

S U M M A R Y

The current debate regarding temporary workers can be informed by past experiences. The system of temporary worker programs in the United States from the 1940s through the present can be summarized as a complex patchwork crafted in response to specific needs and exceptions. Admissions in various categories range from hundreds to hundreds of thousands, duration of stay varies from a few months to ten years, and educational requirements differ widely.

The volume of admissions to the United States in Fiscal Year (FY) 2004 for temporary workers, trainees, and their dependents reached nearly 1.5 million, far outweighing the 155,330 new immigrants who were admitted under the permanent employment-based categories that same year. This large annual flow (as well as the stock) of temporary workers in the United States have significant implications for immigration reform, yet they generally have been overlooked in the policy discussion. For many employers and workers, the temporary worker system is acting as a transition to permanent immigration. This *Insight* concludes by highlighting the significant data needs and administrative challenges in this arena and raising policy questions that result from the analysis.

Temporary Worker Programs: A Patchwork Policy Response

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Historical Programs

The complex issues surrounding temporary worker programs are neither new nor unique to the United States. Therefore, lessons based on past experiences can help inform the present debate.

Bracero

The United States began its temporary labor programs in response to domestic labor shortages in agriculture, railroads, and assembly operations that appeared during World War II. In 1942, the United States and Mexico negotiated a formal agreement, lasting until 1947, to regulate the flow and employment conditions of Mexican farm workers (workers from the British West Indies, Bahamas, Barbados, Canada, and Jamaica arrived under a separate program described below). Between 1948 and 1951, workers entered under Labor Department regulations; from then until 1964, they entered under Public Law 78, which restricted the program to Mexico and to agricultural workers. These imported workers helped maintain food production in the wartime economy and later worked for rail companies, as well.

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The Bracero programs brought almost 4.5 million Mexicans to the United States between 1942 and 1964. The programs required the US

Department of Agriculture and US Employment Service to work with the Mexican government in labor recruitment. Mexican citizens were to receive the same safety and health protections as US agricultural laborers. To protect US farm workers, employers were required first to try to recruit domestic workers for positions, then to apply for certification of a domestic labor shortage if none could be found. Employers were to pay the prevailing wage¹ in their sector in order to protect domestic farm workers from any adverse wage effects that the Mexican workers' entry might cause. To further ensure that the hiring of less-expensive foreign workers would not create disadvantages for domestic labor, employers were required to cover transportation costs and living expenses for their temporary workers in contracts guaranteed by the US government. In reality, however, many of the Bracero workers were housed in camps formerly occupied by prisoners of war, earned salaries of as little as \$9 per week (well below the \$30 average weekly salary nationwide in 1940), and did not receive the same safety and health protections as native-born workers.

The programs were a political compromise. Farmers disliked the rights given to workers, the intrusive role of the Department of Agriculture, and the cumbersome paperwork. Organized labor believed temporary worker programs undermined labor standards, depressed wages for both native and foreign workers, and deprived domestic workers of jobs. Furthermore, organized labor decried

worker exploitation, stating that workers who were dependent on their employers for their status were unable to join unions or complain about unpaid wages, lack of medical care, or unsanitary housing. US government oversight of the program was lax, the recruitment system became corrupt, and upon return home, most workers never received their 10 percent of withheld wages from the fund controlled by the Mexican government.² Although the goal of addressing agricultural labor shortages was accomplished, abuse by employers and poor enforcement led to pressures that spelled the end of the Bracero programs by the mid-1960s. Demand for labor, however, and the tradition of migrating north for employment, did not end with the formal termination of the Bracero programs. Indeed, the long-lasting consequence of the programs was the establishment of social, family, and work-related ties between the two countries that outlasted the programs themselves and perpetuated much of the unauthorized migration that continues through the present.

British West Indies (BWI)

There was a second temporary worker initiative for agriculture between 1943 and 1947, referred to as the British West Indies program. This was used primarily by East Coast employers; most Western growers utilized the Bracero program. A total of approximately 66,000 workers were employed in this program during this timeframe, most in the fruit, vegetable, and sugar cane sectors. The US government was responsible for recruiting workers, though later, employers were allowed to recruit in the islands. The program specified that employment of foreign workers should neither displace nor reduce pay rates of domestic workers, and employers were supposed to pay the prevailing

wage, or a specified minimum amount. As in the Bracero program, wages were deducted to be claimed upon return home.

The BWI program was created through a Memorandum of Understanding drawn up by government representatives and formalized under Public Law 45. Between 1947 and 1952, it operated under the authority of the Immigration Act of 1917 with only a few thousand workers per year; it was absorbed into the newly created H-2 temporary worker program through the 1952 Immigration and Nationality Act (INA).³

Existing Programs

In recent years, the United States has accepted growing numbers of temporary workers under its various agricultural, non-agricultural, and high-skilled programs. It is difficult to know the exact number of individuals entering the United States on temporary work visas, as data often are incomplete, inconsistent, and not comparable.⁴ For instance, as demonstrated in Table 1, Labor Department certification data reflect the number of workers certified (employers do not necessarily hire for all the approved slots), State Department data detail visas issued (not all of which are used or which may be used in the following fiscal year), and Department of Homeland Security (DHS) data reflect admissions, not people (an individual may enter the United States multiple times within one year and thus account for multiple admissions).⁵ The sections below use admissions numbers, as they reflect actual entries. Visa issuance numbers are compared with admissions in Appendix B.

In FY 2004, there were 1,479,406 admissions of temporary workers and trainees and their

dependents. (This figure includes the E, H, L, O, P, Q, R, and TN visa categories described below). Of these, just over two-thirds (998,865) were principals, one-fifth (297,607) were dependents, and the remainder (182,934) were E visas (not disaggregated in DHS statistics by principal applicants and their dependents).⁶ Individuals admitted under other temporary worker categories may in fact work legally in the United States, but that generally is not the primary purpose for their entry (for instance, J-1 exchange visitors or F-1 students).

