

# CRS Report for Congress

## Immigration of Foreign Workers: Labor Market Tests and Protections

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# Immigration of Foreign Workers: Labor Market Tests and Protections

## Summary

Many business people have expressed concern that a scarcity of labor in certain sectors may curtail the pace of economic growth. A leading legislative response to skills mismatches and labor shortages has been to increase the supply of foreign workers. While the demand for more skilled and highly-trained foreign workers has garnered much of the attention in recent years, there has also been pressure to increase unskilled temporary foreign workers, commonly referred to as guest workers.

Those opposing increases in foreign workers assert that there is no compelling evidence of labor shortages. Opponents 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 guest workers because they are less demanding in terms of wages and working conditions, and that expanding guest worker visas would have a deleterious effect on U.S. workers.

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) has grown from under 100,000 in FY1994 to over 250,000 in FY2005. The number of visas for employment-based *temporary* nonimmigrants rose from just under 600,000 in FY1994 to approximately 1.2 million in FY2005. In particular, “H” visas for temporary workers tripled from 98,030 in FY1994 to 321,336 in FY2005.

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.

President George W. Bush has stated that comprehensive immigration reform is a top priority of his second term. His principles of reform include a major overhaul of temporary worker visas, expansion of permanent legal immigration and revisions to the process of determining whether foreign workers are needed. These issues were addressed in legislation (S. 2611) passed by the Senate in the 109<sup>th</sup> Congress and are emerging again in the 110<sup>th</sup> Congress. The challenge inherent in this policy debate is balancing employers’ hopes to increase the supply of legally present foreign workers without displacing or adversely affecting the working conditions of U.S. workers.

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

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# Immigration of Foreign Workers: Labor Market Tests and Protections

## Introduction

### Key Elements

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 the Secretary of Labor provides a certification to the Secretary of State and the Attorney General.<sup>1</sup> 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 a 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.<sup>2</sup>

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, temporary agricultural workers, and temporary nonagricultural workers as well as the streamlined LCA known as *labor attestations* for temporary professional workers. Foreign labor certification is one of the "national activities" within the Employment and Training Administration (ETA).<sup>3</sup>

**Labor Certification.** The process of admitting permanent employment-based immigrants, temporary agricultural workers (H-2A), and temporary nonagricultural workers (H-2B) requires that employers conduct an affirmative search for available U.S. workers and that the DOL determine that admitting alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Under this process — known as labor certification — employers must

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<sup>1</sup> 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.

<sup>2</sup> INA §212(a)(5).

<sup>3</sup> 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.

apply to the DOL for certification that unemployed domestic workers are not available and that there will not be an adverse effect on U.S. workers from the alien workers' entry into the labor market. The H-2A visa has additional 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. Most notably, the employer must offer the H-2A workers the highest of the federal or applicable state minimum wage, the prevailing wage rate, or the adverse effect wage rate (AEWR).<sup>4</sup>

**Labor Attestation.** The labor market test required for temporary professional workers (H-1), known as labor attestation, is considered by many to be less stringent than labor certification for H-2 visas in that it is a *statement of intent* rather than a *documentation of actions taken*. Any employer wishing to bring in an H-1B worker must attest in an application to the DOL that the employer will pay the H-1B worker 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 H-1B worker that do not cause the working conditions of the other employees to be adversely affected; and there is no strike or lockout. Employers defined as H-1B dependent (generally at least 15% of their workforce are H-1Bs) meet additional labor market tests.

## Brief History of Labor Certification

In 1885, 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> This provision in the 1952 Act established the

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<sup>4</sup> For a more complete explanation of this provision and how it works, see CRS Report RS21015, *The Adverse Effect Wage Rate (AEWR)*, by William Whittaker.

<sup>5</sup> 23 Stat. 332.

<sup>6</sup> The McCarran-Walters Act (P.L. 82-414).

<sup>7</sup> §203(a)(1) of P.L. 82-414.

