

February 2, 1996

✓ ~~Seth~~ Harris

219-9216

TO: ✓ Stephen Warnath, DPC	456-7028
Trey Schroeder, WH Counsel	456-1647
Ingrid Schroeder, OMB	395-3109
Debra Bond, OMB	395-6974
Greg Henry, OMB	395-5157
Sarah Horrigan, OMB	395-4817
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✓ Liz Rodriguez-Johnson, DOD	697-3762

FROM: John Fraser, DOL (JF)

To facilitate our follow-up meeting regarding immigration changes and the Administration's "views letter," we have prepared the attached two-page summary of past statements by the Administration on those issues that we understand some may wish to discuss. Of course, this may not cover all of the issues to be raised.

As indicated, we will bring copies of the relevant parts of the referenced documents to the meeting.

Hope this helps. Thanks.

Administration's "Record" on Certain Immigration Law Changes

H-1B Nonimmigrant Program Changes:

1. Duration of Stay 6 -> 3 Years

Administration Proposed

- 4/15/94 GATT protocol
- 9/15/95 Administration Views Letter on H.R. 2202
- 9/28/95 Reich Senate testimony
- 9/28/95 Meissner Senate testimony
- 11/28/95 Administration Views Letter on S. 1394

2. No lay-off

Administration Proposed

- 9/23/93 Legislative Proposal
- 4/15/94 GATT protocol
- 9/15/95 Administration Views Letter on H.R. 2202
- 9/28/95 Reich Senate testimony
- 11/28/95 Administration Views Letter on S. 1394

3. Timely and Significant Steps to Recruit/Retain U.S. Workers

Administration Proposed

- 9/23/93 Legislative Proposal
- 4/15/94 GATT protocol
- 9/15/95 Administration Views Letter on H.R. 2202
- 9/28/95 Reich Senate testimony
- 9/28/95 Meissner Senate testimony
- 11/28/95 Administration Views Letter on S. 1394

4. Training Fee

Administration support <-> not oppose

- 9/28/95 Meissner Senate testimony
- 11/28/95 Administration Views Letter on S. 1394

5. 105 Percent of Prevailing Wage

Administration support <-> not oppose

- 11/28/95 Administration Views Letter on S. 1394

- 2 -

Permanent Program Changes:**1. Training Fee****CIR Proposal: Administration Supports**

- 9/28/95 Reich Senate testimony
- 9/28/95 Meissner Senate testimony
- 11/28/95 Administration Views Letter on S. 1394

2. 105 Percent of Prevailing Wage**CIR Proposal: Administration Supports**

- 11/28/95 Administration Views Letter on S. 1394

3. Prevailing Wage Methodology (Hathaway)

- 9/15/95 Administration Views Letter on H.R. 2202

Attachments -- including excerpted pages from:

- ▶ 9/23/93 legislative request;
- ▶ 4/15/94 GATT protocol;
- ▶ 9/15/95 Administration Views Letter on H.R. 2202;
- ▶ 9/28/95 Reich Senate testimony;
- ▶ 9/28/95 Meissner Senate testimony; and,
- ▶ 11/28/95 Administration Views Letter on S. 1394.

F 2/22/95

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

FEB 22 1995

The Honorable Mickey Kantor
United States Trade Representative
Winder Building
600 17th Street, N.W.
Washington, D.C. 20506

Dear Ambassador Kantor:

This follows up to confirm our telephone conversation about proposals that the Department of Labor is submitting as part of the Administration's reform of the Nation's immigration laws. The proposals are designed to deal with ongoing abuses in the H-1B nonimmigrant category, which provides for the temporary admission and employment of foreign "professionals" in specialty occupations. The program is subject to annual admission of 65,000 workers, which are used primarily by the computer industry, hospitals and other physical therapist employers, and academia.

My understanding of our conversation is that you have no objection to inclusion of these proposals, as described below, in the Administration's legislation.

Three of the provisions we are proposing are already essentially incorporated into the U.S. schedule of commitments under the General Agreement on Trade in Services (GATS). These provisions are:

- (1) NO PRIOR LAYOFF. An employer would not be allowed to hire H-1B workers if there has been a layoff of workers in the same occupation within six months before filing an application, or within three months after filing an application. Moreover, there could be no layoff in the six-month period surrounding the employer's filing of a visa petition for workers in an occupation.
- (2) TIMELY AND SIGNIFICANT STEPS. An employer would be required to attest to taking timely and significant steps designed to recruit, train, and retain sufficient U.S. workers in an occupation to be eligible to hire H-1B workers in the same occupation. However, the legislation would exempt from this requirement firms that over the previous three years had filed applications for no more than ten H-1B workers, or, in the case of occupations requiring Master's degrees, no more than fifty H-1B workers. Neither of these exemptions is part of our GATS schedule of commitments.

- (3) LENGTH OF STAY. The legislation would reduce the duration of H-1B admissions to no more than three years. At present, such workers can stay for up to six years. This change would emphasize that the H-1B program is not designed to fill employer needs for long durations; rather, it is designed to meet temporary labor market needs.

The legislative provisions that are not GATS-related deal with national enforcement policy. For example, the bill would explicitly authorize DOL to conduct compliance investigations where reasonable cause exists to believe there are violations even absent a complaint from a worker or competitor.

Incorporating these provisions into U.S. immigration law will help us to maintain a level competitive playing field for U.S. employers and retain a viable H-1B program -- and thus help employers, like those in the computer industry, who need legitimate access to international labor markets. At the same time, we can provide more adequate protection for U.S. workers from unfair competition, and incentives to develop the U.S. workforce for higher skill jobs.

I appreciate your personal and continued support for such changes in the law.

Sincerely,



Robert B. Reich

Final

**STATEMENT OF SECRETARY OF LABOR ROBERT B. REICH
before the
SUBCOMMITTEE ON IMMIGRATION
OF THE SENATE JUDICIARY COMMITTEE**

September 28, 1995

Mr. Chairman and Members of the Subcommittee:

Let me begin today, Mr. Chairman, by expressing my sincere appreciation to you for affording me this opportunity to share my views regarding the H-1B nonimmigrant visa program. This category of visas, as you know, allows the temporary admission of foreign "professionals" for employment in "specialty occupations" in the United States. This visa program is seriously flawed in its current form, I believe, and urgently requires improvement. I would also like to acknowledge the Members of the full Committee, whose presence demonstrates their interest in reform of the Nation's immigration system.

Let me first attempt to state, as clearly as possible, what I see as the fundamental policy goal for employment-based immigration. Since work-

related temporary visas and work-related immigration are closely intertwined, in ways I will try to explain, it is impossible to discuss today's immediate topic without engaging the more fundamental question of what purpose our employment- or skill-based immigration policy is meant to serve. And on that question, I believe, there is great potential for an emerging bipartisan consensus, and for progress toward meaningful reform. There is great promise in some of the ideas you have recently put forward, Mr. Chairman, which parallel many of the proposals of the U.S. Commission on Immigration Reform.

This nation of immigrants always has and always will welcome new members into the American family, though at a different pace and in different ways to suit the times. This Administration shares the conviction of many in Congress that continued immigration both honors the heritage of our past and helps ensure the vitality of our future. There are many good reasons for welcoming a particular person. But one reason, often advanced, strikes me as troublesome.

Some say a primary purpose of immigration policy should be to suit the

convenience of U.S.-based employers, who prefer to select from the whole world's workforce, not just the American workforce, when assembling the human resources needed to face global competition. Employment-based immigration to fill skill shortages, as well as the temporary admission of selected skilled foreign workers, is sometimes unavoidable. But I firmly believe that hiring foreign over domestic workers should be the rare exception, not the rule. And I believe such exceptions should be even rarer, and more tightly targeted on gaps in the domestic labor market, than is generally the case under current policy.

If employers must turn to foreign labor, this is a symptom signaling defects in America's skill-building system. Our system for giving employers access to global labor markets should be structured to remedy such defects, not acquiesce in them. And it should progressively diminish, not merely perpetuate, firms' dependence on the skills of foreign workers.

One idea contained in both your own draft legislation and in the Jordan Commission's report, Mr. Chairman, strikes me as highly promising in this regard -- requiring that employers make a meaningful contribution to the training of U.S. workers, so that skill-based immigration will become ever less necessary over time. Our immigration policy should embody the commitment

that humanitarian, cultural, and family goals, and not employers' dissatisfaction with the domestic workforce, must govern how we enlarge our American community. My colleagues in the Administration and I are eager to work with Congress to encode this commitment into law.

In short, our immigration policy must provide real incentives for businesses to commit themselves to American workers and develop the domestic workforce for the high-skill jobs and high-performance workplaces of the future, while at the same time providing a safety valve of access to foreign labor markets to meet skill demands that the U.S. workforce cannot supply in sufficient quantity or with sufficient speed. Our primary public policy response to skills mismatches due to changing technologies and economic restructuring must be to prepare the U.S. workforce to meet new demands. Importing needed skills should usually be a short-term response to meet urgent needs while we actively adjust to quickly changing circumstances.

In light of the increasingly global economy and workforce — and the serious danger that rapid changes in our economy and social policy will leave many working people in this country behind — the Nation's immigration policy must carefully balance these imperatives. In recent years, our immigration system has tilted towards expanding employment-based immigration and to

favoring higher-skilled workers, giving progressively more weight to employers' desire to tap global labor markets. However, as our immigration system has evolved within this overall framework, it has treated particular issues in quite different ways. For example, criteria governing access to immigrant workers vary depending on the preference category, and these criteria differ from those which apply to various employment-based nonimmigrant categories. Similarly, the manner in which the basic policy goals are implemented in law for employment-based nonimmigrants differ significantly among the various programs, some of which lack any meaningful labor market protections.