In contrast, there were 155,330 new lawful permanent residents (LPRs) from the employment-based categories in FY 2004. Of these, only 46.7 percent (72,571) were principal applicants and 53.2 percent (82,759) were dependents.⁷

Some of the nonimmigrant visa employment categories have caps on the number of entrants per year, while others require labor market tests to determine whether a shortage of domestic workers warrants bringing in foreign workers.⁸ Importation of foreign-born temporary workers for a specified time period generally has been limited to remedying micro-level shortages in certain industries, and workers are often tied to a particular employer. Sectors in the United States that have used this labor include: health care and other domestic services, construction, hotels and restaurants, agriculture, and tobacco picking. Temporary jobs commonly are described as dirty, demanding, and dangerous.⁹

E Visas

E visas allow for the temporary entry of treaty traders (47,083) and treaty investors (135,851) who enter under the provisions of treaties between the United States and other coun-

tries.¹⁰ As mentioned above, admissions under the E visa totaled 182,934 in FY 2004, including family members. Employers of E-1 and E-2 visa holders are not subject to labor market certifications or attestations. Initial admission is for up to two years with unlimited two-year extensions, and there is no cap. An E-3 visa was created by Congress in spring 2005 for Australians, with a limit of 10,500 principals per year. It is modeled on the H-1B1 visa that resulted from US Free Trade Agreements with Chile and Singapore (described below). Congress has since mandated that no immigration provisions be negotiated as part of free trade agreements in the future.

H-1 Visas

The H-1 visa was created by the 1952 Immigration and Nationality Act (INA) to allow individuals of distinguished merit and ability to temporarily work in the United States in occupations that required those qualifications. It initially had no caps and no provisions for the protection of US workers. At first, the visa required both the job and the worker to be temporary; the requirement that the job be temporary was eliminated in 1970 (unlike the H-2 programs where it remains), allowing workers to stay longer and/or adjust to a more permanent status if so qualified. Further, in 1990, legislative changes allowed dual intent by H-1 visa holders (as discussed later). The H-1 category was subdivided in 1989 into H-1A and H-1B. Spouses and children of H-1, H-2, and H-3 workers are admitted under the H-4 category (130,847 in FY 2004).

H-1A. The 1989 Immigration Nursing Relief Act (INRA) established a five-year pilot program that governed the H-1A temporary visa process used by most foreign-educated nurses who entered the United States as nonimmigrant

workers. Whereas previously, nurses had been admitted as H-2B temporary non-agricultural workers and H-1 temporary workers in specialty occupations, the H-1A visa was created specifically to fill a nursing shortage in the United States. The initial period of admission could not exceed three years, with a maximum period of admission of five years; there was no annual limit on the number that could be granted. Over 24,400 H-1A nurses were in the United States by May 1989.

Prior to receiving these workers, institutions were required to attest¹¹ to the need for H-1A nurses and outline measures to reduce health care institutions' dependence on temporary foreign nurses. Domestic recruitment was not required, but employers did have to certify that they paid foreign nurses the same wages as their US counterparts. The INRA attestation procedures brought the Labor Department into the process and maintained the existing roles of the Department of State in visa issuance and the Immigration and Naturalization Service (INS) in adjudication of the petition and admission at the port of entry. Over 80 percent of H-1A nurses were from the Philippines, with the remainder from Ireland, the United Kingdom, New Zealand, and the Caribbean. Most foreign-educated nurses earned above prevailing wages and 90 percent worked full-time.

Although specialty and locality nursing shortages continued to persist, especially in rural areas, this temporary program was allowed to expire in 1995 because the national-level nursing shortage no longer existed. In part, this was the result of many of the foreign-born nurses having adjusted to lawful permanent resident status. Furthermore, foreign-educated nurses had other avenues of entry available to them, including the H-1B, H-2B, and H-3 tem-

porary worker/trainee visas, the NAFTA visa if they were Canadian or Mexican, and the permanent labor certification category.

H-1B. The 1989 law that subdivided the H category classified all nonimmigrant, non-nursing skilled labor as H-1B. After significant pressure due to concerns that the category was being used by those without the high skills envisioned, the Immigration Act of 1990 (IMMACT) narrowed the definition to professionals, specifying that the job must be a “specialty occupation.” That meant prospective H-1Bs needed a Bachelor’s degree or higher in their area of specialization and a full state license, if required, in their field.¹² Although there is no formal labor market test per se to protect domestic workers, employers must file a labor condition application (LCA) with the Labor Department attesting to posting the application at the job site, a lack of a strike or lock-out, payment of the prevailing wage, and provision of working conditions consistent with that of similarly employed workers. In addition, since the late 1990s, employers have been required to pay a fee (first \$500 then raised to \$1,000 and now \$1,500¹³) when petitioning US Citizenship and Immigration Services (USCIS) for H-1B workers. The fee funds the training of domestic workers to increase the supply in occupations with shortages, as well as scholarships for low-income students in math, science, engineering, or computer science degree programs. Nearly \$270 million had been awarded from these fees as of July 2002.¹⁴

H-1B temporary workers (386,821 new admissions in FY 2004) are most commonly employed in the information technology sectors, but they also work in other fields such as medicine and education. The maximum initial stay on an H-1B visa is three years, but it can be extended for another three years at the

employer’s request. Over two-thirds of H-1B admissions in FY 2004 were from Asia or Europe, in particular India and the United Kingdom.

