Congressional Research Service

Memorandum March 20, 2006

SUBJECT: **H-1B Visas: Legislative History, Trends Over Time, and Pathways to Permanent Residence**

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Overview of H-1B Visas[1]

Nonimmigrant temporary workers seeking employment in the United States are generally classified in the "H" visa category.[2] 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.[3]

The U.S. Department of Labor (DOL) is responsible for ensuring that foreign workers do not displace or adversely affect wages or working conditions of U.S. workers. DOL's Employment and Training Administration (ETA) adjudicates several types of Labor Condition Applications (LCA's) filed by employers who seek to import foreign workers. The H-1B labor attestation, a three-page application form, is a streamlined version of the LCA. It is the first step for an employer wishing to bring in an H-1B professional foreign

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

[2] A nonimmigrant is an alien legally in the United States for a specific purpose and a temporary period of time. There are 72 nonimmigrant visa categories specified in §101(a)(15) of the Immigration and Nationality Act (INA), and they are commonly referred to by the letter that denotes their section in the statute. For a full discussion and analysis of nonimmigrant visas, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

[3] 8 C.F.R. §214.2(h)(4). Law and regulations also specify that fashion models deemed "prominent" may enter on H-1B visas.

worker. In LCA's for H-1B workers, the employer must attest that the firm will pay the nonimmigrant the greater of the actual compensation paid other employees in the same job or the prevailing compensation 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.[4]

The prospective H-1B nonimmigrants must demonstrate to the U.S. Citizenship and Immigration Services Bureau (USCIS) in the Department of Homeland Security (DHS) 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.

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.[5] 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).[6] 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.

The American Competitiveness and Workforce Improvement Act of 1998 (Title IV of P.L. 105-277) added new attestation requirements for recruitment and layoff protections, but only required them of firms that are "H-1B dependent" (generally at least 15% of workforce are H-1Bs workers). All firms have to offer H-1Bs *benefits* as well as wages comparable to their U.S. workers. Education and training for U.S. workers is funded by a $500 fee paid by the employer for each H-1B worker that is hired. The ceiling set by the compromise was 115,000 in both FY1999 and FY2000, 107,500 in FY2001, and back to 65,000 in FY2002.[7]

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. It raised the number of H-1B visas by 297,500 over three years, FY2000-FY2002. Specifically, it added 80,000 new H-1B visas for FY2000, 87,500 visas for FY2001, and 130,000 visas for FY2002. It also authorized additional H-1B visas for FY1999 to compensate for the excess inadvertently approved that

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[4] 8 C.F.R. §214.2(h)(4). For a further discussion of labor attestations, see RL30498, *Nonimmigrant Professional Specialty (H-1B) Workers*.

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

[6] In 1970, Congress removed the "double temporary" requirement that both the H-1B's stay *and the job* be temporary.

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

year. In addition, P.L. 106-313 excluded 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. That law also made a major change in the law governing the permanent admission of immigrants by eliminating the per-country ceilings for employment-based immigrants. It also had provisions that facilitated the portability of H-1B status for those already here lawfully and required a study of the "digital divide" on access to information technology. Separate legislation was enacted to increase the H-1B fee from $500 to $1,000 (P.L. 106-311, H.R. 5362)

Title IV of the legislation implementing the Chile and Singapore Free Trade Agreements (P.L. 108-77 and P.L. 108-78 respectively) amended §101(a)(15)(H) of the INA to carve out a portion of the H-1B visas — designated as the H-1B-1 visa — for professional workers entering through the free trade agreements (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. P.L. 108-77 contained numerical limits of 1,400 new entries under the FTA professional worker visa from Chile, and P.L. 108-78 contained 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, 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.