With this broader context thus established, and my hopes for bipartisan consensus once again affirmed, let me turn to the need for reform of our employment-based nonimmigrant system, and especially the H-1B nonimmigrant program.

Employment-based Nonimmigrant Program Reform

Any reform of our legal immigration system must also address the nonimmigrant programs which allow temporary entry of individuals to the U.S., in many cases for employment purposes. While many acknowledge this

need, few proposals have yet been offered. The Subcommittee's draft legal immigration reform bill does not contain any provisions affecting employment-based nonimmigrant programs. We would again urge that it be expanded to include such provisions, for two main reasons.

First, many more foreign workers legally enter the U.S. for temporary employment than enter as permanent employment-based immigrants. These "temporary" workers often legally stay employed here for many years, and in practice some stay on, illegally, for much longer. Over the three years from fiscal year 1992 to 1994 (the last full year for which data are available), fewer than 150,000 workers were given permanent status as employment-based immigrants. In that same three-year period, however, nearly 570,000 workers - nearly four times as many -- were "temporarily" admitted as employment-based nonimmigrants. (This latter figure excludes traders and investors admissible under our international treaty obligations, and intra-company transferees.) All of these nonimmigrants can work in the U.S. and have impacts -- both positive and negative -- on our labor markets. Given the relative numbers and the fact that many nonimmigrant workers are tied to one employer as a condition of admission, the temporary nonimmigrant workforce has to be considered a very significant factor in our workforce development

policies.

The second reason that the nonimmigrant programs must be encompassed in legal immigration reform is that most petitions for permanent employment-based immigrants are filed by employers on behalf of temporary foreign workers during or after a period in nonimmigrant status -- which often follows completion of their education at U.S. colleges and universities. As you heard in our earlier testimony, of the current employment-based immigrants who are subject to the Department of Labor-administered permanent labor certification process, we estimate that over 90 percent are already in the U.S. and about two-thirds are already working -- sometimes illegally -- for the employer which files the immigrant petition on their behalf. Nonimmigrant foreign students and workers already in the U.S. (many of whom were previously foreign students) are predominantly those whom U.S. employers subsequently seek for permanent residency for employment purposes. In fiscal year 1994, more than one-half of those granted permanent resident status are known to have adjusted from nonimmigrant status as foreign students or "professional" workers admitted as H-1s or under directly related temporary entry provisions.

In other words, our employment-based immigrant selection system mostly deals with decisions about which foreign students and workers will be allowed

to remain to live and work permanently in the U.S., not who will be allowed to enter to work in the U.S. The actual employment-based immigrant selection occurs much earlier in the process, when students are admitted to our universities and when employers seek temporary nonimmigrant workers from abroad. A coherent employment-based immigration policy must recognize these facts and, therefore, address real deficiencies in the nonimmigrant programs through which the first-level selection is really made.

Again, in our recent testimony before the Subcommittee, we offered several suggestions to establish a workable framework for reform of the multiplicity of diverse and inconsistent employment-based nonimmigrant programs that currently exist. I hope that the Committee finds this perspective useful, and I would renew our offer to continue to work with you as our ideas are considered.

H-1B Nonimmigrant Program

While I have stressed that our current system of employment-based immigration needs reform, including both the permanent and various nonimmigrant programs, the most urgent candidate for reform is the H-1B nonimmigrant program.

To briefly recap, the H-1B program allows the admission of up to 65,000 workers each year (to stay for as long as six years), ostensibly to meet short-term, high-skill employment needs in the domestic labor market. In principle, this can be an appropriate purpose, consistent with the overall goals of our employment-based immigration policy. Our experience with the practical operation of the H-1B program has raised serious concerns, however, that what was conceived as a means to meet temporary business needs for unique, highly-skilled professionals from abroad is, in fact, being used by some employers to bring in relatively large numbers of foreign workers who may well be displacing U.S. workers and eroding employers' commitment to the domestic workforce. Some employers — though a minority of those who use the H-1B program — seek the admission of scores, even hundreds of foreign workers, especially for work in relatively low-level computer-related and health care occupations. These employers include "job contractors," some of which have a workforce composed predominantly or even entirely of H-1B workers, which then lease these employees to other U.S. companies or use them to provide services previously provided by laid off U.S. workers.

Many employers, to be sure, do use the H-1B nonimmigrant program for its stated purpose: to provide U.S. businesses with timely access to the "best

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and the brightest" in the international labor market to meet urgent but generally temporary business needs. I hope it is clear that we recognize the need for such use of the program. But reform of the H-1B program is needed because its actual operation is out of synch with its primary purpose and design, in at least three important respects.

First, it has become increasingly evident that the H-1B program is being utilized by some as the basis for building businesses which are dependent on the labors of foreign workers, in some cases in unfair competition with U.S. workers and those U.S. businesses that employ mostly domestic workers.

As you may know, access to the international labor market through the H-1B program does not require any test of the domestic labor market for the availability of qualified U.S. workers, because the program is supposed to be used to meet urgent, short-term employment needs. The growth of "job contractors" with work forces composed predominantly or even entirely of H-1B workers, which then lease these employees to other U.S. companies or use them to provide services previously provided by laid off U.S. workers, is cause for serious concern. Let me give you two cases in point from our enforcement experience.

In the computer field, Syntel, Inc. is a Michigan company with a workforce that is more than 80 percent H-1B nonimmigrants, in this case computer analysts from India. Among its business operations, Syntel contracts to provide computer personnel or services to other companies. In its operations in New Jersey, Syntel contracted with American International Group, Inc. (AIG), a huge insurance company, to provide computer services in the place of nearly 250 U.S. workers, which AIG laid off. In fact, the laid off U.S. workers were required to train their H-1B nonimmigrant replacements during their last few weeks of employment. Displacing laid-off workers was perfectly legal under the rules that then existed for the H-1B program, and that still exist today.

In this case, the desire to cut labor costs led Syntel beyond the wide limits of what current law permits and into actual illegality. In carrying out its contracts in the State of New Jersey, our Wage and Hour Division found Syntel had willfully underpaid its Indian computer programmers by nearly 20 percent below the wage they were required under the law to be paid--about \$34,000 per year instead of the prevailing wage rate of more than \$41,000 per year. As a result of this case, Syntel agreed to pay nearly \$78,000 in back wages to 40 H-1B employees and take other steps to develop U.S. workers to reduce its

dependence on a nonimmigrant workforce. This is but one of 19 enforcement cases involving H-1B workers in computer-related occupations where we have found more than \$200,000 in back wages owing to 89 H-1B nonimmigrant workers, mostly employed by contractors.

In the health care field, Rehab One is a Michigan company which went into the business of providing temporary physical therapists -- in this case, exclusively H-1B workers from Poland -- to health care facilities primarily in Texas. Our investigation of a complaint against Rehab One resulted in the company agreeing to pay more than \$460,000 in back wages to 54 therapist employees. The company had actually paid its Polish therapists as little as \$500 per month during certain periods though it was required to pay a prevailing wage of as much as \$2,800 per month. This is but one of fourteen enforcement cases involving employers of H-1B physical and occupational therapists, nearly all of which are contractors, in which we found nearly \$2 million in back wages owing to nearly 400 temporary foreign workers in these occupations.

These cases, which some might perceive as examples of enforcement "successes" as envisioned by the program's design, merely illustrate the potential -- unfortunately, the unknowably large potential -- for the kinds of

abuse that inflicts real competitive harm on skilled U.S. workers.

The second reason that the H-1B program needs to be reformed is that it has also become increasingly evident that employers commonly use the H-1B program as a form of transitional or probationary employment, either to accommodate foreign students who have started working for a U.S. employer during or just after completing their education at a U.S. institution, or as a way-station for foreign workers to be employed in the U.S. while awaiting adjudication of a permanent immigrant petition. I have already noted that most employment-based immigrants are already working in the U.S. when they gain permanent status -- in fiscal year 1994, 42 percent of these were already working in H-1 status alone. While non-immigrant programs have many potentially valid purposes, there is no consensus that providing a holding pattern for aspiring employment-based immigrants is among them. Yet that has become a significant aspect of the programs' operation.

The third reason that justifies immediate reform of this program is that it simply does not provide the needed balance in our employment-based immigration system between timely access to the international labor market and adequate protection of U.S. workers' job opportunities, wages and working conditions. I have already noted that the H-1B program does not require any

test for the availability of qualified U.S. workers in the domestic labor market. What is more, a U.S. employer can now lay off U.S. workers and replace them with H-1B workers. I simply do not believe this is right. Moreover, the H-1B program does almost nothing to encourage U.S. employers to develop domestic workers to perform the jobs for which they are seeking nonimmigrants, or to limit their dependency on a nonimmigrant workforce. I do not know if any members of this Committee can explain the rationale of this policy to struggling U.S. workers. I know that I cannot.

Mr. Chairman, two years ago I asked the Congress to amend the conditions which still regulate access to the international labor market through the H-1B nonimmigrant program. Unfortunately for many U.S. businesses and workers, the Congress has yet to act on these proposals -- but another important opportunity is now before you, and I am most grateful for the opportunity to tell you personally how important it is to the working people of this country that you not miss this opportunity.

