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Temporary Professional Foreign Workers: Background, Trends, and Policy Issues

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SUMMARY

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Temporary Professional Foreign Workers: Background, Trends, and Policy Issues

Temporary visas have become an increasingly important gateway for foreign professionals to work in the United States. Since 1997, the number of visas issued annually for temporary professional workers has generally trended upward, and it more than doubled from just under 200,000 FY1997 to almost 425,000 in FY2019. Temporary professionals seeking to come to the United States for work undergo a multistep process involving multiple government agencies. Some of these workers are able to remain in the United States for years and some eventually *adjust status* to become lawful permanent residents (LPRs).

Congress has an ongoing interest in regulating the immigration of temporary professional workers to the United States. Facilitating the admission of temporary professional workers without adversely affecting U.S. workers and U.S. students entering the labor market is a key challenge. As the number of temporary professional foreign workers has increased, the visa programs providing for their admission have come under additional scrutiny from employers, U.S. workers, immigration scholars, and advocates, among others, presenting Congress with complex policy questions.

When it was enacted in 1952, the Immigration and Nationality Act (INA) authorized visas for foreign nationals who would come to the United States temporarily to trade, invest, perform temporary services based on their merit and ability, or represent foreign media. Since then, additional visa categories have been added to enable the temporary employment-based admission of foreign professionals. These visa categories are commonly referred to by the letter and numeral that denote their subparagraph in the INA. These include H-1B, H-1B1, and E-3 visas (workers in specialty occupations); L visas (intra-company transferees); E-1 and E-2 visas (treaty traders and investors); P visas (athletes, artists, and entertainers); O visas (workers with extraordinary ability or achievement); TN visas (U.S.-Mexico-Canada Trade Agreement professionals); I visas (representatives of foreign media outlets); and R visas (workers in religious occupations). In addition to these temporary worker visa categories, the Optional Practical Training (OPT) program allows some foreign students who enter the United States on F-1 visas to work in the country for up to three years after graduating from an institution of higher education.

Many observers consider temporary professional foreign workers as a boost to U.S. global economic competitiveness and a key element of legislative options aimed at stimulating innovation and economic growth in the United States. The challenge central to the policy debate is facilitating the migration of temporary professional foreign workers without harming the labor market prospects, conditions, and wages of U.S. workers and recent U.S. college graduates. Policymakers and advocates have focused their concerns on two visa categories in particular: H-1B visas for workers in specialty occupations, and L-1 visas for intra-company transferees. These two nonimmigrant visas account for the largest number of temporary professional workers and epitomize the tensions between the global competition for talent and potential adverse effects on the U.S. workforce.

Visas for temporary professional workers are also a key gateway for foreign professionals to obtain permanent status in the United States. U.S. employers' sponsorship of an increasing number of nonimmigrant workers for LPR status, combined with static numerical limits and per country caps on immigrant visas, have contributed to a sizable queue of foreign nationals waiting to receive employment-based LPR status.

Policy questions that Congress may consider include those related to numerical limits, employer requirements, and opportunities for temporary workers to obtain permanent status.

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Introduction

Congress has an ongoing interest in regulating the admission of temporary professional workers to the United States. In FY2020, U.S. employers received approval from the Department of Homeland Security (DHS) to employ almost 500,000 temporary foreign professionals.[1] As the number of such workers has increased, the visa programs providing for their admission have come under additional scrutiny from employers, U.S. workers, immigration scholars, and advocates, among others, presenting Congress with complex policy questions.

Under current law, temporary workers may be admitted to the United States to perform services in a variety of professional occupations. This report covers the nonimmigrant (i.e., temporary) visa categories[2] associated with professional workers, who are sometimes referred to as *skilled* or *high-skilled workers*.[3] These include workers in specialty occupations (H-1B, H-1B1, E-3), intra-company transferees (L), treaty traders and investors (E-1 and E-2), internationally recognized athletes or entertainers (P), workers with extraordinary ability or achievement (O), U.S.-Mexico-Canada Trade Agreement (USMCA) professionals (TN),[4] representatives of foreign media outlets (I), and workers in religious occupations (R). In addition, the Optional Practical Training (OPT) program allows some foreign college students to remain in the United States for at least a year after graduation to work in their degree field.

Many observers consider this group of foreign workers as a boost to U.S. global economic competitiveness and a key element of legislative options aimed at stimulating innovation and economic growth in the United States.[5] Many also have concerns over displacement of U.S. workers, program fraud and abuse, and the expansion of temporary worker programs and related backlogs for those seeking permanent status.[6]

Facilitating the admission of temporary professional workers without adversely affecting U.S. workers and U.S. students entering the labor market is a key challenge before Congress. As the United States continues to compete for human capital in a global economy, conditions are

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[1] U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), "Nonimmigrant Worker Petitions by Case Status and Request for Evidence (RFE) (Fiscal Year 2022, 1st Quarter, Oct. 1, 2016 – DEC 31, 2021)," March 9, 2022, https://www.uscis.gov/sites/default/files/document/reports/I129_Quarterly_Request_for_Evidence_FY2016_FY2022_Q1.pdf.

[2] Nonimmigrant visa categories are commonly referred to by the letter (and sometimes also the numeral) that denote their subparagraph in the Immigration and Nationality Act (INA). For more information on nonimmigrant visa categories and trends, see CRS Report R45040, *Immigration: Nonimmigrant (Temporary) Admissions to the United States*.

[3] The term *high-skilled immigration* is often used to refer to the temporary or permanent admission of workers with college degrees or those working in white collar occupations. This report uses the term *professional* rather than *high-skilled* to refer to these categories of foreign workers. Categories for temporary workers that are not covered by this report include H-2A visas for agricultural workers and H-2B visas for nonagricultural workers. Workers in these visa categories fill jobs that do not require much formal education. They are sometimes referred to as *unskilled* or *low-skilled workers.* In addition, some cultural exchange visitors on J-1 visas also work while in the United States, but most are in jobs that do not require a college degree (e.g., au pairs, camp counselors, or summer work travel participants) and are not covered by this report.

[4] The U.S.-Mexico-Canada Trade Agreement (USMCA) replaced the North American Free Trade Agreement (NAFTA) on July 1, 2020. Previously, these workers were referred to as *NAFTA professionals*.

[5] For a summary of the extensive literature on this topic, see National Academies of Sciences, Engineering, and Medicine, *The Economic and Fiscal Consequences of Immigration*, ed. Francine D. Blau and Christopher Mackie, National Academies Press, 2017.

[6] Ibid. For information on the queue of foreign nationals awaiting permanent status through the employment-based immigration system, see CRS Report R46291, *The Employment-Based Immigration Backlog*.

arguably more complicated than in recent years because the U.S. labor market is still contending with labor supply and demand issues related to the 2020 recession and ongoing pandemic.[7]

This report opens with an overview of temporary professional foreign workers and the process by which they enter the United States. This is followed by a description of each of the various visa categories available for temporary professional workers, discussion of policy issues associated with each visa type, and then an analysis of the trends in the use of these visas over the past two decades. The policy of authorizing foreign college students to work temporarily in the United States following graduation through the OPT program is discussed next. The report concludes with a discussion of the links between the temporary and permanent employment-based immigration systems and policy considerations for Congress.

Overview of Trends and Admission Process

Temporary visas have become an increasingly important gateway for foreign professionals to work in the United States. Since 1997, the number of visas issued annually by the Department of State (DOS) for temporary professional workers has generally trended upward, and it more than doubled from just under 200,000 in FY1997 to almost 425,000 in FY2019 (see **Figure 1**).[8] This is more than twice the rate of growth of total nonimmigrant (i.e., temporary) visas issuances.

In general, the number of visas issued to temporary professional workers has a procyclical pattern: increasing with economic expansion and decreasing during periods of economic contraction. The sharp decline in visa issuances from FY2019 to FY2020 corresponded to the COVID-19 pandemic and resulting suspension of visa processing at U.S. consulates around the world.[9] The data presented in **Figure 1** represent only those individuals who received a visa for temporary professional work from a U.S. consulate overseas. They do not include individuals already in the United States who changed their status to that of a temporary professional worker (e.g., a nonimmigrant student may change status to a temporary worker without going abroad to obtain a new visa). U.S. Citizenship and Immigration Services (USCIS) data show that from FY2011 to FY2020, an average of 69,605 individuals per year obtained temporary professional worker status from within the United States. Most of these (44,305 per year, on average) were foreign students changing to H-1B status.[10]

[7] For more information, see CRS Report R46554, *Unemployment Rates During the COVID-19 Pandemic*.

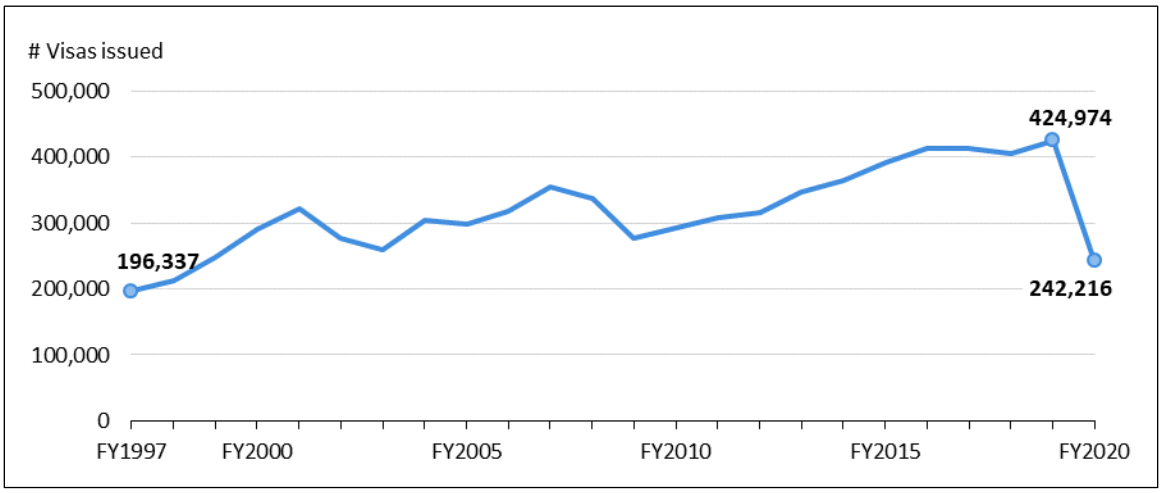
[8] FY1997 is the earliest year for which DOS publishes detailed visa issuance data. Department of State, Bureau of Consular Affairs, "Nonimmigrant Visa Issuances by Visa Class and by Nationality, FY1997-2020 NIV Detail Table," retrieved from https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html.

[9] From March through July 2020, in response to worldwide challenges related to the COVID-19 pandemic, DOS temporarily suspended routine visa services at all U.S. embassies and consulates. The pandemic continues to affect the ability of embassies and consulates around the world to resume routine visa services, and there is a significant backlog of visa applications. FY2020 saw a 54% decline in total nonimmigrant visa issuances compared to FY2019; over the same time period, visa issuances for temporary professional workers dropped 43%.

[10] CRS analysis of unpublished data provided by USCIS on July 14, 2021.

Figure 1. Visas Issued to Temporary Professional Workers

FY1997-FY2020



Source: CRS presentation of data from U.S. Department of State, Bureau of Consular Affairs, "Nonimmigrant Visa Issuances by Visa Class and by Nationality, FY1997-2020 NIV Detail Table," retrieved from https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html.

Notes: These data represent the following visa classes: E-1, E-2, E-2C, E-3, H-1B, H-1B1, I, L-1, O-1, O-2, P-1, P-2, P-3, R-1, and TN. Visas for derivative family members are not included except in the case of E-1, E-2, and I visas because there is not a separate visa class for these family members. Data do not include foreign nationals converting to temporary professional worker statuses within the United States nor the majority of TN nonimmigrants from Canada because Canadians are not required to obtain a visa in order to enter the United States as USMCA professionals.

Admission Process

Foreign professionals coming to the United States for temporary work undergo a multistep process involving multiple government agencies (see **Figure 2**). The Office of Foreign Labor Certification (OFLC) in the U.S. Department of Labor (DOL) is responsible for ensuring that foreign workers do not displace or adversely affect the working conditions of U.S. workers. Under current law, DOL adjudicates *labor certification* applications for permanent employment-based immigrants[11] and for temporary workers in the H-2 classification.[12]

Most of the foreign professionals entering the United States on a temporary basis for employment, however, are *not* subject to labor market tests (i.e., demonstrating that there are not sufficient U.S. workers who are able, willing, qualified, and available).[13] Employers of specialty occupation workers on H-1B, H-1B1, and E-3 visas are required to file labor condition applications (LCAs) with DOL's OFLC stating the number of positions they are requesting, for what occupation and period of employment they need the worker(s), and what wages they will

[11] The INA bars the admission of employment-based lawful permanent residents who seek to enter the United States 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. INA §212(a)(5) (8 U.S.C. §1182(a)(5)).

