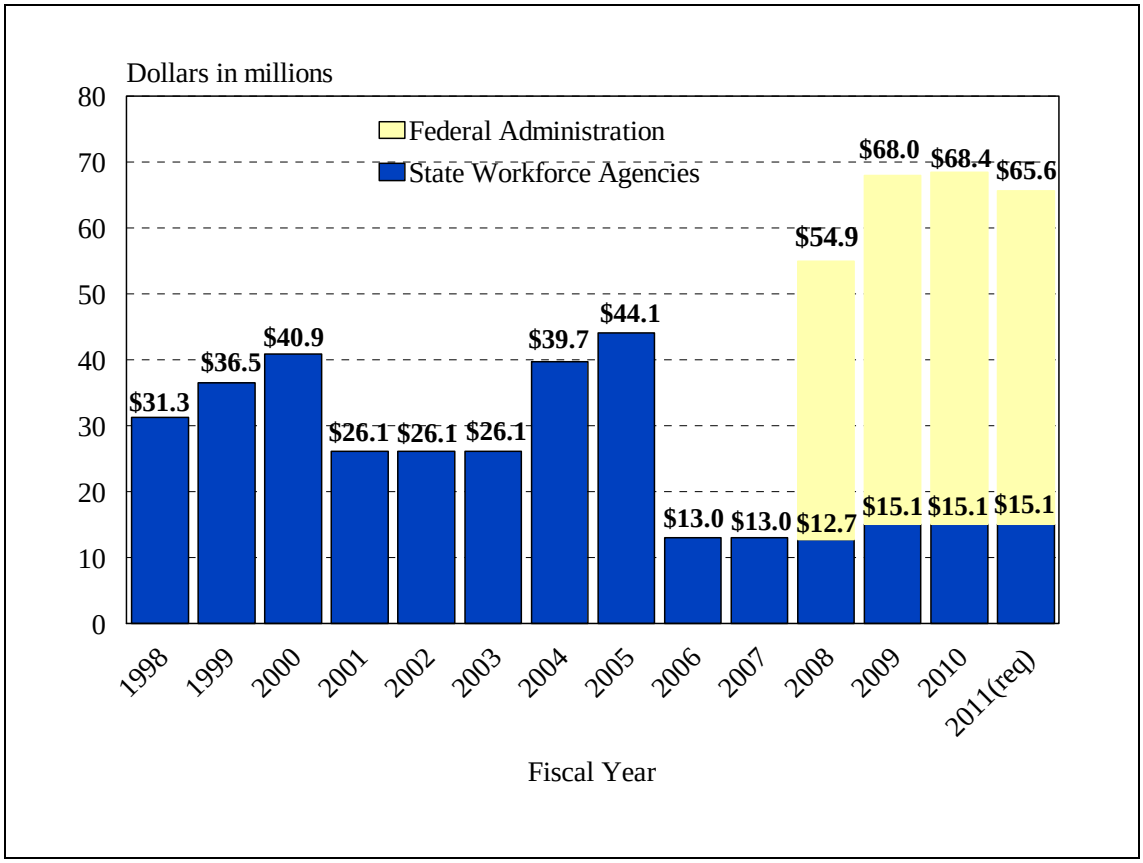
[73] U.S. Department of Labor Employment and Training Administration, "Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing ," 73 *Federal Register* 78019-78069, December 19, 2008.

[74] *FY1998 Budget Justifications of Appropriations Estimates for Committee on Appropriations*, vol. 1, SUIESO-28.

[75] U.S. Congress, House Committee on Appropriations, *Consolidated Appropriations Act, 2008, H. R. 2764, P.L. 110-161, Division G*, committee print, 110th Cong., 1st sess., p.1472.

Figure 4. Funding to ETA for Foreign Labor Certification

FY1998-FY2010 Appropriations and FY2011 Request



Source: U.S. Department of Labor, Budget Justification of Appropriation Estimates for Committee on Appropriations, FY2006-FY2009; U.S. Congress, House Committee on Appropriations, *Consolidated Appropriations Act, 2008, H. R. 2764, P.L. 110-161, Division G*, committee print, 110th Congress, 1st sess; and Explanatory language accompanying H.R. 1105, *Congressional Record,* February 23, 2009.

