

# CRS Report for Congress

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## Labor Certification for Permanent Immigrant Admissions

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### Summary

The foreign labor certification program in the U.S. Department of Labor (DOL) is responsible for ensuring that foreign workers do not displace or adversely affect working conditions of U.S. workers. DOL handles the labor certifications for permanent employment-based immigrants, temporary agricultural workers, and temporary nonagricultural workers as well as the simpler process of labor attestations for temporary professional workers.<sup>1</sup> This report is organized into five sections: a brief history of employment-based immigration; a summary of the role of the DOL in employment-based immigration; an overview of current law on employment-based immigration; an analysis of trends in employment-based admissions and labor certification applications (LCAs); and a discussion of the recent funding history for labor certification. This report will be updated if legislative or policy changes warrant.

### Brief History of Employment-Based Immigration

Congress enacted its first law aimed at protecting U.S. workers from the adverse labor market effects linked to the entry of foreign workers when it passed the contract labor law of 1885, known as the Foran Act. In 1864, Congress had legalized contract labor, but over the next two decades concerns arose that employers in some industries were recruiting foreign workers to work for lower wages or to work as “strike breakers.”<sup>2</sup> The Foran Act made it unlawful to import aliens for the performance of labor or service

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<sup>1</sup> For a discussion of labor certification and attestations for temporary foreign workers, see CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers* (hereafter cited as RL30498, *Nonimmigrant Professional Specialty (H-1B) Workers*); and CRS Report RL30852, *Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues*, both by (name redacted).

<sup>2</sup> The extent and impact of alien contract labor remains a subject of debate among historians. For examples, see Maldwyn Allen Jones, *American Immigration*, University of Chicago Press (1960); and Michael C. LeMay, *From Open Door to Dutch Door*, Praeger (1987).

of any kind in the United States.<sup>3</sup> That bar on employment-based immigration lasted until 1952, when Congress enacted the Immigration and Nationality Act (INA), a sweeping law also known as the McCarran-Walters Act that brought together many disparate immigration and citizenship statutes and made significant revisions in the existing laws.<sup>4</sup>

Not only did the Immigration and Nationality Act of 1952 end the bar on employment-based immigration, it allocated 50% of the visas to aliens who would perform needed services because of their high education, technical training, specialized experience, or exceptional ability.<sup>5</sup> Prior to the admission of these employment-based immigrants, however, the 1952 Act required the Secretary of Labor to certify to the Attorney General and the Secretary of State that there were not sufficient U.S. workers “able, willing, and qualified” to perform this work and that the employment of such aliens would not “adversely affect the wages and working conditions” of similarly employed U.S. workers.<sup>6</sup> This provision in the 1952 Act established the policy of labor certification.

Prior to the enactment of the Immigration Act of 1990 (which amended the INA), employment-based immigration totaled 54,000 annually and was evenly split between those who were members of the professions or of exceptional ability, and those who were skilled or unskilled workers with occupations in which U.S. workers were in short supply.

## **Evolving Role of Department of Labor**

In 1903, Congress transferred the various existing immigration functions from the Department of Treasury to the then-Department of Commerce and Labor. When the Department of Labor (DOL) was established in 1913, the Bureau of Immigration and the Bureau of Naturalization were both transferred to the new DOL. These immigration and naturalization functions remained in DOL until 1940, when they were moved to the Department of Justice, largely for national security reasons. In 2003, these functions were transferred to the Department of Homeland Security.

Within the Department of Labor, the former Bureau of Employment Security first administered labor certification following enactment of the policy in 1952. After the abolishment of Employment Security in 1969, the Manpower Administration handled labor certification. In 1975, the Manpower Administration became the Employment and Training Administration (ETA), and ETA continues to oversee the labor certification of aliens seeking to become legal permanent residents (LPRs). Currently, foreign labor certification is one of the “national activities” within ETA.<sup>7</sup>

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<sup>3</sup> 23 Stat. 332.

<sup>4</sup> The McCarran-Walters Act (P.L. 414, 82<sup>nd</sup> Congress) passed over a veto by President Harry Truman. Truman publicly opposed the race and ethnic immigration quotas in the Act, but his legislative alternative to McCarran-Walters included employment-based immigration and labor certification provisions similar to P.L. 414. Neither included provisions for unskilled workers.

<sup>5</sup> §203(a)(1) of P.L. 414.

<sup>6</sup> §212(a)(14) of P.L. 414.