<sup>8</sup> §212(a)(14) of P.L. 82-414.

policy of labor certification. The major reform of INA in 1965 included language that obligated the employers to file labor certification applications (LCAs).<sup>9</sup>

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 United States of aliens seeking to work without proper labor certification. The labor certification ground for exclusion covers both aliens coming to live as LPRs and as temporarily-admitted aliens (i.e., nonimmigrants). 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.<sup>10</sup>

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

The INA establishes a statutory worldwide level of 675,000 annually for legal permanent residents (LPRs), 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.<sup>11</sup>

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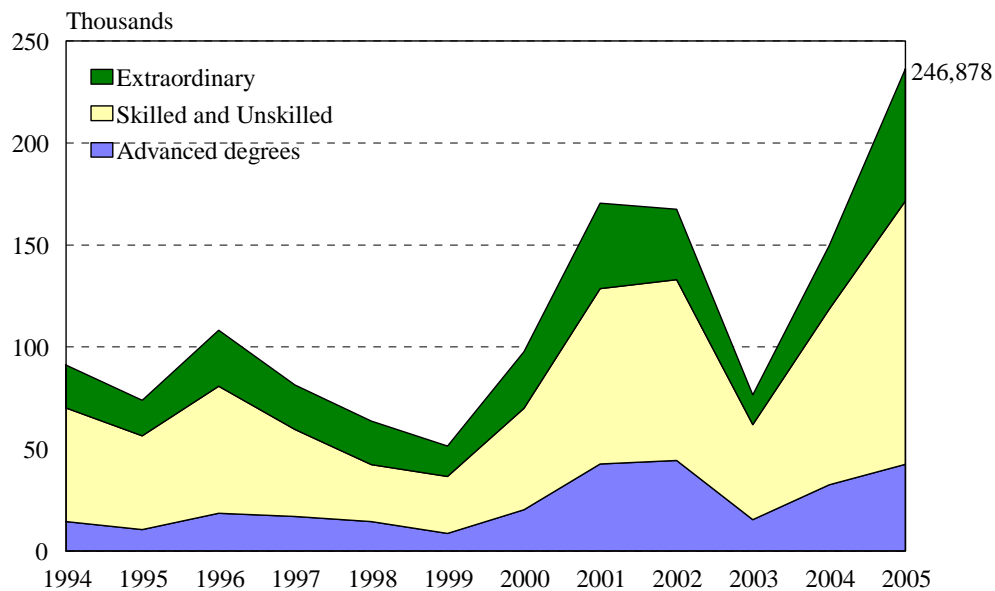
<sup>9</sup> *Interpreter Releases*, “The Lawyer’s Guide to §212(a)(5)(A): Labor Certification from 1952 to PERM,” by Gary Endelman, Oct. 11, 2004.

<sup>10</sup> §212(a)(5) of INA; §1182(a)(5) 8 USC.

<sup>11</sup> 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. 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 in recent years.<sup>12</sup> Although there were major legislative proposals in the mid-1990s to alter employment-based immigration, these preference categories remain intact.<sup>13</sup>

**Figure 1. Permanent Employment-based Admissions for 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Preferences, 1994-2005**



**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.

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;

<sup>12</sup> For an explanation of these trends, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

<sup>13</sup> CRS Report 96-149, *Immigration: Analysis of Major Proposals to Revise Family and Employment Admissions*, by Joyce C. Violet and Ruth Ellen Wasem.

- *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.

Employers who seek to hire prospective immigrant workers petition with the U.S. Citizenship and Immigration Services Bureau (USCIS) in the Department of Homeland Security. 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.<sup>14</sup>

In terms of employment-based immigration, decisions of the Board of Immigration Appeals (BIA) have significantly effected 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.

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<sup>14</sup> § 203(b) of INA; 8 U.S.C. § 1153.

<sup>15</sup> Certain second preference immigrants who are deemed to be “in the national interest” are exempt from labor certification.

<sup>16</sup> 20 C.F.R. Part 656.

<sup>17</sup> 20 C.F.R. Part 656.



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.” 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.”<sup>18</sup>

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).<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup>

In 2003, DOL acknowledged a backlog of more than 300,000 LCAs for permanent admissions and projected an average processing time of 3½ years before

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<sup>18</sup> §212(a)(5)(A) of INA.