The amendments I requested in 1993 were carefully designed to assure continued business access to needed high-skill workers in the international labor market while decreasing the H-1B program's susceptibility to misuse to the detriment of U.S. workers and the businesses which employ them. Briefly

stated, the two amendments I proposed would require employers which seek access to temporary foreign "professional" workers to attest that:

- (1) they have not laid off or otherwise displaced U.S. workers in the occupations for which they seek nonimmigrant workers in the periods preceding and following their seeking such workers; and,
- (2) in certain circumstances, they have taken timely and significant steps to recruit and retain U.S. workers in these occupations.

These amendments were modeled on similar provisions applicable to the temporary admission of foreign registered nurses (this program has just expired), and are targeted especially to those employers which seek to obtain relatively low-skilled "professional" workers.

As we laid out in our recent testimony, enactment of these amendments is increasingly critical. Abuses of this program have become increasingly well-documented. There appears to be a trend of growth of companies which are predominantly or entirely dependent on nonimmigrant workers and are thus able to compete unfairly with U.S. companies which employ mostly U.S. workers. The nonimmigrant registered nurses (H-1A) program has recently expired and some foreign nurses will now be entering under the H-1B program, which has significantly lesser protections for U.S. workers than the predecessor program.

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Finally, I think all would agree that in nearly all situations it is entirely unreasonable that — as a matter of public policy — an employer in this country not only does not have to test the domestic labor market for the availability of qualified U.S. workers before gaining access to foreign workers, but is actually able to lay off U.S. workers to replace them with temporary foreign workers, either in their own employ or through contract. As I have emphasized, this is exactly what is happening now. Our public policy tolerates it, perhaps encourages it. This must change.

In addition to the amendments I proposed in 1993, I would also urge enactment of another amendment that would reduce the allowable period of stay under the H-1B program from six to three years to better reflect the "temporary" nature of the presumed employment need. It is difficult to imagine why these changes would be hard to swallow for businesses which want to use the H 1B program for the purposes for which it was intended.

Further, Mr. Chairman, if this and other employment-based nonimmigrant programs are actually meant to serve as "probationary" employment situations to transition foreign students and temporary workers into the permanent labor force as employment-based immigrants, then the programs ought to be redesigned to reflect that purpose, and we should abandon the

fiction that they are intended to meet specific, urgent, short-term demands.

Mr. Chairman, I also want to briefly discuss the treatment of the H-1B program under H.R. 2202, which is now being marked up by the House Judiciary Committee. The only provision of H.R. 2202 which modifies current law affecting nonimmigrant categories (Title VIII, Section 806) makes a number of changes in the H-1B program. While still evolving, these provisions generally would weaken protections for U.S. workers. However, one of the changes in the program currently being considered would require employers filing H-1B applications to attest that they have not laid off workers with substantially similar qualifications and experience in the specific employment for which an H-1B nonimmigrant is being sought during limited time periods unless the employer pays an actual wage to each nonimmigrant that is at least 110 percent of the mean of the last wage earned by the laid off employees. In addition, a "job contractor" would have to attest that it will not place an H-1B worker with another employer unless the other employer has executed an attestation that it is complying and will continue to comply with this requirement in the same manner as it applies to the contractor.

This proposed change represent a welcome effort to implement one of the modifications in the H-1B program which I previously requested -- to prevent

U.S. workers from being laid off or otherwise displaced by nonimmigrants -- and I applaud the intent. But it is considerably weaker than the change I requested, because it provides a means of circumventing the essential protection. This provision would allow a U.S. employer to lay off U.S. workers and replace them with foreign workers in the same job so long as the employer paid the foreign workers a little more than it had paid its U.S. workers. The bill does not prohibit an employer from laying off U.S. workers to replace them with nonimmigrant workers during certain time periods, it merely provides a modest disincentive to doing so. So it goes in the right direction, but not nearly far enough. Further, H.R. 2202 does not include the additional change to the H-1B program I asked for -- a requirement that certain H-1B employers attest to taking timely and significant steps to recruit and retain U.S. workers in the jobs for which they are seeking foreign workers. In addition, the proposed changes in H.R. 2202 need to be consistent with U.S. international obligations in the General Agreement on Trade in Services under the World Trade Organization.

While we have a number of serious concerns about the changes to the H-1B program contained in H.R. 2202 -- and, as I have said, would like to see any reform legislation address more nonimmigrant programs, and in the broader

context of the array of nonimmigrant programs for which the Department has responsibility -- we find promise in the general framework provided in the bill and have been working with the Committee and interested parties to address our concerns and attempt to fashion H-1B amendments which the Administration could endorse. We look forward to working with you in the Senate to this same end.

Permanent Employment-based Immigration Changes

Mr. Chairman, I would also ask your indulgence today to briefly comment on proposals contained in the Subcommittee's draft reform bill -- which generally reflect the recommendations of the Commission on Immigration Reform -- to change the "labor certification" process used to admit or, more commonly, adjust individuals to permanent immigrant status for employment reasons. Our earlier testimony before the Subcommittee raised several important questions and suggestions regarding the proposed new labor certification systems set out in the draft bill. The larger point, however, merits emphasis: We share the view that reform is required, and we support a shift towards an immigration system which relies more on market-type incentives to discourage employers from abandoning the domestic workforce in favor of

foreign labor. A fee levied on employers sponsoring skill-based immigrants, with the proceeds dedicated to building the skills of American workers, forges an admirably direct and efficient link between the problem of skill shortages, and the only valid long-term solution, which is investment in the U.S. workforce. While we have some important concerns about the draft bill's approach, we want to work with you to further. I know you are anxious to move ahead with the bill; we are prepared and eager to help.

Conclusion

Mr. Chairman, let me conclude by repeating that reform of the employment-based nonimmigrant programs, and the H-1B program in particular, is so integral and essential to effective reform of our entire system of legal immigration that it should be included in any such legislation.

I appreciate the interest shown by the Subcommittee Members and staff in our views, and their thoughtful consideration. The Department looks forward to continuing to work closely and cooperatively with you and your staff as the legislation moves forward. In this regard, I understand that you will be spending some time today hearing testimony regarding the perceived need for nonimmigrant program reform to import new agricultural "guestworkers."

While I have not addressed this subject in my testimony today, the President and I strongly oppose such a new guestworker program. I will follow-up this hearing with a further statement of our views and rationale on this important subject.

Mr. Chairman, that concludes my statement. Thank you again for inviting me to testify today, and I will be pleased to respond to the Members' questions.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO: Steve Mertens

Joe Wire

Debra Bond/Dan Chenok

Stephen Warnath

Greg Henry

Stacy Dean

Take necessary action ☐

Approval signature ☐

Comment ☐

Prepare reply ☐

Discuss with me ☐

For your information ☒

See remarks below ☐

FROM: Ingrid Schroeder

DATE: November 29, 1995

RE: Final Justice Letter on S. 1394 - Simpson, Legal Immigration

Attached is the final S. 1394 letter. for subcommittee markup

Please note, Justice will send a replacement page #20 to the Subcommittee (today) which will include the noted changes.

11/28/95

Final Justice views letter (subc.)
on S. 1394

**U. S. Department of Justice****Office of Legislative Affairs**

Office of the Assistant Attorney General

Washington, D.C. 20530

November 28, 1995

The Honorable Alan Simpson
Chairman
Subcommittee on Immigration
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Simpson:

This letter presents the views of the Administration concerning S. 1394, the "Immigration Reform Act of 1995," scheduled to be marked up by the Immigration Subcommittee. As you know, the Administration strongly supports reform of the current immigration law that affects both illegal and legal immigration. The Administration endorses a framework of legal immigration reform that respects our immigration tradition while achieving a moderate reduction in overall admission numbers to promote economic opportunities for all Americans.

The Administration seeks legal immigration reform that promotes family reunification, protects U.S. workers from unfair competition while providing employers with appropriate access to international labor markets to promote our global competitiveness, and enhances the value of naturalization to encourage full participation in the national community.

We have outlined our positions on the individual provisions in S. 1394 in the following section-by-section discussion.

TITLE I - IMMIGRANTS

SECTION 101 narrows the "immediate relatives" classification by limiting the

eligibility of parents of U.S. citizens to immigrate. A "qualifying parent" is defined as a parent who is at least 65 years of age and the majority of whose sons and daughters normally reside in the U.S. as nationals or lawful permanent residents. This section further conditions admission of these parents on a showing that the son or daughter has purchased for their parent a health insurance policy, including long-term care.

The term "immediate relative" applies only to parents of U.S. citizens. The term "qualifying parent," however, makes no reference to U.S. citizen sons and daughters, but rather refers to a parent with sons and daughters who are nationals of the United States or legal permanent residents. Although U.S. citizens are necessarily U.S. nationals, it would be preferable if the term "qualifying parent" also referred to U.S. citizen sons and daughters.

The Administration believes that the value of family reunification to our communities and nation relies on more complete family units than this bill contemplates. It includes U.S. citizens' parents. In many U.S. citizen families, immigrant parents can provide essential household support which promotes economic well-being and mobility. Such reunified families often make the difference between a family that needs public assistance and one that is self-sufficient. Therefore, the Administration opposes the health insurance mandate on parents and limiting entry to parents who have a majority of children who normally reside in the United States. The Administration strongly believes in protecting against the misuse of public assistance programs, but it also seeks to strengthen families and provide them with the means to become productive.

Also, requiring the Department of State to establish how many children an applicant parent may have, where those children reside and their immigration status poses problems with respect to access to proof. Consular officers have no way of verifying the number of non-U.S. national children an applicant may have.