Until the implementation of PERM, state workforce agencies (SWAs) were funded to handle LCA processing with appropriations from the "national activities" account of ETA's Employment Services. As **Figure 4** illustrates, Congress has increased the funding for the federal administration of LCAs to reflect the shift in workload as well as backlog issues.

Although over 90% of the funding for USCIS comes from fees for providing adjudication and naturalization services that are deposited into the Examinations Fee Account,[76] Congress has not specifically authorized DOL to collect fees to cover the costs of processing LCAs. The Clinton Administration sought authority in 1997 to charge a user fee that employers would pay to offset the cost of processing the LCAs, but Congress opted not to do so.[77] The George W. Bush Administration had unsuccessfully sought authority to use a portion of the H-1B education and training fees for the processing of LCAs.[78]

[76] §286 of the Immigration and Nationality Act. 8 U.S.C. 1356.

[77] U.S. Department of Labor, *FY1998 Budget Justifications of Appropriations Estimates for Committee on Appropriations*, vol. 1, SUIESO-28.

[78] CRS Report RL31973, *Programs Funded by the H-1B Visa Education and Training Fee, and Labor Market* (continued...)

The President's FY2011 Budget proposes $65,648,000 for foreign labor certification, of which $50,519,000 would be for the federal administration (181 FTE) and $15,129,000 would be for state grants.[79] Although this is a decrease of $2.8 million from the FY2010 appropriation and $2.3 million from the FY2009 appropriation, it remains an increase of $10.7 million from the FY2008 appropriation.

The President's FY2011 budget seeks legislative authority to charge user fees to cover the costs of processing LCA for employers seeking to import three specific types of foreign workers: those coming on permanent employment-based visa; those coming on temporary H-2A visas;[80] and those coming on temporary H-2B visas. According to DOL budget justifications, "Once the fees are enacted, the discretionary budget request for these activities could be reduced or eliminated."[81]

The Full-Year Continuing Appropriations Act, 2011 (H.R. 3082), which the House passed on December 8, 2010, would freeze FY2011 discretionary appropriations at the FY2010 level.

Funding the LCA Enforcement Activities

There are very limited data available on funding for enforcing the LCAs and investigating those employers who hire temporary foreign workers. DOL is allocated one-third of the total receipts DHS obtains from employers for the H-1B and L visa fraud detection and prevention fee of $500 per employee that has been collected since FY2005.[82] The fee of $150 per H-2B employee also goes into the same visa fraud detection and prevention account.[83] As presented in **Table 2**, DOL's estimated share of the total Fraud Prevention and Detection Fee Accounts has been $31 million in recent years. However, DOL reportedly used only $6.7 million in FY2007, $5.5 million in FY2008 and an estimated $5.5 million in FY2009 for H-1B, H-2B and L visa fraud investigation activities.[84]

(...continued)

Conditions for Information Technology (IT) Workers, by Linda Levine and Blake Alan Naughton.

[79] U.S. Department of Labor, *FY2011 Congressional Budget Justification*, Employment and Training Administration Overview, February 2010, p. 11, http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V1-03.pdf.

[80] DOL is authorized to charge employers a fee for each LCA filed for H-2A workers, but the funds collected currently remain in the U.S. Treasury.

[81] U.S. Department of Labor, *FY2011 Congressional Budget Justification*, State Unemployment Insurance and Employment Service Operations, February 2010, pp. 54-69, http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V1-08.pdf.

[82] P.L. 108-447, Division J, Title IV, Subtitle B, §426.

[83] §286(v) of the INA; 8 U.S.C. §1356(v).

[84] U.S. Department of Labor, *FY2009 Budget Justification of Appropriation Estimates for Committee on Appropriations*, Volume II, Employment Standards Administration, 2008.

Table 2. Amounts from the Fraud Prevention and Detection Fees Allocated to DOL, FY2005-FY2009

Dollar Amount is in Thousands of Dollars

Budget Year	Estimated Share of Fees	Amount Reported Used
FY2005	26,175	NA
FY2006	31,000	NA
FY2007	31,000	6,700
FY2008	31,000	4,700
FY2009	31,000	5,500
FY2010 (estimates)	31,000	12,500
FY2011 (request)	33,150	

Source: U.S. Department of Labor, Budget Justification of Appropriation Estimates for Committee on Appropriations, FY2006-FY2011, Volume II, Employment Standards Administration.

