

**MEMORANDUM**

November 10, 2021

**Subject:** Estimating Green Card Recipients from the Immigration Provisions of the Build Back Better Act (H.R. 5376)

**From:** William A. Kandel, Analyst in Immigration Policy, [wkandel@crs.loc.gov](mailto:wkandel@crs.loc.gov), 7-4703  
Jill H. Wilson, Analyst in Immigration Policy, [jwilson@crs.loc.gov](mailto:jwilson@crs.loc.gov), 7-0002

**This memorandum was prepared to enable distribution to more than one congressional office.**

---

This memorandum by the Congressional Research Service (CRS) provides estimates of the number of foreign nationals who could potentially receive lawful permanent resident (LPR)<sup>1</sup> status (i.e., *green cards*) under Sections 60002 and 60003 of H.R. 5376, the Build Back Better Act, also referred to herein as the reconciliation bill.<sup>2</sup> This memorandum focuses on these estimates and contains limited background information on family-sponsored and employment-based immigration.<sup>3</sup> Estimates presented herein rely on the most recent data available.

## Section 60002: Immigrant Visa Recapture

Section 60002 of the reconciliation bill would recapture family-sponsored and employment-based immigrant visa numbers<sup>4</sup> that went unused from FY1992 and FY2021.<sup>5</sup> The bill would also make available diversity immigrant visas to foreign nationals who were selected to apply for such visas from FY2017 to FY2021 but who were unable to complete the visa application process or were barred from traveling to or entering the United States on a diversity visa (see “Recapturable Diversity Immigrant Visas” below). Unlike Sections 60001 and 60003, Section 60002 of the reconciliation bill does not involve any fees.

---

<sup>1</sup> LPRs are foreign nationals who have been approved to live and work permanently in the United States. In this memorandum, the terms *LPR* and *immigrant* are used interchangeably.

<sup>2</sup> Rules Committee Print 117-18, Text of H.R. 5376, Build Back Better Act, as reported by the Committee on the Budget, with modifications, G:\M\17\MISC\RECONCILIATION\_RCP.XML, <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5376RH-RCP117-18.pdf>, pp. 865-872, November 3, 2021.

<sup>3</sup> For more information on employment-based immigration, see CRS Report R46291, *The Employment-Based Immigration Backlog* and CRS Report R45447, *Permanent Employment-Based Immigration and the Per-country Ceiling*. For more information on family-based immigration, see CRS Report R43145, *U.S. Family-Based Immigration Policy*.

<sup>4</sup> In this memorandum, CRS uses the term *visa numbers* rather than *visas* to refer to the number of lawful permanent residents allocated annually by the Immigration and Nationality Act (INA) through different LPR categories.

<sup>5</sup> For general background on the pathways to lawful permanent residence, see CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*.

## Recapturable Family-Sponsored and Employment-Based Immigrant Visas

In an earlier memorandum published in September 2021, CRS used four methods proposed in 2008 by the Department of State (DOS) to calculate the number of recapturable family-sponsored and employment-based immigrant visa numbers.<sup>6</sup> In that memorandum, CRS extended the DOS estimates from these four methods through FY2021. One of these four methods (*Scenario One*) reflects the approach used in Section 60002. Use of this method produces estimates indicating that 247,000 family-sponsored and 194,100 employment-based visa numbers remained unused at the end of FY2021.<sup>7</sup> The visa numbers had accumulated since FY1992, the first year the current Immigration and Nationality Act (INA) numerical limits were fully implemented following passage of the Immigration Act of 1990 (P.L. 101-649).

## Recapturable Diversity Immigrant Visas

The diversity immigrant visa category (sometimes called “the green card lottery” or “the visa lottery”) was added to the INA by the Immigration Act of 1990 to foster immigration from countries other than the major sending countries of immigrants to the United States.<sup>8</sup> The INA allows for 55,000 diversity immigrants per year from countries for which immigrant admissions were less than 50,000 over the preceding five years combined.<sup>9</sup>

Because the demand for diversity visas (DVs) is much higher than the statutory annual limit, a lottery is used to randomly select who may apply for diversity visas each year. Being chosen as a selectee (“lottery winner”) does not guarantee receipt of a diversity visa; rather, it identifies those who are eligible to apply for one. To receive a visa, selectees must successfully complete the application process (including security and medical screenings and in-person interviews) by the end of the fiscal year for which they were selected, or they lose their eligibility.<sup>10</sup>

Section 60002 of the reconciliation bill would allow individuals who were DV selectees for FY2017, FY2018, FY2019, FY2020, or FY2021 to remain eligible for diversity visas if they were unable to complete the visa application process or were barred from traveling to or entering the United States on a diversity visa for certain reasons. Those reasons are related to (1) four orders<sup>11</sup> issued by former President Donald Trump that restricted the entry of foreign nationals from certain countries and (2) restrictions or limitations on visa processing, visa issuance, travel, or other effects associated with the COVID-19 public health emergency.