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

Trends in Admissions

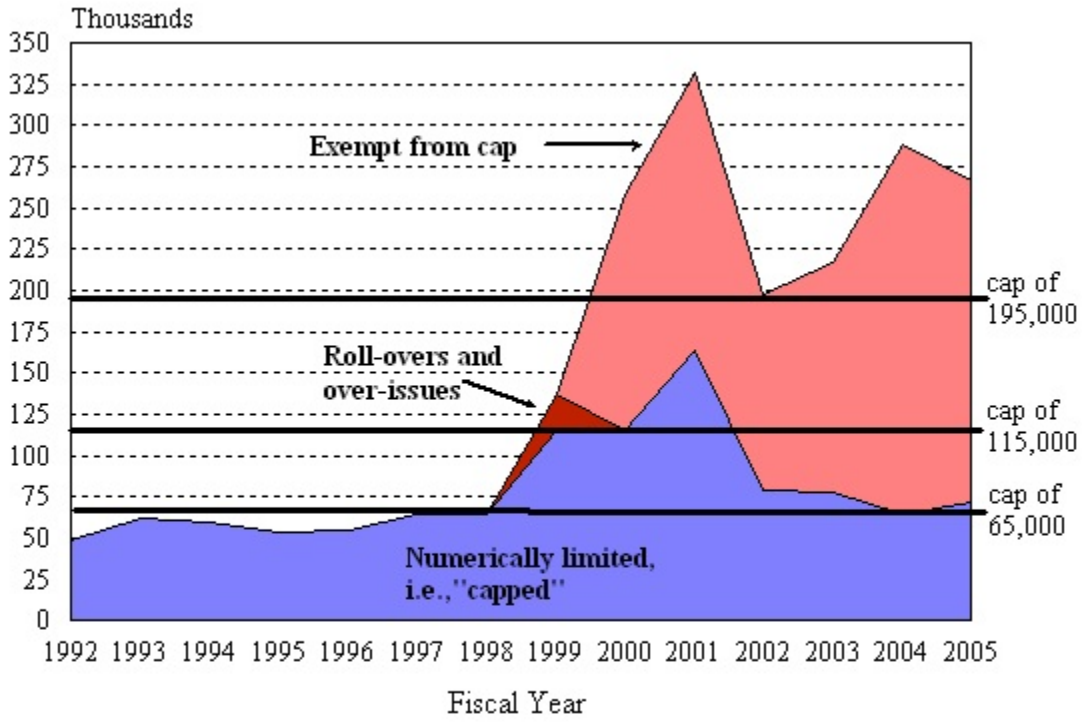
The number of petitions approved for H-1B workers escalated in the late 1990s and peaked in FY2001 at 331,206 approvals (**Figure 1**). Data from the DHS Office of Immigration Statistics (hereafter referred to as DHS Immigration Statistics) illustrate that the demand for H-1B visas continued to press 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, discussed above, 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 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-FY2005



Source: CRS presentation of data from the U.S. Citizenship and Immigration Services and the former Immigration and Naturalization Service. FY2004 and FY2005 data are preliminary.

The former INS acknowledged 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 above. Over 217,00- H-1B petitions were approved in FY2003, but only about 78,000 were subject to the cap of 195,000. The FY2004 limit of 65,000 was reached in mid-February. On October 1, 2004, USCIS announced that it had already reached the FY2005 cap, which that year was 58,200 because of visas set aside by the U.S.-Chile and U.S.-Singapore Free Trade Agreements.

According to USCIS, approximately 288,000 H-1B petitions were approved in FY2004 and approximately 266,000 in FY2005.[8] The FY2006 cap was hit before the fiscal year began in August 2005.

Pathways to Permanent Residence

The H-1B visa often provides the link for the foreign student (F-1 visa) to become legal permanent residence (LPR).[9] Anecdotal accounts tell of foreign students who are hired by U.S. firms as they are completing their programs. The employers obtain H-1B visas for the recent graduates, and if the employees meet expectations, the employers may also petition for the nonimmigrants to become legal permanent residents through one of the employment-based immigration categories.[10] Some policy makers consider this a natural and positive chain of events, arguing that it would be foolish to educate these talented young people only to make them leave to work for foreign competitors. Others consider this "F-1 to H-1B to LPR" pathway an abuse of the temporary element of nonimmigrant status and a way to circumvent the laws and procedures that protect U.S. workers from being displaced by immigrants.[11]

Recent research by B. Lindsay Lowell of the Institute for the Study of International Migration estimates that approximately 7% of foreign students adjust to LPR status directly, and that additional 7% to 8% of students adjust to LPR status following a stint as an H nonimmigrant worker.[12] Lowell's earlier analysis of all H-1Bs who ultimately become LPRs suggests that about half of them do so.[13]

In 1995, CRS analysis of Immigration and Naturalization Service data on employment-based admissions found that 43% of those adjusting status were either H-1Bs or accompanying H-4 immediate family members of the temporary worker. Another 14.4% of

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[8] E-mail correspondence from USCIS, Mar. 21, 2006.

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

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

[11] During the 104th Congress and earlier, some observers maintained that many foreign students violate the intent of the provision that requires they have a foreign residence that they do not intend to abandon. Specifically, the practice of a foreign student petitioning to change status to nonimmigrant H-1B professional and specialty workers raised concerns. Fears that foreign students, as well as H-1Bs, were "leap frogging" the laws that protect U.S. workers from being displaced by immigrants prompted some to suggest that all foreign students and foreign temporary workers return home for 2 years to establish residency if they wish to return to the United States. This proposal circulated in the Senate, but it met with strong and varied opposition from the educational community and business interests. Many argued it would just lead to abuses and increase incentives to manipulate the nonimmigrant visa process.