<sup>7</sup> DOL is charged with other immigration-related responsibilities. Most notably, the Wage and Hour Division in DOL is tasked with ensuring compliance with the employment eligibility (continued...)

## Current Law on Employment-Based Immigration

The 1990 amendments to INA raised the level of employment-based immigration from 54,000 LPR visas to over 143,000 LPR visas annually and expanded two categories into five preference categories. Although there were legislative proposals in the mid-1990s to alter employment-based immigration, these preference categories remain intact:

- *first preference*: priority workers who are persons of extraordinary ability in the arts, sciences, education, business, or athletics; outstanding professors and researchers; and certain multinational executives and managers;
- *second preference*: members of the professions holding advanced degrees or persons of exceptional ability;
- *third preference*: skilled workers with at least 2 years training, professionals with baccalaureate degrees, and “other workers” i.e., unskilled workers, with occupations in which U.S. workers are in short supply;
- *fourth preference*: special immigrants, largely consisting of religious workers, certain former employees of the U.S. government, and undocumented juveniles who become wards of the court; and
- *fifth preference*: investors who invest at least \$1 million (or less money in rural areas or areas of high unemployment) to create at least 10 new jobs.

Only employment-based immigrants applying through the **second** and **third** preferences must obtain labor certification.<sup>8</sup> More specifically, the employer who seeks to hire a prospective immigrant worker petitions with the Bureau of Citizenship and Immigration Services in the Department of Homeland Security and the ETA in DOL on behalf of the alien. The prospective LPR must demonstrate that he or she meets the qualifications for the particular job as well as the INA preference category. If the DOL determines that a labor shortage exists in the occupation for which the petition is filed, labor certification will be issued. If there is not a labor shortage in the given occupation, the employer must submit evidence of extensive recruitment efforts in order to obtain certification.

Several elements are key to the approval of the LCA. Foremost are findings that there are not “available” U.S. workers or, if there are available workers, the workers are not “qualified.” Equally important are findings that the hiring of foreign workers would not have an adverse affect on U.S. workers, which often hinges on findings of what the prevailing wage is for the particular occupation and what constitutes “similarly employed workers.”<sup>9</sup> Occupations for which the Secretary of Labor has already determined that a shortage exists and in which foreign hiring will not adversely affect U.S. workers are listed in Schedule A of the regulations. Conversely, occupations for which the Secretary

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<sup>7</sup> (...continued)

provisions of the INA as well as labor standards laws, such as the Fair Labor Standards Act, the Migrant and Seasonal Worker Protection Act, and the Family and Medical Leave Act.

<sup>8</sup> Certain second preference immigrants who are deemed to be “in the national interest” are exempt from labor certification.

<sup>9</sup> §212(a)(5)(A) of INA.

of Labor has already determined that a shortage does not exist and that U.S. workers will be adversely affected are listed in Schedule B.<sup>10</sup>

Employers file an ETA 750 form with the State Employment Service Administration (SESA) office in the area of intended employment.<sup>11</sup> The SESAs do not have the authority to grant or deny labor certification applications (LCAs); rather, the SESAs process the LCAs. They also have a role of aiding in recruitment as well as gathering data on prevailing wages and the availability of U.S. workers. They then forward the LCA along with their report on an ETA 147 form to the regional ETA office. The employer also submits an I-140 form and pays a \$135 filing fee to the Bureau of Citizenship and Immigrant Services (formerly part of the Immigration and Naturalization Service (INS)).<sup>12</sup>

Many have criticized the foreign labor certification process, both from the perspective of employers and employees (native born as well as foreign born). Employers usually label it as onerous and unresponsive to their need to hire people expeditiously. Domestic workers question whether it provides adequate protection, asserting that employers find ways to “end run” the lengthy process, often with temporary workers. Foreign workers maintain that they are caught up in the long wait for visas to become LPRs, leaving them vulnerable to exploitation by the employer who is petitioning for them. During the mid-1990s there was momentum to revise the process, but it was unsuccessful largely due to the absence of any alternative that had a broad base of support.

## Trends in Employment-Based Admissions and LCAs

Although the statutory ceiling for employment-based LPR admissions has been about 143,000 for over a decade, this ceiling was not reached until 2001. As **Figure 1** illustrates, the number of aliens becoming LPRs through one of the two preference categories that require LCAs has been steadily rising. The total number of second and third preference LPRs rose from 59,655 in FY1997 to 128,678 in FY2001, up by 102%.