A cap on H-1B visa issuances was initially set at 65,000 by IMMACT in 1990; the limit was first reached in 1997 (dependents were not subject to the cap). Passage of the American Competitiveness and Workforce Improvement Act in 1998 raised the levels to 115,000 for FY 1999 and 2000, and 107,500 in 2001, but available visa numbers ran out early in the fiscal year. Businesses again lobbied Congress for additional numbers, and Congress responded with the American Competitiveness in the Twenty-First Century Act (AC-21) in October of 2000, raising the H-1B cap to 195,000 for FY 2001, 2002, and 2003. The cap returned to 65,000 in October 2003 (FY 2004).

AC-21 also exempted nonprofit or government research organizations, institutions of higher education, and other nonprofit entities from the cap on H-1B visa issuances and from the filing fee. Moreover, the law allowed H-1B holders to switch employers (instituting some visa portability) as well as to extend their stay beyond the six years if an application for LPR status had been filed but not yet adjudicated.¹⁵ (Extension of stay holders are not counted against the cap.) An additional exemption from the cap was created by the H-1B Visa Reform Act of 2004 (signed as part of a December 2004 spending bill and effective as of May 2005). The provision allows up to 20,000 additional individuals to receive H-1B visas if they have earned a Master’s degree or higher from a US institution of higher education. Again, these exemptions resulted from a tendency for the cap to be reached prior to the

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end of the fiscal year. For instance, in August 2005, USCIS announced it already had sufficient applications for FY 2006. Provisions in a Senate budget reconciliation bill would have raised the cap to 95,000 for the next ten years by recapturing approximately 300,000 unused H-1B visas dating back to FY 1991 and allowing 30,000 of them to be used annually, but the provisions were not included in the conference committee bill that was passed by the House in December 2005.¹⁶

However, the Immigration Act of 1990 eliminated for H-1B visa holders a key requirement applicable to nearly all other nonimmigrant visa categories — that applicants for nonimmigrant visas have a foreign residence which they have no intention of abandoning. This change — known as dual intent — allows applicants to simultaneously pursue a temporary and permanent visa, and it has encouraged and facilitated the adjustment of these workers to lawful permanent resident status. In 2000, an estimated 60 percent of H-1Bs were adjusting to permanent status. Thus, in effect, the program is used by employers and workers as a transition to permanent status.¹⁷

A new component of the H-1B program is the H-1B1 program for professionals who qualify under the Chile or Singapore Free Trade Agreements (signed September 3, 2003 and effective January 1, 2004). Up to 5,400 qualifying individuals from Singapore and 1,400 from Chile may apply for temporary worker visas annually under the terms of those agreements, numbers that are set aside within the overall H-1B cap. Only 326 were used in FY 2004. These workers are subject to the same labor attestation requirements as other H-1B workers, including working conditions, absence of a strike or lockout, payment of prevailing wage, and posting of the notice.

H-1C. Admissions under the H-1C nonimmigrant visa began in January 2001, following the Nursing Relief for Disadvantaged Areas Act of 1999. The bill aimed to address a specific need in understaffed facilities in urban and rural areas that served primarily poor patients. The Department of Health and Human Services designated the areas in which there was a shortage of health professionals, and H-1C nurses were allowed to work for up to three years. As with the other H-1 categories, the employer was required to file a labor attestation with the Labor Department, and the annual limit was 500 nurses for this category, with per-state caps, as well. In FY 2004, there were seventy admissions in this category; the program expired in September 2004.

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H-2 Visas

The H-2 programs evolved out of the British West Indies program in order to address the agricultural sector's need for seasonal assistance upon expiration of the BWI and Bracero programs. In 1986, the Immigration Reform and Control Act (IRCA) subdivided the visa into H-2A (agricultural) and H-2B (non-agricultural) visas for temporary labor. As is the case with many of the temporary worker categories, the process involves multiple agencies, including components of the Labor Department, the State Department, and the Department of Homeland Security. State Employment Service Agencies have the principal responsibility for administering the program on the ground.

H-2A. Used primarily by East Coast employers, the H-2A nonimmigrant visa allows employers to import temporary workers for seasonal (up to one year) agricultural jobs. Unlike for H-1 visas, the double temporary requirement of a temporary worker and a temporary job continues to apply. The law specifies that the individual must be a resident of a "...foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services...of a temporary or seasonal nature...."

The H-2A program has no annual cap, and over three-quarters of those now admitted on these visas are Mexican. FY 2004 statistics show that there were 22,141 H-2A admissions, up from only 14,094 one year earlier but still fewer than half the 33,292 in FY 2000. H-2As are used primarily for workers in "perishable-crop" agricultural jobs, such as picking fruit, harvesting vegetables, and in the past, sugarcane processing, though it also covers workers who pick tobacco, herd sheep and cows, and work in greenhouses or in forestry jobs.

The H-2A program is highly regulated, with requirements for the application process, the recruitment period, the certification, and the wage rate. Almost all H-2A certifications applied for are issued, though not always in a timely manner; therefore many employers

choose not to use it.¹⁸ Employers who wish to use the program must file an application for labor certification with the Labor Department describing the terms and conditions of employment. The grower has to prove, and the Labor Department has to certify, that (a) "there are not sufficient [US] workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the [agricultural] labor or services involved in the petition"; and (b) there will be no adverse effect "on the wages and working conditions of workers in the United States similarly employed."¹⁹ If insufficient workers are identified through domestic recruitment (which includes state employment service referrals to the employer and employer recruitment), the employer receives the labor certification.²⁰

The wages, benefits, and working conditions the employer intends to offer H-2A workers must also be offered to US workers. Workers must receive written contracts, a guarantee of work for at least three-quarters of the contract period, free housing, transportation, and meals (or cooking facilities), and prescribed wages and working conditions. The wage must be the highest of the minimum wage, state minimum wage, prevailing wage for the occupation in the area, or the Adverse Effect Wage Rate (AEWR) for that state. The Labor Department is responsible for enforcement.