---

<sup>6</sup> *Assessing Four Department of State Methods to Compute Recapturable Immigrant Visa Numbers*, Congressional Distribution Memorandum, September 8, 2021, available to congressional staff upon request.

<sup>7</sup> These numbers differ from those reported in the September 2021 memorandum because DOS’s earlier estimate of the unused employment-based visa numbers for FY2021 declined from 88,000 to 62,000 after the September 2021 CRS memorandum was distributed. Consequently, CRS’s initial estimate of 220,000 unused employment-based visa numbers (132,100 from FY1992 to FY2020, plus 88,000 estimated for FY2021) has been revised downward to 194,100. Similarly, DOS’s earlier estimate of the unused family-sponsored visa numbers for FY2021 also declined from 151,000 to 140,000. Consequently, CRS’s initial estimate of 258,000 unused family-sponsored visa numbers (107,000 from FY1992 to FY2020, plus 151,000 estimated for FY2021) has been revised downward to 247,000. No exact FY2021 unused visa numbers are yet available. Neither DOS nor USCIS has published recent estimates on the total number of recapturable immigrant visa numbers.

<sup>8</sup> For more information, see CRS Report R45973, *The Diversity Immigrant Visa Program*.

<sup>9</sup> The 55,000 annual limit includes some individuals who *adjust status* from within the United States (typically about two percent of diversity immigrants per year).

<sup>10</sup> INA §204(a)(1)(I)(ii)(II).

<sup>11</sup> Executive Order 13769, Executive Order 13780, Presidential Proclamation 9645, and Presidential Proclamation 9983. For more information, see CRS Legal Sidebar LSB10458, *Presidential Actions to Exclude Aliens Under INA § 212(f)*.

CRS cannot provide a precise estimate of the number of individuals who were selected in the FY2017-FY2021 diversity visa lotteries but who, for the reasons listed, were unable to immigrate to the United States. Data on visa applications subject to presidential proclamations 9645 and 9983 are available from DOS, but these reports do not break out the number of diversity visas affected.<sup>12</sup> Estimates of the number of potential diversity immigrants impacted by restrictions or limitations on visa processing, visa issuance, travel, or other effects associated with the COVID-19 public health emergency are not available.<sup>13</sup>

**Table 1** displays the number of diversity visas available and the number of diversity visas used in FY2017-FY2021, the years covered by the reconciliation bill. For FY2017-FY2020, the number of diversity visas used includes both diversity visas issued abroad by DOS and diversity immigrant status provided by the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) to individuals adjusting status from within the United States.<sup>14</sup> The sum of the differences between the number of diversity visas available and the number used (79,696) in **Table 1** can be used as an estimate of the *maximum* number of diversity visas that could be made available under Section 60002 of the bill. The actual number would be lower since some DVs would likely be unused for reasons other than those specified in the bill.<sup>15</sup>

**Table 1. Diversity Visas Available and Used, FY2017-FY2021**

	FY2017	FY2018	FY2019	FY2020	FY2021	Total
<b>Diversity visas available<sup>a</sup></b>	50,000	50,000	50,000	54,650	54,750	---
<b>Diversity visas used<sup>b</sup></b>	49,976	49,713	45,889	19,125	15,001 <sup>c</sup>	---
<b>Difference</b>	24	287	4,111	35,525	39,749	79,696

- a. INA §201(d) sets the annual level of diversity visas at 55,000. The Nicaraguan Adjustment and Central American Relief Act of 1997 (P.L. 105-100) decreased the annual ceiling by up to 5,000 visas per year beginning in FY2000. The number of diversity visas available is taken from the September issue of the DOS *Visa Bulletin* for each fiscal year.
- b. For FY2017-FY2020, these numbers include visa issuances and adjustments of status in the diversity immigrant classification. Source: Department of State, *Report of the Visa Office FY2020*, Table VII, “Immigrant Number Use for Visa Issuances and Adjustments of Status in the Diversity Immigrant Category.” The FY2021 number comes from a federal court order. *Filizapovich v. Dep’t of State*, No. 21-00943 (APM), 2021 WL 4476844, at \*3 (D.D.C. Sep. 30, 2021) (“As of September 26, 2021, Defendants have issued a total of only 15,001 diversity visas . . .”).
- c. As of September 26, 2021. The FY2021 number does not include adjustments of status, which typically account for about two percent of diversity visas annually.

