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

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Summary

The economic prosperity of the 1990s fueled a drive to increase the levels of employment-based immigration. Both the Congress and the Federal Reserve Board then expressed concern that a scarcity of labor could curtail the pace of economic growth. A primary response was to increase the supply of foreign temporary professional workers through FY2003. Now that the H-1B annual numerical limits have reverted to 65,000, the 108th Congress is weighing whether to extend the increases as the admissions approach the limit. Certain labor market protections aimed at firms whose workforce is more than 15% H-1B workers also expired at the end of FY2003. The inclusion of H-1B provisions in free trade agreements (P.L. 108-77 and P.L. 108-78) as well as national security concerns are sparking debate.

The 106th Congress enacted the American Competitiveness in the Twenty-first Century Act of 2000 (S. 2045, P.L. 106-313) with bipartisan support in October 2000. That law raised the number of H-1B visas by 297,500 over three years. It also made changes in the use of the H-1B fees for education and training, notably earmarking a portion of training funds for skills that are in information technology shortage areas. P.L. 106-311 increased the H-1B fee, authorized through FY2003, from $500 to $1,000. The 107th Congress enacted provisions that allow H-1B workers to remain beyond the statutory limits if their employers petitioned for them to become legal permanent residents.

In FY2002, the almost half (49%) of newly arriving H-1B workers had Bachelor's degrees, an additional 29% had Master's degrees, and 14% had doctorates. Only a quarter (25%) reported occupations in computer-related fields, down from over half in FY2001. While India sent 45% of the newly arriving H-1B in FY2001, it only sent 20% in FY2002. The median annual compensation for newly arriving H-1B workers was $45,000 in FY2002, down from $50,000 in FY2001.

Those opposing any further increases or easing of admissions requirements assert that there is no compelling evidence of a labor shortage in these professional areas that cannot be met by newly graduating students and retraining the existing U.S. work force. They argue further that the education of U.S. students and training of U.S. workers should be prioritized instead of fostering a reliance on foreign workers.

Proponents of current H-1B levels say that the education of students and retraining of the current workforce is a long-term response, and they assert that H-1B workers are essential if the United States is to remain globally competitive. Some proponents argue that employers should be free to hire the best people for the jobs, maintaining that market forces should regulate H-1B visas, not an arbitrary ceiling.

On July 24, 2003, Senator Christopher Dodd and Representative Nancy Johnson introduced the USA Jobs Protection Act of 2003 (S. 1452/H.R. 2849), which would make several changes to current law on H-1B visas. Two bills (H.R. 2235 and H.R. 2688) have been introduced that would suspend or eliminate H-1B visas. This reports tracks legislative activity and will be updated as needed.

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Immigration Policy for Professional Workers

Introduction

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

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

The recent economic downturn in the information technology sector may have diminished demand for H-1B workers in that sector and has raised questions about the lay-offs of H-1Bs nonimmigrants. Now that the H-1B annual numerical limits have reverted to 65,000, the 108th Congress is weighing whether to extend the increases as the admissions approach the limit. The inclusion of H-1B provisions in free trade agreements (P.L. 108-77 and P.L. 108-78) as well as national security concerns are sparking debate.

Temporary Foreign Professional (H-1B) Workers

A nonimmigrant is an alien legally in the United States for a **specific purpose** and a **temporary period of time**. There are 70 nonimmigrant visa categories specified in the Immigration and Nationality Act (INA), and they are commonly

referred to by the letter that denotes their section in the statute.[1] The major nonimmigrant category for temporary workers is the H visa. The largest classification of H visas is the H-1B workers in specialty occupations.[2] In 1998, the American Competitiveness and Workforce Improvement Act (Title IV of P.L. 105-277) increased the number of H-1B workers and addressed perceived abuses of the H-1B visa.

Any employer wishing to bring in an H-1B nonimmigrant must attest in an application to the Department of Labor (DOL) that: the employer will pay the nonimmigrant the greater of the actual wages paid other employees in the same job or the prevailing wages for that occupation; the employer will provide working conditions for the nonimmigrant that do not cause the working conditions of the other employees to be adversely affected; and, there is no strike or lockout. The employer also must post at the workplace the application to hire nonimmigrants. Firms categorized as H-1B dependent (generally if at least 15% of the workforce are H-1B workers) must also attest that they have attempted to recruit U.S. workers and that they have not laid off U.S. workers 90 days prior to or after hiring any H-1B nonimmigrants.