Table 1. H-Visa Labor Certifications, Visas Issued, and Admissions: FY 2004

Visa Category	Certifications	Visas Issued	Admissions
H-1B (specialty occupation)	306,884	138,958	386,821
H-2B (nonagricultural worker)	7,532	76,169	86,958

Sources: Labor Department Division of Foreign Labor Certification, FLC Data Center; Department of State "Report of the Visa Office," 2004; Department of Homeland Security Office of Immigration Statistics, *Yearbook of Immigration Statistics: 2004*.

The Department of Agriculture conducts the wage surveys to help determine the AEWR, a rate that is the regional weighted average hourly wage rate for field and livestock workers combined.²¹ Used in US agriculture since the 1950s, it is based on the Department of Agriculture's annual wage surveys of employers' reported wage rates to non-supervisory workers. Basically, the AEWR is an enhanced minimum wage, designed to offset the depressing effect on wages created by foreign farm workers. The rate can decline and does not include cost of living increases; it has not kept pace with inflation.

Many of the H-2A workers are recruited through intermediaries in Mexico, such as farm labor contractors. Their role in the process has been controversial, with reports of bribes, exploitation, and blacklisting. Moreover, in doing the hiring, the intermediaries shield the employer from enforcement actions related to hiring of unauthorized workers. Employer use of the program seems to be tied to previous experience with Latino workers and problems (real or perceived) with domestic workers. Some employers use the program to legally hire workers who previously worked for them in an unauthorized status. Many of these temporary workers have at least one family member who has already migrated to the United States, and many find their jobs through networks of relatives or friends, with others hearing about them through labor contractors. Research interviews have indicated that workers would prefer the involvement of the Mexican government in the recruiting process and as a source to lodge complaints.

H-2B. Also created in 1986, the H-2B non-immigrant visa allows employers to request

foreign workers to fill non-agricultural temporary jobs (less than one year). Again, both the job and the worker are supposed to be temporary for this category. The need for labor must be a one-time occurrence: a seasonal, peak load, or intermittent need; it cannot be ongoing. Examples of occupational sectors using H-2B workers include landscaping, building maintenance, construction, hotels, restaurants, stables, retailers, manufacturing, food production, health care, recreation, and transportation.

A cap of 66,000 visas was imposed on this category by IMMACT. The program was lightly used until the economic expansion and low unemployment rate of the late 1990s. Admissions increased by nearly 35 percent between FY 1998 and FY 2004, from 24,895 to 86,958; nearly two-thirds are from Mexico.²² In FY 2005, the H-2B category was oversubscribed for the first time; the cap was reached approximately three months into the fiscal year.²³ To address this issue, Congress seems to have drawn from the H-1B experience. The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of May 2005 exempted returning workers (those who had worked in the United States any one of the last three years) from the cap. The law further specified that only half the visas should be issued in the first half of the year, so as not to harm employers whose seasonal businesses needs occur later in the fiscal year.²⁴

The H-2B program is less regulated than the H-2A, as H-2B employers are not required to provide free housing or transportation. Nevertheless, the Labor Department must still certify that qualified domestic workers are not available and that the terms of employment

will not adversely affect the wages and working conditions of similarly employed US workers. The Labor Department reviews the employers' recruiting attempts, as well as the wages and working conditions offered, but unlike in the H-2A program, it has no enforcement responsibilities for this. In fact, because of its advisory role, DHS can grant an H-2B petition despite a negative recommendation from the Labor Department. There is currently a proposed rule that would make changes to the H-2B program, such as requiring electronic filing. This would eliminate the need for a Labor Department certification and establish a one-step petition process.

H-3 Visas

The H-3 nonimmigrant visa category is designed to allow foreign nationals to come to the United States to participate in training programs. The regulation allows for training in "any field of endeavor," including agriculture, communications, and finance. There are two H-3 categories: general and those coming for specific training in special education (this does not include graduate education or medical training).

There is no annual limit on H-3 admissions, but there have been fewer than 3,000 H-3 admissions in each of the last three fiscal years. Most H-3 admissions are from Asia and Europe. The petitioning employer or sponsor must demonstrate that the training is not available in the foreign national's home country, that the foreign national will not be placed in a position that is part of the normal operation of business ordinarily filled by a US worker, that the foreign national will not be productively employed unless such employment is essential to the training, and that the training will benefit the foreign national in pursuit of employment outside the United

States. As is the case with the H-2 category, this is not a dual-intent visa, so the beneficiary cannot simultaneously be pursuing avenues toward permanent residency.

L Visas

The L visa, created in 1970 to address delays in employment-based visas experienced by international businesses, allows multinational companies with US operations (and those looking to establish US operations) to temporarily transfer top personnel from abroad to the United States. In FY 1994, there were just over 98,000 admissions in this category. By FY 2004, there were 314,484 L-1 admissions, 44 percent of which were from European countries such as the UK and Germany. Japan, India, Canada, and Mexico also are significant users of this category. In addition, in FY 2004 there were an additional 142,099 admissions of spouses and children of these intracompany transferees (L-2s).

An individual may qualify for an L-1 intracompany transferee visa as a multinational manager or executive (admission is for up to seven years) or as an employee with specialized knowledge of the firm's products (admission is for up to five years). Neither a labor market test nor an attestation is required for this category. As occurred with H-1s, IMMACT eliminated the requirement that L-1 applicants demonstrate that they have no intention of permanently abandoning their home country. Furthermore, it modified the requirement of one continuous year of employment by the foreign affiliate for one of the past three years. Recent concerns about abuse of the L-1 visa led to clarification that L-1s could not be outsourced to other firms, and to the imposition of a \$500 fraud prevention and detection fee (imposed on certain H visas, as well).