<sup>12</sup> See Department of State, “Implementation of Presidential Proclamations 9645 and 9983,” available at [https://travel.state.gov/content/dam/visas/presidentialproclamation/PP-9645\\_Montly-Public-Reporting-January%202021.pdf](https://travel.state.gov/content/dam/visas/presidentialproclamation/PP-9645_Montly-Public-Reporting-January%202021.pdf).

<sup>13</sup> 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 48% decline in immigrant visa issuances compared to FY2019.

<sup>14</sup> Adjustment of status data are not yet available for FY2021. Thus, the number shown in **Table 1** for diversity visas used in FY2021 includes only those issued abroad.

<sup>15</sup> Each year, DOS chooses approximately 100,000 selectees from the DV lottery in order to attempt to yield the 50,000-55,000 visas provided by statute. Historically, for various reasons, about half of selectees do not successfully complete the visa application process by the deadline. In a typical year, the number of diversity visas used is somewhat above or below the cap.

## Section 6003: Adjustment of Status

### Introduction

Under current law, foreign nationals who possess immigrant petitions establishing a family relationship or sponsorship by a U.S. employer acquire LPR status in one of two ways, depending on where they reside.<sup>16</sup> If they reside abroad, they must *acquire an immigrant visa* at a DOS consulate. The visa allows them to travel to the United States and present themselves before an immigration officer at a U.S. port of entry. If admitted, they acquire LPR status. Foreign nationals who possess immigrant petitions establishing a family relationship or sponsorship by a U.S. employer reside in the United States may apply for *adjustment of status* (AOS) with USCIS.

However, an individual can only receive an immigrant visa or apply to adjust to LPR status if a numerically limited immigrant visa number is immediately available.<sup>17</sup> Because demand for immigrant visa numbers far exceeds the annual statutory allocations, many foreign nationals with approved immigrant petitions are currently waiting to adjust to LPR status—in some cases for decades—in two immigrant queues described below.

### The Family Sponsored Immigrant Queue

The current family-sponsored immigrant queue contains 3.8 million foreign nationals, according to DOS data from November 2020.<sup>18</sup> The DOS data reflect *principal immigrants* as well as accompanying *derivative immigrants* (i.e., spouses and adult children), all of whom the INA treats equally for purposes of the annual numerical limits. DHS immigration statistics for recent years indicate that 6.3% of all family-sponsored immigrants resided in the United States and acquired LPR status by adjusting status.<sup>19</sup> Applying this percentage to the total queue of 3.8 million yields an initial pool of just under 275,000 foreign nationals. Of these, CRS cannot estimate how many have two-year-old immigrant petitions,<sup>20</sup> and of that smaller subset, what proportion would pay the required fees and ultimately acquire LPR status. For example, a prospective employment-based immigrant with a spouse and two children would be facing supplemental fees of \$4,750 to acquire LPR status for himself or herself and his or her family members under the two provisions within Section 6003. There would be supplemental fees of \$2,250 to file an adjustment of status application (\$1,500 plus \$250 for each of his or her three accompanying family members), as well as a supplemental fee of \$2,500 to subsequently adjust to LPR status without waiting for a visa number to become available.

---

<sup>16</sup> For more information on the pathways to LPR status, see CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*.

<sup>17</sup> In addition, firms that sponsor immigrants in the second (EB-2) and third (EB-3) employment-based preference categories must successfully apply to the Department of Labor for labor certification before they submit an immigrant petition to USCIS. For more information, see U.S. Department of Labor, Employment and Training Administration, “Permanent Labor Certification,” <https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent>.

<sup>18</sup> U.S. Department of State, National Visa Center, *Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2020*. DOS indicates in this report that “Applications for adjustment of status under INA 245 which are pending at USCIS Offices are not included in the tabulation of the immigrant waiting list data which is being provided at this time. As such, the following figures ONLY reflect petitions which the Department of State has received, and do not include the significant number of applications held with the USCIS Offices.”

<sup>19</sup> DHS *Yearbook of Immigration Statistics 2017 through 2019*, Table 6.

<sup>20</sup> Section 6003 would require eligible prospective immigrants to have filed their family-sponsored or employment-based immigration petitions at least two years prior to applying for LPR status.