<sup>19</sup> Employers also file immigration petitions with USCIS on behalf of the aliens they are recruiting and pay fees for each petitions they file.

<sup>20</sup> These forms are available at [<http://www.foreignlaborcert.doleta.gov/>], accessed Apr. 23, 2007.

<sup>21</sup> *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, p. 77325.

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.<sup>22</sup>

## **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.

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.<sup>23</sup>

In addition 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

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<sup>22</sup> CRS Report RS21520, *Labor Certification for Permanent Immigrant Admissions*, by Ruth Ellen Wasem.

<sup>23</sup> 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.

employer must conduct three additional steps that the employer chooses from a list published in the regulation.<sup>24</sup>

As a result of these regulatory reforms, DOL predicts 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.

## 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 72 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.<sup>25</sup> 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. While a variety of temporary visas — by their intrinsic nature — allow foreign nationals to be employed in the United States, the applications for many of these visas do not trigger the requirement for an LCA filing.

**Temporary Workers.**<sup>26</sup> 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). 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.

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<sup>24</sup> *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp. 77325-77421.

<sup>25</sup> For a fuller discussion and analysis, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Chad C. Haddal and Ruth Ellen Wasem.

<sup>26</sup> 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.

**Multinational Executives 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. Aliens who are treaty traders enter on E-1 visas while those who are treaty investors use E-2 visas.<sup>27</sup>

**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.

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. Aliens working in religious vocations enter on R visas. Temporary professional workers from Canada and Mexico may enter according to terms set by the North American Free Trade Agreement (NAFTA) on TN visas.

**Aliens in Transit and Crew Members.** 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.<sup>28</sup>

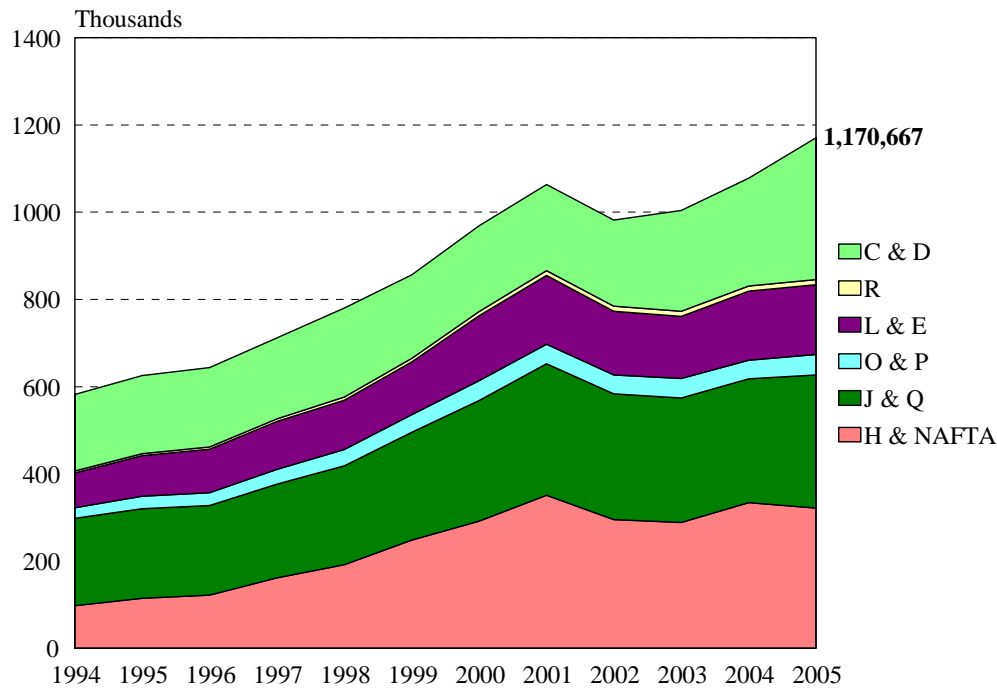
As **Figure 2** illustrates, the issuances of temporary employment-based visas has risen steadily over the past decade. In FY2005, almost 1.2 million visas were issued. A total of 849,331 visas were issued in FY2005 to C, D, E, J, L, O, P, Q and R employment-based nonimmigrants.<sup>29</sup>

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<sup>27</sup> 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 Chad C. Haddal.