O, P, Q, and R Visas

Another set of temporary worker categories was created by the Immigration Act of 1990 (admissions began in April 1992).

Admissions in these categories totaled over 100,000 in FY 2004 (not including spouses and children). They are less relevant to the current US policy debate regarding a new temporary worker program, so they simply are summarized here, along with the admission numbers for FY 2004. These highly skilled categories include:

- O visas for aliens of extraordinary ability in science, art, business, or athletics (33,459);
- P visas for athletes and entertainers (54,314);
- Q visas for cultural exchange (2,481); and
- R visas for religious workers (21,571).

Approximately 58 percent of O-1 and Q admissions are from Europe. P and R visa holders hail from a broader range of regions. Approximately 34 percent of admissions on a P visa are from Europe, nearly 12 percent are from Asia, almost 39 percent are from North America (including Central America and the Caribbean), and approximately 10 percent are from South America. About 33 percent of admissions under the R visa are from Asia, with an additional 20 percent each from Europe and North America, and nearly 7 percent from Africa.

None of these categories requires labor market testing, but O visas are the only ones in this group to allow dual intent. Limitations on the duration of stay vary from twelve months for P-1 entertainment groups and athletic teams to five years for P-1 individual athletes (renewable once for up to five more years). Q-1 visa holders may stay up to fif-

teen months, O visa holders for up to three years with one-year extensions allowed, and religious workers for three years (renewable up to five years total). Some of the categories allow individuals to reapply after a year outside the United States.

TN (Trade NAFTA) Visas

The TN visa currently allows North American professionals in sixty-three occupational categories to work in the United States for one year at a time with an unlimited number of extensions. It was created by the North American Free Trade Agreement (NAFTA), which became effective in January 1994 and extended most of the mobility terms of the 1988 Canada-US Free Trade Agreement to Mexico. NAFTA also guaranteed to intracompany transferees and business travelers the existing privilege of traveling between the three countries. Mexican professionals were subject to a numerical ceiling of 5,500 for the first ten years (this cap expired in January 2004) and the prospective employer was required to file a labor condition application with the Labor Department as well as a “Petition For Non-Immigrant Workers” with INS/DHS. In FY 2004, there were 66,207 total TN admissions, with 96 percent (64,062) coming from Canada.²⁵

Admissions for Mexican TNs have remained steady but low over time, as eligible Mexicans were more likely to use the H-1B visa, which allows access for three years, renewable once, rather than the TN visa which is renewed annually. In general, the TN visa requires neither a labor certification nor attestation, instead requiring applicants to show they possess the proper credentials and a job offer from a US employer. It has no

annual cap, but applicants must prove they do not intend to abandon their country of residence, as the TN visa does not allow dual intent. Canadian TN admissions to the United States initially skyrocketed from 5,000 in 1989 to 89,864 in 2000, but they declined between FY 2001 and 2002 and have yet to rebound.

Conclusions and Policy Questions

High Volume of Admissions and Adjustments

There are two equally striking conclusions that can be derived from this analysis. First, temporary admissions for labor far outweigh permanent admissions for labor. This large annual flow (and stock) of temporary workers in the United States has significant implications for immigration reform and generally has been overlooked in the policy discussion. Furthermore, countering concerns that a new temporary worker program would be administratively unmanageable, the total volume of the various existing temporary worker categories demonstrates that the United States already is implementing large-scale temporary worker programs.

Second, a significant portion of these so-called temporary workers adjust to lawful permanent resident (LPR) status.²⁶ This demonstrates that in many ways, the temporary worker system is not truly temporary; rather, for many employers and workers it is acting as a transition to permanent immigration.

Views are mixed as to whether this transitional use of the temporary worker system is a desirable or undesirable phenomenon. Regardless, three things seem clear. First, this use of the temporary system is reflecting a market-based

mechanism that allows potential workers to be tested and to demonstrate their ability to contribute to the US economy and integrate linguistically and socially. Second, it is reflecting an adaptation by employers and businesses to the failures of the permanent immigration system (particularly insufficient employment-based numbers and processing delays that can take years), and in fact, acts as a substitute for it in terms of providing more immediate employer access to these workers.²⁷ Third, the volume of temporary workers, and the role they play in feeding into permanent admissions, is a reality that needs to be understood properly and addressed explicitly.

The key policy question raised by these conclusions is whether the goals of the temporary worker program writ large (as well as particular categories) need to be revisited and clarified. There may well be a mismatch between the temporary worker and permanent employment-based categories from both the perspective of workers and employers, and it is important to define what the relationship should be between the permanent and temporary systems.²⁸

The key policy question raised by these conclusions is whether the goals of the temporary worker program writ large (as well as particular categories) need to be revisited and clarified. There may well be a mismatch between the temporary worker and permanent employment-based categories from both the perspective of workers and employers, and it is important to define what the relationship should be between the permanent and temporary systems.²⁸

Varied Definitions and a Complex System

The word “temporary” has a wide variety of meanings in the context of temporary worker programs. In many ways, the system is a patchwork that has been crafted in response to specific needs and exceptions. Yet tension between proactively recruiting workers and

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imposing labor market protections or numerical restrictions exists both at the upper and lower ends of the labor market. Temporary workers have dramatic variations of stay that range from three months to ten years and numerical variations in category admissions that range from a few hundred to hundreds of thousands. Even in categories with specified caps, it is not uncommon for caps to be raised or for defined groups of applicants to be exempted. Though all these temporary worker categories permit the entry of dependents, there also are variations as to whether the dependents are counted against the category limits. Finally, there are inconsistencies in the fact that only a few visa categories explicitly allow dual intent.