Notes: The estimates of total share of fees are matched with the U.S. Citizenship and Immigration Services' *Congressional Budget Justifications, FY2006-FY2010*, because INA §212(n) allocates that agency the same portion of the fees collected as DOL.

During the George W. Bush Administration, DOL sought to use a portion of these H-1B and L visa funds for "self-directed" investigations aimed at industries that were more likely to employ low-wage, foreign workers. When Congress did not revise INA §286(v) to permit H-1B and L visas investigation fees to be used to fund investigations for low-skilled employment, the funds were rescinded.[85] Although the DOL has not provided detailed data on how much of the H-1B, H-2B, and L visas investigation fees it did not expend, the conference report on the FY2008 Consolidated Appropriations Act (P.L. 110-161) states

> The amended bill includes a rescission of $102,000,000 in unobligated funds collected pursuant to section 286(v) of the Immigration and Nationality Act. The House and the Senate proposed a rescission of $70,000,000; however, information received from the Department of Labor indicates that receipts in this account allow a higher amount to be rescinded while still ensuring that the $5,500,000 the Department estimates it will use in fiscal year 2008 under current authority remains available.[86]

DOL's *Budget Justification of Appropriation Estimates for Committee on Appropriations*, Volume II, however, reported that only $30,000,000 was rescinded in FY2008.[87] It is unclear at this time what accounts for this difference in FY2008, but it has been addressed further in the FY2009 appropriation. The report language accompanying the Omnibus Appropriations Act, 2009 (H.R. 1105, P.L. 111-8) stated the following:

[85] U.S. Department of Labor, *FY2009 Budget Justification of Appropriation Estimates for Committee on Appropriations*, Volume II, Employment Standards Administration, 2008.

[86] U.S. Congress, House Committee on Appropriations, *Consolidated Appropriations Act, 2008, H. R. 2764, P.L. 110-161, Division G*, committee print, 110th Cong., 1st sess., p. 1473.

[87] U.S. Department of Labor, *FY2009 Budget Justification of Appropriation Estimates for Committee on Appropriations*, Volume II, Employment Standards Administration, 2008.

> The bill includes a rescission of $97,000,000 in unobligated funds collected pursuant to section 286(v) of the Immigration and Nationality Act. Sufficient funds will remain to ensure that the Department of Labor will be able to continue its enforcement activities under the current legislative authority.[88]

This issue was addressed in §524 of division D of the Consolidated Appropriations Act, 2010 (P.L. 111-117). That provision amended §426(b) of division J of the Consolidated Appropriations Act, 2005 (P.L. 108-447) to authorize the Department of Labor to use one-third of the amounts deposited into the Fraud Prevention and Detection Account for wage and hour enforcement programs and activities that focus on industries likely to employ nonimmigrants, including enforcement pertaining to §212(n) for H-1B workers and §214(c)(14)(A) for H-2B workers.[89]

The INA authorizes appropriated funding for DOL to enforce the LCAs for H-2A workers.[90] Detailed funding data are not available to determine how much, if any, funds have been requested and appropriated to DOL for this specific activity in recent years.[91] As noted above, the Full-Year Continuing Appropriations Act, 2011 (H.R. 3082), which the House passed on December 8, 2010, would freeze FY2011 discretionary appropriations at the FY2010 level.

Additional Fees on Firms with Majority H-1B and L Workers

Concern that certain multinational firms are hiring foreign professional workers on H-1B and L visas to work as temporary contractors at salaries that undercut salaries of comparable U.S. workers is cited as one of the reasons Congress has imposed an additional fee on companies who have more than 50% of their employees on H-1B or L visas.[92] Opponents to the additional fee argue that it is discriminatory because it largely affects companies based in India.[93] Both sides agree the additional fees make it more expensive to hire temporary foreign professional workers.

The Emergency Border Security Supplemental Appropriations Act, 2010 (H.R. 6080, P.L. 111-230), temporarily increases the L visa filing fee and the fraud prevention and detection fee by $2,250 for applicants that employ 50 or more employees in the United States if more than 50% of the applicant's employees are on L or H-1B visas. It also increases the H-1B visa filing fee and the fraud prevention and detection fee by $2,000 for applicants that employ 50 or more

[88] Explanatory language accompanying H.R. 1105, *Congressional Record*, February 23, 2009, pp. H2162-H2167.