## The Employment-Based Immigrant Queue

The current employment-based immigrant queue must be estimated because USCIS data reflect only principal immigrants, not derivative immigrants. The most recent USCIS data indicate that roughly 481,000 foreign nationals with approved employment-based immigrant petitions were waiting for a numerically limited visa number as of April 2021.<sup>21</sup> CRS has previously estimated the size of the total employment-based queue and determined that an average of one derivative immigrant has accompanied every principal employment-based immigrant in recent years (FY2017-FY2019).<sup>22</sup> The total employment-based queue is thus estimated at about 962,000, double the number of principal immigrants. DHS immigration statistics for recent years (FY2017-FY2019) indicate that about 83% of all employment-based immigrants adjusted to LPR status from within the United States. This reduces the estimated queue to an initial estimated pool of about 800,000 (962,000 times 83%) prospective employment-based immigrants eligible to adjust status under Section 60003. Of these, CRS cannot estimate how many have two-year-old immigrant petitions, and of that smaller subset, what proportion would pay the required fees and ultimately acquire LPR status.

### Section 60003 LPR Provisions

Section 60003 of the reconciliation bill contains two major provisions related to lawful permanent residence. The first would allow persons who have approved family-sponsored or employment-based immigrant petitions and who are otherwise eligible to do so to *file to adjust to LPR status* even if an immigrant visa number is not immediately available.<sup>23</sup> Filing for AOS for these individuals would require a “supplemental fee” of \$1,500 (plus \$250 for every accompanying family member or *derivative beneficiary*).

The act of filing to adjust status does not provide a prospective immigrant with lawful permanent residence. Prospective immigrants who file to adjust to LPR status under Section 60003 would still have to wait until an immigrant visa number became available before they could actually adjust to LPR status. However, the act of filing to adjust status provides prospective immigrants with certain benefits during the period while they wait for an immigrant visa number to become available. Benefits include continued lawful presence without the need to maintain nonimmigrant status; eligibility for advance parole;<sup>24</sup> and the ability to apply for an employment authorization document (EAD or “work permit”) that allows employment with any U.S. employer while the AOS application is pending. Eligible family members could receive the same benefits under Section 60003.

The second provision in Section 60003 would allow DHS to *grant LPR status* to individuals who filed for adjustment of status regardless of whether a visa number was immediately available. As noted earlier, eligible prospective immigrants would have to have filed their family-sponsored or employment-based immigration petitions at least two years prior to applying for LPR status under this provision. They would also have to pay a supplemental fee of \$2,500 for family-sponsored immigrants, \$5,000 for employment-based immigrants except for EB-5 immigrants,<sup>25</sup> and \$50,000 for EB-5 immigrants.

---

<sup>21</sup> U.S. Citizenship and Immigration Services, *Form I-140, I-360, I-526 Approved Employment Based Petitions Awaiting Visa Availability By Preference Category and Country of Birth As of April 21, 2021*.

<sup>22</sup> See archived CRS Report R45447, *Permanent Employment-Based Immigration and the Per-country Ceiling*.

<sup>23</sup> INA §245, 8 U.S.C. §1255.

<sup>24</sup> Advance parole allows a foreign national in the United States to travel abroad without having to obtain a visa in order to return to the United States. Advance parole, however, does not ensure U.S. entry upon arrival. Entry is granted at the discretion of the inspecting immigration officer at the port of entry. For more information, see CRS Report R46570, *Immigration Parole*.

<sup>25</sup> EB-5 refers to the fifth of the five employment-based preference categories for *immigrant investors*. For more information on employment-based immigration generally, see CRS Report R45447, *Permanent Employment-Based Immigration and the Per-country Ceiling*. For more information on the EB-5 preference category, see CRS Report R44475, *EB-5 Immigrant Investor Visa*.

Section 60003 would take effect on the earlier of either May 1, 2022, or 180 days following enactment. It would remain effective upon until September 30, 2031. Between the time the bill might be enacted and September 30, 2031, the numerical limits governing family-sponsored immigrants and employment-based immigrants would not apply to prospective immigrants who use this second provision in 60003 and pay the corresponding fee.