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

The prospective H-1B nonimmigrants must demonstrate to the U.S. Citizenship and Immigration Services Bureau (USCIS) in the Department of Homeland Security that they have the requisite education and work experience for the posted positions. USCIS then approves the petition for the H-1B nonimmigrant (assuming other immigration requirements are satisfied) for periods up to three years. An alien can stay a maximum of six years on an H-1B visa. There is a $110 filing fee that goes to USCIS.[3]

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

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

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

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

Other Categories of Professional Foreign Workers[5]

Permanent Employment-Based Immigration. Many people confuse H-1B nonimmigrants with permanent immigration that is employment-based.[6] If an employer wishes to hire an alien to work on a permanent basis in the United States, the alien may petition to immigrate to the United States through one of the employment-based categories. The employer "sponsors" the prospective immigrant, and if the petition is successful, the alien becomes a legal permanent resident. Many H-1B nonimmigrants may have education, skills, and experience that are similar to the requirements for three of the five preference categories for employment-based immigration: priority workers — i.e., persons of extraordinary ability in the arts, sciences, education, business, or athletics, outstanding professors and researchers; and, certain multinational executives and managers (first preference); members of the professions holding advanced degrees or persons of exceptional ability (second preference); and, skilled workers with at least two years training and professionals with baccalaureate degrees (third preference).[7]

Employment-based immigrants applying through the second and third preferences must have job offers for positions in which the employers have obtained labor certification. The labor certification is intended to demonstrate that the immigrant is not taking jobs away from qualified U.S. workers, and many consider the labor certification process far more arduous than the attestation process used for

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

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

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

[7] Third preference also includes 10,000 "other workers," i.e., unskilled workers with occupations in which U.S. workers are in short supply.

H-1B nonimmigrants.[8] More specifically, the employer who seeks to hire a prospective immigrant worker petitions USCIS and DOL on behalf of the alien. The prospective immigrant must demonstrate that he or she meets the qualifications for the particular job as well as the preference category. If DOL determines that a labor shortage exists in the occupation for which the petition is filed, labor certification will be issued. If there is not a labor shortage in the given occupation, the employer must submit evidence of extensive recruitment efforts in order to obtain certification.[9]

Intracompany Transfers (L Visas). There have been a series of media reports that firms are opting to bring in foreign professional workers on L-1 visas rather than the H-1B visa for professional specialty workers.[10] Intracompany transferees who work for an international firm or corporation in executive and managerial positions or have specialized product knowledge are admitted on the L-1 visas. Their immediate family (spouse and minor children) are admitted on L-2 visas. The prospective L nonimmigrant must demonstrate that he or she meets the qualifications for the particular job as well as the visa category. The alien must have been employed by the firm for at least six months in the preceding three years in the capacity for which the transfer is sought. The INA does not require firms who wish to bring L intracompany transfers into the United States to meet any labor market tests in order to obtain a visa for the transferring employee.[11]

Analysis of H-1B Admissions

Trends in H-1B Entries

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

Because of statutory changes made by P.L. 106-313, which is discussed below, most H-1B petitions are now exempt from the ceiling. Only 79,100 H-1B approvals fell under the cap in FY2002. DHS Immigration Statistics reports that 103,584