[89] §524 of P.L. 111-117 also gave USCIS the authority to use the H-1B, H-2B and L Fraud Prevention and Detection Fees to investigate all types of immigration benefit fraud, not just that pertaining to foreign temporary workers.

[90] §218(g) of the INA.

[91] Explanatory language accompanying H.R. 1105, stated: "Due to concern about the Department's new requirement for State Workforce Agencies to assume the responsibility for employment verification in the H-2A agricultural workers program, the Secretary is directed to provide a report to the Committees on Appropriations of the House of Representatives and the Senate within 90 days of the enactment of this Act on the costs to States and legal basis for imposing this responsibility on a mandatory basis." *Congressional Record*, February 23, 2009, pp. H2162-H2167.

[92] For example, see remarks of Senator Charles Schumer, Emergency Border Security Supplemental Appropriations Act, 2010, Senate debate, *Congressional Record*, August 12, 2010, pp. S6996-99..

[93] Ariana Eunjung Cha, "Indian government calls H1B visa fee hike 'discriminatory'," *Washington Post*, August 10, 2010.

employees in the United States if more than 50% of the applicant's employees are H-1B or L visas. The additional fees are in effect through September 30, 2014.

As discussed above, the filing fees are generally deposited into the Examinations Fee Account, and the fraud prevention and detection fee are deposited into the H-1B and L Visa Fraud Prevention and Detection Fee Account. These additional fees, however, are deposited into the General Fund of the Treasury to offset the $600 million emergency border security funding that P.L. 111-230 provides in supplemental FY2010 appropriations.[94]

Selected Issues for the 112th Congress

Many criticize the foreign labor certification process, both from the perspective of employers and employees (native-born as well as foreign-born workers). Employers often describe frustration with the process, labeling it as unresponsive to their need to hire people expeditiously. Representatives of U.S. workers question whether it provides adequate safeguards and assert that employers find ways to "end run" the lengthy process. Others point out that certain professional employees such as L intracompany transferees with specialized knowledge or E-3 professional workers from Australia are not appreciably different from H-1B workers, yet only employers of the latter are required to file LCA attestations. Advocates for temporary foreign workers, in turn, maintain that they remain caught up in the long wait for visas to become LPRs, leaving them vulnerable to exploitation by those employers who promise to petition for them. The issues that follow are illustrative of the multifaceted aspects of this debate on the labor market test for foreign workers.[95]

Unemployment Statistics and Other Economic Triggers

The option of using unemployment rates and other economic indicators to determine what occupations and sectors might import foreign workers has arisen several times over the past few decades. During the legislative debate leading up to the Immigration Act of 1990, supporters of this alternative argued that it would be a more objective basis to govern employment-based immigration and would place the priorities of the national economy ahead of individual employer preferences.[96] At that time, however, leading government economists acknowledged that they did not have labor force and other economic data available to make such determinations.[97] The option of using national and regional unemployment data to regulate foreign worker admissions arose most recently during the debate over comprehensive immigration reform in the 110th Congress. Echoing earlier arguments, proponents also maintained such triggers would afford better protections for U.S. workers. Opponents asserted that adoption of such policies would prompt some firms to relocate or "out-source" to areas in which they had access to foreign workers, further harming U.S. workers in locations with higher unemployment.

[94] For further discussion on P.L. 111-230, see CRS Report R40848, *Immigration Legislation and Issues in the 111th Congress*, coordinated by Andorra Bruno.

[95] For legislative tracking of these issues, see CRS Report R40848, *Immigration Legislation and Issues in the 111th Congress*, coordinated by Andorra Bruno.

[96] U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Refugees, and International Law, *Legal Immigration*, 100th Cong., 1st sess., July 21, 1987.

[97] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, *Reform of Legal Immigration*, 104th Cong., 1st sess., September 13, 1995.

Global Competition for Talent

As the United States is rising out of an economic recession, attention is again focused on recruitment of the "best and the brightest" people to the United States. Once a debate limited to the H-1B visas, the global competition for foreign workers with advanced degrees and high-level skills has broadened to encompass more sweeping revisions to the permanent employment-based preferences. Some promote amending the INA to create expedited pathways for foreign students earning degrees at U.S. universities in the fields of the sciences, technology, engineering, or math (STEM) to become LPRs without a prospective employer submitting an LCA.[98] However, Michael Teitelbaum, vice president of the Alfred P. Sloan Foundation (which funds basic scientific, economic and civic research) has said over the past few years that there are "substantially more scientists and engineers" graduating from U.S. universities than can find attractive jobs.[99] A fundamental question is whether the current labor market tests to hire foreign workers offer an efficacious response to these competing perspectives on the international race for talent.