To some extent, the United States places fewer restrictions upon higher skilled workers and is more amenable to their adjustment. However, this is not true across the board, as there is no cap on H-2A temporary agricultural workers, and as Canadian and Mexican TN professionals must reapply annually and are ineligible to adjust to LPR status under the terms of the NAFTA treaty.

Usage of the visa categories also varies, as some

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industries are far more dependent on temporary foreign labor than others. Demand in certain categories has remained steady over time while others have experienced

sharp rises or declines.²⁹ Widely varying demand could be based on the relative strength of the economy, the availability of numbers, efficiency of process in the permanent employment-based system, experience with the pro-

gram, and use of unauthorized workers, as well as other factors.

It seems clear that US laws are sending mixed messages to workers and employers about the intentions of temporary work programs.³⁰ In FY 2004, more than 60 percent of LPRs adjusted their status (rather than being new arrivals), and at least 10 percent of LPRs were former temporary workers. Furthermore, nearly half of all temporary worker admissions (H-1, L-1 and O-1s) are in categories that explicitly allow adjustment.

Therefore, the most salient policy questions raised here are: whether the visa categories can be simplified; whether the presumption that they are “intending immigrants” should continue to be something most temporary worker visa applicants need to overcome; and what, if any, mechanisms are appropriate to protect domestic workers and/or reduce dependence on foreign labor.

Significant Data Needs

Additionally, the information simply is not available to perform the desirable and necessary analysis that would better inform policy decisions in this area. Data are incomplete (for instance, there have been no new data about the status from which new LPRs adjusted since FY 2002) and as discussed earlier, there are discrepancies in data from the relevant agencies.³¹ The policy responsibility, therefore, is to determine what data would be most useful to inform the policy debate and then determine whether and how that information might be gathered. For instance, complete data on how many former temporary workers in various categories adjusted to permanent residence and what mechanisms they used to do so

would be extremely valuable, as would knowing what happens to the temporary workers who do not adjust. (Do they return home? Return on another visa? Overstay?) In addition, despite the labor certification process, little solid information is available on the impacts of temporary workers on native-born workers, the effectiveness of training domestic workers in the specialized skills of temporary workers, or the degree to which these temporary worker programs are meeting employer needs.

Multifaceted Administrative Components

Finally, it is clear that existing temporary worker programs, particularly those that include measures to protect domestic workers, involve a complicated process that engages three separate cabinet agencies: the Labor Department (labor certification or attestation); the State Department (visa issuance); and the Department of Homeland Security (adjudication of petition and determination of admissibility). Each component of the process takes a certain amount of time and requires the transfer of data between agencies. Temporary worker programs in most countries have been ineffectively implemented and poorly enforced; the United States has not been an exception to the rule.

The crucial policy question is which agency would be in charge of creating, administering, and overseeing a new temporary worker program. Particularly if there were a new temporary worker program of the size currently under discussion, it is not clear that the United States has the necessary infrastructure and resources to manage such a program in a timely and effective manner on top of existing

responsibilities. Nor is it clear what role, if any, sending governments would play in such a program.

Ironically, the Bracero programs between the United States and Mexico incorporated most of the components that analysts who have studied temporary worker programs on a comparative basis consider as minimum requirements for success.³² The agreement was bilateral, the foreign workers were provided with health and safety protections equivalent to similarly employed domestic workers, and worker contracts were guaranteed. Furthermore, employers had to first make reasonable efforts to attract domestic workers and were required to pay specified wages. And, as discussed earlier, the temporary labor need was met and most workers returned home and/or engaged in circular migration.

Despite all of these elements, the program is considered to have been a relative failure. Why? Among other reasons, because of exploitative conditions, inaccurate record-keeping and payment, inadequate resources and limited interest in enforcement, and the creation of migration networks that long outlasted the program.³³ Devising a policy is not the same as implementing it. Detailed criteria and regulations matter little without clear goals, sufficient infrastructure, dedicated enforcement efforts, and realistic expectations regarding outcomes based on past experiences.

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Appendix A: Selected Temporary Worker Visas

Visa Name	Length of Stay, Extensions	Ability to Adjust/ Bring Family	Numerical Limit	Domestic Worker Protections?
E Treaty traders and treaty investors	Initially up to 2 years, unlimited extensions of up to 2 years	Yes/ Yes	None (E-1, E-2) 10,500 (E-3)	None required
H-1A Registered Nurses (Ended in 1995)	Initially up to 3 years, up to 5 years total	Yes/ Yes	None	Labor attestation required,* employers must pay prevailing wage
H-1B Specialty occupations	3 years, renewable once. Also extendable for adjustment of status applicants in 1 year increments	Yes/ Yes	65,000, includes 5,400 from Singapore and 1,400 from Chile; +20,000 for students with US advanced degrees. Exempt: adjustment of status holders, nonprofit and university workers	Employers must attest to lack of strike, payment of prevailing wage, and proper working conditions
H-1C Nurses in disadvantaged areas (Ended in 2004)	Up to 3 years	Yes/ Yes	500	Labor attestation required
H-2A Temporary agricultural workers	Up to 1 year, though workers may return in following years	No/ Yes	None	Employers must apply for temporary labor certification,** offer housing, transportation, and meals or cooking facilities, and prescribed wages and working conditions
H-2B Non-agricultural temporary workers	Up to 1 year	No/ Yes	66,000	Employers must apply for temporary labor certification, offer prevailing wages
L Intracompany transferees	Initially 3 years, up to 5 years for L-1B (specialized knowledge), up to 7 years for L-1-A (executive, managerial)	Yes/ Yes	None	None required
O Extraordinary ability in science, art, business, athletics	Up to 3 years, unlimited 1 year extensions; 3 years for new event	Yes for O-1/ Yes	None	None required
P Athletes and entertainers	1 year for P-1 entertainment groups & athletic teams; 5 years for individuals, renewable once	No/ Yes	None	None required
Q Cultural exchange	Up to 15 months, up to 3 years for Q-2/3	No/ Yes for Q-2	None	None required
R Religious workers	3 years, renewable up to 5 years	No/ Yes	None	None required
TN Professionals from Canada or Mexico	1 year, unlimited renewals	No/ Yes	None	None; professionals applying must prove proper credentials and existing job offer

* Labor attestation requires employers to attest to the Labor Department that they will provide working conditions consistent with those of similarly employed workers and pay prevailing wages, that there is no strike or lockout, and that they have posted the job application at the work site.