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

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

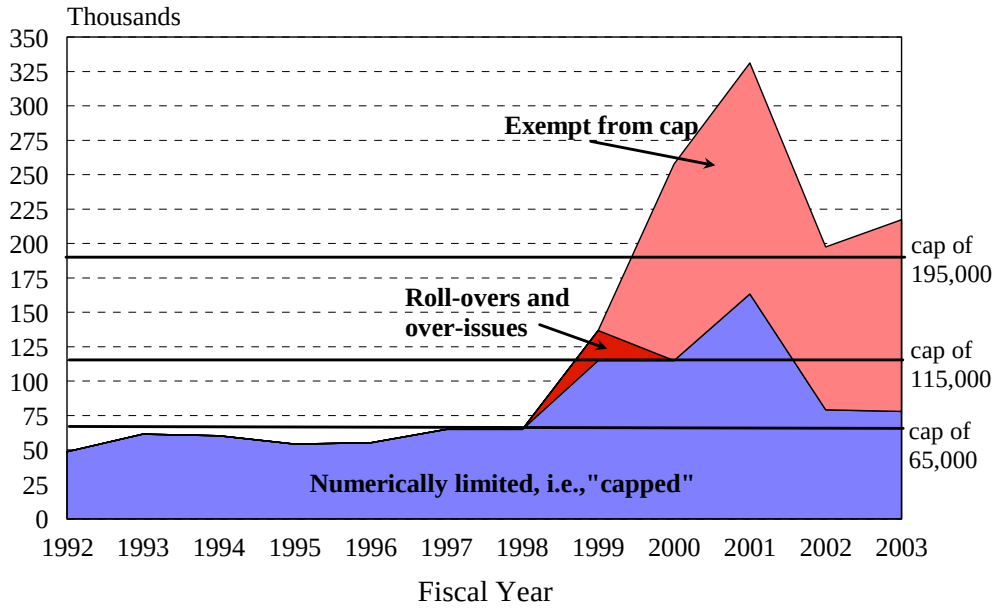
[10] For examples, see "L1s Slip Past H-1B Curbs," *eWeek*, Jan. 6, 2003; "A Loophole as Big as a Mainframe," *Business Week*, Mar. 10, 2003; "Displaced Americans," *Washington Times*, Mar. 14, 2003; and, "Magna Cum Unemployed," *Computerworld*, Apr. 28, 2003.

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

petitions were approved for newly arriving H-1B workers in FY2002. There were also 93,953 petitions approved in FY2002 for H-1B workers who were continuing to be employed after their initial H-1B visa had expired. In FY2001, there were 163,200 approved petitions that counted under the cap. The former INS reported that 201,079 petitions for newly arriving H-1B workers were approved in FY2001. That year INS also reported that 130,127 H-1B workers already in the United States were approved for continuing employment, up from 120,853 continuing H-1B workers approved in FY2000.

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

Figure 1. H-1B Nonimmigrant Petitions Approved, FY1992-FY2002



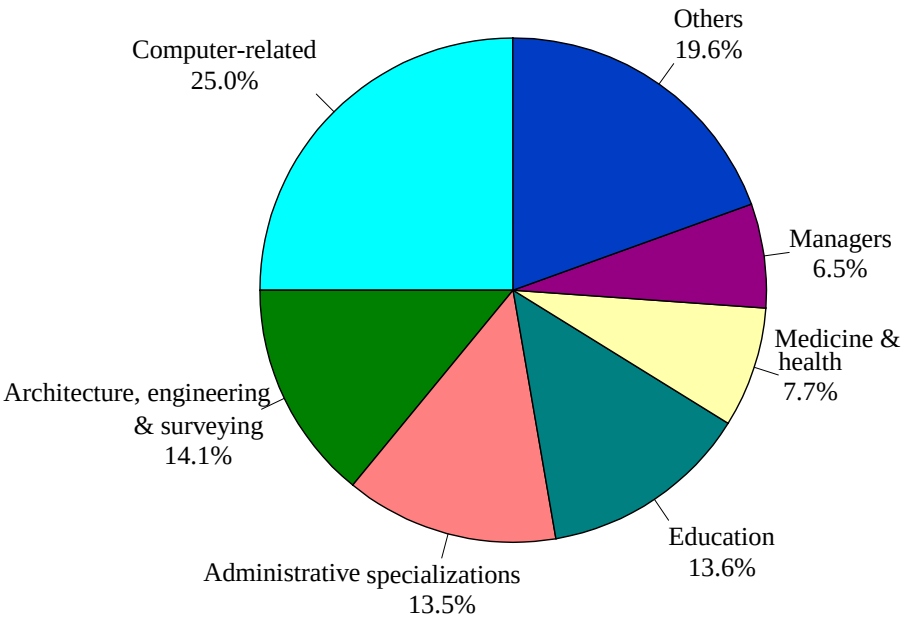
Source: CRS presentation of data from the U.S.Citizenship and Immigration Services and the former Immigration and Naturalization Service. FY2003 data are preliminary.

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

Ultimately, INS reported that 136,787 petitions for newly arriving H-1B workers were approved in FY2000.

As **Figure 1** illustrates, most H-1B petitions are approved outside of the numerical limits due to exemptions added to the law that are discussed below. Preliminary data indicates that 217,340 H-1B petitions were approved in FY2003, but that only about 78,000 were subject to the cap of 195,000. Reportedly, total petitions approved thus far in FY2004 are already approaching the 65,000 limit.