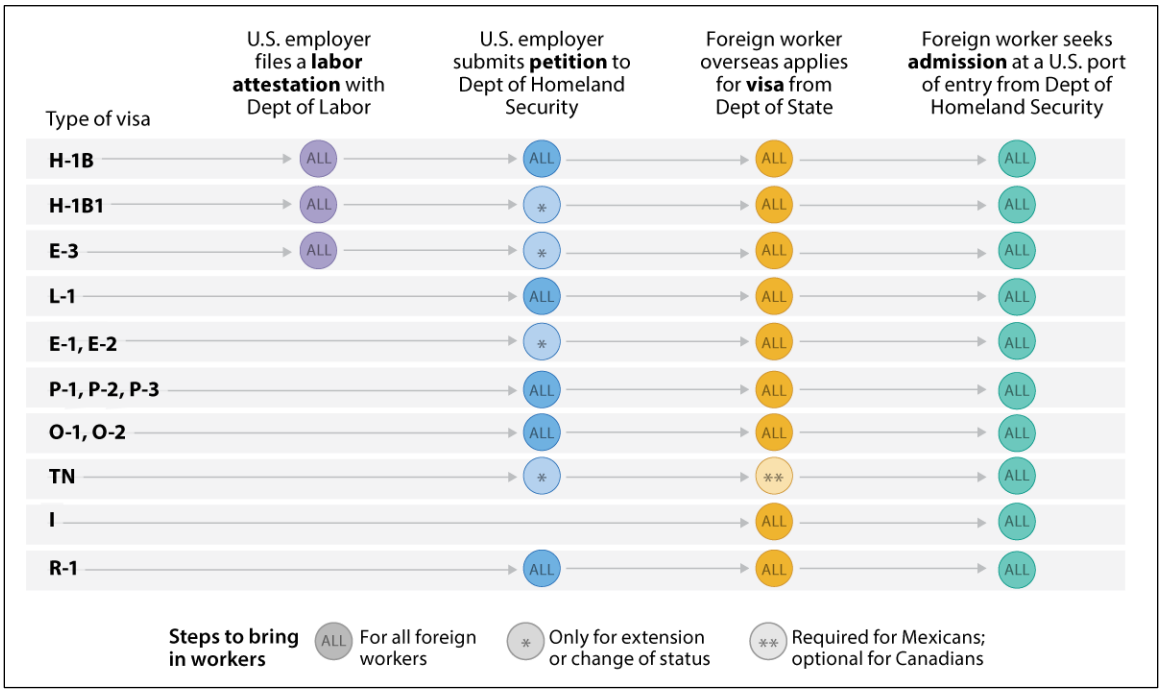
[12] H-2A visas are for temporary agricultural workers and H-2B visas are for temporary nonagricultural workers. For more information, see CRS Report R44849, *H-2A and H-2B Temporary Worker Visas: Policy and Related Issues*.

[13] Certain H-1B employers who are deemed *H-1B dependent* or *willful violators* are required to recruit U.S. workers before hiring H-1B workers. For more details, see the "H-1B, H-1B1, and E-3 Visas: Specialty Occupation Workers " section.

pay. Employers must also attest that they will comply with program requirements related to fair wages and working conditions. This process is known as *labor attestation* and is less rigorous than the labor certification process required when seeking to hire permanent employees and H-2 temporary workers. The labor attestation process is described more fully in the "H-1B, H-1B1, and E-3 Visas: Specialty Occupation Workers " section.

For most temporary professional workers, prospective employers must submit a petition to USCIS (see **Figure 2**). For specialty occupation workers, an LCA approved by DOL must accompany the employer's petition. USCIS adjudicates the petition to determine whether the prospective employee possesses the required qualifications for the position and visa class and whether other statutory and regulatory requirements have been met. If the petition is approved by USCIS, the prospective employee applies for a visa at a U.S. consulate if he or she is outside the United States. A DOS consular officer determines whether the prospective employee is admissible and eligible for the visa class for which he or she is applying. An approved visa gives the worker permission to travel to the United States and seek admission. DHS's Customs and Border Protection (CBP) officers at U.S. airports and other ports of entry determine whether to admit the individual. If the prospective employee is already present in the United States, he or she applies to USCIS for a change of status rather than applying for a visa abroad.

Figure 2. Steps to Bring in Temporary Professional Workers from Abroad



Source: CRS presentation of information from DOL, DHS, and DOS.

Note: Employers of H-1B workers on U.S. Department of Defense cooperative research and development projects do not file labor attestations with DOL.

Visas for Temporary Professional Workers

When it was enacted in 1952, the Immigration and Nationality Act (INA) authorized visas for foreign nationals who would come to the United States temporarily to trade, invest, perform temporary services based on their merit and ability, or represent foreign media. Since then, additional visa categories have been added to enable the temporary admission of foreign

professionals. These visa categories are commonly referred to by the letter and numeral that denote their subparagraph in the INA.[14] (See **Appendix A** for a list of visa categories and number of visas issued.) They include the following:

- H-1B, H-1B1, and E-3 visas (workers in specialty occupations);
- L visas (intra-company transferees);
- E-1 and E-2 visas (treaty traders and investors);
- P visas (athletes, artists, and entertainers);
- O visas (workers with extraordinary ability or achievement);
- TN visas (USMCA professionals);
- I visas (representatives of foreign media outlets); and
- R visas (workers in religious occupations).

In addition to these temporary worker visa categories, the OPT program allows some foreign students who enter the United States on F-1 visas to remain and work in the country for up to three years after graduating from an institution of higher education.

Policymakers and other stakeholders have focused on two visa categories in particular: H-1B visas for specialty occupation workers, and L visas for intra-company transferees. These nonimmigrant visas account for the largest number of temporary professional foreign workers and epitomize the tensions between the global competition for human capital and potential adverse effects of foreign professional workers on the U.S. workforce.

H-1B, H-1B1, and E-3 Visas: Specialty Occupation Workers

Current law provides for the admission of temporary workers in three visa classes to perform services in *specialty occupations.* The INA defines *specialty occupation* as "an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."[15] Specialty occupations may include, but are not limited to, architecture, engineering, education, accounting, law, and the arts. The main visa class for specialty occupation workers is H-1B. The H-1B1 and E-3 classes are associated with free trade agreements and are limited to citizens of Chile (H-1B1), Singapore (H-1B1), and Australia (E-3).

H-1B Visas

More H-1B visas are issued than any other type of temporary professional worker visa. Although H-1B employees may work in a variety of fields, the majority are hired to work in science, technology, engineering, and mathematics (STEM) occupations, with about two-thirds of all H-1Bs working in computer-related occupations.[16] In addition to specialty occupation workers, the H-1B classification is also for those coming to the United States to perform services of an

[14] See INA §101(a)(15) (8 U.S.C. §1101(a)(15)). For a fuller discussion and analysis, see CRS Report R45040, *Immigration: Nonimmigrant (Temporary) Admissions to the United States*.

[15] INA §214(i)(1) (8 U.S.C. §1184(i)(1)). For H-1B1 workers, the definition of *specialty occupation* includes "body of specialized knowledge" rather than "body of *highly* specialized knowledge." See INA §214(i)(3).

[16] See, for example, DHS, USCIS, *Characteristics of Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress*, March 5, 2020. Annual reports from other recent years show similar occupational patterns.

exceptional nature relating to a cooperative research and development project administered by the U.S. Department of Defense (DOD)[17] and for fashion models "of distinguished merit and ability."[18]

Current law generally limits the number of individuals who are annually provided H-1B status to 65,000, but since FY2000 most H-1B workers have been exempted from the limits because they are extending their status (and thus have already been counted against the cap once) or they work for universities or nonprofit research or government research facilities that are exempt from the cap.[19] Each year, up to 20,000 H-1B workers with a master's or higher degree from a U.S. university are also exempted from the cap.[20]

Prospective employers of H-1B workers must submit an LCA—also referred to as *labor attestation*—to the Secretary of Labor before they can file petitions with USCIS for specialty occupation workers. The LCA is a statement of intent rather than a documentation of actions taken. On the form, the employer must attest that (1) the firm will pay the nonimmigrant the greater of the actual wages paid to similar employees or the prevailing wages for that occupation, (2) the firm will provide working conditions for the nonimmigrant that do not cause the working conditions of the other employees to be adversely affected, (3) there is no applicable strike or lockout, and (4) notice of the filing of the LCA has been given to the union bargaining representative or has been posted at the place of employment.[21] Employers deemed to be *willful violators* or *H-1B dependent* must make additional attestations on the LCA.[22] These employers must 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 to or after the hiring of H-1B workers.[23]

After DOL has approved the LCA, the employer files a petition with USCIS. In recent years, because the number of cap-subject petitions has far exceeded the annual numerical limit for H-1B visas, a lottery system has been used to select which petitions are accepted for adjudication.[24] The

[17] H–1B nonimmigrants working on DOD research and development projects or coproduction projects may not exceed 100 in the United States at any time (8 C.F.R. §214.2(h)(8)(i)(B)). In recent years, fewer than 10 petitions for these workers have been approved annually.

[18] INA §101(a)(15)(H)(i)(b) (8 U.S.C. §1101(a)(15)(H)(i)(b)). In recent years, fewer than 20 petitions for fashion models have been approved annually.

[19] INA §214(g)(5)(A)-(B) (8 U.S.C. §1184(g)(5)(A)-(B)). This provision was added by P.L. 106-313, which became law on October 17, 2000.

[20] INA §214(g)(5)(C) (8 U.S.C. §1184(g)(5)(C)). This provision was added by Title IV of P.L. 108-447, which became law on December 8, 2004.

[21] INA §212(n). Also see CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections.*

[22] *Willful violators* are those found "to have committed a willful failure or misrepresentation during the 5-year period preceding the filing of the application"; INA §212(n)(1)(E)(ii) (8 U.S.C. §1182(n)(1)(E)(ii)). *H-1B dependent* employers are defined as follows: firms having 25 or fewer employees, of whom at least 8 are H-1Bs; firms having 26-50 employees of whom at least 13 are H-1Bs; and firms having at least 51 employees, 15% of whom are H-1Bs. Employees who earn at least $60,000 or have a related master's or higher degree are excluded from these calculations; INA §212(n)(3) (8 U.S.C. §1184(n)(3)).

[23] INA §212(n)(1)(E)-(G) (8 U.S.C. §212(n)(1)(E)-(G)).

[24] In 2020, USCIS implemented an electronic registration process for H-1B petitions subject to the annual cap. Employers seeking to hire H-1B employees subject to the cap must first complete a registration process that requires only basic information about the prospective employer and each requested worker. A lottery is used to select the number of registrations projected to be needed to meet the H-1B annual cap. Employers with selected registrations are eligible to submit petitions for those workers. For more information, see DHS, USCIS, "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens," 84 *Federal Register* 888, January 31, 2019. Before this rule, employers submitted petitions prior to the lottery.

petition must include evidence of the prospective H-1B employee's qualifications (typically at least a bachelor's degree), and that the position normally requires at least a bachelor's degree.[25] USCIS may approve the petition for periods of up to three years. A foreign national can stay in the United States for up to six years in H-1B status. Certain individuals with pending applications for employment-based lawful permanent resident (LPR) status are exempt from the six-year limitation.[26]

Spouses and minor children of H-1B workers may enter the United States on H-4 visas, a category which also includes spouses and children of H-2A agricultural and H-2B nonagricultural workers.[27] H-4 visas are not numerically limited. Most H-4 nonimmigrants are not permitted to work in the United States, but certain H-4 spouses whose H-1B spouses are awaiting employment-based LPR status may apply for work authorization.[28] The children of H-1B workers can maintain their H-4 status up to age 21, as long as their H-1B parent remains in status.

H-1B Trends

The Immigration Act of 1990 (P.L. 101-649) set an annual cap of 65,000 H-1B workers. In the early years of the visa category, this level was rarely reached. However, as the information technology industry began using H-1B visas for temporary foreign workers, the cap was regularly met. Congress enacted legislation in 1998 to increase the H-1B cap from 65,000 to 115,000,[29] but the increased annual ceiling was reached months before the end of FY1999 and of FY2000. Many in the business community, notably in the information technology sector, urged that the ceiling be raised again. In 2000, Congress enacted legislation to temporarily increase the annual ceiling from 115,000 to 195,000, permanently exempt H-1B workers who are renewing their status or who work for universities and nonprofit research facilities from the cap, and allow those with approved employment-based LPR petitions to remain in H-1B status while awaiting permanent status.[30] During the three years that the 195,000 ceiling was in place, the cap was not met because an increased number of H-1B workers were cap-exempt. A subsequent provision that remains in effect annually exempts up to 20,000 aliens holding a master's or higher degree from the numerical limit on H-1B visas (often referred to as the *master's cap*)[31] (see **Figure 3**).

[25] 8 C.F.R. §214.2(h)(4)(iii).

[26] 8 C.F.R. §214.2(h)(13)(iii)(D) and (E).