** Labor Department certification requires that employers prove an inability to find US workers to fill the job and that the employment of temporary workers will not adversely affect the wages or working conditions of native workers.

Appendix B: Work-Based Nonimmigrant Visas and Admissions, FY 2004

Visa Category	Visas Issued	Admissions	Ratio: Admissions to Visas Issued
Treaty traders (E1)	8,608	47,063	5.47
Treaty investors (E2)	28,213	135,851	4.82
Registered Nurses (H-1A)	-	7,795	-
Specialty occupations (H-1B)	138,958	386,821	2.78
Chile/Singapore Free Trade Agreement (H-1B1)	79	326	4.13
Registered Nurses for disadvantaged areas (H-1C)	110	70	0.64
Agricultural workers (H-2A)	31,774	22,141	0.7
Nonagricultural workers (H-2B)	76,169	86,958	1.14
Industrial trainees (H3)	1,410	2,226	1.58
Spouses and children of H1, H2, and H3 workers (H4)	83,127	130,847	1.57
Intracompany transferees (L1)	62,700	314,484	5.02
Spouses and children of intracompany transferees (L2)	59,164	142,099	2.4
Workers with extraordinary ability/achievement (O1)	6,437	27,127	4.21
Workers accompanying/assisting in performance of O1 workers (O2)	2,611	6,332	2.43
Spouses and children of O1 and O2 workers (O3)	1,679	3,719	2.22
Internationally recognized athletes or entertainers (P1)	22,269	40,466	1.82
Artists or entertainers in reciprocal exchange programs (P2)	211	3,810	18.06
Artists or entertainers in culturally unique programs (P3)	8,689	10,038	1.16
Spouses and children of P1, P2, and P3 workers (P4)	871	1,853	2.13
Workers in international cultural exchange programs (Q1)	1,570	2,113	1.35
Workers in Irish Peace Process Cultural and Training Program (Q2)	11	368	33.45
Spouses and children of Q2 workers (Q3)	0	11	-
Workers in religious occupations (R1)	8,806	21,571	2.45
Spouses and children of R1 workers (R2)	2,976	6,443	2.16
Professional workers US-Canada Free-Trade Agreement (TC)	-	12	-
Spouses and children of Canada Free Trade worker (TB)	-	40	-
Professional workers NAFTA (TN)	908	66,207	72.92
Spouses and children of NAFTA workers (TD)	-	12,595	-
Total	547,350	1,479,406	-

Sources: Department of State "Report of the Visa Office," 2004; Department of Homeland Security Office of Immigration Statistics, *Yearbook of Immigration Statistics: 2004*.

ENDNOTES

- 1 Prevailing wage is defined as “the average wage paid to similarly employed workers in the requested occupation in the area of intended employment.” For additional information, see US Department of Labor, Employment and Training Administration, “Foreign Labor Certification Prevailing Wages,” August 1, 2005, <http://workforcesecurity.doleta.gov/foreign/wages.asp>.
- 2 In the December 2004 budget, the Mexican Congress allocated \$26.5 million to partially compensate former Braceros for the deducted wages they never received. Hiram Soto, “Mexico takes step to pay former bracero workers,” *The San Diego Union Tribune*, January 29, 2005, http://www.signonsandiego.com/union-trib/20050129/news_1n29bracero.html. A similar sum was allocated in the 2005 budget.
- 3 Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers* (Washington, DC: Government Printing Office), 1992.
- 4 For additional explanation see Appendix 2 in Jeanne Batalova, “From Temporary to Permanent Immigration: Policy and Data Considerations,” Background Paper Prepared for the Independent Task Force on Immigration and America’s Future, Migration Policy Institute, November 2005.
- 5 DHS’s Office of Immigration Statistics has begun trying to estimate how many workers might account for the admissions numbers. DHS statistics indicate that 22.5 million of the 30.8 million NIV admissions in FY 2004 were for individuals with a single arrival — 3.2 million individuals had more than one arrival.
- 6 US Department of Homeland Security, Office of Immigration Statistics, *2004 Yearbook of Immigration Statistics* (Washington, DC: Department of Homeland Security), 2004, <http://uscis.gov/graphics/shared/statistics/yearbook/index.htm>.
- 7 Ibid.
- 8 For instance, a position must actually be advertised in a newspaper, journal, or other outlet and a lack of domestic applicants must be demonstrated before the position can be offered to a foreign worker.
- 9 In Japanese, these are referred to as “3K” jobs – kitanai (dirty), kitsui (demanding/difficult), and kiken (dangerous). Demetrios G. Papademetriou and Kimberly A. Hamilton, *Reinventing Japan: Immigration’s Role in Shaping Japan’s Future* (Washington, DC: Carnegie Endowment for International Peace), 2000.
- 10 Treaty traders must have at least half of the international trade of that business between the two countries, while treaty investors must create, or make a substantial investment in, a business. The individual must possess the nationality of the treaty country and at least 50 percent of the business must be owned by nationals of the treaty country.
- 11 Prospective employers had to attest to items including: no dismissal of staff RNs during the previous year; a need to avoid disruption of health care services; and avoidance of adverse impacts on the employment of domestic nurses. Labor shortages were determined by the employer demand for nurses as well as an institutional vacancy rate of 7 percent.
- 12 Individuals who were initially included in this category but were non-degreed, such as entertainers and fashion models, were shifted into the newly created O and P categories. Prior to IMMACT, the National Science Foundation had predicted a shortage of technical professionals (such as engineers and scientists). Similarly, a 1987 study by the Hudson Institute had noted a likely gap between job skills that would be required for the future and those possessed by new workers entering the labor market.
- 13 The fee is \$750 for those employers with twenty-five or fewer full time employees who are employed in the United States.
- 14 US General Accounting Office, *High-Skill Training: Grants from H-1B Visa Fees Meet Specific Workforce Needs, but at Varying Skill Levels*, September 2002, <http://www.gao.gov/new.items/d02881.pdf>. In spring 2002, President Bush proposed canceling that training and redirecting the funds toward reducing backlogs for permanent foreign workers. By law, the training fee sunset on October 1, 2003, but it was reinstated by the H-1B Visa Reform Act of 2004 (included in the FY 2005 Consolidated Appropriations Act).
- 15 Those who have had labor certification applications of I-140 (adjustment of status) petitions pending for more than a year at the end of their sixth H-1B year may be granted year-by-year H-1B extensions until the permanent residence process is concluded.