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



Source: CRS presentation of data from DHS Office of Immigration Statistics, *Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2002.*

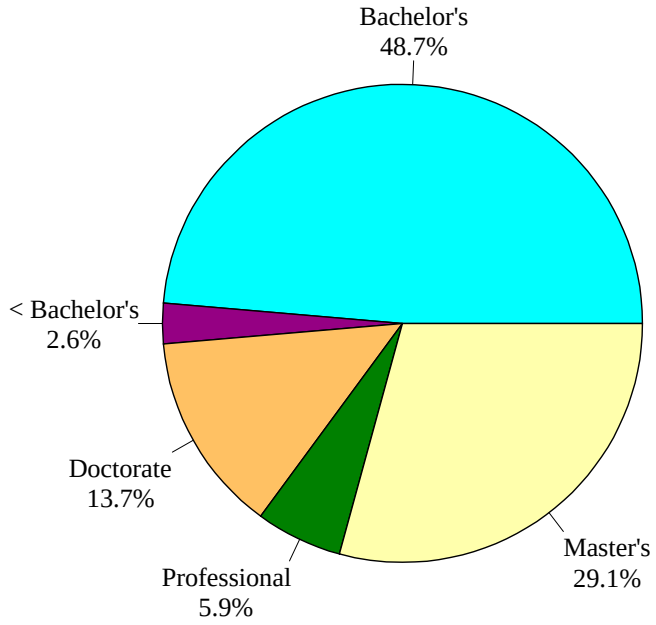
Characteristics of Recent H-1B Nonimmigrants

Until recently, the only data available on the occupations filled by H-1B nonimmigrants were the labor attestation applications filed by prospective employers. These data were imperfect because they included multiple openings and did not reflect actual H-1B admissions. According to the DOL data on approved attestations, therapists — mostly physical therapists, but also some occupational therapists, speech therapists, and related occupations — comprised over half (53.5%) of those approved in FY1995. The number of attestations approved for therapists fell to one-quarter (25.9%) in FY1997. In FY1996 computer-related occupations became the largest category and continue to lead in job openings approved by DOL for H-1Bs, going from 25.6% in FY1995, to 41.5% in FY1996, to 44.4% of the openings approved in FY1997. The DOL data from October 1998 through May 1999 have

systems analysts, programmers, and other computer-related occupations comprising 51% of all openings approved.[12]

According to data from the DHS Immigration Statistics for FY2001, over half (55.3%) of H-1B new arrivals, i.e., those who came in under the numerical cap, were employed in computer-related fields; however, this percentage fell to 25% in FY2002, as **Figure 2** illustrates. Architects, engineers and surveyors follow with 14.1% of the newly approved H-1B petitions in FY2002. Administrative specializations (13.5%), educators (13.6%), and those working in medicine and health (7.7%), and life sciences (4.5%) round out the occupations with notable numbers of H-1B nonimmigrants.[13]

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



Source: CRS presentation of data from DHS Office of Immigration Statistics, *Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2002*.

To obtain H-1B visas, nonimmigrants must demonstrate they have highly specialized knowledge in fields of human endeavor requiring the attainment of a bachelor's degree or its equivalent as a minimum. As **Figure 3** depicts, the most common degree attained by most H-1B new arrivals is a bachelor's degree or its equivalent (48.7%). Somewhat less than one-third (29.1%) have earned master's degrees. Another 19.6% have either professional degrees or doctorates. Of those

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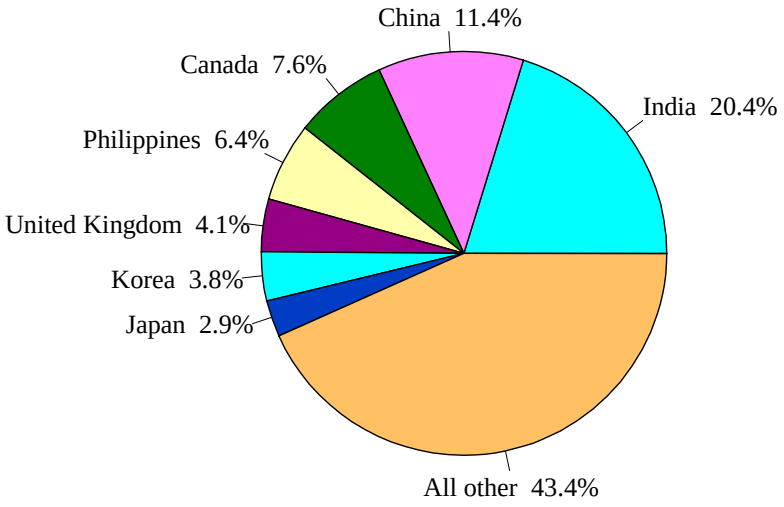
[12] For a fuller analysis of these DOL data and their limitations, see CRS Report 98-462, *Immigration and Information Technology Jobs: The Issue of Temporary Foreign Workers*, by Ruth Ellen Wasem and Linda Levine.