Similar to H.R. 2202, section 101(b) of this bill would require each immigrant parent of a U.S. citizen or the petitioning son or daughter to obtain, prior to the immigrant's admission to the U.S., health insurance that is at least comparable to Medicare parts A and B, and long-term care insurance that is at least comparable to Medicaid's long-term care benefits. The immigrant would be required to demonstrate to consular officials and to the Attorney General that he or she would maintain such coverage throughout the period of residence in the United States.

Unlike the House bill, S. 1394 would require that the petitioning son or daughter agree to provide such health insurance coverage as part of a legally enforceable affidavit of support; establish civil monetary penalties if the sponsor fails to provide the agreed coverage; define judicial remedies available to enforce the requirement; and

allow an exemption from the requirement for sponsors whose financial circumstances change such that providing insurance would reduce the sponsor's total family income to below the Federal poverty level.

The Administration believes this section would impose a mandate upon purchasers of health insurance that, absent a corresponding mandate that insurers offer such coverage on an equitable basis, would set standards that are virtually impossible to meet and, thereby, render this family reunification category largely meaningless. Private health insurance policies comparable to Medicare plus the long-term care benefits of Medicaid, as required by this section, are often unavailable, especially within a reasonable price range. Private long-term care policies in particular generally contain far more limited benefits than Medicaid, and thus cannot be considered comparable.

In addition, insurers often require medical examinations and tests before they will offer individual acute care or long-term care policies, and are unlikely to accept tests performed outside the United States. This section would require a demonstration of health insurance coverage prior to entry into the United States. This section would also necessitate reliance upon State insurance departments to determine the acceptability of individual policies, to monitor and to enforce continued coverage, and to convey this information to consular officials worldwide, with no additional resources provided in this bill to fund this additional administrative burden on the States.

The long-term care insurance requirement is especially problematic. The long-term care insurance industry is in its infancy. Availability, type and quality of benefits, consumer safeguards, and regulation by State insurance departments all vary widely. It is not known whether current premiums will provide sufficient revenue to pay promised benefits many years in the future.

In addition to our other concerns, we believe the insurance mandate's costs would effectively allow only wealthy American families to reunite with their immigrant parents. For everyone but the wealthy, the cost of the required health insurance products would be prohibitively expensive. Our preliminary estimates indicate that, for parents age 65 and over, premiums for Medicare comparable to acute care coverage plus minimally acceptable long-term care policy would average between \$7,000 and \$13,000 per person per year. Immigration laws should serve to strengthen U.S. citizen families. This section, however unintentionally, erects an unnecessary barrier to U.S. citizens being reunited with their parents.

SECTION 102 allots no more than 85,000 visas to the spouses and minor children of lawful permanent residents and eliminates or greatly narrows the other family-sponsored preference classifications in current law -- i.e., unmarried adult sons and daughters of citizens (1st preference), married sons and daughters of citizens (3rd preference), unmarried adult sons and daughters of permanent residents (2B), and brothers and sisters of adult citizens (4th preference).

The Administration supports retention of the current preference for spouses and minor children of lawful permanent residents. The Administration estimates that new demand for spouses or children of lawful permanent residents will remain about 85,000 per year for the next five or so years. We recommend allocating 100,000 visas for spouses and children of lawful permanent residents to accommodate anticipated demand and provide any remaining visas (100,000 minus the estimated 85,000 per year) to help reduce more quickly the comparatively small number of relatives in the second preference backlog who are not sponsored by a legalized alien (roughly 20 percent of the current second preference backlog).

The Administration also strongly supports retention of the first and third preferences at current admission levels. As discussed in Commissioner Meissner's testimony before the Subcommittee on September 14, 1995, this is consistent with protecting the interests of U.S. citizens, and can be accomplished within a framework that lowers the overall level of legal immigration and reduces the second preference backlog.

The Administration's underlying policy objective of a moderate reduction in overall admission numbers necessitates the suspension of visas for future fourth preference applicants until subsequent review by Congress as contemplated under Section 115. During the subsequent review, Congress should decide whether future immigration and economic trends allow any room under the overall ceiling for new fourth preference admissions consistent with the framework, priorities and principles we have outlined.

For brothers and sisters of United States citizens who have already applied and are waiting in the backlog, we want to work with Congress to develop a way to verify the number of visa petitioners currently in the backlog and to reach agreement on an appropriate grandfathering process that is consistent with our overall framework, priorities and principles.

Immigration law has long recognized the fundamental importance of reducing the backlog of family reunification immigrants who are waiting for visas, particularly close family members of United States citizens. These United States citizens have submitted petitions and paid fees to the United States to allow their close family

members to immigrate, and the federal government has approved these petitions. The United States citizens who have applied on behalf of their family members have "played by the rules" and have chosen to wait, in some cases nearly two decades, in order to be legally reunited with their family.

SECTION 103 changes the employment-based preference classifications, eliminating the unskilled worker category and reorganizing the remaining employment-based preferences into two categories: those subject to the labor certification requirements and those who are exempt. It eliminates the five existing employment-based preference classifications and substitutes the following classifications that do not require labor certification: aliens with extraordinary ability, certain multinational executives and managers, investors, and special immigrants. Professionals with advanced degrees, professionals with baccalaureate degrees, and certain skilled workers with five years experience outside of the United States would still require labor certification. This section also specifies that the last three classifications would face two additional requirements: first, they would be required to pass an English proficiency test; second, their lawful permanent resident status would be conditional for two years.

This section allocates 90,000 visas for employment-based preferences which are to be allocated in the order listed above with each successive category eligible only for the number of visas not used by the previous category. The "professionals with advanced degrees" and "professionals with baccalaureate degrees" categories each inherit one half of the "fall down" from the preceding categories that are exempt from labor certification requirements. This "fall down" scheme does not apply to the special immigrant category, which is limited to 5,000. This section would also remove the existing authority for the Attorney General to waive the requirement of a job offer for advanced degree holders.

The Administration supports the exclusion of unskilled immigrants from the employment-based immigration system and the repeal of the diversity visa category of admission. We also support the general structure of the employment-based immigrant preferences contained in the bill. The bill generally does not dictate admission ceilings for each of the preference categories and thereby retains desirable flexibility to accommodate future changes in demand. In this regard, we question the necessity and value of allocating visa numbers between the categories including "members of the professions holding advanced degrees" and "professionals with baccalaureate degrees."

The Administration also has several concerns about the elimination of the category of "outstanding professors and researchers" and the impact it would have on research

universities, colleges, the National Institutes of Health (NIH) and recipients of NIH funding. It is the only category specifically targeted to scientists and academics. If the majority of researchers are classified as individuals with "extraordinary ability," they would be given immigration preference, and at current levels of employment-based immigration, the impact on research institutions would be minimal. However, if significant numbers of researchers were classified as "aliens who are members of the professions holding advanced degrees," they would receive lower immigration priority using the proposed formula, and the negative impact on research institutions could be significant. Therefore, the Administration supports retaining the first preference treatment of "outstanding professors and researchers" as under current law.

The Administration believes that most of the changes in minimum qualifications and experience required of employment-based immigrants who would be subject to labor certification are positive. However, the new minimum qualification of English language proficiency for certified workers is, notably, is not required of employment-based immigrants who would not be subject to labor certification, including multinational executive and managers, investors, and "special" immigrants. The Administration believes that this is an unnecessary measure in managing employment-based immigration and, where it is a bona fide occupational requirement, is a requirement which would best be left to the employer; thus, since the requirement is unnecessary, it should be dropped from the bill.

The Administration opposes the provision that requires three years of work experience outside the United States. Rather than focusing on the number of years of work experience required, the Administration suggests more narrowly tailoring any new restrictions to address the use of work experience of all kinds in a nonimmigrant status that can lead to adjustment of status and employment -- a back door to legal immigration. This could include disallowing any work experience gained with the petitioning employer (to break the misuse of the work experience connection), and certainly any experience gained if the prospective immigrant resided and worked illegally in the United States, including as a visa overstayer. We would be pleased to work with the Subcommittee staff to develop other ways to address the essential objective of this proposed requirement that would better conform to the reasonable needs of American workers, employers, and employment-based immigrants.

Section 103 includes the concept of "conditional status" applicable to all employment-based immigrants who are subject to labor certification. The Administration supports the goal of ending abuse of the employment-based immigration categories, but must restate its strong belief that this new scheme raises grave concerns. We urge the Subcommittee to reconsider its proposal. The Administration is concerned that the proposal would bind the immigrant to an employer for two years, creating the

potential for exploitation in the workplace.

Under current law, employment-based immigrants gain lawful permanent resident status on entry (or adjustment of status) and all the rights attendant to such status, including freedom of movement in the labor market. "Conditional" status would bind the immigrant to the employer, and at the end of the two-year period the immigrant would have to petition for removal of "conditional" status and obtain the cooperation of the employer to appear for a personal interview to demonstrate that the worker had remained employed by the employer and had continued to receive the required wage during the prior two year period. This requirement could easily foster a great, and entirely avoidable, potential for workplace exploitation.

If one assumes that obtaining lawful permanent resident status is a primary motivation for employment-based immigrants, this "conditional" status gives the employer tremendous power over the worker -- extending beyond any period of employment in nonimmigrant status during which the worker is also bound to the specific employer (but, in some cases at least, is better protected under the law).