[27] For more information on these visa programs, see CRS Report R44849, *H-2A and H-2B Temporary Worker Visas: Policy and Related Issues*.

[28] For more information, see CRS Report R45176, *Work Authorization for H-4 Spouses of H-1B Temporary Workers: Frequently Asked Questions*.

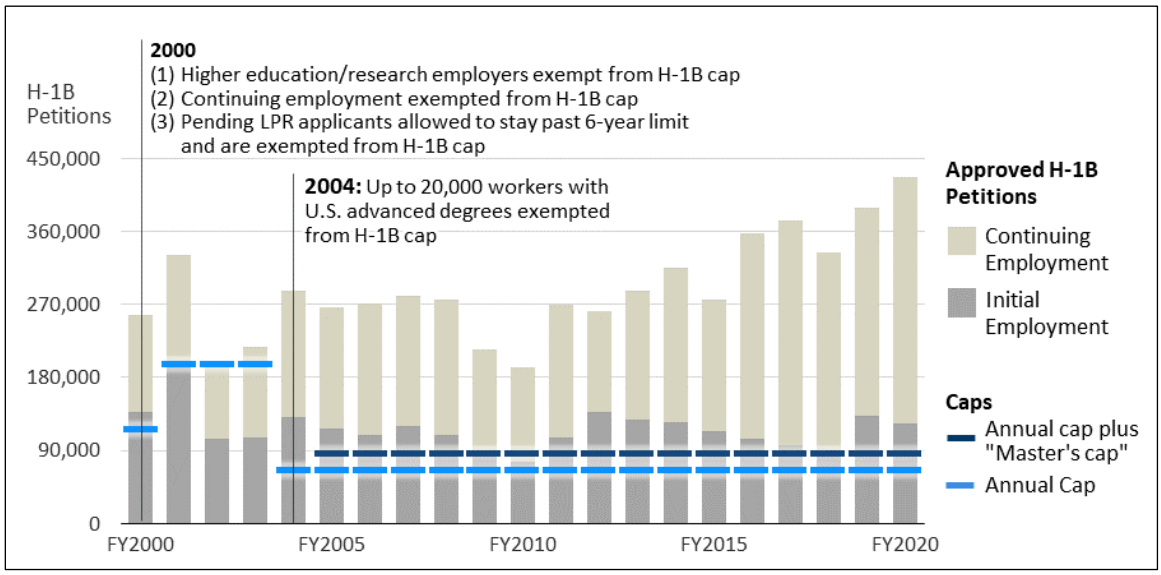
[29] Title IV of the FY1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (P.L. 105-277).

[30] The American Competitiveness in the Twenty-first Century Act of 2000 (P.L. 106-313, Title I).

[31] The Consolidated Appropriations Act, 2005 (P.L. 108-447) included the H-1B Visa Reform Act of 2004.

Figure 3. Approved Employer Petitions for H-1B Workers, FY2000-FY2020

with annual numerical limits and major policy changes



Source: CRS presentation of numeric data from U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Characteristics of H-1B Specialty Occupation Workers,* FY2000-FY2020. Policy changes based on P.L. 105-277, P.L. 106-313, and P.L. 108-447.

Notes: "Approved H-1B Petitions" are based on data from Form I-129, Petition for a Nonimmigrant Worker. Not all approved petitions result in the issuance of a visa by the Department of State because (1) some approved workers do not pursue a visa or are denied a visa and (2) individuals already in the United States who are changing to H-1B status are not issued visas by DOS.

In FY2020, USCIS approved 426,710 H-1B petitions,[32] 71% of which were for continuing employment. The lowest number of approved petitions since FY2000 occurred in FY2010 following the 2007-2009 recession, when 192,990 H-1B petitions were approved. As **Figure 3** displays, since FY2001 when the American Competitiveness in the Twenty-first Century Act (P.L. 106-313, Title I) went into effect, more H-1B petitions were approved outside of the numerical limits than under the cap.[33]

USCIS produces an annual report on characteristics of H-1B specialty occupation workers who have received approved petitions. These reports consistently show that a significant portion of H-1B beneficiaries work in STEM occupations. In FY2020, 296,572 approved H-1B petitions, almost 70% of all beneficiaries, were for workers in computer-related occupations. The next largest major occupational group was architecture, engineering, and surveying, which accounted for 9%. Of all approved H-1B petitions in FY2020, 36% were for those with a bachelor's degree, 57% for those with a master's or professional degree, and 7% for those with a doctorate. The median salary reported for all H-1B beneficiaries in FY2020 was $101,000, and the average age was 33. Workers born in India made up 75% of all approved petitions, and workers born in China accounted for 12%. Seventy-four percent of approved petitions were for males.[34]

[32] DHS, USCIS, *Report on H-1B Petitions: Fiscal Year 2020 Annual Report to Congress*, February 2021.

[33] Not all H-1B workers with approved petitions for initial employment go on to obtain visas or travel to the United States.

[34] DHS, USCIS, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2020 Annual Report*, February, 2021.

H-1B Policy Issues

The H-1B program has been popular with U.S. businesses. Employer petitions for new H-1B workers have routinely exceeded the statutory numerical limits—in some years exceeding limits during the first week or even on the first day that petitions are accepted by USCIS. While some Members of Congress have voiced concerns about whether employers have adequate access to H-1B workers, others have raised questions about whether H-1B workers may be placing downward pressure on U.S. workers' wages and benefits as well as discouraging or displacing U.S. students in STEM fields.

Proponents of the H-1B program contend that it allows American firms to access foreign professionals to fill gaps in the labor market and that such workers largely benefit the U.S. economy.[35] They also point to competition with other nations over emerging technologies, arguing that U.S. economic and national security depend on recruiting and retaining what are often called the *best minds*—regardless of their country of origin—including those graduating from U.S. universities. Some argue that high demand for H-1B workers by U.S. employers demonstrates that there are insufficient numbers of U.S. workers available to fill these jobs.

Some proponents argue that the H-1B program should be reformed to make the process of bringing in workers less cumbersome and uncertain for U.S. employers. They may cite rising petition denial rates and the lottery process used by USCIS to determine which employer petitions can move forward given the numerical limits on H-1B visas to illustrate the uncertainty of the process.[36]

Critics of the H-1B visa program often focus on its substantial utilization by labor outsourcing firms to hire workers with ordinary skill levels.[37] They argue that the growing presence of H-1B workers negatively impacts wages and working conditions in the United States and that there is little compelling evidence of labor shortages.[38] They contend that many of the H-1B visa slots are taken by U.S. offices of large outsourcing firms headquartered overseas and that their H-1B employees are subject to abuse and have been used to replace more expensive U.S workers.[39]

Critics argue that the H-1B program should be reformed by strengthening enforcement mechanisms and requiring all H-1B employers to recruit U.S. workers first and pay H-1B workers

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[35] See, for example, Rachel Rosenthal and Noah Smith, "Do H-1B Workers Help or Hurt American Workers?" *Bloomberg*, August 24, 2020; and Stuart Anderson, *Setting the Record Straight on High-Skilled Immigration*, National Foundation for American Policy, August 2016.

[36] See, for example, Stuart Anderson, *H-1B Denial Rates and Numerical Limits as Indicators of Current Restrictions*, National Foundation for American Policy, May 2020.

[37] See, for example, Nicole Torres, "The H-1B Visa Debate, Explained," *Harvard Business Review*, May 4, 2017; and Rachel Rosenthal and Noah Smith, "Do H-1B Workers Help or Hurt American Workers?" *Bloomberg*, August 24, 2020.

[38] See, for example, Vivek Wadhwa, "Foreign Worker Visas Are the Tech Industry's Dirty Secret," *Foreign Policy*, June 25, 2020; Ron Hira and Bharath Gopalaswamy, *Reforming U.S.' High-Skilled Guestworker Program*, Atlantic Council, January 2019; Daniel Costa, *H-1B Visa Needs Reform to Make it Fairer to Migrant and American Workers*, Economic Policy Institute, April 5, 2017; and Norm Matloff, "Trump Is Right: Silicon Valley Is Using H-1B Visas To Pay Low Wages To Immigrants," *Huffington Post*, February 3, 2017.

[39] See, for example, CBS, "You're Fired," *60 Minutes*, March 19, 2017; Testimony of Ronil Hira, Associate Professor of Public Policy, Howard University, before U.S. Congress, Senate Subcommittee on Immigration and the National Interest, *The Impact of High-Skilled Immigration on U.S. Workers*, 115th Cong., 2nd sess., February 25, 2016; and Julia Preston, "Large Companies Game H-1B Visa Program, Costing the U.S. Jobs," *The New York Times*, November 10, 2015.

higher wages.[40] Some also argue that the H-1B allocation process should be revised so that preference is given to workers with the highest salary offers or educational attainment.[41] The U.S. Government Accountability Office (GAO) has issued several reports that recommended more controls to protect U.S. workers, prevent abuse, and streamline H-1B visa issuance.[42]

Over the years, many bills aimed at reforming the H-1B program have been introduced in Congress. These proposals typically aim to protect U.S. workers by requiring employers to do more to recruit U.S. workers (including posting open positions on a public website), requiring higher wages for H-1B workers, prohibiting the replacement of U.S. workers with H-1B workers, limiting the proportion of a firm's employees who can be in H-1B status, expanding DHS's and/or DOL's authority to review and investigate H-1B fraud and abuse, increasing penalties for employers who violate program requirements, and/or prioritizing H-1B visas for workers with advanced degrees in STEM or with the highest salary offers rather than allocating these slots via lottery.[43]

As the number of H-1B workers and the length of time they spend working in the United States has grown, issues related to H-1B workers' family members have gained congressional attention. Historically, H-4 spouses of H-1B workers were not eligible to apply for work authorization. A 2015 USCIS final rule extended eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are in the process of obtaining employment-based LPR status.[44] The Trump Administration's 2017 announcement of its plan to rescind this eligibility gained congressional interest,[45] but that Administration never published a rule to do so.[46]

A related issue is the children of H-1B workers who age out of their derivative H-4 status when they turn 21. At that point, they must leave the country if they are unable to obtain another nonimmigrant status or adjust to LPR status.[47] This issue has gained attention in recent years, given the limited options and long wait times for those adjusting to LPR status and the increasing number of children who have spent many years in the United States as derivatives of their

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[40] See, for example, Alexia Fernández Campbell, "There's a Clear Way to Fix the H-1B Visa Program," *The Atlantic*, December 6, 2016; Ron Hira and Bharath Gopalaswamy, *Reforming U.S.' High-Skilled Guestworker Program*, Atlantic Council, January 2019; and Daniel Costa, *Temporary Work Visa Programs and the Need for Reform*, Economic Policy Institute, February 2021.

[41] Ron Hira and Bharath Gopalaswamy, *Reforming U.S.' High-Skilled Guestworker Program*, Atlantic Council, January 2019.

[42] U.S. Government Accountability Office (GAO), *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*, GAO/HEHS-00-157, September 2000; GAO, *H-1B Foreign Workers: Better Tracking Needed to Help Determine H-1B Program's Effects on U.S. Workforce*, GAO-03-883, September 2003; and GAO, *H-1B Visa Program: Reforms are Needed to Minimize the Risks and Costs of Current Program*, GAO-11-26, January 14, 2011. GAO has not issued a report on this topic since 2011.

[43] Examples from the 117th Congress include S. 348, S. 3720, H.R. 865, H.R. 1177, and H.R. 3648.

[44] DHS, USCIS, "Employment Authorization for Certain H-4 Dependent Spouses," 80 *Federal Register* 10283-10312, February 25, 2015.

[45] See, for example, H.R. 7442 and S. 970 from the 117th Congress and H.R. 3033 from the 116th Congress.

[46] For more information, see CRS Report R45176, *Work Authorization for H-4 Spouses of H-1B Temporary Workers: Frequently Asked Questions*.