<sup>28</sup> 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.

<sup>29</sup> For a detailed analysis, see **Table 2** in CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Chad C. Haddal and Ruth Ellen Wasem.

**Figure 2. Temporary Employment-based Admissions, 1994-2005**

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

## H-1B Visas<sup>30</sup>

Nonimmigrant temporary workers seeking employment in the United States are generally classified in the “H” visa category. The largest number of H visas are issued to temporary workers in specialty occupations, known as H-1B nonimmigrants. 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.<sup>31</sup>

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,

<sup>30</sup> 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*.)

<sup>31</sup> 8 C.F.R. §214.2(h)(4). Law and regulations also specify that fashion models deemed “prominent” may enter on H-1B visas.

the attestation is a statement of intent rather than a documentation of actions taken.<sup>32</sup> 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.<sup>33</sup>

**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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

The prospective H-1B nonimmigrants must demonstrate to the USCIS 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.

## H-2A Visas<sup>37</sup>

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

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<sup>32</sup> Attestation was part of a compromise package on H-1B visa that included annual numerical limits in the Immigration Act of 1990 (P.L.100-649). See CRS Report RL30498, *Nonimmigrant Professional Specialty (H-1B) Workers*.

<sup>33</sup> INA §212(n); 8 C.F.R. §214.2(h)(4). For a further discussion of labor attestations, see CRS Report RL30498, *Nonimmigrant Professional Specialty (H-1B) Workers*.

<sup>34</sup> 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.

<sup>35</sup> INA §212(n).

<sup>36</sup> CRS Report RS20164, *Immigration: Temporary Admission of Nurses for Health Shortage Areas (P.L. 106-95)*, by Joyce Vialet.

<sup>37</sup> 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.

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 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. This process — known as labor certification — is similar but not identical to the process required of employers who seek to bring in workers as permanent, employment-based immigrants (discussed above).<sup>38</sup> Employers must apply to DOL for certification that unemployed domestic workers are not available and that there will not be an adverse effect from the alien workers' entry. The application must include a copy of the job offer to be used to recruit U.S. and H-2A workers.<sup>39</sup>

**Required Benefits.** 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).<sup>40</sup>
- 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).

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<sup>38</sup> 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.

<sup>39</sup> INA §101(a)(15)(H)(ii)(a), §218(a)(1), (d)(1); 20 CFR §655.100; §655.101(a), (b); §655.103.

<sup>40</sup> For a more complete explanation of this provision and how it works, see CRS Report RS21015, *The Adverse Effect Wage Rate (AEWR)*, by William Whittaker.

- 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<sup>41</sup>

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.<sup>42</sup> The statute does not establish specific skills, education or experience required for the visa, with some exceptions.<sup>43</sup> Foreign medical graduates coming to perform medical services are explicitly excluded from the program. An approved H-2B visa petition is valid for an initial period of up to one year.<sup>44</sup> An alien's total period of stay as an H-2B worker may not exceed three consecutive years.<sup>45</sup>

Like prospective H-2A employers, prospective H-2B employers must first 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. H-2B employers must pay their workers at least the prevailing wage rate. Unlike H-2A employers, they are not subject to the AEWB and do not have to provide housing, transportation,<sup>46</sup> and other benefits required under the H-2A program.

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<sup>41</sup> This section is drawn, in part, from CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

<sup>42</sup> For definitions of these types of need, see 8 C.F.R. §214.2(h)(6)(ii).

<sup>43</sup> 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).

<sup>44</sup> See 8 C.F.R. §214.2(h)(9)(iii)(B).

<sup>45</sup> 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.

<sup>46</sup> 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 (continued...)



## Summary of Labor Market Tests for Workers on H Visas

**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.

**Table 1. Selected 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	no
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.