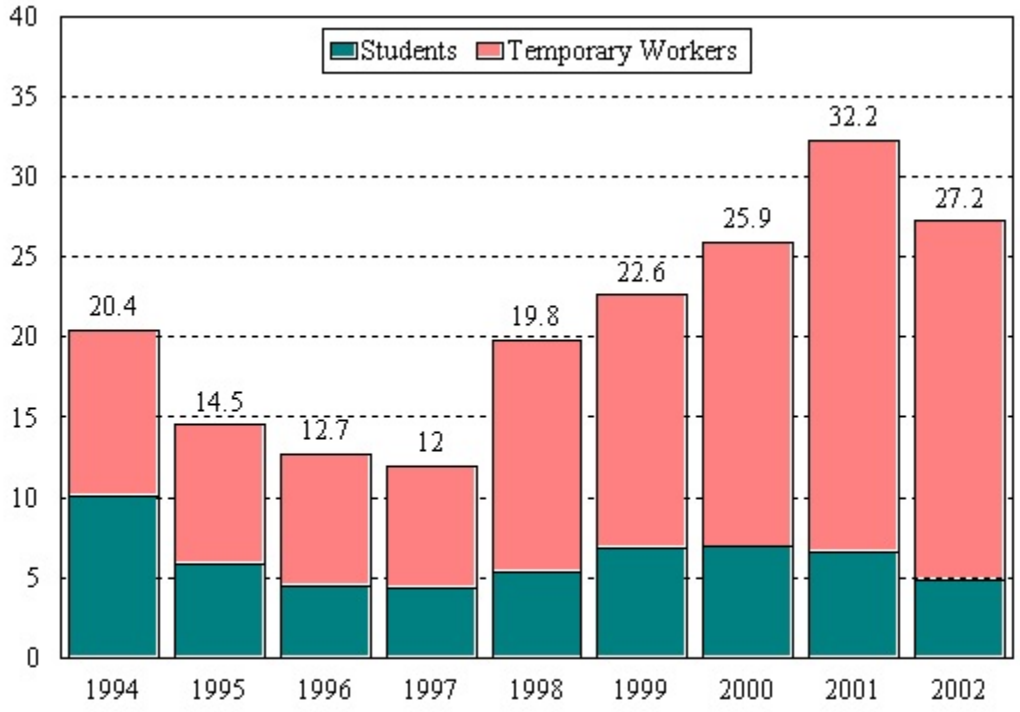
[12] B. Lindsay Lowell, "Foreign Student Adjustment to Permanent Status in the United States," Presentation at the International Metropolis Conference, 2005.

[13] B. Lindsay Lowell, "H1-B Temporary Workers: Estimating the Population," Institute for the Study of International Migration, Georgetown University, 2000.

the employment-based adjustments were foreign students and the accompanying immediate family of foreign students. That analysis also found that H worker adjustments to LPR status had increased from 7,244 in FY1988 to 24,223 in FY1994 – an increase of over 225% in six years – which was likely due in part to the change in the Immigration Act of 1990 to permit dual intent for H-1Bs.[14]

Although the USCIS asks what the last nonimmigrant status was of aliens who are adjusting to LPR status, there has been a data quality problem in recent years. According to the DHS Office of Immigration Statistics, the data collected on last nonimmigrant status are missing on more than 40% of the adjustment of status records.[15] Nonetheless, Jeanne Batalova of the Migration Policy Institute recently published analyses of the limited data that are available. Batalova's analysis finds that the percentage of foreign students adjusting has remained rather flat, if not diminishing, but that the percentage of adjustments who are H nonimmigrant workers has grown, notably from FY1998 through FY2002, as **Figure 2** illustrates.[16]

Figure 2. Percent of LPRs Adjusting Status by Previous Nonimmigrant Category, FY1994-FY2002



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

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[14] CRS Memorandum, "Nonimmigrant Pathways to Permanent Residence," by Ruth Ellen Wasem, Sept. 1995. (Available by request from author)

[15] E-mail correspondence from the DHS Office of Immigration Statistics, Mar. 3, 2006.

[16] Migration Policy Institute, *The Growing Connection Between Temporary and Permanent Immigration Systems,* by Jeanne Batalova, Jan., 2006.