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

with less than a bachelor's degree, many are presumed to be the "prominent" fashion models who also are admitted as H-1B nonimmigrants.

India was the leading country of origin for H-1B workers, comprising 45.2% of all of the new arrivals in FY2001, but falling to 20.4% in FY2002 (**Figure 4**). Data previously released by DHS Immigration Statistics further estimate that nearly 74% of all of the systems analysts and programmers are from India. In terms of overall H-1B new arrivals, China follows with 11.4%, and Canada is third (7.6%). Other countries at or near 2%-6% are the United Kingdom, Philippines, Korea, and Japan.

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



Source: CRS presentation of data from DHS Office of Immigration Statistics, *Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2002.*

The median annual compensation of the newly arriving H-1B nonimmigrants dropped from $50,000 in FY2001 to $45,000 in FY2002. Half of all H-1Bs who came in under the numerical cap in FY2002 have median annual compensations ranging from $34,947 to $63,280. Fashion models have the highest reported median compensation — $100,000 annually. Although few H-1B nonimmigrants are admitted in law and jurisprudence occupations, they have the second highest median compensation of $79,520. Newly arriving H-1B nonimmigrants in computer-related occupations have median annual salaries of $45,000 in FY2002, down from $55,000 in FY2001. The median compensation for those H-1B workers approved for continuing employment is much higher — $60,000 annually in FY2002 — but fell from $65,000 annually in FY2002. Likewise, the median compensation for those H-1B workers approved for continuing employment in computer-related occupations in FY2002 — $60,000 — is higher than their newly arriving counterparts, but dropped from $69,000 in FY2001.

Legislative History

When Congress enacted the Immigration and Nationality Act of 1952, the H-1 nonimmigrants were described as aliens of "distinguished merit and ability" who were filling positions that were temporary.[14] Nonimmigrants on H-1 visas had to maintain a foreign residence. Over the years, Congress made a series of revisions to the H-1 visa category and in 1989, split the H-1 visa into (a) and (b). The Immigration Act of 1990 (P.L. 101-649) established the main features of H-1B visa as it is known today. Foremost, §205 of P.L. 101-649 replaced "distinguished merit and ability" with the "specialty occupation" definition. It added labor attestation requirements and the numerical limit of 65,000 on H-1B visas issued annually. It also dropped the foreign residence requirement.

American Competitiveness and Workforce Improvement Act[15]

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

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

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[14] P.L. 414, 82nd Congress.

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

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

Legislation in the 106th Congress

On October 3, 2000, both chambers of Congress passed the American Competitiveness in the Twenty-First Century Act of 2000 (S. 2045) with bipartisan support, and President Clinton signed the new law (P.L. 106-313) on October 17. The Senate had debated the legislation for several days, though much of the debate centered on procedural issues — specifically whether amendments that would legalize certain aliens (mostly Central Americans and Liberians) would be permitted.[16] The House passed S. 2045 under a suspension of the rules shortly after the Senate passed it.

The language that passed was a substitute version offered by Judiciary Committee Chairman Orrin Hatch with bipartisan support. It includes many of the same features as the version of the bill reported earlier by the Senate Judiciary Committee.[17] It raises the number of H-1B visas by 297,500 over three years, FY2000-FY2002. Specifically, it adds 80,000 new H-1B visas for FY2000, 87,500 visas for FY2001, and 130,000 visas for FY2002. It also authorizes additional H-1B visas for FY1999 to compensate for the excess inadvertently approved that year. In addition, P.L. 106-313 excludes from the new ceiling all H-1B nonimmigrants who work for universities and nonprofit research facilities. A provision that would have exempted H-1B nonimmigrants with at least a master's degree from the numerical limits was dropped from the final bill. The new law also makes a major change in the law governing the permanent admission of immigrants by eliminating the per-country ceilings for employment-based immigrants. It also has provisions that facilitate the portability of H-1B status for those already here lawfully and requires a study of the "digital divide" on access to information technology.