- 16 While this category has often been oversubscribed, the unused slots primarily originated from the years in which the cap was 195,000 and all the visas were not used.
- 17 This is not particularly surprising given that expanded use of the temporary visa system in the late 1980s and early 1990s was viewed as a way around the long processing delays and limited visas of the permanent employment-based immigration system.
- 18 Many Western farmers do not use the H-2A program, at least in part because of these requirements and also because their access to unauthorized workers has not dissipated. It is estimated that well over half the perishable-crop agricultural labor force in the United States is unauthorized.
- 19 Certification may not be issued under various conditions, including if there is a strike, a previous violation of H-2A conditions, an insufficient employer recruitment effort, a failure to provide insurance, or the offering of better conditions to H-2As than domestic workers.
- 20 The employer must nevertheless hire any referred domestic workers for up to 50 percent of the contract period, even if the certification has been granted.
- 21 Most regions include more than one state, and wages are based on salaries one year earlier (e.g., the 2001 AEWG was based on wages during 2000).
- 22 The second largest nationality is Jamaicans, numbering around 8,685, followed by Guatemalans at 3,077.
- 23 One of the challenges with data for this category has been a lack of regulations specifying how to count H-2Bs (e.g., by number of workers? Jobs?); the government has acknowledged that it issued more than were allowed.
- 24 In the H-2A program, employers are advised to file at least 45 days (and no more than 120 days) before the work begins while H-2B employers are advised to file at least 60 days (but no more than 120 days) before the worker is needed.
- 25 Canadians entering the United States for short stays as tourists or other designated purposes are allowed to enter without a visa. Mexicans are required to have a visa to enter the United States, though Mexicans residing in border communities are eligible for a special “laser” visa/border crossing card which allows travel within twenty-five miles of the border for up to thirty days. The card is valid for ten years.
- 26 This fails to include individuals in non employment-based temporary visitor categories (such as F-1 foreign students and J-1 exchange visitors) who also are allowed to work and later may end up adjusting.
- 27 A permanent employment-based visa could take well over one year, whereas an H-1B visa could take only a few weeks (using premium processing) to a few months depending on whether the individual is adjusting from another status in the United States or is abroad and requires a visa.
- 28 There may also be potential technical fixes such as making the permanent employment-based process more efficient to preclude unnecessary use of temporary visas by applicants awaiting a permanent visa.
- 29 For instance, in FY 1985, L-1 visa admissions totaled 65,349, rising to 112,124 in FY 1995, and 314,484 in FY 2004. H-2B admissions have ranged from under 20,000 to over 100,000.
- 30 Jeanne Batalova, “From Temporary to Permanent Immigration: Policy and Data Considerations,” (see n. 4) and US Department of Homeland Security, *2004 Yearbook of Immigration Statistics* (see n. 6).
- 31 Ibid.
- 32 One missing component was a mechanism for adjustment for those who “unexpectedly” stayed.
- 33 For these and many other reasons including doubts regarding labor shortages, the Select Commission on Immigration and Refugee Policy (1979-1981), the Commission on Agricultural Workers (1989-1993), and the US Commission on Immigration Reform (1992-1997) all recommended against new temporary worker programs.

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The Migration Policy Institute (MPI) is an independent, non-partisan, non-profit think tank dedicated to the study of the movement of people worldwide. The institute provides analysis, development, and evaluation of migration and refugee policies at the local, national, and international levels. It aims to meet the rising demand for pragmatic responses to the challenges and opportunities that migration presents in an ever more integrated world. MPI produces the Migration Information Source website, at www.migrationinformation.org.

This report was commissioned as part of MPI's Independent Task Force on Immigration and America's Future. The task force is a bipartisan panel of prominent leaders from key sectors concerned with immigration, which aims to generate sound information and workable policy ideas.

The task force's work focuses on four major policy challenges:

- The growing unauthorized immigrant population
- Immigration enforcement and security requirements
- Labor markets and the legal immigration system
- Integrating immigrants into American society

The panel's series of reports and policy briefs will lead to a comprehensive set of recommendations in 2006.

Former Senator Spencer Abraham (R-MI) and former Congressman Lee Hamilton (D-IN) serve as co-chairs, and the task force's work is directed by MPI Senior Fellow Doris Meissner, the former Commissioner of the Immigration and Naturalization Service.

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