The bill acknowledges the possibility of such exploitation by providing for waiver of the two-year employment requirement as in the case of an "unfair labor practice that was causing or threatening to cause significant injury to the alien." This standard is very difficult to apply, and the bill seems to overlook the problem of how such unfair practices would ever be identified if there are no involved parties with any interest in preventing or exposing possible exploitation, with the possible exception of any similarly-employed U.S. workers who might somehow become aware of the situation. At the same time, the troubled employment relationship would either continue while the issue is contested, investigated, and adjudicated, or would -- more likely -- be terminated by the employer, leaving the worker without a means of support, at least temporarily. In addition, it seems grossly unfair to punish an immigrant worker for the employer's violation of the wage requirement, particularly when the employer suffers no penalty except for the eventual loss of the immigrant worker and, presumably, its contribution to the training fund.

For all these reasons, the Administration opposes the creation of "conditional" status for employment-based immigrants. Because employment-based immigrants are frequently not paid the wage promised in the labor certification, and often actually are employed in a lesser capacity than described in the certification application, we believe that these problems should be effectively addressed through the enforcement mechanism discussed below.

The bill states that the wage requirement that must be maintained during the period of

such conditional status is "105 percent of the prevailing compensation for individuals in such employment (including wages, benefits, and all other compensation)." It is unclear in the bill whether this is contemplated to be an obligation fixed at the time of application, or one which reflects changes in prevailing compensation which occur during the two-year period. If the former, this could adversely affect similarly-employed U.S. workers. Further, we strongly believe that the employer's wage obligation -- with or without "conditional" status -- should include consideration of the wage level that the employer actually pays similarly-employed workers (in addition to the prevailing wage level) so that such workers' wages cannot be undercut if they exceed the prevailing wage. (In this regard, it appears that the bill's references to the employer's wage obligation during "conditional" status -- on page 20, ref. 212(a)(5)(A)(ii), and on page 24, ref. 212(n)(1)(A) -- are inconsistent.)

The Administration recommends that Congress clarify the meaning of several phrases and terms used in this section that are problematic for adjudication of visas. For example, the phrase "potential for extraordinary achievement" is vague and difficult to establish during adjudication of the visa request. We suggest that the language could simply require the documentation listed later in the paragraph (p. 9, line 13).

The Administration supports inclusion of a definition of multinational company as a way to reduce fraud. We believe, however, that the threshold numbers in S. 1394 are too low to have much impact. We also note that the term "substantially common ownership" (p. 12, line 4) is vague and would be hard to use in adjudication.

The Administration also believes that it is not necessary to eliminate the "targeted area" provision in the employment creation category. This provision was enacted in order to facilitate job creation and investment in rural areas of high unemployment, areas which had difficulty competing for domestic investment dollars and where jobs for American workers are needed most. It provides an alternate means to attract job creating investment dollars into local communities and recognizes that smaller infusions of investment capital are necessary in order to promote job creation in rural America and depressed inner cities.

SECTION 104 establishes new labor certification systems which would replace the current system. Both of the new labor certification systems proposed (discussed further below) would require the employer applicant to pay a fee which would provide a market-based mechanism to encourage employers to look first to the U.S. -- rather than the international -- labor market to meet their employment needs. The fee would also serve, over time, to increase the supply and competitiveness of U.S. workers with the requisite skills to meet these needs. Employers would be required to pay a fee equal to 25 percent of the value of the prospective immigrant's annual compensation

into a private fund certified by the Secretary of Labor as dedicated to the goal of increasing U.S. worker competitiveness.

This section provides that, as one alternative, the employer also certify that it attempted to recruit a United States citizen or lawful permanent resident for the job offering compensation of at least 105 percent of the prevailing compensation for such employment. The section further provides that, as the second alternative system, if the Secretary of Labor determines that a national labor shortage exists with respect to an occupational classification, certification for petitions for that classification shall be deemed to have been issued. Conversely, if the Secretary of Labor determines that a labor surplus exists with respect to an occupational classification, petitions for that classification may not be issued. Any person may petition the Secretary of Labor for a surplus or shortage determination.

The Administration strongly supports reform that relies on market-based mechanisms. The Administration endorses the training fee, and the training fund which would be built from these fees, as the principal mechanism for ensuring that U.S. employers undertake appropriate efforts to first recruit, retain and retrain U.S. workers to meet their employment needs.

Employment-based immigration to fill skill shortages, as well as the temporary admission of skilled foreign workers, is sometimes unavoidable. But the Administration firmly believes that hiring foreign over domestic workers should be the rare exception, not the rule. And we believe that such exceptions should become even rarer, and more tightly targeted on gaps in the domestic labor market than is generally the case under current law. If employers must turn to foreign labor, this is a symptom signaling defects in the Nation's skill-building system. Our system for giving access to global labor markets should be structured to remedy such defects, not acquiesce to them. Our immigration system should progressively diminish, not merely perpetuate, firms' dependence on the skills of foreign workers.

Our primary public policy response to skills mismatches due to changing technologies and economic restructuring must be to prepare the U.S. workforce to meet new demands. Importing needed skills should usually be a short-term response to meet urgent needs while we actively adjust to quickly changing circumstances. In this larger context, the Administration supports a shift towards an immigration system which relies more on market-type incentives to discourage employers from abandoning the domestic workforce in favor of foreign labor while, at the same time, making it less necessary for them to do so. A fee levied on employers sponsoring skill-based immigrants, with the proceeds dedicated to building the skills and enhancing the competitiveness of U.S. workers, forges an admirably direct and efficient link between

the problem of skill shortages and the only valid long-term solution -- investment in the U.S. workforce.

Requiring employers to make a meaningful contribution to the training of U.S. workers as a prerequisite to gaining access to a foreign worker -- so that skill-based immigration will become ever less necessary over time -- makes sound public policy sense. Our immigration policy must provide real incentives for business to commit to American workers and develop the domestic workforce for the high-skill jobs and high-performance workplaces of the future while at the same time providing a safety valve of access to foreign labor markets to meet skill demands that the U.S. workforce cannot supply in sufficient quantity or with sufficient speed.

The bill sets the required fee at "25 percent of the value of the annual compensation (including wages, benefits, and all other compensation) to be paid to the alien whose services are being sought." An employer's financial contribution to the fund (the fee) must create a real incentive for employers to look first to the domestic labor market to recruit, retain, and retrain U.S. workers. In addition to creating an incentive to develop U.S. workers, the fee contribution should create a disincentive for employers seeking lower-skilled immigrant workers. We have examined the wage distribution of immigrant workers subject of labor certification in fiscal years 1993 and 1994; the large majority of immigrant workers in those years were to earn between \$15,000 and \$50,000. We have already pointed out to the Subcommittee that if the amount of the fee that an employer must pay equates proportionately to the value of the compensation package it will provide the immigrant employee, this builds in incentives to keep these compensation costs as low as possible, creating the potential for abuses as well as undermining the wages and benefits offered similarly-employed U.S. workers. In addition, it creates an incentive for employers to seek lower-skilled, lower-paid immigrant workers, which works against the basic thrust of our employment-based immigration policy. On the other hand, a flat dollar amount fee allows employers of higher-skilled, higher-paid workers to pay a comparatively small fee that would have less effect in creating the proper incentives/disincentives.

In addition, the legislation should clarify that an employer's training fee be a genuine incentive; that is employers should not be able to satisfy the fee requirement by pointing to existing training that they may fund. The training fee provides a weak incentive, or no incentive at all, to invest in U.S. workers if employers can simply reduce its value by counting existing expenditures for training and education to satisfy their fee requirement. Further, as contemplated by the bill, employers must be expressly prohibited from shifting the cost of the fee to the immigrant worker, either directly or indirectly. Such a provision will restrain, although not entirely block, employers that want to exploit immigrant workers or "game" the training fee

requirement. The Administration supports the mechanisms contained in the bill to prevent and penalize such cost-shifting, although reimbursement to the worker should be made either by the fund or by the employer as appropriate to the circumstances. In addition, in order to assure that employers do not recover the cost of the fee by reducing wages -- and as an appropriate safeguard of the wages and working conditions of similarly-employed U.S. workers -- employers of immigrant workers must be required to pay the immigrant worker the higher of 105 percent of the local prevailing wage or the actual wage paid to similarly-employed U.S. workers. These provisions are currently absent from the bill and the Administration urges that they be incorporated.

With respect to the structure of the training fund itself, the bill refers to a "private fund certified by the Secretary of Labor as dedicated to the goal of increasing the competitiveness of [U.S.] workers ... and reducing the dependence of employers on new foreign workers, by making grants for education or training, or for other purposes consistent with such goal." The Administration is concerned about the use and structure of the training fund. At present the bill is unclear about how the fund would accomplish its stated goals and how it would be managed. The Administration would like to work with the Committee to develop a criteria for the use of fund monies that achieves the goals of the bill and a workable fund structure that provides the accountability that the public expects.

Also, due to the uncertainty of the Federal government's employment and training structure, the Administration would like flexibility in assigning the responsibility of managing the criteria for the use of the fund. Thus, the Administration would like the reference to the Secretary of Labor in this instance changed to the "the Secretary of Labor and other departments as designated by the President."

Also, the bill suggests that this would be a single fund, but the Subcommittee Chairman's introductory statement creates some ambiguity in this regard by stating that, "... fees would be paid into private, industry-specific funds, which would use the money to finance training or education programs or in other ways to reduce the industry's dependence on foreign workers." The Administration would like the Committee to consider the benefits of a single, consolidated, national training fund.