[47] The children of long-term H-1B nonimmigrants, together with children of other long-term nonimmigrant workers, are sometimes called *legal Dreamers* or *documented Dreamers*. The term *Dreamers* refers to individuals who entered the United States as children and do not have a lawful immigration status, and for whom various DREAM Acts to provide lawful permanent status have been proposed. Such DREAM Acts typically require beneficiaries to lack lawful immigration status; thus, children in H-4 status do not qualify. For more information, see CRS Insight IN11844, *Legal Dreamers*.

temporary worker parents.[48] Some bills have proposed allowing certain children of H-1B workers (and other nonimmigrant workers) to adjust to LPR status and/or be protected from aging out of H-4 status while awaiting LPR status based on a parent's application.[49]

H-1B1 Visas and E-3 Visas

H-1B1 and E-3 visas are similar to H-1B visas except that they are limited to nationals of certain countries. H-1B1 visas are limited to nationals of Chile and Singapore, while E-3 visas are limited to nationals of Australia. Both visa types are associated with U.S. free trade agreements (FTAs). The H-1B1 visa was created in 2003 when FTAs with Chile and Singapore were implemented.[50] The E-3 visa was created in 2005 as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (P.L. 109-13, §501). While not included in the United States-Australia Free Trade Agreement signed in 2004, the E-3 visa is seen as an outgrowth of those trade negotiations. [51]

Both types of visas require the employer to submit an LCA to DOL (see the "Admission Process" section), but H-1B1 and E-3 employers do not submit petitions to USCIS unless the worker is extending or changing status within the United States (see **Figure 2**). Unlike H-1B status, which can be approved for up to three years at a time, H-1B1 status is approved for up to one year at a time and E-3 status for up to two. Both H-1B1 and E-3 status may be renewed an indefinite number of times, and E-3 spouses are permitted to work. There is an annual numerical limit of 1,400 H-1B1 visas for nationals of Chile and 5,400 for nationals of Singapore.[52] These visas are part of the overall H-1B cap of 65,000; unused H-1B1 visas are made available to H-1B applicants. The separate annual limit for E-3 visas is 10,500 and has never been reached; unused visas are lost.[53]

H-1B1 and E-3 Visa Policy Issues

Although H-1B1 and E-3 visas have received relatively little congressional attention compared to H-1B visas, the inclusion of immigration provisions in FTAs has been a point of contention.[54] Since 2017, there have been proposals in Congress to allow nationals of Ireland to apply for E-3

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[48] See, for example, David Spunt, "Documented Dreamers weigh self-deportation, say they've been left behind by Congress," *Fox News*, June 16, 2021; Sakshi Venkatraman, "Young Indian Americans, aged out of parents' visas, appeal for a path to citizenship," *NBCNews*, July 1, 2021; Genevieve Douglas, "'Legal Dreamers' See Renewed Chance for Relief in Legislation," *Bloomberg Law*, April 26, 2021; U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Citizenship, *Why Don't They Just Get in Line? Barriers to Legal Immigration*, 117th Cong., 1st sess., April 28, 2021; and Letter from House Democrats to Alejandro Mayorkas, Secretary of Homeland Security, June 25, 2021, available at https://ross.house.gov/sites/evo-subsites/ross.house.gov/files/evo-media-document/Documented%20Dreamers%20Letter%20to%20DHS%206.25.21.pdf.

[49] Examples from the 117th Congress include H.R. 6, H.R. 1177, H.R. 4331, S. 348, S. 970, and S. 2753.

[50] United States-Chile Free Trade Agreement Implementation Act (P.L. 108-77) and United States-Singapore Free Trade Agreement Implementation Act (P.L. 108-78).

[51] Its inclusion in the E category of nonimmigrant visas (for nationals of treaty countries) supports this view. See Stanley Mailman and Stephen Yale-Loehr, "Immigration Law," *New York Law Journal*, June 27, 2005.

[52] INA §214(g)(8)(B)(ii) (8 U.S.C. §1184(g)(8)(B)(ii)).

[53] INA §214(g)(11)(B) (8 U.S.C. §1184(g)(11)(B)).

[54] In 2003 when Congress considered the implementing bills for the FTAs with Chile and Singapore, there was bipartisan and bicameral opposition to including immigration provisions. The Senate Joint Report on the Chile FTA, for example, contended that "such agreements usurped the prerogative of Congress to legislate immigration law," and the House Report stated that both FTAs set "a dangerous precedent by including U.S. immigration law in trade agreements"; see S.Rept. 108-116 and H.Rept. 108-224.

visas along with Australians,[55] and a new E-4 visa has been proposed for specialty occupation workers from South Korea.[56] None of these proposals have been enacted.

L-1 Visas: Intracompany Transferees

Intracompany transferees who are executives or managers or have specialized knowledge and are employed with an international firm or corporation may be admitted on L-1 visas to work at or establish a U.S. affiliate. To qualify for an L-1 visa, a foreign national must have been employed by the firm for at least one year in the preceding three years.[57] There are two subtypes of L-1 visas: L-1A visas for executives and managers and L-1B visas for employees with specialized knowledge. To be admitted, the prospective L-1 nonimmigrant must demonstrate that he or she meets the qualifications for the particular job as well as the visa category. The employer is required to file a petition on behalf of the prospective L-1 worker. Certain employers are permitted to file *blanket petitions* for L-1 workers, which gives an employer the flexibility to transfer eligible employees to the United States quickly and with short notice without having to file an individual petition with USCIS.[58]

L-1 nonimmigrants admitted for the purpose of establishing a U.S. affiliate are allowed a maximum initial stay of one year; for all others, the period is three years. Extensions may be granted up to a maximum total stay of seven years for L-1A nonimmigrants and five years for L-1B nonimmigrants.[59] Spouses and children of L-1 nonimmigrants are admitted on L-2 visas, and spouses are eligible to work in the United States.[60] There is no annual numerical limitation on the number of L-1 visas issued.

L-1 Visa Policy Issues

The L-1 intracompany transferee visa was established for companies with offices abroad and business interests in the United States to transfer key personnel freely within the organization. Many observers consider it a visa category essential to retaining and expanding international businesses in the United States and facilitating foreign investment in the United States.[61] In recent years, proponents have expressed concern about an increase in denials of L-1 visas as well as an increase in requests for additional evidence in order to adjudicate L petitions.[62]

Some have raised concerns that intracompany transferees on the L-1 visa may displace U.S. workers.[63] Others express concern that the L-1 visa has become a substitute or workaround for the H-1B visa, noting that L-1 employees are often comparable in skills and occupations to H-1B

[55] See, for example, S. 3869 from the 117th Congress.

[56] See, for example, S. 1861 and H.R. 3382 from the 117th Congress.

[57] INA §101(a)(15)(L) (8 U.S.C. §1101(a)(15)(L)).

[58] 8 C.F.R. §214.2(l)(4)-(5).

[59] 8 C.F.R. §214.2(l)(11)-(12).

[60] INA §214(c)(2)(E) (8 U.S.C. §1184(c)(2)(E)).

[61] See, for example, David Bier, *The Facts About the L-1 Visa Program*, Cato Institute, June 10, 2020; and U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security and Citizenship, *The L1 Visa and American Interests in the 21st Century Global Economy*, 108th Cong., 1st sess., July 29, 2003.

[62] David Bier, *The Facts About the L-1 Visa Program*, Cato Institute, June 10, 2020; and Stuart Anderson, *L-1 Denial Rates for High Skilled Foreign Nationals Continue to Increase*, National Foundation for American Policy, NFAP Policy Brief, March 2014.

[63] See, for example, Daniel Costa, "Little-known temporary visas for foreign tech workers depress wages," *The Hill*, November 11, 2014.

workers yet lack the labor market protections and numerical limits that the law sets for U.S. employers hiring H-1B workers.[64] This concern has been raised, in particular, with respect to some outsourcing and information technology firms that employ L-1 workers as subcontractors within the United States. A related concern, some argue, is that an unchecked use of L-1 visas could foster the transfer of STEM and other high-skilled professional jobs overseas, as managers and specialists gain experience in the United States before they transfer the operations abroad.[65]

Legislation to address these concerns is frequently linked with H-1B reform. The H-1B and L-1 Visa Reform Act, for example, is a bicameral bill that has been introduced in several recent congresses.[66] It would (1) place restrictions on outplacement of L-1 workers (i.e., one employer placing an L-1 employee at the worksite of another employer), (2) prohibit employers from replacing U.S. workers with L-1 workers, (3) prohibit a foreign national from receiving an L-1 visa to open a new office if the individual has been the beneficiary of two or more L-1 petitions visas in the last two years; and (4) raise wage requirements for L-1 workers.

As with other temporary professional worker categories that allow for extended stays, the issue has arisen of the children of L-1 workers aging out of their derivative L-2 status when they turn 21. At that point, they must leave the country if they are unable to change to another nonimmigrant status or adjust to LPR status.[67] As discussed above with relation to H-1B, this issue has gained attention in recent years, given the limited options and long wait times for adjusting to LPR status and the increasing number of children who have spent many years in the United States as derivatives of their temporary worker parents.[68] Some in Congress have proposed allowing certain children of L-1 workers (and other nonimmigrant workers) to adjust to LPR status and/or be protected from aging out of L-2 status while awaiting LPR status based on a parent's application.[69] Some proposals would also allow L-1 workers in the employment-based LPR queue to extend their L-1 status while awaiting LPR status, as H-1B workers are currently allowed to do.[70]

E-1 and E-2 Visas: Treaty Traders and Investors

Nationals of treaty countries[71] may enter the United States on E-1 or E-2 visas. An E-1 treaty trader enters the United States for the purpose of conducting "substantial trade" between the

[64] As explained above in the "H-1B Visas" section, prospective employers of H-1B workers must attest to DOL that certain wage and working conditions will be met, and H-1B dependent employers must attest that no U.S. workers have been displaced.

[65] See, for example, Office of the Inspector General, *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, U.S. Department of Homeland Security, OIG-06-22, January 2006, p. 9.

[66] See, for example, S. 3720 in the 117th Congress and S. 3770 and H.R. 6993 in the 116th Congress.

[67] See CRS Insight IN11844, *Legal Dreamers*.

[68] See, for example, David Spunt, "Documented Dreamers weigh self-deportation, say they've been left behind by Congress," *Fox News*, June 16, 2021; Sakshi Venkatraman, "Young Indian Americans, aged out of parents' visas, appeal for a path to citizenship," *NBCNews*, July 1, 2021; Genevieve Douglas, "'Legal Dreamers' See Renewed Chance for Relief in Legislation," *Bloomberg Law*, April 26, 2021; U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Citizenship, *Why Don't They Just Get in Line? Barriers to Legal Immigration*, 117th Cong., 1st sess., April 28, 2021; and Letter from House Democrats to Alejandro Mayorkas, Secretary of Homeland Security, June 25, 2021, available at https://ross.house.gov/sites/evo-subsites/ross.house.gov/files/evo-media-document/Documented%20Dreamers%20Letter%20to%20DHS%206.25.21.pdf.

[69] Examples from the 117th Congress include H.R. 6, H.R. 4331, S. 970, and S. 2753.

[70] Examples from the 117th Congress include S. 348 and H.R. 1177.

[71] Treaty countries are those with which the United States maintains a treaty of commerce and navigation or maintains a qualifying international agreement, or which have been deemed qualifying countries by legislation. There are 82

United States and the trader's country of citizenship.[72] An E-2 treaty investor comes to the United States to develop and direct the operations of an enterprise in which he or she has invested, or is in the process of investing a "substantial amount of capital."[73] Employees, spouses, and minor children of E-1 traders and E-2 investors are eligible for the same status as their employer, spouse, or parent.[74] E-1 and E-2 spouses are eligible to apply for work authorization in the United States. E-1 and E-2 nonimmigrants are allowed a maximum initial stay of two years and may renew their status in increments of up to two years each time.[75] While there is no limit on the number of renewals, E-1 and E-2 nonimmigrants must maintain an intention to depart the United States when their status expires or is terminated.[76] There is no annual numerical limitation on the number of E-1 or E-2 visas issued.

E-1 and E-2 Visa Policy Issues

Congressional action on E-1 and E-2 visas has focused on adding countries to the list of those whose nationals are eligible. The 112th Congress enacted legislation to allow nationals of Israel to apply for E-2 visas,[77] and the 115th Congress enacted legislation making nationals of New Zealand eligible for E-1 and E-2 visas.[78] Bills to make nationals of Portugal eligible for E-1 and E-2 visas passed the House in the 116th and 117th Congresses; they have not been taken up by the Senate.[79]

Some Members of Congress have expressed concern about the recent trend of nationals of non-treaty countries gaining access to E-1 and E-2 visas by participating in citizenship-by-investment (CBI) programs in treaty countries. In this scenario, third-country nationals gain citizenship in a treaty country by making a financial contribution to that country's private or public sector (or

countries currently on the list of treaty countries. Some of these countries' nationals qualify for both E-1 and E-2 visas, and some qualify for one or the other. For details, see the Department of State list of treaty countries at https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html.

[72] INA §101(a)(15)(E)(i) (8 U.S.C. §1101(a)(15)(E)(i)). In addition, representatives of Taiwan employed by the Taipei Economic and Cultural Representative Office (TECRO) are admitted to the United States in E-1 status. This is because the United States does not have official relations with Taiwan and does not recognize it as an independent, sovereign state. Therefore its representatives are not eligible for A or G visas, which are reserved for diplomats and official representatives to international organizations.

[73] INA §101(a)(15)(E)(ii) (8 U.S.C. §1101(a)(15)(E)(ii)). No set dollar amount is given in law, but regulations define a "substantial amount of capital" in terms of the investor's financial commitment and likelihood of success (see 8 C.F.R. §214.2(e)(14). In addition, the E-2C classification was created in 2008 for long-term treaty investors in the U.S. territory of the Commonwealth of the Northern Mariana Islands (CNMI) only; it is intended to help the CNMI transition its permit system to U.S. immigration law. To qualify for E-2C status, the investor must have filed an initial application before January 18, 2013. The E-2C classification is set to expire on December 31, 2029. See 8 C.F.R. §214.2(e)(23).