The new law makes changes in the use of the H-1B fees for education and training, notably earmarking a portion of DOL training funds for skills that are in information technology shortage areas and adding to the NSF portion a K-12 math, science and technology education grant program. Because S. 2045 originated in the Senate, it did not contain revenue provisions. Separate legislation to increase the H-1B fee from $500 to $1,000 (P.L. 106-311, H.R. 5362) passed the House on October 6, the Senate on October 10, and was signed by President Clinton on October 17. The conference agreement on the FY2001 Commerce, Justice, State appropriations

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

[17] The Judiciary Committee report (S.Rept. 106-260) was filed on Apr. 11, 2000.

bill (H.R. 4942, H.Rept. 106-1005) includes a provision that would authorize another H-1B fee that employers would pay for expedited servicing of the petitions.

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

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

Representatives David Dreier and Zoe Lofgren introduced H.R. 3983, which would have added an additional 362,500 over FY2001-FY2003. Specifically, it would have raised the ceiling by 200,000 for three years and would have set aside 60,000 visas annually through FY2003 for persons with master's degrees. It would have required employers to file W-2 forms with DOL for each H-1B worker employed. Like P.L. 106-313, H.R. 3983 would have eliminated the per-country ceilings for permanent employment-based admissions. It would have enabled employers to use Internet recruiting to meet labor market recruitment requirements and would have established an Internet web-based tracking system for immigration-related petitions. Like P.L. 106-311, this bill would have increased the $500 fee for education and training to $1,000, and it would have modified the scholarship and

training program requirements, including the addition of student loan forgiveness in special cases.

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

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

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

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

$60,000. More stringent than H.R. 2687, S. 1645 included provisions aimed at protecting U.S. workers that are comparable to the provisions governing the H-1B visa.

Legislation in the 107th Congress

Several bills addressing the H-1B numerical limits were introduced in the 107th Congress. H.R. 2984 would have amended the INA to require the Attorney General to ensure that only H-1B visa holders who actually commence employment are counted toward the ceiling. Congressman Tom Tancredo offered H.R. 3222, which would have set the upper limit of H-1B admissions at 65,000 and reduced it by 10,000 for each quarter percentage point by which the unemployment rate for the United States exceeded 6%. Emerging concerns of a shortage of nurses and other health care workers, however, prompted interest in the use of H-1Bs among health care professionals. The Senate Committee on the Judiciary Subcommittee on Immigration held hearings May 22, 2001, on "Immigration Policy: Rural and Urban Health Care Needs."[18]

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

Legislative Issues in the 108th Congress

Issues of Debate

Effects on U.S. Labor Market. Congress continues to strive to balance the needs of U.S. employers with employment opportunities for U.S. residents. Proponents argue that continuing current levels in the admission of H-1B workers are essential if the United States is to remain globally competitive and that employers should be free to hire the best people for the jobs. They say that the education of students and retraining of the current workforce is a long-term approach, and they cannot wait to fill today's openings. Some point out that many mathematics, computer science, and engineering graduates of U.S. colleges and universities are

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

foreign students and that we should keep that talent here. Others assert that H-1B workers create jobs, either by ultimately starting their own information technology firms or by providing a workforce sufficient for firms to remain in the United States. Proponents of the increase also cite media accounts of information technology workers from India who prefer to work for companies in India and warn that the work will move abroad if action to increase H-1B visas is not taken.[19]

Those opposing any further increases — temporary or permanent — assert that there is no compelling evidence of a labor shortage in these professional areas that cannot be met by newly graduating students and by retraining the existing U.S. work force. They argue that the education of U.S. students and training of U.S. workers should be prioritized. Opponents also maintain that salaries and compensation would be rising if there is a labor shortage and if employers wanted to attract qualified U.S. workers. Some allege that employers prefer H-1B workers because they are less demanding in terms of wages and working conditions and that an industry's dependence on temporary foreign workers may inadvertently lead the brightest U.S. students to seek positions in fields offering more stable and lucrative careers.[20]

Alternatively, some maintain that the H-1B ceiling is arbitrary and would not be necessary if more stringent protections for U.S. workers were enacted. They argue the question is not "how many" but "under what conditions." Some would strengthen the anti-fraud provisions and would broaden the recruitment requirements and layoff protections enacted in 1998 for "H-1B dependent" employers to all employers hiring H-1B workers.[21] Others would reform the labor attestation and certification process and would make the labor market tests for nonimmigrant temporary workers comparable to those for immigrants applying for one of the permanent employment-based admissions categories.