Under such a structure, use of the training fund's resources would be more easily audited because all disbursements would be made from a single source. The training fund's resources could also be used more flexibly and strategically -- training fund resources could be directed to meet a broad range of training needs rather than the needs defined by particular employers (e.g., basic skills training vs. occupation- or employer-specific training). In any case, the scope and content of the certification

process as contemplated by the bill should be left to regulations; the issues involved in the certification criteria are simply too complicated to address in legislation. Also, greater flexibility will ensure that the goals of the training fund are achieved over time as the best means to regulate the fund and to adjust certification standards accordingly become apparent.

Consistent with this framework, a nexus between the disbursement of the training fee's proceeds and the labor shortage being addressed by the immigrant workers is needed. However, it is important to take a broad view of the problems that cause domestic skills shortages. Accordingly, the Administration believes that the bill should encourage, but not require, the use of the funds generated by the fee for training for the occupation in which the immigrant workers will be employed; broader use, including basic skills training -- but excluding anything that does not directly involve human resource development -- should be permitted.

The training fee requirement in the bill should not preclude the assessment of additional fees to cover the cost of administering and enforcing the requirements of this immigration program. In these stringent budgetary times, it would be best if taxpayers do not have to foot the bill for the cost of providing the benefits received by employers and immigrants who use this system. The assessment of user fees to cover these costs should be expressly authorized.

As previously noted, the training fee/fund is a common component of the two new labor certification systems established by the bill. One of these systems supplements the training fee with a labor shortage/surplus determination system. The Administration opposes an employment-based immigrant admission system based on labor shortage/surplus determinations.

Under this system, if the Secretary of Labor found and declared that a national labor shortage exists in an occupational classification, certification for that occupation "shall be deemed to have been issued" provided that the training fee has been paid. On the other hand, if the Secretary found and declared that a national labor surplus exists in an occupational classification, certification could not be issued for that occupation.

This system parallels one used under the current labor certification system (though somewhat more ambiguously). Nonetheless, the Administration has -- as we have expressed on numerous occasions, including the Subcommittee hearing -- serious concerns about the technical feasibility of this approach which may make it unworkable. Based on our experience with a parallel "labor market information" pilot program a few years ago, while simple in concept, this approach is terribly complex and difficult in execution given its essential dependency on labor market information

which is insufficient for this purpose. While the bill contemplates that such labor shortage/surplus findings would be based on evidence presented by parties seeking to establish the existence of national occupational shortages/surpluses, the very best data available has -- in our view -- already proven ill-suited and not sufficiently up-to-date nor sensitive to circumstances in the localities where immigrant workers are actually being sought. Development of current labor market information on a locality basis would be prohibitively costly. Also, a complete exclusion rule tends to be a much blunter tool than is necessary to redress the abuses with which we should be concerned.

The other new labor certification system created under Section 104 of the bill would replace the current system with one which requires the Secretary of Labor to certify that, in addition to making its training fee contribution, the prospective employer has attempted to recruit a U.S. worker for the job in which the immigrant would be employed. Recruitment procedures must meet industry-wide standards and offer a total compensation package equal in value to at least 105 percent of the prevailing compensation package for such employment.

The bill would require the Secretary to certify that the prospective employer had attempted to recruit "a" U.S. worker -- in the singular -- for the job. Certainly the bill must intend that the employer recruit in the domestic labor market, and not tolerate a situation where, for example, an employer recruited only one U.S. worker who lives in Wyoming for the job in Texas, and told the U.S. worker that she would have to pay her moving expenses to get there. This should be made explicit. Further, the bill should clearly indicate that the employer's domestic recruitment would have to be unsuccessful. The bill does not clearly say this and, in our view, it is too critical a question to leave to speculation or legislative history. In this regard, it would also be useful if the bill clarified the intended standards against which such unsuccessful recruitment would be measured to address the currently common practice of employers "tailoring" job descriptions to suit only the immigrant worker, thereby assuring that the domestic recruitment will be unsuccessful.

In its recruitment an employer would be required to offer "105 percent of the prevailing compensation for individuals in such employment (including wages, benefits, and all other compensation)." We agree that no loophole should be allowed which would permit undercutting U.S. workers' working conditions (and reduce the incentives/disincentives created by the training fee) by depriving immigrant workers of benefits that are typically provided. Yet the inherent difficulty of determining prevailing compensation packages for various occupations should not be underestimated. We have explored the availability of reliable, up-to-date information regarding total compensation by occupation and area and found very little. Further,

the development of such information can be extremely costly and burdensome, and the legislation is too vague to provide guidance. To remedy this problem (which does not occur in the context of the fee obligation) but still serve the goals stated above, we strongly recommend that the bill be revised -- wherever a "prevailing wage" payment or recruitment obligation is set forth -- to invoke 105 percent of the locally prevailing wage plus the same benefits and additional compensation provided to similarly-employed workers by the employer.

As noted, the bill does not indicate that prevailing wage determinations would be made for the area where the immigrant will be employed. This deficiency, which we have previously pointed out, will create undesirable and probably unintended consequences. For example, employers in major metropolitan areas -- where wage rates and benefits tend to be higher -- could be encouraged to use the system due to their advantage of being able to recruit by offering compensation packages that meet the 105 percent test -- against a nationally prevailing standard -- but which might well be less than they actually pay their U.S. workers in those locations. On the other hand, employers in lower wage areas of the country could be discouraged from using the program because they would be seriously disadvantaged by being required to recruit offering a compensation package which satisfies the test but which actually represents much more than 105 percent of what they pay similarly-employed U.S. workers in their location. However, requiring determination of prevailing compensation for an occupation only on a locality basis could be extremely resource intensive, so we again urge that the bill afford the flexibility to require determination of the prevailing wage on a local, State-wide, regional or national basis depending on the availability of reliable, up-to-date data for various occupations and industries. The Administration is still in the process of reviewing this requirement and may have additional comments.

In the Administration's view, this alternative labor certification system does not adequately protect U.S. workers from unfair competition with immigrant workers. In this regard, the Administration strongly urges that, beyond requiring unsuccessful recruitment in the domestic labor market, additional labor protections be built into the system. Most important, if employers are trying to find foreign workers to fill labor shortages caused by a breakdown in the U.S. skill development system, there can be no legitimate justification for laying off U.S. workers or using immigrant workers as strike breakers. Accordingly, the new labor certification system should include an unambiguous requirement that employers must not have laid off or otherwise displaced U.S. workers in the occupation in which the immigrant will be employed, and must not be the subject of a strike or lockout involving that occupation.

Given the serious problems with the bill's "conditional" status concept (as discussed

above) and the need to assure that the obligations of participation in the program are fully complied with by the employer, the Administration believes strongly that the bill needs to provide appropriate enforcement powers to the Department of Labor. Such enforcement powers are important not only as a safeguard for workers' rights; they also insure that the market mechanism created by the training fee/fund functions properly. For example, an employer that can avoid paying the required wage or shift costs to the immigrant worker with impunity will have defeated the market-based incentive to recruit, retain, and retrain U.S. workers. In order to ensure that the requirements of the new labor certification admission process are observed, the Labor Department must have the ability to seek out and identify employers that violate the law, assure that U.S. and immigrant workers are protected or made whole, and impose substantial penalties that will deter future violations and promote compliance. Thus, the legislation should vest the Labor Department with additional enforcement powers -- including subpoena authority, the right to seek injunctive relief, the right to initiate investigations, and whistleblower protections -- and require remedies for employer violations that include "making whole" workers injured by the violation -- e.g., reinstatement of wrongfully laid off workers -- as well as substantial penalties for violations. These specific provisions must be included in the legislation as some cannot be created by regulation or administrative action.

With respect to the bill's new labor certification process -- as amended to reflect the concerns and recommendations provided herein -- consideration has been given by the Department of Labor as to how it can best assure that employers comply with the recruitment requirement, the other requirements relating to the fee (e.g., prevailing wage, no cost shifting), and the labor protective provisions discussed above while providing timely customer service. The Department currently adjudicates employers' labor certification applications on a case-by-case basis to verify compliance with existing requirements before an immigrant worker's admission is approved. Everyone agrees, however, that the existing process is slow and costly for employers and results in U.S. workers being hired for the relevant jobs in only a small proportion of cases as a result of the existing recruitment requirement -- although about one-third of certification applications are denied and some portion of those jobs may be filled by U.S. workers. The existing process does, however, serve as a deterrent to some employers filing applications on behalf of immigrant workers. The Administration supports changing requirements for labor certification as significant mechanisms to create job opportunities for U.S. workers.

SECTION 105, unlike H.R. 2202, modifies the special immigrant classifications by adding a new category for certain disabled sons and daughters of United States citizens and lawful permanent residents. This section imposes insurance requirements upon the parent sponsor of such disabled immigrant sons and daughters similar to the

insurance requirements imposed in section 101 upon son and daughter sponsors of elderly immigrant parents.

The Administration objects to this section for reasons similar to those described in section 101 regarding elderly immigrant parents. In addition, this requirement is even more impractical than the insurance requirement for elderly parents. Private individual health insurance policies are even less likely to be available or affordable to the severely disabled.

This section also appears to offer a benefit which could, as a practical matter, only be met by a parent whose employer offers health insurance coverage that would extend to an adult son or daughter without pre-existing condition limits or exclusions. Very few parents are likely to have such coverage. While we note the exemption for changes in the sponsor's financial circumstances, this exemption would not cover changes in the sponsor's employment status or changes the sponsor's employer makes in health insurance coverage. It is also unclear who would be held responsible regarding health insurance coverage for a disabled son or daughter if the parent dies first, as would frequently be the case.