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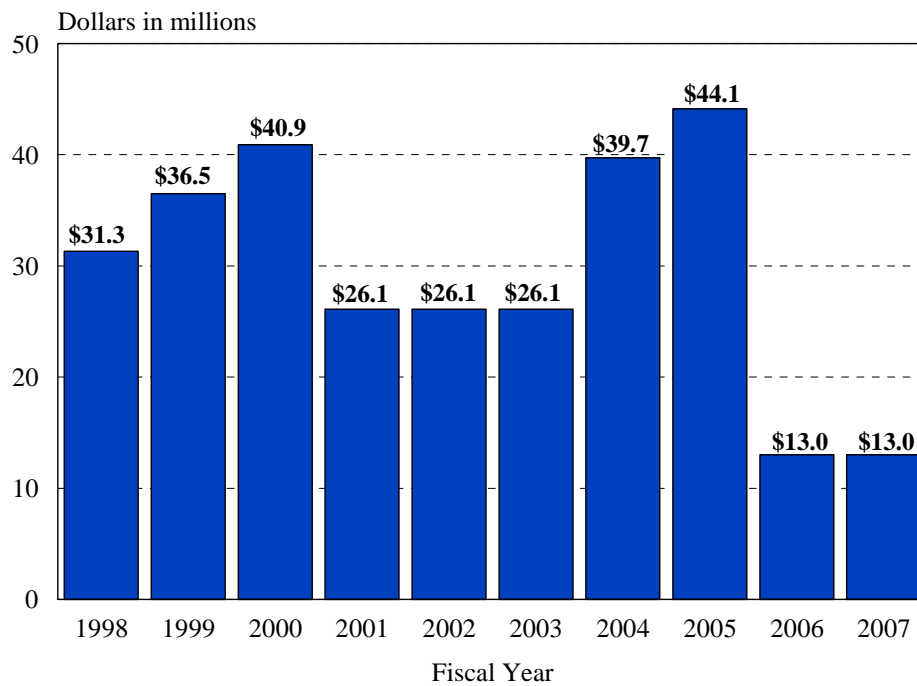
<sup>46</sup> (...continued)

for an H-2B worker who is dismissed prior to the end of his or her authorized period of stay.

## Funding Foreign Labor Certification

As **Figure 3** shows, funding for foreign labor certification has fluctuated over the past 10 years despite the steady upward trends in employment-based immigration (**Figures 1 and 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 eliminate the backlog of LCAs that were pending at that time.<sup>47</sup> PERM's on-line filings are also credited with reducing the LCA processing times. DOL expects to eliminate the backlog by September 30, 2007.<sup>48</sup>

**Figure 3. Appropriations for Foreign Labor Certification, FY1998-FY2007**



Source: CRS presentation of DOL Budget Justifications for Appropriations, FY1999-FY2007.

<sup>47</sup> *FY1998 Budget Justifications of Appropriations Estimates for Committee on Appropriations*, vol. 1, SUIESO-28.

<sup>48</sup> For further information, see [<http://www.foreignlaborcert.doleta.gov/>], accessed Apr. 23, 2007.

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,<sup>49</sup> 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.<sup>50</sup> The Bush Administration has unsuccessfully sought authority to use a portion of the H-1B education and training fees for the processing of LCAs.<sup>51</sup> Congress continues to fund LCA processing with appropriations from the “national activities” account of ETA’s Employment Services.

## Selected Issues

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. 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.

### 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.<sup>52</sup>

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<sup>49</sup> §286 of the Immigration and Nationality Act. 8 U.S.C. 1356.

<sup>50</sup> U.S. Department of Labor, *FY1998 Budget Justifications of Appropriations Estimates for Committee on Appropriations*, vol. 1, SUIESO-28.

<sup>51</sup> CRS Report RL31973, *Programs Funded by the H-1B Visa Education and Training Fee, and Labor Market Conditions for Information Technology (IT) Worker*, by Linda Levine.