[74] Employees must be of the same nationality as the principal E-1 or E-2 employer. Spouses and children of the principal E-1 or E-2 visa holder may be of any nationality (8 C.F.R. §214.2(e)(3) and (4)).

[75] 8 C.F.R. §214.2(e)(19)-(20).

[76] 8 C.F.R. §214.2(e)(5) and (e)(20)(iii).

[77] A treaty of friendship, commerce, and navigation between the United States and Israel that entered into force on April 3, 1954, entitled nationals of Israel to E-1 status for treaty trader purposes, but the treaty did not include E-2 status. Although the law (P.L. 112-130) providing E-2 eligibility was enacted in 2012, it wasn't until 2019 that the Department of State confirmed that Israel offered U.S. nationals reciprocal treatment. Israelis became eligible to apply for E-2 visas on May 1, 2019.

[78] P.L. 115-226. Nationals of New Zealand became eligible to apply for E-1 and E-2 visas on June 10, 2019.

[79] H.R. 2571 passed the House in the 117th Congress; its companion in the Senate, S. 1194, has not seen action.

both).[80] Once they are nationals of a treaty country, they become eligible to apply for E-1 or E-2 visas. One way Congress has sought to address this concern is by proposing legislation that would require foreign nationals to have lived in the treaty country for a certain number of years in order to be eligible for E-1 or E-2 visas.[81]

In 2019, GAO issued a report on the E-2 program in response to a request from the Joint Economic Committee.[82] The report reviewed DOS's and USCIS' adjudication processes and presented five recommendations, including that DOS provide more E-2 training or resources to consular officers, and that DOS and USCIS establish a regular coordination mechanism to share information on E-2 fraud risks. DOS and USCIS concurred with all five recommendations.[83]

Some Members of Congress have shown support for granting permanent status to certain long-term E-1 and E-2 nonimmigrants. For example, one bill would have provided LPR status to E-2 investors who have been in the United States for at least 10 years and created at least two full-time jobs.[84] Others have focused on the children of E-1 and E-2 treaty traders and investors who age out of their derivative status when they turn 21.[85] At that point, they must leave the country if they are unable to change to another nonimmigrant status or adjust to LPR status.[86] As discussed above with relation to H-1B and L nonimmigrants, this issue has gained attention in recent years, given the limited options and long wait times for adjusting to LPR status and the increasing number of children who have spent many years in the United States as derivatives of their temporary worker parents.[87]

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[80] For more information, see CRS In Focus IF11344, The Changing Landscape of Immigrant Investment Programs.

[81] For example, the AMIGOS Act in the 117th Congress, which would make nationals of Portugal eligible for E-1 and E-2 visas, would also require at least three years of residence in the treaty country for all E-1 and E-2 applicants who obtained treaty country nationality through a financial investment. See S. 1194 and H.R. 2571. See also S. 1177.

[82] GAO, *Nonimmigrant Investors: Actions Needed to Improve E-2 Visa Adjudication and Fraud Coordination*, GAO 19-547, July 2019.

[83] As of the cover date of this report, two of the five recommendations had been implemented and three were open; see https://www.gao.gov/products/gao-19-547.

[84] H.R. 3265 in the 115th Congress. See also H.R. 3370 in the 114th Congress and H.R. 4331 in the 117th Congress.

[85] Examples from the 117th Congress include H.R. 6, H.R. 4331, S. 970, and S. 2753.

[86] The children of long-term E-1 and E-2 nonimmigrants, together with the children of long-term H-1B and L nonimmigrants, are sometimes called *legal Dreamers* or *documented Dreamers*. The term *Dreamers* refers to individuals who entered the United States as children and do not have a lawful immigration status and for whom various DREAM Acts to provide lawful permanent status have been proposed. Such DREAM Acts typically require beneficiaries to lack lawful immigration status; thus, children in E-1 and E-2 derivative status do not qualify. For more information, see CRS Insight IN11844, *Legal Dreamers*.

[87] See, for example, David Spunt, "Documented Dreamers weigh self-deportation, say they've been left behind by Congress," *Fox News*, June 16, 2021; Sakshi Venkatraman, "Young Indian Americans, aged out of parents' visas, appeal for a path to citizenship," *NBCNews*, July 1, 2021; Genevieve Douglas, "'Legal Dreamers' See Renewed Chance for Relief in Legislation," *Bloomberg Law*, April 26, 2021; U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Citizenship, *Why Don't They Just Get in Line? Barriers to Legal Immigration*, 117th Cong., 1st sess., April 28, 2021; and Letter from House Democrats to Alejandro Mayorkas, Secretary of Homeland Security, June 25, 2021, available at https://ross.house.gov/sites/evo-subsites/ross.house.gov/files/evo-media-document/Documented%20Dreamers%20Letter%20to%20DHS%206.25.21.pdf.

P Visas: Athletes, Artists, and Entertainers

P visas are for foreign nationals who seek to enter the United States temporarily to perform as athletes, artists, or entertainers (individually or as part of a group or team). The P visa category is divided into five subtypes:

1. P-1A visas for athletes and coaches participating in an athletic competition or a theatrical ice skating production;
2. P-1B visas for members of internationally recognized entertainment groups;
3. P-2 visas for artists or entertainers participating in a reciprocal exchange program between a U.S. organization and an organization in another country;
4. P-3 visas for artists or entertainers coming to perform, teach, or coach as part of a program that is culturally unique; and
5. P-4 visas for spouses and minor children of P-1, P-2, and P-3 visa holders.

Essential support personnel may be admitted in the same visa category as the principal visa holder. A U.S. employer or agent must file a petition on behalf of a prospective P nonimmigrant. The employer or agent must also submit a letter from a labor organization in a related field stating its opinion of the prospective P nonimmigrant's qualifications, a process known as *consultation*. Individual athletes in P-1A status may stay in intervals of up to 5 years, not to exceed 10 years in total; other P nonimmigrants are typically limited to a year's stay with the possibility of extension.[88] There is no annual numerical limitation on the number of P visas that may be issued.

P Visa Policy Issues

The P visa is generally uncontroversial and has not attracted much attention from Congress in recent years. In 2006, Congress expanded the scope of P-1 visas to include professional athletes, members of minor league teams, and individuals performing in theatrical ice skating productions.[89] Prior to 2006, P-1 visas had been limited to athletes performing at an "internationally recognized level of performance."[90] The comprehensive immigration reform bill that passed the Senate in 2013 would have made ski instructors eligible for P visas.[91]

O Visas: Persons with Extraordinary Ability

Persons with extraordinary ability who are coming to the United States temporarily to continue working in their field can be admitted on O-1 visas. This visa category is subdivided into O-1A visas for individuals with extraordinary ability in the sciences, education, business, or athletics, and O-1B visas for individuals with extraordinary ability in the arts or with extraordinary achievement in the motion picture and television industry. Regulations define extraordinary ability in the field of science, education, business, or athletics as a level of expertise indicating that the person is "one of the small percentage who have arisen to the very top of the field of endeavor."[92] The standard for extraordinary ability in the arts is somewhat lower.[93]

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[88] 8 C.F.R. §214.2(p)(8).

[89] P.L. 109-463.

[90] INA §214(c)(4)(A)(i) (8 U.S.C. §1184(c)(4)(A)(i)).

[91] S. 744 §4601.

[92] 8 C.F.R. §214.2(o)(3)(ii).

[93] "Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the field

O-2 visas are available for individuals who accompany O-1 artists or athletes to assist in a specific event or performance. A U.S. employer or agent must file a petition on behalf of a prospective O-1 or O-2 worker. The petition must generally include a letter from a peer group or labor union in the prospective O worker's field stating its opinion of the prospective O worker's ability, a process known as *consultation*. Spouses and minor children of O-1 and O-2 nonimmigrants may apply for O-3 visas. O nonimmigrants are admitted for up to three years and may extend their status in increments of up to one year each time. O visas have no annual numerical limit.

O Visa Policy Issues

Congress has expressed concern regarding fraud in the O-1B visa program. In 2013, motion picture and television industry unions alleged that some individuals had submitted falsified letters from peer groups in order to obtain O-1B or O-2 nonimmigrant status.[94] The 114th Congress called for USCIS to issue a report on the integrity of the O-1B and O-2 visa programs and whether additional fraud prevention measures were needed.[95] The resulting report identified six cases of O-1A and O-1B petitions—and zero cases of O-2 petitions—being denied on the basis of fraud in the preceding three years.[96] The report further stated that the agency had not identified any necessary additional fraud identification or prevention measures.

Citing concerns raised by the Directors Guild of America (one of the unions referenced above) in 2016, the House passed the Oversee Visa Integrity with Stakeholder Advisories Act (O-VISA Act; H.R. 3636). The O-VISA Act would have required DHS to share with the consulting labor union the results of its decision to approve or deny O nonimmigrant status to individuals seeking to work in a motion picture or television production; the bill was not taken up by the Senate. After labor unions raised the same fraud concerns directly with the USCIS Director in 2018, USCIS announced that to reduce the risk of fraud unions would be able to send negative consultation letters directly to USCIS so that the agency could compare them to the letters submitted by the prospective O nonimmigrants.[97]

More recently, as wait times for employment-based immigrant visas have grown, some Members of Congress in the 117th Congress have proposed allowing O nonimmigrants (along with H-1Bs and Ls) to extend their status indefinitely while waiting for their LPR applications to be adjudicated or for a visa number to become available.[98]

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of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts" 8 C.F.R. §214.2(o)(3)(ii).

[94] U.S. Congress, House Committee on the Judiciary, *Oversee Visa Integrity with Stakeholder Advisories Act*, H.Rept. 114-614, 114th Cong., 2nd sess., June 10, 2016.

[95] U.S. Congress, Senate Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2016*, S.Rept. 114-68, 114th Cong., 1st sess., June 18, 2015; and U.S. Congress, House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, FY2016*, H.Rept. 114-215, 114th Cong., 1st sess., July 21, 2015.

[96] The report noted that these numbers do not account for all petitions that might have had an indicator of fraud, but only those petitions that were denied on the basis of fraud rather than on some other basis. DHS, USCIS, *Integrity of O-1B and O-2 Visa Issuances*, FY2016 Report to Congress, June 14, 2016.

[97] DHS, USCIS, "USCIS Now Accepting Copies of Negative O Visa Consultations Directly from Labor Unions," press release, September 14, 2018, https://www.uscis.gov/news/alerts/uscis-now-accepting-copies-of-negative-o-visa-consultations-directly-from-labor-unions.

[98] See, for example, S. 348 and H.R. 1177. For more information on the employment-based LPR backlog, see CRS Report R46291, *The Employment-Based Immigration Backlog*.

TN Visas: USMCA Professionals

NAFTA, which entered into force in 1994, established the TN nonimmigrant classification to allow citizens of Canada and Mexico to seek temporary entry into the United States to engage in business activities at a professional level.[99] NAFTA was replaced by USMCA in July 2020, and the TN visa provisions were carried over.[100] Among the approximately 60 types of professionals who are eligible to seek admission to the United States as TN nonimmigrants are accountants, engineers, lawyers, pharmacists, scientists, and teachers.[101]

To obtain TN status, an individual must provide evidence of Canadian or Mexican citizenship, a job offer from an employer (self-employment is not permitted), and professional credentials.[102] Mexican citizens must obtain a TN visa from a U.S. embassy or consulate prior to arrival at a U.S. port of entry.[103] Citizens of Canada are not required to obtain TN visas prior to travel; rather, they may apply directly for admission as TN nonimmigrants at a U.S. port of entry.[104]

TN nonimmigrants are admitted for an initial period of up to three years and may extend their status for additional periods of up to three years each either by leaving the country and re-applying for admission or by applying to USCIS for an extension of stay from within the United States. There is no specific limit on the total period of time an individual may be in TN status provided the individual continues to engage in TN business activities and otherwise continues to properly maintain TN nonimmigrant status.[105] Spouses and minor children of TN nonimmigrants are eligible for TD status for the same period of time as the principal who holds TN status.[106] TD nonimmigrants are generally not permitted to work in the United States. There is no annual numerical limit on TN visas.

TN Visa Policy Issues

As mentioned in the "H-1B1 and E-3 Visa Policy Issues" section, the inclusion of immigration provisions in FTAs has been a point of contention, and TN visas are no exception.[107] In addition, some observers have raised concerns over the lack of numerical limitations on the admission of TN professionals, the fact that U.S. employers are not required to attest that they are not displacing U.S. workers,[108] the differential treatment of Canadian versus Mexican TN

[99] INA §214(e) (8 U.S.C. §1184(e)).

[100] For more information on NAFTA, see CRS Report R42965, *The North American Free Trade Agreement (NAFTA)*. For more information on USMCA, see CRS Report R44981, *The United States-Mexico-Canada Agreement (USMCA)*.