SECTION 106 would modify the effect of an approved immigrant visa petition by providing that the approval of an immigrant classification petition does not relieve the alien of the burden of proving to a consular officer that he has established eligibility to receive an immigrant visa in all respects. This section further provides that the denial of an immigrant visa by a consular officer, notwithstanding the presence of an approved petition, is non-reviewable.

Although the Administration supports efforts to prevent the issuance of visas based on the presentation of fraudulent immigrant visa petitions, section 106, as currently drafted, contains numerous ambiguities and does not appear to achieve that result. For example, under section 212 of the INA, the mere presentation of a fraudulent visa petition does not automatically constitute a basis for denying a visa. Section 106 appears to reiterate the existing authority of consular officers to deny visas, rather than conferring additional authorities. At the same time, it raises questions as to what is meant by "appropriate action" in cases where a petition is returned to the INS. Would the INS be required to revoke the petition upon its "return to the Attorney General"? If so, would the revocation be subject to review? We would be happy to work with the Subcommittee to clarify this section.

SECTION 107 would establish limitations and conditions on judicial review of agency actions relating to petitions for a visa or adjustment of status. The Administration believes these limitations and conditions on judicial review should include both

immigrant and nonimmigrant visa decisions. The Administration also believes that, because the petitioner seeking relief under this section may be a U.S. citizen, the venue should lie in the district in which the petitioner resides. The requirement that the venue for these matters lies only in the U.S. District Court for the District of Columbia may also overburden this court, which in any case, does not have a particular history or expertise in immigration matters over the other federal courts.

SECTIONS 108 AND 109 contain conforming amendments and repeals and transition provisions, respectively.

SECTION 111 establishes a worldwide numerical limitation on family-sponsored immigration of 85,000, plus any visas authorized for backlog reduction under section 114 (2nd preference). The Administration strongly supports its own framework for legal immigration reform as set out in Commissioner Meissner's September 14 testimony before the Subcommittee. The administration's framework lowers the level of legal immigration while providing stronger support for family reunification principles.

SECTION 112 establishes a worldwide numerical limitation on employment-based immigration of 90,000 per year. The Administration testified before the Subcommittee that we support an admission level of 100,000, which represents a substantial reduction from current law (140,000) but which allows U.S. employers to hire the employees they need to remain competitive in the global market. While we appreciate that the somewhat lower level in S. 1394 could help tighten certain labor markets and encourage employer efforts to invest in developing the domestic labor market to meet future skill demands, it may be too low in the short term.

SECTION 113 changes current law on per-country limits, providing that the level of family-sponsored and employment based immigrants may not exceed 20,000 for non-contiguous foreign states, 40,000 for contiguous foreign states, or 5,000 for dependent areas. This limit would be reduced for a country in any fiscal year by the number of immediate relatives above 20,000 (or 40,000 for contiguous countries and 5,000 for dependent areas) admitted during the prior year. Immigrant visas made available to spouses and minor children of lawful permanent residents for backlog reduction are exempt from the per country limit.

The Administration has reservations about changing the nation's policy of equity among all countries, including our contiguous neighbors. Per country ceilings may also create problems because of the increasing number of naturalizations and their resulting impact on immediate relative petitions. We hope to work with the Subcommittee to explore the full potential impact of these and other changes in levels

of admissions.

SECTION 114 creates a special "transition" program to reduce the backlog of spouses and minor children of lawful permanent residents, calling for 150,000 visas in the first year and the lesser of 150,000 or the difference between the total level of family-sponsored immigration (including immediate relatives) for the prior fiscal year and the same numbers for fiscal year 1995. These visas are to be made available first to relatives of aliens who did not become lawful permanent residents due to IRCA's legalization programs. If the Subcommittee is not fully aware of the INS' increasing capacity and commitment to backlog reduction through naturalization we invite and urge the Subcommittee to provide the INS with the opportunity to brief the Subcommittee.

The Administration strongly favors relying on its naturalization initiative to reduce the backlog of spouses and minor children of lawful permanent residents, rather than creating a special program.. We estimate that 80 percent of the backlog consists of relatives of aliens who became lawful permanent residents through IRCA's legalization programs. With this Administration's commitment to improve the naturalization process, these aliens have an opportunity to step forward affirmatively to become U.S. citizens. Upon taking that step, they may petition for their spouse and minor children as immediate relatives of a U.S. citizen. The 20 percent of the backlog who are not relatives of legalized aliens should have preference for visas in this category.

SECTION 115 calls for Congress to review the annual numerical limitations on family-sponsored and employment-based immigrant classifications after the present backlog of spouses and minor children of permanent resident aliens has declined to 10,000 or 5 years after enactment, whichever comes later. It also creates special procedural rules for consideration of such legislation. The Administration supports congressional review of immigration levels after 5 years. We do not believe, however, that the decline in second preference backlog numbers to 10,000 is a valuable triggering mechanism for review. We urge the Subcommittee to consider the Administration's legal immigration reform proposal that maintains the integrity of the family preference categories and does not require a substantial overhaul of the system because of special transitory attention given to the second preference backlog.

TITLE II - NONIMMIGRANTS

The Administration agrees with the general objective of the nonimmigrant program changes in S. 1394 to address abuses in the program and provide adequate protections to U.S. workers. However, there are a number of provisions that require additional review with regard to their consistency with U.S. trade agreement commitments.

Sections 201-203 of the bill, for example, propose changes to various visa categories - including H-1B and L -- for which the United States has undertaken international obligations under the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) and the North American Free Trade Agreement (NAFTA).

SECTION 201 changes the H and L immigrant classifications to eliminate the "dual intent" standard which was implemented through the Immigration Act of 1990, and to limit the maximum length of stay of L, H-1B and H-2B nonimmigrants to three years. The Administration strongly supports the limitation on length of stay in the H visa programs as comporting with the "temporary" nature of these nonimmigrant visa categories. As a result, H-2B visa holders are currently subject and will remain subject to recertification by regulation on at least an annual basis.

SECTION 202 makes important changes to the H-1B nonimmigrant visa category which allows the admission (or adjustment) of foreign "professionals" to be employed in "specialty occupations" (as well as fashion models of distinguished merit and ability). As you know, the Administration has long and vigorously urged amendment of the H-1B admission criteria, consistent with our GATS and NAFTA commitments, to effectively address real abuses in the program and assure adequate protection for U.S. workers.

The bill's amendments to the H-1B program would require an employer seeking to employ such nonimmigrants to pay a fee into the training fund to increase the competitiveness of U.S. workers and reduce dependency on new foreign workers. In addition, such an employer would be required to attest that:

- it will pay a total compensation package that is the higher of the package paid similarly-employed U.S. workers or 105 percent of the prevailing compensation for the occupation;
- during certain periods it has not or will not lay off U.S. workers in the occupation unless it pays the nonimmigrant workers a higher compensation package than was paid to the laid off U.S. workers;
- it has attempted to recruit a U.S. worker for the job using industry-standard recruitment procedures and offering the higher of the actual or prevailing compensation package; and,
- it has and will take timely, significant and effective steps to recruit and retain U.S. workers to reduce its dependence as quickly as reasonably possible on foreign workers.

The Administration opposes the mandatory foreign work requirement but will work with the Committee to address their concerns in this area.

Further, "job contractors" seeking to use the program would be precluded from placing H-1B nonimmigrant employees at worksites of customers which had not also attested to complying with the H-1B criteria. In addition, the bill would change the minimum qualifications of H-1B workers to include "2 years experience in the specialty outside of the United States after obtaining the most recently received bachelor's or higher degree," and it would establish new guidelines for prevailing wage determinations applicable under the program.

The Administration appreciates and generally supports the objectives of these amendments. We fully support the provision on job contractors contained in the bill. This provision is a significant improvement over the comparable provision in H.R. 2202 and will improve protections for U.S. workers. The Administration is still in the process of reviewing ~~this requirement~~ and may have additional comments. We must point out, however, that the H-1B program amendments raise a variety of technical and international agreement issues that need to be examined carefully.

the H-1B program amendments

The Administration would strongly urge that the amendments it had previously proposed -- particularly with respect to the displacement of U.S. workers -- be substituted for those in the bill. The H-1B program amendments we requested in 1993 were carefully designed to assure continued business access to needed high-skill workers in the international labor market while adequately protecting U.S. workers and the businesses which employ them. These amendments are targeted especially to those employers who seek to obtain relatively low-skilled "professional" workers. Specifically, in nearly all situations it is entirely unreasonable that an employer in this country -- as a matter of public policy -- not only does not have to test the domestic labor market for the availability of qualified U.S. workers before gaining access to foreign workers, but is actually able to lay off U.S. workers to replace them with temporary foreign workers in their own employ or through contract. This is exactly what is happening now; our public policy tolerates it, perhaps encourages it, and our policy must change.

One of the changes contained in S. 1394 would require employers filing H-1B applications to attest that they have not laid off workers with substantially equivalent qualifications and experience in the specific employment for which an H-1B nonimmigrant is being sought during limited time periods unless the employer pays an actual wage to each nonimmigrant that is at least 105 percent of the mean of the last compensation package received by the laid off U.S. workers. As noted, this proposed change takes a small step towards one of the modifications in the H-1B program which the Administration previously requested -- to prevent U.S. workers from being laid off or otherwise displaced by nonimmigrants -- but it is not as purposeful as the change the Administration had requested. The bill does not prohibit an employer from laying

off U.S. workers to replace them with nonimmigrant workers during certain time periods, it merely provides a modest disincentive to doing so. That does not go far enough. In essence, the bill would permit an employer to buy a license to lay off U.S. workers by paying a premium wage to temporary foreign workers. The bill should contain a clear and unambiguous prohibition on such lay-offs of U.S. workers.