<sup>52</sup> In Jan. 2005, USCIS proposed regulations to streamline the H-2B petitioning process, which would significantly alter procedures. Among other changes, the proposed rule would eliminate the requirement that prospective H-2B employers file for a labor certification from DOL in most cases. Instead, employers seeking H-2B workers in areas other than logging, the entertainment industry, and professional athletics would include certain labor attestations as part of the H-2B petition they file with USCIS. According to the proposed rule, this H-2B attestation process would be similar to the process currently used for H-1B professional specialty workers. The proposed USCIS rule is available at (continued...)

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.<sup>53</sup> They express concern that PERM regulations have undermined the integrity of labor market tests for the LPR process.

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.<sup>54</sup>

## 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.<sup>55</sup> Many cite the GAO studies that document abuses of H-1B visas and recommend additional controls to protect U.S. workers.<sup>56</sup>

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 relatively unfamiliar with the local labor markets and that this centralized decision-making might adversely affect U.S.

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<sup>52</sup> (...continued)

[<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-1240.htm>]. DOL has published a companion proposal, which is available at [<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-1222.htm>].

<sup>53</sup> For example, see AFL-CIO Legislative Alert, letter to U.S. Senators from William Samuel, Oct. 19, 2005.

<sup>54</sup> For example, see the "H-2A Reform and Agricultural Worker Adjustment Act of 2001" S. 1313/H.R. 2736 introduced in the 107<sup>th</sup> Congress.

<sup>55</sup> CRS Report RL30140, *An Information Technology Labor Shortage? Legislation in the 106<sup>th</sup> 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.

<sup>56</sup> For example, see AFL-CIO Legislative Alert, letter to U.S. Senators from William Samuel, Oct. 19, 2005.

workers. The AFL-CIO has maintained that a thorough manual review of labor certification applications is, at times, the sole protection of American workers.<sup>57</sup>

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 Administration further points 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.<sup>58</sup>

## 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.<sup>59</sup>

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.<sup>60</sup>

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 Administration is reportedly considering a plan to cross-check the employer's federal employer identification number with other available databases.<sup>61</sup>

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<sup>57</sup> *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

<sup>58</sup> *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

<sup>59</sup> *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

<sup>60</sup> 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.

<sup>61</sup> *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.<sup>62</sup> They further point out that most LPRs working in the United States entered on visas not subject to labor market tests.<sup>63</sup> 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."<sup>64</sup>

## 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.<sup>65</sup>

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.<sup>66</sup>

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<sup>62</sup> *Interpreter Releases*, "The Lawyer's Guide to §212(a)(5)(A): Labor Certification from 1952 to PERM," by Gary Endelman, Oct. 11, 2004.

<sup>63</sup> 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.

<sup>64</sup> *Business Dateline*, "The U.S. Labor Department unveils a streamlined path," by William T. Quinn (quoting William McAlvanah), Apr. 4, 2005.

<sup>65</sup> *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

<sup>66</sup> *Federal Register*, vol. 69, no. 247, Dec. 27, 2004, pp 77325-77421.

## 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 replacements.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup>

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.<sup>70</sup>

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.<sup>71</sup>

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<sup>67</sup> 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.

<sup>68</sup> CRS Report 98-531, *Immigration: Nonimmigrant H-1B Specialty Worker Issues and Legislation*, by Ruth Ellen Wasem.

<sup>69</sup> CRS Report RL30072, *Temporary Workers as Members of the Contingent Labor Force*, by Linda Levine; and CRS Report RL30498, *Nonimmigrant Professional Specialty (H-1B) Workers*.

<sup>70</sup> 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.

<sup>71</sup> 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* (continued...)

## 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. 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.<sup>72</sup> 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 specialized expertise as well as workers with no skills. Legislation that would comprehensively 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 comprehensive immigration reform

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<sup>71</sup> (...continued)

*Global Economy*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., July 29, 2003; and U.S. Congress, House Committee on Foreign Relations, *L Visas: Losing Jobs Through Laissez-faire Policies?* hearings, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., Feb. 4, 2004.

<sup>72</sup> *Congressional Record*, vol. 142, Statement of Senator Ted Kennedy, Apr. 15, 1996, p. S3287.