[101] The full list of qualifying professions—typically requiring a bachelor's degree at the entry level—are listed in Appendix 2 of USMCA Chapter 16.

[102] 8 C.F.R. §214.6(d)(3).

[103] 8 C.F.R. §214.6(d)(1).

[104] 8 C.F.R. §214.6(d)(2). Alternatively, a prospective TN employer may choose to file a petition with USCIS on behalf of a Canadian citizen who is outside the United States. If the petition is approved, the prospective worker may apply for admission at a port of entry by providing proof of Canadian citizenship and the approved petition from USCIS.

[105] 8 C.F.R. §214.6(h).

[106] 8 C.F.R. §214.6(j).

[107] During the renegotiation of NAFTA, Senator Grassley wrote a letter to then-U.S. Trade Representative Robert Lighthizer in which he raised the issue, among others, of whether admitting temporary workers under trade agreements rather than through statutory and regulatory frameworks was in the best interest of American workers; Letter from Charles E. Grassley, U.S. Senator, to Ambassador Robert E. Lighthizer, U.S. Trade Representative, October 23, 2017.

[108] See, for example, Kevin Penton, "Grassley Rips TN Visas For Bringing In 'Cheap Foreign Labor'," *Law 360*, October 24, 2017.

professionals, the lack of government data on the number of workers in TN status,[109] and reported fraud.[110] The NAFTA provisions related to the entry of temporary professionals carried over to USMCA. USMCA does not place new restrictions on the number of entrants or expand the list of eligible professionals, as many businesses and other service providers had hoped it would.[111]

I Visas: Representatives of Foreign Information Media

I visas are for representatives of foreign press, radio, film, or other information media who are coming to the United States to work in their profession.[112] Activities in the United States while on an I visa must be for a media organization having its home office in a foreign country, and must be informational in nature and generally associated with the news gathering process and reporting on current events. I visas are issued on the basis of reciprocity, meaning that visa fees, validity periods, and the number of entries reflect each foreign government's policies toward Americans applying for similar visas. I visas are used for long-term or short-term journalistic assignments, and I nonimmigrants are typically admitted for *duration of status*, meaning the period of time during which they are employed in such capacity.[113] Spouses and children of foreign information media representatives are eligible to apply for I visas as derivatives; they are not authorized for employment in the United States.

I Visa Policy Issues

Historically, the I nonimmigrant visa has not attracted much attention from lawmakers. Unlike the other visa classes covered in this report, I nonimmigrants are not employed by U.S. employers and thus do not generate debate related to competition with U.S. workers. Three events in 2020, however, led to this visa category gaining media attention.

In March 2020, citing the Chinese government's "increasingly harsh surveillance, harassment, and intimidation against American and other foreign journalists operating in China," DOS announced a personnel cap on four Chinese state media companies, requiring them to reduce their number of Chinese employees in the United States from 160 to 100.[114] The announcement did not explicitly address immigration status, but it is presumed that most of the employees who were required to leave by March 13, 2020, were in the United States on I visas.[115]

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[109] Because Canadians do not usually obtain TN visas, DOS data on TN visa issuances capture Mexicans but very few Canadians. DHS maintains data on the number of admissions to the United States in each nonimmigrant category, including TN. These data count the number of *entries* but not the number of individuals because one person can (and often does) enter multiple times in a year. In 2016, the Canadian Broadcasting Corporation reported that "an estimated 30,000 to 40,000 Canadians work in the U.S. under the nonimmigrant NAFTA professional [TN] visa"; Steven D'Souza, "Canadians working in U.S. under NAFTA exemption worry about future under Trump," *Canadian Broadcasting Corporation*, December 24, 2016.

[110] See, for example, Maria Perez, "Mexican veterinarians given low-skill jobs; Offers in visa program don't measure up to reality of work," *USA Today*, December 11, 2019.

[111] See CRS Report R44981, The United States-Mexico-Canada Agreement (USMCA); and Nicole Narea, "TN Visas Survive Trade Deal, But Challenges May Remain," *Law 360*, October 2, 2018.

[112] INA §101(a)(15)(I) (8 U.S.C. §1101(a)(15)(I)).

[113] 8 C.F.R. §214.2(i). I nonimmigrants are not permitted to change employers or information medium without permission from DHS.

[114] DOS, "Institution of a Personnel Cap on Designated PRC State Media Entities," press release, March 2, 2020.

[115] Ministry of Foreign Affairs of the People's Republic of China, "Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference," press release, May 11, 2021, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1874971.shtml.

DHS implemented a new rule in May 2020, limiting the admission period for Chinese journalists on I visas to 90 days.[116] The rule applies to People's Republic of China (PRC) passport holders; those with passports from Hong Kong and Macau are exempt. The rule cited cases of U.S. and foreign journalists being forced out of China as a factor in the decision to limit admission periods. DHS said the new rule "addresses the actions of the PRC government and creates a greater degree of reciprocity with the treatment the PRC accords foreign journalists, including U.S. citizens, who are increasingly receiving shorter and shorter durations of stay, as well as increasing uncertainty during the visa renewal process."[117] Additionally, DHS proposed a rule in September 2020 limiting the initial period of admission for all I nonimmigrants to a maximum of 240 days. This would have been a change from the current practice of admitting them for *duration of status* (i.e., the period of time they are complying with the terms and conditions of their nonimmigrant category).[118] The rule cited fraud, national security, and overstay concerns among the reasons for requiring a fixed end date for the admission of foreign media representatives and others, and noted that these categories of nonimmigrants could apply for extensions of stay, providing DHS with the opportunity to ensure that they were complying with the terms of their status.[119] The rule was not finalized under the Trump Administration. The Biden Administration withdrew the proposed rule but indicated that it would consider rule changes to protect the integrity of the I visa programs.[120]

Some in Congress have proposed legislation that would place restrictions on nonimmigrant visas (including H-1B, I, and L visas) for Chinese journalists employed by Chinese state-run media organizations and impose reporting requirements related to monitoring the number of Chinese journalists in the United States.[121] Another proposal would expand the I visa category to make eligible foreign nationals who are considered "threatened journalists" and their family members.[122]

R Visas: Religious Workers

Foreign nationals may come to the United States on R visas to work in religious occupations. The regulations define two types of religious workers: ministers and those pursuing religious vocations or occupations.[123] Examples of non-ministers include workers in religious hospitals or healthcare facilities, religious counselors, cantors, and missionaries. To qualify for R nonimmigrant status, an individual must be coming to the United States to work at least part-time

[116] I nonimmigrants subject to this rule may apply for extensions of stay, not to exceed 90 days each. DHS, U.S. Customs and Border Protection (CBP), "Period of Admission and Extensions of Stay for Representatives of Foreign Information Media Seeking To Enter the United States," 85 *Federal Register* 27645-27649, May 11, 2020.

[117] DHS, CBP, "Period of Admission and Extensions of Stay for Representatives of Foreign Information Media Seeking to Enter the United States," 85 *Federal Register* 27645-27649, May 11, 2020.

[118] The rule would have also changed the admission period for students on F visas and exchange visitors on J visas to a fixed period rather than duration of status. See DHS, U.S. Immigration and Customs Enforcement (ICE), "Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media," 85 *Federal Register* 60526-60598, September 25, 2020.

[119] Ibid.

[120] DHS, ICE, "Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media," 86 *Federal Register* 35410, July 6, 2021.

[121] S. 4797 in the 116th Congress.

[122] S. 1495 in the 117th Congress.

[123] 8 C.F.R. §214.2(r).

for a religious organization or religiously affiliated nonprofit organization. He or she must have been a member of a religious denomination that has a bona fide nonprofit religious organization in the United States for at least two years immediately before requesting such status. An R nonimmigrant's period of stay may not exceed five years, with an initial admission of up to 30 months and one extension of up to 30 additional months.[124] Spouses and children of R-1 visa holders are admitted in R-2 status and are not authorized for employment in the United States.[125]

An R nonimmigrant may work for more than one employer provided that all employers submit petitions on behalf of the worker and all the work meets the requirements for R nonimmigrant status. In addition to the petition that an employer must submit to USCIS for most temporary workers, an employer of an R nonimmigrant must submit a supplemental form providing additional information and attesting that the employee will work at least 20 hours per week, is qualified for the position, will not be engaged in secular employment, and has been a member of the denomination for at least two years.[126] There is no annual numerical limit on the number of R visas that may be issued.

R Visa Policy Issues

Since its creation in 1990, the R visa category has received less attention from Congress than the more commonly used temporary worker visa categories. Nevertheless, in response to reports of fraud in the mid-1990s, Congress requested that GAO examine the extent and nature of fraud in the program.[127] GAO identified incidents of fraud that DOS and the former Immigration and Naturalization Service (INS) had uncovered during the visa screening process and fraud investigations. These included misrepresentation of an applicant's qualifications, the length of time an applicant spent as a member of the religious organization, and the nature of the positions being filled. Some investigations involved organizations petitioning for more workers than they could reasonably support.[128]

In 2005, USCIS's Office of Fraud Detection and National Security (FDNS) estimated that approximately one-third of applications and petitions filed for religious workers were fraudulent, including petitions filed on behalf of nonexistent organizations and material misrepresentations in documents submitted to establish eligibility for the program.[129] To address program fraud and abuse, USCIS implemented new regulations requiring employers to submit petitions to USCIS for religious workers providing sufficient evidence of compliance with program rules and allowing for USCIS to conduct onsite inspections as part of the petition approval process.[130]

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[124] 8 C.F.R. §214.2(r)(1).

[125] 8 C.F.R. §214.2(r)(4)(ii).

[126] 8 C.F.R. §214.2(r)(8). Prior to 2008, employers of R nonimmigrants did not submit petitions or attestations. These requirements were added by rulemaking in order to "improve the Department of Homeland Security's (DHS's) ability to detect and deter fraud and other abuses in the religious worker program." See DHS, USCIS, "Special Immigrant and Nonimmigrant Religious Workers," 73 *Federal Register* 72276, November 26, 2008.

[127] In addition to the R nonimmigrant program, the report also covered the program for immigrant (i.e., permanent) religious workers; GAO, *Visa Issuance: Issues Concerning the Religious Worker Visa Program*, GAO/NSIAD-99-67, March 1999.

[128] GAO, *Visa Issuance: Issues Concerning the Religious Worker Visa Program*, GAO/NSIAD-99-67, March 1999.

[129] DHS, USCIS, "Special Immigrant and Nonimmigrant Religious Workers," 73 *Federal Register* 72275-72297, November 26, 2008.

[130] Ibid.

No statutory changes have been made to the program since its inception, but bills have been introduced that would codify the petition requirement and allow religious organizations that are frequent users of the program and have a record of compliance to submit *blanket petitions* for more than one worker at a time.[131]

Trends by Category of Worker

Over the past two decades, the number of visas issued for the various categories of temporary professional workers has fluctuated, while generally increasing overall. **Figure 4** displays visa issuances by category for the period from FY1997 (the earliest year for which DOS publishes detailed data) through FY2020.[132] These data do not include foreign nationals converting to temporary professional worker status from within the United States but rather cover only those who received a visa at a U.S. consulate abroad. Between FY1997 and FY2019, the total number of visas issued to temporary professional workers more than doubled, driven in large part by increases in visas issued to specialty occupation workers (H-1B, H-1B1, and E-3), intracompany transferees (L-1), and treaty traders and investors (E-1 and E-2). USMCA professionals (TN), individuals with extraordinary ability (O), and athletes and entertainers (P) also saw increases over this time period. The number of visas issued to foreign media (I) and religious workers (R) declined somewhat. Between FY2019 and FY2020, there was a sharp decline in visa issuances for all categories of temporary professional workers, reflecting the COVID-19 pandemic's disruption of travel and visa processing.[133]

Visas for specialty occupation workers (H-1B, H-1B1, and E-3) accounted for the largest number of issuances in every year, followed by visas for intracompany transferees (L-1). In FY2019, specialty occupation workers accounted for almost half (47%) of visa issuances to temporary professional workers.