DOL reports that it receives about 95,000 LCAs a year now and that this number is up from 53,000 in FY1995. The peak year was 2001 when DOL reported receiving 335,000 LCAs. DOL also acknowledges a current backlog of over 300,000 LCAs for permanent admissions and projects an average processing time of 3½ years before an employer receives a determination. DOL notes further that some states have backlogs that may lead to processing times of 5 to 6 years. DOL reports that it processed 89,000 permanent LCAs in FY2002.<sup>13</sup>

Six years ago, DOL projected that its backlog of applications for permanent labor certification would grow from 40,000 to 65,000 during FY1998. At that time DOL sought authority to charge a user fee that employers would pay to offset the cost of

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<sup>10</sup> The regulations for permanent labor certification are located in 20 C.F.R. Part 656.

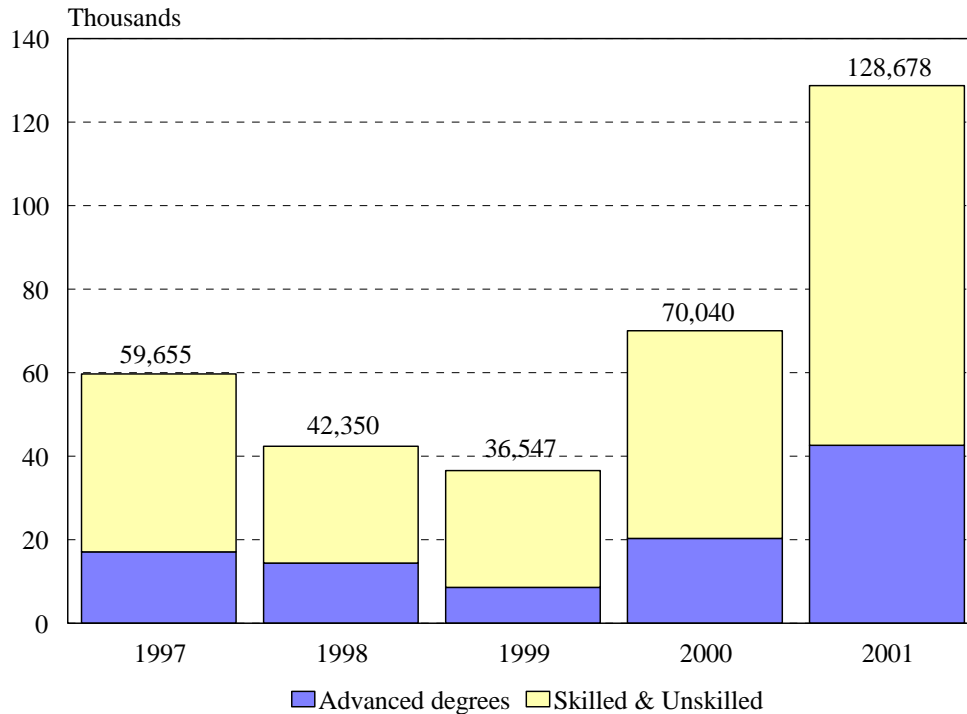
<sup>11</sup> Copies of the ETA 750 form may be obtained on line at [<http://www.ows.doleta.gov/foreign/>].

<sup>12</sup> Copies of the I-140 form and instructions for completing the form may be obtained at [<http://www.immigration.gov/graphics/formsfee/forms/i-140.htm>].

<sup>13</sup> U.S. Department of Labor, *FY2004 Budget Justifications of Appropriations Estimates for Committee on Appropriations*, vol. 1, pp. 144-150.

processing the LCAs.<sup>14</sup> Although the processing of immigrant, nonimmigrant, and naturalization petitions by the then-INS had long been funded largely through user fees, the DOL proposal to charge user fees to offset their processing costs was not enacted.<sup>15</sup>

**Figure 1. Employment-Based Immigration:  
Second and Third Preference Totals by Fiscal Year**



**Source:** CRS analysis of former Immigration and Naturalization Service data.

Several factors account for the recent increase in LCAs. The temporary reinstatement of §245(i) of INA enabled many employers to petition for foreign workers who are currently unauthorized to work in the United States, and DOL estimates that 235,000 LCAs were filed due to the time-limited §245(i) provision.<sup>16</sup> Laws that increased admissions of temporary professional workers (H-1B) coupled with statutory changes in INA that facilitated the ability of H-1Bs to adjust to LPR status, including the lifting of per-country ceilings for employment-based immigration, have fostered longer term

<sup>14</sup> U.S. Department of Labor, *FY1998 Budget Justifications of Appropriations Estimates for Committee on Appropriations*, vol. 1, SUIESO-28.