Some, which notably includes a panel of international experts assembled by the Transatlantic Council on Migration, advocate what they refer to as more "flexible" and "forward-thinking" approaches to bringing foreign workers into the labor market. These options are typically based upon the human capital needs of the national economy rather than the hiring preferences of individual employers.[100] Other policy researchers, such as the Directorate for Science, Technology, and Industry of the Organization for Economic Cooperation and Development, maintain that immigration laws and labor market protections are not the most decisive factors for talented migrants.

> Various factors contribute to the flows of the highly skilled. In addition to economic incentives, such as opportunities for better pay and career advancement and access to better research funding, mobile talent also seek higher quality research infrastructure, the opportunity to work with "star" scientists and more freedom to debate.[101]

The United States arguably fares quite well on these factors.[102] Labor markets tests that employers must pass in order to hire foreign workers are arguably aimed at curbing employer abuses rather than influencing the migration decisions of foreign worker.

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[98] For further discussion, see CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem.

[99] Greg Toppo and Dan Vergano, "Scientist Shortage? Maybe Not," *USA Today*, July 8, 2009; and U.S. Congress, House Committee on Science and Technology, Subcommittee on Technology and Innovation, *The Globalization of R&D and Innovation: Implications for the Science and Engineering Workforce*, 110th Cong., 1st sess., November 7, 2007.

[100] Demetrios G. Papademetriou and Annette Heuser, "Talent, Competitiveness and Migration," in *Council Statement: Responding Competitively to the New Mobility of the 21st Century*, ed. Bertelsmann Stiftung, Migration Policy Institute (2009).

[101] Organization for Economic Cooperation and Development (OECD), *The Global Competition for Talent: Mobility of the Highly Skilled*, Directorate for Science, Technology and Industry, September 2008.

[102] Lesleyanne Hawthorne, "The Growing Global Demand for Students as Skilled Migrants," in *Talent, Competiveness and Migration*, ed. Bertelsmann Stiftung, Migration Policy Institute (2009).

Certification Versus Attestation

Many argue that the labor market tests in the INA in their current forms are insufficiently flexible, entail burdensome regulations, and may pose potential litigation expenses for employers. Proponents of these views support extensive changes—particularly moving from labor certification based upon documented actions (i.e., evidence of recruitment advertisements) to a streamlined attestation of intent. These advocates of streamlining maintain it would increase the speed with which employers could hire foreign workers and reduce the government's role in delaying or blocking such employment.

Others maintain that the streamlined attestation process may be adequate for employers hiring H-1B workers because those foreign workers also must meet rigorous educational and work experience requirements, but that an attestation process would be an insufficient labor market test for jobs that do not require a baccalaureate education and skilled work experience.[103] They express concern that PERM regulations have undermined the integrity of labor market tests for the LPR process. Opponents of the new H-2A and H-2B regulations argue that they weaken government protections for vulnerable domestic and foreign workers in industries known exploitative working conditions and for lax enforcement of the minimum wage.[104]

Some recommend opting for a streamlined attestation process in which employers who have collective bargaining agreements with their U.S. workers would be afforded expedited consideration. Proponents of this position argue that collective bargaining agreements would enable the local labor-management partnerships to develop the labor market test for whether foreign workers are needed.[105]

Protections for U.S. Workers

Some allege that employers prefer foreign 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 careers.[106] Many cite the GAO studies that document abuses of H-1B visas and recommend additional controls to protect U.S. workers.[107]

Some have warned that PERM and other intent-based attestations are more likely to foster non-meritorious applications than the prior system because they hinge on self-reporting by the employers and that such attestations provide inadequate protections for workers currently in the U.S. labor market. Others have expressed concern that the Certifying Officers (COs) are

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[103] For example, see AFL-CIO Legislative Alert, letter to U.S. Senators from William Samuel, Oct. 19, 2005.