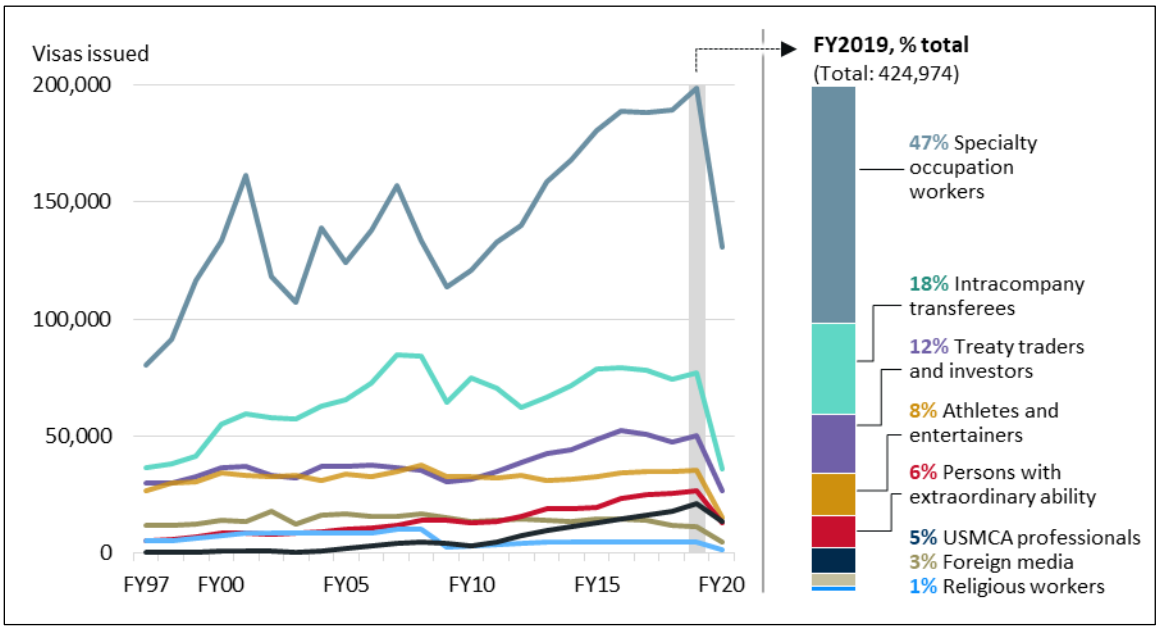
[131] See, for example, S. 775 in the 115th Congress.

[132] While **Figure 4** displays data through FY2020, the written analysis focuses on data through FY2019 in order to avoid data anomalies associated with the COVID-19 pandemic's effects on visa issuances beginning in FY2020.

[133] In addition, H-1B, L, and certain other nonimmigrant workers were prohibited from entering the United States from June 22, 2020, through March 31, 2021. For more information see CRS Insight IN11435, *COVID-19-Related Suspension of Nonimmigrant Entry*.

Figure 4. Visas Issued to Temporary Professional Workers by Category

FY1997-FY2020



Source: CRS representation of data from U.S. Department of State, Bureau of Consular Affairs, "Nonimmigrant Visa Issuances by Visa Class and by Nationality, FY1997-2020 NIV Detail Table," retrieved from https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html.

Notes: Specialty occupation professionals are those with H-1B, H-1B1, or E-3 visas; intracompany transferees are those with L-1 visas; individuals with extraordinary ability are those with O-1 or O-2 visas; athletes and entertainers are those with P-1, P-2, or P-3 visas; treaty traders and investors are those with E-1, E-2, or E-2C visas; foreign media representatives are those with I visas; religious workers are those with R visas; USMCA professionals are those with TN visas. Most categories do not include derivative family members. Data do not include foreign nationals converting to temporary professional worker status within the United States nor the majority of TN nonimmigrants from Canada because Canadians are not required to obtain a visa in order to enter the United States as USMCA professionals.

Optional Practical Training (OPT)

In addition to the visa categories for temporary professional workers described above, thousands of foreign students and recent graduates work in the United States while on F-1 visas. F-1 visas are for full-time academic study and are the most common visas issued to foreign students. Since 1947, regulations have provided that F-1 students may work "in cases where employment for practical training is required or recommended by the school" and approved by immigration officials.[134] Current regulations provide that, after their first academic year, F-1 students are eligible to participate in OPT—temporary employment that is directly related to their major area of study. In order to do so, a student must get approval from his or her school and then file an application for employment authorization with USCIS. A job offer from a U.S. employer is not required. Generally, an F-1 student may work up to 12 months in OPT, which may be completed before and/or after graduation.

[134] U.S. Department of Justice, Immigration and Naturalization Service, "Title 8—Aliens and Nationality," 12 *Federal Register* 5357, August 7, 1947.

Those who receive a degree in a STEM field[135] may apply for a two-year extension of their OPT, known as STEM OPT. Those who are authorized for the STEM OPT extension are thus allowed to work for up to 36 months.[136] In this way, OPT often serves as a bridge for students on F-1 visas to transition to H-1B status, which subsequently may lead to employment-based LPR status.[137] F-1 nonimmigrants are eligible to participate in OPT once per degree level (i.e., bachelor's, master's, or doctorate) but may not participate more than two times in the STEM OPT extension. STEM OPT employers must attest that any STEM OPT employee they hire is not replacing a U.S. worker and that the duties, hours, and compensation are commensurate with those for their U.S. employees. STEM OPT employers must also use E-Verify.[138]

The OPT program is not numerically limited, and the number of F-1 visa holders who are employed through it has risen substantially (see **Figure 5**). In CY2007, there were just under 25,000 F-1 nonimmigrants working as part of the OPT program; this number rose to over 200,000 in 2017. [139] The number of foreign students earning STEM degrees in the United States has also increased over time, as has their share of all STEM degrees earned in the United States.[140] Of the approximately 1.5 million foreign students in the United States in 2018, more than 10% were engaged in OPT.[141] The implementation of the STEM OPT extension in 2008 (for 17 months) and its expansion in 2016 (to 24 months) has allowed more students to stay past graduation for longer periods of time. The decline in OPT employment between CY2017 and CY2020 mirrored a decline in foreign student enrollment in the United States.[142]

For foreign students who want to remain and work in the United States after graduation, obtaining OPT authorization is typically faster and easier than changing to a temporary or permanent employment-based immigration status, especially statuses like H-1B and LPR that are numerically limited and oversubscribed. Working for three years through STEM OPT also

[135] DHS maintains a list of degree programs that qualify for the STEM OPT extension and periodically makes changes to the list, most recently in January 2022. See DHS, USCIS, "Update to the Department of Homeland Security STEM Designated Degree Program List," 87 *Federal Register* 3317, January 21, 2022.

[136] The STEM OPT extension began in 2008 as a 17-month extension. It was expanded to 24 months in 2016 (for a total of 36 months in OPT). For more information, see DHS, "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students," 81 *Federal Register* 13039-13122, March 11, 2016.

[137] In FY2020 and FY2021, 47% of H-1B petitions approved for initial employment were for individuals requesting a change from F-1 status to H-1B status. See DHS, USCIS, *Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2020 and FY2021 Annual Report[s] to Congress*. It is likely that many of these students changing to H-1B status (85% of whom had received Master's or higher degrees) were first hired by a U.S. employer through the OPT program (during which they maintain their F-1 status). In some cases, the employer previously may have attempted to hire the student as an H-1B worker but been denied due to numerical limits or other program restrictions.

[138] E-Verify is an electronic employment eligibility verification program that some U.S. employers use to confirm new hires' employment authorization through Social Security Administration and DHS (if necessary) databases. For more information, see CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

[139] These data represent the number of F-1 nonimmigrants with OPT employment authorizations who were working during each calendar year. Students whose OPT ends and STEM OPT begins within the same year are displayed as "Both OPT and STEM OPT" in order to provide a unique count of individuals. Data obtained from https://www.ice.gov/doclib/sevis/pdf/data-ApprovedEmploymentAuthorizations2007-2020.pdf.

[140] For more information, see CRS In Focus IF11347, *Foreign STEM Students in the United States*, by Boris Granovskiy and Jill H. Wilson.

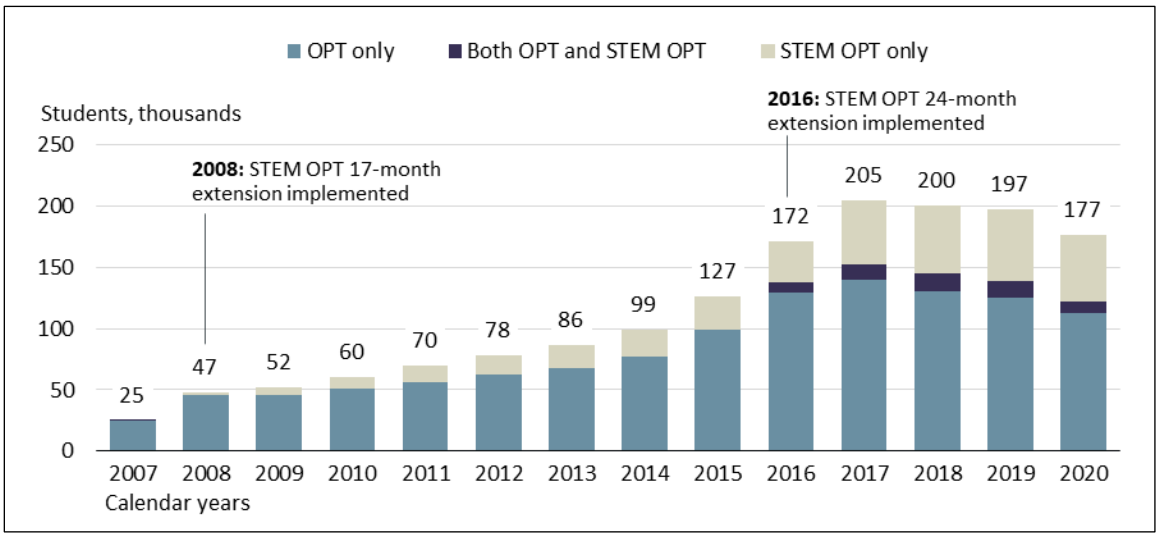
[141] U.S. Citizenship and Immigration Services Ombudsman, *Annual Report 2020*, June 30, 2020.

[142] The Institute for International Education, which closely tracks trends in foreign student enrollment in the United States, cites several factors that have contributed to a decline in enrollment since 2017: high tuition costs, difficulties in obtaining a visa or maintaining status, student perception of an unwelcome environment, negative rhetoric about immigration, and news of crime in the United States. See, for example, Kathleen Struck, "Fewer Foreign Students Enrolling in US College and Universities," *Voice of America News*, November 18, 2019.

provides an F-1 nonimmigrant with multiple chances to win the H-1B lottery, for example, in order to be petitioned for by a U.S. employer for an H-1B visa. OPT can also provide an interim status for recent graduates whose employers are sponsoring them for LPR status.

Figure 5. F-1 Nonimmigrants Employed via Optional Practical Training

CY2007-CY2020



Source: CRS presentation of data from DHS Immigration and Customs Enforcement Student and Exchange Visitor Program.

Notes: Numbers (in thousands) represent F-1 nonimmigrants who were authorized for OPT employment and were employed in each calendar year. Some individuals were authorized for OPT and STEM OPT in the same year.

OPT Policy Issues

As the number of nonimmigrants participating in OPT has increased—along with the length of time they are permitted to work in the United States—debate has arisen about OPT's legality and merits. OPT opponents claim that DHS lacks statutory authority to permit F-1 nonimmigrants to remain and work in the United States after graduation on the grounds that student visa status is limited to pursuing a course of study at an academic institution.[143] They also argue that what was initially designed as a way to give students some work experience in their field has become a large-scale temporary worker program without safeguards in place for protecting U.S. workers and students, and that OPT serves as an end-run around the numerical limitations and more lengthy application processes for H-1B or LPR status.[144] In addition, opponents point out that

[143] See Wash. Alliance of Tech. Workers v. Dep't. of Homeland Sec., 518 F. Supp. 3d 448 (D.D.C. 2021). The district court ultimately ruled that the regulations creating and expanding the OPT program for F-1 student visa holders after completion of courses were based on a reasonable interpretation of an INA statutory provision governing F-1 visas. Id. at 470–75. This decision has been appealed to the Court of Appeals for the District of Columbia, and litigation is ongoing. See Wash. Alliance of Tech. Workers v. Dep't. of Homeland Sec., No. 21-5028 (D.C. Cir. 2021).

[144] See, for example, Daniel Costa and Ron Hira, *The Department of Homeland Security's proposed STEM OPT extension fails to protect foreign students and American workers*, Economic Policy Institute, December 1, 2015; Karin Fischer, "How a Little-Known Program for Foreign Students Became Embroiled in a Hot-Button National Debate," *The Chronicle of Higher Education*, January 20, 2016; David North, *Now Is the Perfect Time to Downsize the OPT Program*, Center for Immigration Studies, May 26, 2020; and Elizabeth Redden, "Will Trump Opt to Restrict Foreign

OPT provides U.S. employers with a financial incentive to hire recent graduates who are foreign nationals over those who are U.S. citizens because employers are not required to pay Social Security and Medicare (FICA) taxes for OPT employees.[145]

Observers have also raised concerns about OPT workers' access to U.S. technology and intellectual property, particularly nationals of China, Iran, Russia, and other countries of concern. This exposure could help develop expertise that is then used to build capabilities in these countries.[146] A recent report by the USCIS Ombudsman's office stated that OPT "may be exploited by foreign governments with interests adverse to those of the United States" and that the OPT program "is currently being used by government actors such as the PRC as a means of conducting espionage and technology transfer."[147]

Supporters argue that OPT helps the United States attract international students in an increasingly competitive global market.[148] U.S. universities have increasingly come to rely on foreign students for their out-of-state tuition payments and academic contributions to degree programs, particularly in STEM fields. Supporters also contend that OPT provides a mechanism for those with in-demand skills to remain in and contribute to the U.S. economy, that OPT allows employers to evaluate employees before hiring them permanently, and that there is no evidence that OPT workers take jobs from American students.[149] In particular, they argue that the two additional years of work allowed under the STEM OPT extension—as opposed to the 12 months allowed under regular OPT—justifies a company's investment in training these new employees.