### Estimated Number of Lawful Permanent Residents from Section 60003

CRS could not estimate the number of green cards that Section 60003 would provide. The provision would create a fee-based exemption to (1) the effective 226,000 annual limit on prospective family-sponsored immigrants, (2) the statutory 140,000 annual limit on employment-based immigrants, and (3) the 7% per-country ceiling that applies to both sets of immigrant visas.<sup>26</sup> These exceptions, for the purposes of acquiring LPR status, would last for about seven years.<sup>27</sup> Those applying for LPR status under Section 60003, among other eligibility requirements, would have to

- possess an approved family-sponsored or employment-based immigrant petition;
- be residing in the United States in order to be eligible to adjust status;
- have filed their immigrant petition two years prior to applying for LPR status; and
- pay all required fees established in Section 60003.

In principle, the number of potential beneficiaries of Section 60003 appears partially unconstrained. At its broadest level, its impact could extend beyond existing immigrant visa queues to all foreign nationals with requisite family or employment ties admitted or paroled into the United States who could have their family-sponsored and employment-based immigrant petitions approved by USCIS. To acquire LPR status without waiting for a visa number to become available, those individuals would have to apply for LPR status by September 30, 2029, and pay the required fees.

In practice, potential beneficiaries of Section 60003 would face standard nonimmigrant eligibility screening. Nonimmigrants seeking LPR status as family-sponsored immigrants would have to find a way to enter the United States. Many would seek to obtain a nonimmigrant (temporary) visa allowing them to travel to the United States but would likely be declined because they could not overcome the INA's "intending immigrant" presumption.<sup>28</sup> The number of potential beneficiaries from Section 60003 could also be constrained by USCIS's capacity to expediently adjudicate and process immigrant petitions, as well as by DOS's capacity to process nonimmigrant and immigrant visa applications abroad.<sup>29</sup>

---

<sup>26</sup> In addition to overall annual numerical limits, the INA also imposes a 7% *per-country limit* on the number of family-sponsored preference immigrants and employment-based immigrants from a single country. The per-country limit helps ensure that foreign nationals from only a few countries do not dominate permanent immigration flows. For more information, see CRS Report R45447, *Permanent Employment-Based Immigration and the Per-country Ceiling*.

<sup>27</sup> Numerical limits would not apply to fee-paying applicants utilizing Section 60003 until September 30, 2031. However, to acquire LPR status, an applicant would have had to have filed for adjustment of status two years prior to applying to receive LPR status. Therefore, the cutoff date to be eligible to acquire LPR status would be September 30, 2029. Applicants meeting this latter deadline would remain eligible to receive LPR status even if processing delays carried them past the 2029 deadline. As noted earlier, Section 60003 would take effect on the earlier of either May 1, 2022, or 180 days following enactment.

<sup>28</sup> INA Section 214(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 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 three-quarters of all nonimmigrant ineligibility findings in FY2018. For more information on nonimmigrant visas, see CRS Report R45040, *Immigration: Nonimmigrant (Temporary) Admissions to the United States* and CRS Report R45938, *Nonimmigrant and Immigrant Visa Categories: Data Brief*.

<sup>29</sup> In FY2021, for example, tens of thousands of employment-based and family sponsored visa numbers went unused, not because of statutory limits, but because USCIS and DOS faced COVID-19 related personnel and operating constraints that prevented

Section 60005 of the bill provides \$2.8 billion to increase USCIS capacity specifically to adjudicate immigration applications under Section 60001 as well as immigrant petitions under Section 60003. CRS could not determine how much of the \$2.8 billion funding would go toward adjudicating solely family-sponsored and employment-based immigrant petitions.<sup>30</sup>

A further consideration that also cannot be quantified is the degree to which the provisions of this bill would alter the calculus for all foreign nationals overseas who might contemplate education, employment, or permanent residence in the United States. Persons with qualifying U.S. citizen relatives who have not sought family-sponsored LPR status because of lengthy waiting periods may be incentivized to do so under Section 60003. Likewise, foreign students and skilled workers who currently are discouraged from studying or working in the United States because of long LPR wait times may reconsider their options for where to study, advance their careers, and settle.

---

them from processing the full allotment of petitions and visas by the end of the fiscal year. See Michelle Hackman, “Up to 80,000 Unused Green Cards for Workers Set to Expire Friday,” *Wall Street Journal*, September 30, 2021.

<sup>30</sup> USCIS’s District Operations processes immigration benefit applications, such as employment-based and family-sponsored immigrant petitions, where an in-person interview is required. District Operations represents \$1.9 billion or about 37% of USCIS’s \$5.2 billion total budget. In FY2019, the most recent year for which DHS data are available, 204,139 family-sponsored and 139,458 employment based immigrants together represented 33% of the 1,031,765 foreign nationals who acquired lawful permanent residence.

---