GAO has issued a report that recommended more controls to protect workers, to prevent abuses, and to streamline services in the issuing of H-1B visas. GAO concluded that the DOL has limited authority to question information on the labor attestation form and to initiate enforcement activities. GAO also concluded that the former INS's handling of H-1B petitions had potential for abuses.[22]

Inclusion in Free Trade Agreements. Negotiators for the Uruguay Round Agreements of the General Agreement on Tariffs and Trade (GATT), completed in

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[19] Pamela Constable, "India's Brain Drain Eases Off," *Washington Post*, Sept. 14, 2000.

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

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

[22] U.S. General Accounting Office, *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*, GAO/HEHS-00-157, Sept. 2000.

1994 and known as the General Agreement on Trade in Services (GATS), included specific language on temporary professional workers. This language references §101(a)(15)(H(i)(b) of INA and commits the United States to admitting 65,000 H-1B visa holders each year under the definition of H-1B specified in GATS.[23]

Some have expressed concerned that free trade agreements, most recently the Chile and Singapore Free Trade Agreements (FTAs), include language on temporary professional workers that bars the United States from future statutory changes to H-1B visas as well as other temporary business and worker nonimmigrant categories. Some assert that the Office of the U.S. Trade Representative (USTR) has overstepped its authority by negotiating immigration provisions in FTAs and are voicing opposition to trade agreements that would prevent Congress from subsequently revising immigration law on temporary professional nonimmigrants. Some have expressed concern that professional workers from Chile and Singapore are held to a less stringent standard than existing H-1B law as a result of the recent FTAs.

Proponents of these trade agreements point out that they are merely reflecting current immigration law and policy. They argue that the movement of people is subsumed under the broader category of "provision of services" and thus an inherent part of any free trade agreement. Such agreements on the flow of business people and workers, they maintain, are essential to U.S. economic growth and business vitality. The USTR states that the labor attestations, education and training fees, and numerical limits provisions have been added to the FTAs in response to congressional concerns. The USTR further argues that the temporary business personnel provisions in the FTAs are not immigration policy because they only affect temporary entry.[24]

National Security. Some concerns have been raised about the need to monitor H-1Bs workers, particularly those whose employment gives them access to controlled technologies, i.e., those that could be used to upgrade military capabilities. GAO found that 15,000 foreign nationals from countries of concern (e.g., China, India, Iran, Iraq, North Korea, Pakistan, Sudan, and Syria) had changed their immigration status to an H-1B visa in 2001 to obtain jobs that could have involved controlled technologies without the Department of Commerce screening and called for a reexamination of policies that give foreign nationals access to such technology.[25]

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[23] General Agreement on Trade in Services (GATS), Uruguay Round Trade Agreements, Schedule of Specific Commitments. For legal analysis see CRS Congressional Distribution Memorandum, *U.S. Immigration-Related Obligations Under the WTO General Agreement on Trade in Services*, by Jeanne J. Grimmett, May 12, 1998.

[24] For a more on these trade agreements, see CRS Issue Brief IB10123, *Trade Negotiations in the 108th Congress*, by Ian Fergusson and Lenore Sek; and the CRS Electronic Briefing Book on Trade at [http://www.congress.gov/brbk/html/ebtra1.shtml].

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

Supporters of the current policy maintain that safeguards which are more than adequate are already in place and point out that all foreign nationals who seek to enter the United States are screened for potential national security risks by both the Department of State and the Department of Homeland Security. They argue that additional monitoring of H-1B workers would shift resources away from other areas of homeland security where they are more needed, such as border security.

Legislation in the 108th Congress

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

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

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

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

H-1B Elimination/Moratorium. On June 25, 2003, Congressman Sam Graves introduced H.R. 2235, which would suspend the issuances of certain nonimmigrant visas — including H-1B visas — until a set of conditions pertaining to the full implementation of specified immigration and homeland security laws are met. On July 9, 2003, Congressman Tom Tancredo introduced H.R. 2688, which would repeal the statutory authority to admit H-1B workers.