Congress has proposed eliminating the OPT program,[150] reducing the length of time students and graduates are permitted to stay and work,[151] and restricting its use in sensitive technology fields.[152] There have also been proposals over the years to allow STEM graduates from U.S.

Student Work Program?," *Inside Higher Ed*, May 29, 2020.

[145] See, for example, Daniel Costa and Ron Hira, *The Department of Homeland Security's proposed STEM OPT extension fails to protect foreign students and American workers*, Economic Policy Institute, December 1, 2015; and Matthew Bultman, "OPT Extension Is Hurting Us, Tech Workers Tell DC Circ.," *Law360*, February 4, 2016. For information on taxation rules for F and other nonimmigrants, see Internal Revenue Service (IRS), "U.S. Tax Guide for Aliens," Publication 519, March 4, 2020, pp. 42-43. See also IRS, "Aliens Employed in the U.S. – Social Security Taxes," November 3, 2020, https://www.irs.gov/individuals/international-taxpayers/aliens-employed-in-the-us-social-security-taxes.

[146] For more information on China's use of U.S. research ties as a technology transfer vehicle, see the "China's State Talent Programs" section in CRS Report R46915, *China's Recent Trade Measures and Countermeasures: Issues for Congress*.

[147] U.S. Citizenship and Immigration Services Ombudsman, *Annual Report 2020*, June 30, 2020, pp. 80-81. In its response to this report, USCIS stated that it is working to mitigate these risks. See U.S. Citizenship and Immigration Services, *USCIS Response to the Citizenship and Immigration Services Ombudsman's Office Annual Report to Congress*, December 4, 2020, pp. 19-20.

[148] See, for example, NAFSA, "151 Higher Education Institutions Support Amicus Brief in Support of Optional Practical Training (OPT) for International Students," press release, June 21, 2021; FWD.us, *Protecting Optional Practical Training is in our National Interest*, May 24, 2021; Elizabeth Redden, "Will Trump Opt to Restrict Foreign Student Work Program?," *Inside Higher Ed*, May 29, 2020; Kelly Mae Ross and Josh Moody, "What to Know About Optional Practical Training," *U.S. News and World Report*, November 27, 2019; and National Foundation for American Policy, *The Importance of International Students to American Science and Engineering*, October 2017.

[149] Stuart Anderson, "Setting the Record Straight on Optional Practical Training," *Forbes*, June 21, 2021; and David Bier, *The Facts about Optional Practical Training for Foreign Students*, Cato, May 20, 2020.

[150] Examples from the 117th Congress include H.R. 865, H.R. 4644 and H.R. 6206.

[151] See, for example, H.R. 3983 from the 117th Congress.

[152] See, for example, H.R. 3983 from the 117th Congress.

universities to more directly obtain permanent status,[153] thus removing the need for them to use OPT and/or H-1B status as stepping stones to LPR status.

Links between Temporary and Permanent Employment-Based Immigration

Many temporary professional foreign workers are eventually sponsored for permanent status through the employment-based immigration system. As such, visas for temporary professional workers are a key gateway for foreign professionals to obtain permanent status in the United States. Over the last two decades or so, 84%, on average, of those receiving employment-based LPR status each year did so by *adjusting* from a temporary status within the United States rather than by applying for an immigrant visa from abroad.[154] Of those adjusting to employment-based LPR status, most do so from a temporary professional worker status. More specifically, from FY2010 to FY2019, 88% of those adjusting to EB-1, EB-2, or EB-3 status were temporary professional workers or their family members; H-1B workers and their family members accounted for 57%, and L-1 transferees and their family members accounted for 23%.[155]

In addition to individuals in the United States on visas for temporary professional workers, those on foreign student visas (F-1) are part of the pipeline to employment-based LPR status. After H-1B and L nonimmigrants and their family members, F-1 students and their family members made up the next highest share (6%) of persons adjusting to EB-1, EB-2, or EB-3 LPR status from FY2010 to FY2019. Many anecdotal accounts tell of foreign students who are hired by U.S. firms as they are completing their degree programs. Employers may opt to hire them through OPT, thus extending their F-1 status. If the employees meet expectations, the employers may petition for them to become LPRs through one of the employment-based immigration categories.[156]

U.S. employers' sponsorship of an increasing number of nonimmigrant workers for LPR status, combined with static numerical limits and per country caps on immigrant visas, have contributed to a sizable queue of foreign nationals waiting to receive employment-based LPR status.[157] Some observers argue that the growing use of temporary professional workers signals not only increased labor demand for individuals with specific skills, but also labor market pressure resulting from the INA's annual statutory limit on permanent employment-based immigration.[158]

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[153] See, for example, S. 348, S. 3638, H.R. 4521, and H.R. 5924 in the 117th Congress; S. 328 and S. 1744 in the 116th Congress; and H.R. 2717 in the 115th Congress.

[154] *Adjusting status* permits a nonimmigrant to become an LPR without having to return to his/her country of origin to complete visa processing through a DOS consulate. CRS calculated the share of EB-1, EB-2, and EB-3 immigrants who had adjusted status each year (as opposed to those who were new arrivals) for FY1996-FY2019. This share ranged from a low of 63% in 2003 to a high of 93% in 2010 and averaged 84% over the time period.

[155] These calculations are based on unpublished data provided to CRS by USCIS on June 29, 2020.

[156] Employers may instead petition for an F-1 student (with or without OPT) to be hired as an H-1B worker. From FY2011 to FY2021, for example, an average of 44,000 F-1 students changed to H-1B status each year, accounting for 71% of those changing to H-1B status from within the United States over the same time period. These calculations are based on unpublished data provided to CRS by USCIS. It is not known what share of these H-1Bs are eventually sponsored by their employers for LPR status.

[157] For more information, see CRS Report R46291, *The Employment-Based Immigration Backlog*.

[158] See Lazaro Zamora, *Are "Temporary Workers" Really Temporary? Turning Temporary Status into Green Cards*, Bipartisan Policy Center, May 2016; Muzaffar Chishti and Jessica Bolter, *Despite Political Resistance, Use of Temporary Worker Visas Rises as U.S. Labor Market Tightens*, Migration Policy Institute, June 20, 2017; Jeremy Neufeld, *Optional Practical Training (OPT) and International Students After Graduation*, Niskanen Center, March 2019; and Daniel Costa, "Temporary Migrant Workers or Immigrants? The Question for U.S. Labor Migration," *The*

Given the level of economic growth and technological innovation since 1990, when current employment-based immigration limits were established, employers seeking skilled workers from abroad appear to be increasingly relying upon the INA's nonimmigrant provisions, some of which may not have been intended for how employers are using them.[159]

Dual Intent and the INA Section 214(b) Presumption

Section 214(b) of the INA (8 U.S.C. §1184(b)) generally presumes that all aliens seeking admission to the United States intend to settle permanently. As a result, most foreign nationals seeking to qualify for nonimmigrant (i.e., temporary) visas must demonstrate that they are not coming to reside permanently. The Section 214(b) presumption is the most common basis for rejecting nonimmigrant visa applications, accounting for 71% of ineligibility findings in FY2020. There are three nonimmigrant visas for which *dual intent* is allowed, meaning that the prospective nonimmigrant visa holder is permitted simultaneously to seek admission to the United States on a nonimmigrant visa and to seek LPR status. Nonimmigrants seeking H-1B visas (specialty occupation workers), L visas (intracompany transferees), or V visas (accompanying family members) are exempt from the requirement to show that they are not coming to the United States to live permanently. In the 117th Congress, there have been proposals to add F-1 students to the list of those who are exempt (e.g., H.R. 1177, S. 348, H.R. 4521, S. 3638, and H.R. 5924).

Considerations for Congress

Facilitating the admission of temporary professional workers to meet U.S. employers' labor needs without adversely affecting U.S. workers and students entering the labor market is seen as a key challenge before Congress. Related policy questions that Congress may consider include the following:

Numerical limits

- Do the annual numerical limits on temporary professional foreign workers adequately balance protection for U.S. workers with current economic needs? Are the appropriate categories of workers exempted from numerical limits? Should annual numerical limits vary, based on economic conditions such as unemployment rates or evidence of labor shortages?
- Should foreign workers with advanced degrees (perhaps in particular fields) from U.S. universities be given preferential treatment over other foreign workers for numerically limited temporary or permanent visas?

Employer requirements

- Should employers of temporary professional foreign workers be required to meet labor market tests, such as making efforts to recruit U.S. workers and offering wages and benefits that are comparable to similarly employed U.S. workers?
- What, if any, labor protections and worker rights should be extended to temporary professional foreign workers to prevent abuse or exploitation by employers?
- Should DOL have greater authority to investigate fraud and enforce employer compliance in temporary worker programs?

Russell Sage Foundation Journal of the Social Sciences, vol. 6, no. 3 (November 2020).

[159] Ibid.

- Should regulations governing the admission of temporary professional foreign workers be streamlined so that the rules are less time consuming and burdensome for employers?

Permanent status

- Should temporary professional foreign workers or foreign students be permitted to have *dual intent*; that is, to apply for LPR status while seeking or renewing temporary visas? If so, for what visa categories and under what circumstances should dual intent be permitted?
- Should foreign students—particularly those with degrees in in-demand fields—have more opportunities to stay and work in the United States after graduation?
- Should the children of temporary professional workers who are waiting in line for permanent visas to become available be able to maintain lawful status after they turn 21 rather than aging out?

The temporary admission of foreign professionals to work in the United States poses complex policy considerations. The questions noted above are just some of those that policymakers may consider as they contemplate how to enhance the functioning of the U.S. immigration system for admitting temporary workers. Given the range of perspectives on the costs and benefits of admitting foreign professional workers, policymakers have much to consider in undertaking these challenges.

Appendix A. Nonimmigrant Visa Classes for Temporary Professional Workers and Family Members: Visa Issuances in FY1997 and FY2019, and Percentage Change

Table A-1. Nonimmigrant Visa Classes for Temporary Professional Workers and Family Members

Visa Issuances in FY1997 and FY2019, and Percentage Change

Visa Symbol	Visa Class	FY1997 Visa Issuances	FY2019 Visa Issuances[c]	% Change, FY1997-FY2019
E-1	Treaty trader, employee, spouse, and child	9,497	6,668	-29.8
E-2	Treaty investor, employee, spouse, and child	20,261	43,286	113.6
E-2C	CNMI investor, spouse, and child	N/A	73	N/A
E-3	Australian specialty occupation worker	N/A	5,807	N/A
E-3D	Spouse and child of E-3	N/A	4,177	N/A
E-3R	Returning E-3	N/A	3,167	N/A
H-1B	Specialty occupation worker	80,547	188,123	133.6
H-1B1	Free trade agreement professional (Singapore and Chile)	N/A	1,724	N/A
H-4	Spouse or child of H-1B or H-1B1[a]	47,206	125,999	166.9
I	Representative of foreign information media, spouse, and child	12,056	11,312	-6.2
L-1	Intracompany transferee	36,589	76,988	110.4
L-2	Spouse or child of L-1	43,476	80,720	85.7
O-1	Person with extraordinary ability in the sciences, art, education, business, and athletics	3,345	17,751	430.7
O-2	Person accompanying and assisting in the artistic or athletic performance by O-1	1,848	8,743	373.1
O-3	Spouse or child of O-1 or O-2	748	5,337	613.5
P-1	Internationally recognized athlete or member of an internationally recognized entertainment group	18,991	25,601	34.8
P-2	Artist or entertainer in a reciprocal exchange program	194	107	-44.8
P-3	Artist or entertainer in a culturally unique program	7,756	9,848	27.0
P-4	Spouse or child of P-1, P-2, or P-3	607	1,401	130.8
R-1	Person in religious occupation	5,082	4,583	-9.8
R-2	Spouse or child of R-1	1,291	1,705	32.1
TN	USMCA professional[b]	171	21,193	12,293.6
TD	Spouse or child of TN	340	11,040	3,147.1

Source: U.S. Department of State, *Annual Report of the Visa Office*, FY1997 and FY2019.

Notes: CNMI=Commonwealth of the Northern Mariana Islands, USMCA=United States-Mexico-Canada Agreement.

a. H-4 visas are also issued to spouses and children of H-2A, H-2B, and H-3 visa holders.
b. The U.S.-Mexico-Canada Agreement (USMCA) replaced NAFTA as of July 1, 2020. The provisions related to the entry of temporary professionals remained the same.
c. This table displays percentage change from FY1997 to FY2019 in order to avoid anomalies associated with the COVID-19 pandemic's effects on visa issuances beginning in FY2020.

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