<sup>15</sup> The FY2001 Justice, Commerce, State Appropriations Act (P.L. 106-113) did authorize collection of the “premium processing” fee of \$1,000 for then-INS to expedite processing of certain employment-based immigrant petitions.

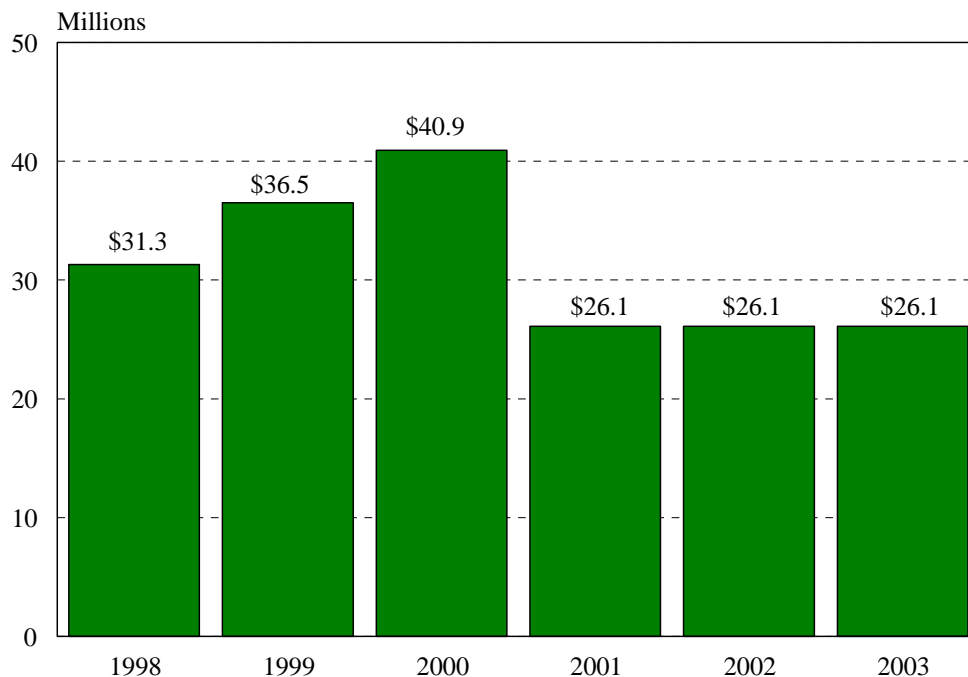
<sup>16</sup> For a complete discussion and analysis of §245(i), a provision of INA enabling unauthorized aliens who are otherwise eligible to become LPRs, see CRS Report RL31373, *Immigration: Adjustment to Permanent Resident Status Under Section 245(i)*, by (name redacted).

growth in employment-based immigration.<sup>17</sup> It is unclear at this time whether the recent economic downturn has slowed or reversed this trend.

## Recent Funding History

DOL currently funds foreign labor certification out of the “national activities” account of ETA’s Employment Services. As **Figure 2** shows, funding for foreign labor certification has leveled off at \$26.1 million for the past 3 years. These funds are also used to process the LCAs for H-2A temporary agricultural workers and H-2B temporary nonagricultural workers as well as labor attestations for H-1B temporary professional workers.

**Figure 2. Funding for Foreign Labor Certification, FY1998-FY2003**



**Source:** CRS presentation of data from DOL Budget Justifications for Appropriations, FY1999-FY2004.

For FY2004, the Bush Administration is requesting \$54,966,000 for foreign labor certification, up tenfold from the FY2003 request of \$5,540,000.<sup>18</sup> Of this amount, the Administration is seeking \$42 million this year (and next) to eliminate the backlog of 300,000 LCAs. Since the authority to collect H-1B filing fees — a portion of which goes to DOL — expires at the end of this fiscal year, the Administration is requesting additional appropriations rather than an extension of the authority for the H-1B user fees. Last year, the Administration unsuccessfully sought authority to use the H-1B education and training fees for the processing of LCAs.

<sup>17</sup> See RL30498, *Nonimmigrant Professional Specialty (H-1B) Workers*.

<sup>18</sup> For a fuller account of the FY2004 budget request for immigration, see CRS Report RS21504, *Immigration-Related Funding in the President's FY2004 Budget Request*, by (name redacted).

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