[104] Susan Ferriss, "Bush administration makes last-minute changes in farmworker hiring," *The Sacramento Bee*, December 11, 2008. The Southern Poverty Law Center (SPLC) called conditions for many H-2B workers "close to slavery," citing unsavory recruiters, abusive employers and substandard wages. Nicolle Gaouette, "Guest workers in U.S. say they are being exploited," *Los Angeles Times*, June 12, 2008.

[105] For example, see the "H-2A Reform and Agricultural Worker Adjustment Act of 2001" S. 1313/H.R. 2736 introduced in the 107th Congress.

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

[107] For example, see AFL-CIO Legislative Alert, letter to U.S. Senators from William Samuel, Oct. 19, 2005.

relatively unfamiliar with the local labor markets and that this centralized decision-making might adversely affect U.S. workers. The AFL-CIO has maintained that a thorough manual review of labor certification applications is, at times, the sole protection of American workers.[108]

DOL argues that the COs possess sufficient knowledge of local job markets, recruitment sources, and advertising media to administer the program appropriately. DOL maintains that it will handle the non-meritorious applications by adjusting the audit mechanism in the new system as needed. The Bush Administration further pointed out that it retained authority under the regulations to adjust the audit mechanism—increasing the number of random audits or changing the criteria for targeted audits—as necessary to ensure program integrity. Many practitioners observe that under PERM, employers must recruit more intensively and boost their salary offers.[109]

Fraudulent Claims

Many observers argue that PERM and other intent-based attestations are more susceptible to fraudulent filings. The American Council of International Personnel (ACIP), for example, has argued that PERM's audit and enforcement procedures would not act as effective deterrents to fraud and misrepresentation. One of the SWAs commenting on the proposed PERM rule stated the incidence of fraud and abuse of the current system suggests a need for tighter controls, rather than a process that relies on employer self-attestations.[110]

In terms of its evaluations of the LCA process for H-1B workers in particular, GAO reported that the H-1B petitions had potential for abuses. GAO has issued studies 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.[111] Most recently, an investigation by USCIS's Office of Fraud Detection and National Security (FDNS) discovered that 13% of the H-1B files sampled were fraudulent and another 7% had technical violations of the law.[112]

DOL asserts that critics underestimate the process' capacity to detect and deter fraud, though the department acknowledges labor certification fraud to be a serious matter. DOL maintains the COs will review applications upon receipt to verify whether the employer-applicant is a bona fide business entity and has employees on its payroll. DOL has promised to aggressively pursue methods to identify those applications that may be fraudulently filed. The Bush Administration reportedly considered a plan to cross-check the employer's federal employer identification number with other available databases.[113]

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[108] *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

[109] *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

[110] *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

[111] U.S. General Accounting Office, *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*, GAO/HEHS-00-157, Sept. 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 Sept. 2003.

[112] USCIS Office of Fraud Detection and National Security, *H-1B Benefit Fraud and Compliance Assessment*, Washington, D.C., September 2008.

[113] *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

Enforcement Tool

A few practitioners assert that PERM fails in achieving the objectives of the law because, as they argue, it functions as only an enforcement mechanism for the relatively small subset of employers who are required to file LCAs.[114] They further point out that most LPRs working in the United States entered on visas not subject to labor market tests.[115] These observers conclude that PERM in particular and labor certification in general neither protects U.S. workers nor facilitates employers who need workers.

Another view is that PERM's streamlining reforms serve to enhance enforcement. According to DOL Assistant Secretary Emily Stover DeRocco, "technology allows us to strengthen our overall program's integrity and provide better customer service." One practitioner characterizes PERM as "a step in the right direction to move these cases through and do it in a timely fashion."[116]

Small Business Concerns

Some have expressed the concern that the INA's labor market tests favor large companies and unduly affect small businesses because they lack the in-house legal and human resource specialists who can complete and track the LCAs. They point to the PERM regulations in which certain types of aliens are ineligible: small business investors (who also do not qualify as fifth preference investors); employees in key positions who previously worked for affiliated, predecessor, or successor entities; and alien workers who are so inseparable from the sponsoring employer the employer would be unlikely to continue in operations without the foreign national.[117]

DOL points out that a small business investor is not an occupational category. The Administration further states that some foreign workers with special or unique skills might be eligible for labor certification under the basic process. In terms of alien workers who are "so inseparable from the sponsoring employer that the employer would be unlikely to continue in operation without the alien," DOL has long held the position that if a job opportunity is not open to U.S. workers, labor certification will be denied.[118]

Subcontractors and Multinational Companies

Over the years, the media has aired stories of U.S. workers who have been laid off and replaced by foreign workers who are employed by subcontractors. In many of these accounts, the subcontractor provides the foreign worker fewer benefits than the displaced U.S. workers. In some instances, the displaced workers reportedly have been asked to train their foreign

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[114] *Interpreter Releases*, "The Lawyer's Guide to §212(a)(5)(A): Labor Certification from 1952 to PERM," by Gary Endelman, Oct. 11, 2004.

[115] In FY2004, a total of 155,330 LPRs were employment-based preference immigrants (including spouses and children), comprising 16.4% of all LPRs that year.

[116] *Business Dateline*, "The U.S. Labor Department unveils a streamlined path," by William T. Quinn (quoting William McAlvanah), Apr. 4, 2005.

[117] *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

[118] *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

replacements.[119] The additional requirements for H-1B dependent employers are expressly aimed at discouraging subcontractors who recruit H-1B workers from placing the worker with another employer who had recently laid off U.S. workers.[120] However, multinational firms have the option of substituting employees on the L visa for those on the H-1B visa.

Some employers argue that they will not be able to stay in business without expedient access to the contingent workers supplied by subcontractors, some of whom are foreign nationals with the requisite skills. These contingent workers meet the need for a specialized, seasonal, intermittent or peak-load workforce that is able to adapt with the market forces. They express concern that labor market tests for visas may limit the flexibility of firms that are hiring the caliber of workers necessary to stay competitive in the global marketplace.[121]

Some observers have expressed concern that intra-company transferees on L-1 visas should be admitted only after a determination that comparable U.S. personnel are not adversely affected, particularly in the cases of foreign nationals entering as mid-level managers and specialized personnel. They argue that the L-1 visa currently gives multinational firms an unfair advantage over U.S.-owned businesses by enabling multinational corporations to bring in lower-cost foreign personnel.[122]

Supporters of current law governing intra-company transfers argue that it is essential for multinational firms to be able to assign top personnel to facilities in the United States on an "as needed basis" and that it is counterproductive to have government bureaucrats delay these transfers to perform labor market tests. They warn these multinational firms will find it too burdensome and unprofitable to do business in the United States.[123]

Conclusion

The legal entry of foreign workers into the United States has been governed by the same basic provisions since 1952, with some policy adjustments along the way. Over a decade ago, the Commission on Immigration Reform estimated that the labor certification process costs employers in administrative, paperwork, and legal fees a total of $10,000 per immigrant.[124] As is apparent in the analysis above, the current set of provisions and policies are visa-specific and yield various standards and thresholds for different occupations and sectors of the economy. There are, however, common critiques underlying the recruitment of foreign workers with

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[119] In 1995, the DOL Inspector General found widespread abuses of the H-1B program, and former Secretary of Labor Robert Reich argued for changes in the H-1B provisions so DOL could take action against employers who displace U.S. workers with nonimmigrants.

[120] CRS Report 98-531, *Immigration: Nonimmigrant H-1B Specialty Worker Issues and Legislation*.

[121] CRS Report RL30072, *Temporary Workers as Members of the Contingent Labor Force*, by Linda Levine; and CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers.*

[122] The DHS Office of the Inspector General found potential vulnerabilities and abuses in the L-1 visa for intracompany transferees that bear on labor market protections for U.S. workers; U.S. Department of Homeland Security, Office of Inspector General, *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, OIG 06-22, Jan. 2006.

[123] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Citizenship and Border Security, *The L-1 Visa and American Interests in the 21st Century Global Economy*, hearings, 108th Cong., 1st sess., July 29, 2003; and U.S. Congress, House Committee on Foreign Relations, *L Visas: Losing Jobs Through Laissez-faire Policies*? hearings, 108th Cong., 2nd sess., Feb. 4, 2004.

[124] *Congressional Record*, vol. 142, Statement of Senator Ted Kennedy, Apr. 15, 1996, p. S3287.

specialized expertise as well as workers with no skills. Legislation that would reform the INA may provide an opportunity to revise and update the labor market tests; on the other hand, a consensus on the labor market tests may also be hurdle to enacting immigration reform.

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