A second amendment we proposed in 1993 would impose a requirement that employers of H-1B workers attest that they have and are taking timely and significant steps to recruit and retain U.S. workers in the jobs in which they seek to employ H-1B nonimmigrants. The "recruitment of United States workers" provision in the bill should be incorporated within the "steps to end dependence on foreign workers" provision, and it is quite important that, if "significant step[s] reasonably designed to recruit and retain" U.S. workers are to be included in the bill, they should be both new actions by the employer and meaningful.

With respect to the technical problems in these amendments, one example occurs in the bill's lay-off disincentive provision where -- presumably based on an earlier version of H.R. 2202 -- reference is made to "protected individuals (within the meaning of 274B(a)(3))." This reference would exclude from protection lawful permanent residents who had not applied for citizenship within six months of the date they first become eligible. This is inappropriate in the context in S. 1394, though it is not in the context of the anti-discrimination provision of 274B; it has been corrected in H.R. 2202 and needs to be corrected here. Further, we cannot discern the intended purpose or effect of the proposed amendment to section 212(n)(2) on page 62 of the bill. This section also lacks corresponding amendments to the program's penalty provisions reflecting the addition of the new attestation elements.

The Administration may have additional comments on section 202(d) of the bill.

SECTION 203 makes changes to the L visa criteria including limiting the availability of the visa to employees of "multinational firms" as defined in section 103(a)(1)(B)(ii), and increasing the length of time an employee must be employed by a multinational firm outside the U.S. prior to application. Although the Administration supports the goal of reducing fraud, these particular provisions require further review with regard to their consistency with U.S. international obligations.

SECTION 204 changes the B, F, J, and M nonimmigrant classifications to limit the duration of admission for student visa holders to the proposed period of study or participation in the sponsoring exchange program. It also excludes from eligibility under the F classification persons studying English for six months or less and persons attending public elementary or secondary schools.

The Administration suggests amending the language in Section 204 (a)(2) as follows:
"(2) a nonimmigrant under section 101(a) (15) (J) shall be admitted for the length of time necessary to complete the nonimmigrant's exchange program, but in no event shall such admission exceed the maximum duration of stay permitted by regulations promulgated by the Director of the United States Information Agency."

The amendments in sections 204 (b)(2)(A)(ii) and (B) would prevent a nonimmigrant student from obtaining a student visa in order to attend a public elementary or secondary school, although that student could obtain a student visa to attend a private elementary or secondary school. Nonimmigrant students other than those who entered the U.S. on a student visa, or who are here temporarily for business or pleasure, could still apply to attend public elementary or secondary schools. We have strong concerns about drawing distinctions among elementary and secondary students solely on the basis of whether they are attending a public or private school -- a distinction that does not appear to take into account the fact that some public school districts charge nonresident fees to students from outside the district. The schools that these students seek to attend must agree to report on the withdrawal of nonimmigrant students before the visas can be granted, thereby essentially agreeing to the students' attendance, and if the public schools are willing to enroll these students, their student visas should not be denied. We would like to work with the Subcommittee to address this issue.

SECTION 205 establishes a pilot program to collect information from colleges and universities, establish an electronic tracking system of nonimmigrant foreign students, and make this information available to selected U.S. embassies and consulates. The information would include whether an alien is enrolled or has been accepted for enrollment, the alien's current U.S. address, whether the alien is studying full-time or part-time, and whether he or she is making normal progress toward the degree. The pilot would be funded by processing fees assessed by the Department of State and the Attorney General.

The Administration is currently working on an improved tracking system through the INS' Student Controls Task Force and believes that this approach is better than the one proposed in this bill. INS does not need to know when a student is placed on academic probation. The INS needs to know only when the student is still a full-time student, whether the student has interrupted his/her education, ceased attendance, or otherwise violated student status. Currently, these institutions are required to report only the withdrawal of students with student visas so this provision would increase the reporting burden on institutions. The Administration would like to work with the Subcommittee staff to develop appropriate language to support implementation of a revised, efficient tracking system.

Currently, the bill requires, in subsection (f) (on page 70) a report on the feasibility of expanding the program to cover the nationals of all countries, but then, subsection (g) (same page), requires that, not later than six months after the submission of the report, expansion of the pilot program to cover the nationals of all countries must begin and be completed within one year after submission of the report.

The bill also should clarify that the fee it proposes is in addition to the fee currently collected for normal processing which goes to the Exams Fee Account. There should be clearer definition of the appropriate distribution and collectors of the fee. The Department of State should collect the money and the proceeds should be divided between the Department of State and the Immigration and Naturalization Service based on the costs which they respectively incur.

The bill currently does not specify that a fee will be collected for processing the J visa, and we oppose such a fee because it would adversely impact that group of J visitors that can least afford an additional fee, i.e. students. We are especially concerned about the impact the processing fee would have on government-funded programs, unless they are exempted. Government sponsored exchange programs would, in all likelihood, absorb this fee and thereby incur increased programming costs. However, for USIA to participate in the pilot program, incorporating the J visa exchange visitors, would require additional appropriations.

We also recommend modifying the language of the clause referring to J visas in (h) at line 5 to read "...or as a condition of their continued designation as an exchange visitor program by the Director of the United States Information Agency under section 101 (a) (15) (J) of such Act."

TITLE III - EFFECTIVE DATE

SECTION 301 establishes that the effective date of the Act is October 1, 1996, unless otherwise provided.

Mr. Chairman, we appreciate the continued support of this Committee for the initiatives taken by this Administration on urgent immigration matters. We want to continue to work with you on bipartisan immigration improvements legislation that is in the national interest. We look forward to working with you to address all of these issues.

The Office of Management and Budget has advised that there is no objection to the subcommission of this letter from the standpoint of the Administration's program.

Sincerely,

**COPY FOR YOUR
INFORMATION**

Andrew Fois
Assistant Attorney General



Final

Office of the Deputy Attorney General
Washington, D.C. 20530

February 14, 1996

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Hatch:

This letter presents the views of the Administration concerning S. 1394, the "Immigration Reform Act of 1995" as reported out of the Subcommittee on Immigration (Subcommittee) on November 29, 1995.

While the Administration strongly supports reform of the current immigration law that affects both illegal and legal immigration, and S. 1394 contains numerous responsible and thoughtful reforms, S. 1394 raises considerable concerns in specific areas that we hope the Committee will examine thoroughly before reporting the bill to the Senate floor. In particular, employment eligibility verification systems should contain necessary privacy protections and be piloted before any nationwide implementation. We urge the Committee to adopt our proposal to pilot programs for 3 years and then request Congressional authorization to implement only those pilot projects that work. Any increases in penalties for and enforcement of employer sanctions should be similarly increased for enforcement of laws against immigration related employment discrimination. The intentional discrimination standard in the document abuse provision of S. 1394 will severely undermine anti-discrimination enforcement. Labor and immigration law enforcement should be increased and coordinated. S. 1394 should adopt our proposal to hire 202 Department of Labor (DOL) Wage and Hour Staff to investigate and prosecute labor standards and employer sanctions violators. The birth and death registry provision presents myriad constitutional, operational, and programmatic concerns and would impose a tremendous unfunded mandate on states and localities as well as a major burden on private individuals, such as having their fingerprints and Social Security numbers added to their birth certificates by age 16.

Expedited exclusion procedures should be established in extraordinary situations the Attorney General deems appropriate. Imposition of a 30 day time limit in which to apply for asylum would create needless protracted litigation on the issue of when

The Administration's underlying policy objective of a moderate reduction in overall admission numbers, coupled with granting highest priority to closest family members, supports the suspension of any new applications for fourth preference category admissions until subsequent review by Congress as contemplated under section 315. During this period, the Administration proposes to examine in greater detail this category and the nature of its existing backlog to better evaluate its role in national immigration policy. This examination would help guide Congress in its subsequent review to determine whether future immigration and economic trends allow room under the overall ceiling for new fourth preference admissions consistent with the framework, priorities and principles we have outlined.

For U.S. citizens, whose brothers and sisters have already applied and are waiting in the backlog, we support and want to reach agreement with Congress on an appropriate and equitable grandfathering process that is consistent with our overall framework, priorities and principles.

Reducing the backlog of family reunification immigrants who are waiting for visas, particularly close family members of U.S. citizens, is of fundamental importance in immigration law. These U.S. citizens have submitted petitions and paid fees to the U.S. to allow their close family members to immigrate, and the federal government has approved these petitions. The U.S. citizens, who have applied on behalf of their family members, have "played by the rules" and have chosen to wait, in some cases nearly two decades, in order to be legally reunited with their family.

Sec. 303 changes the employment-based preference classifications, eliminating the unskilled worker category and reorganizing the remaining employment-based preferences into two categories: those subject to the labor market screening requirements and those who are exempt. It eliminates the five existing employment-based preference classifications and substitutes the following classifications that do not require labor market screening: aliens with extraordinary ability, certain multinational executives and managers, investors, and special immigrants. Outstanding professors and researchers, professionals with advanced degrees, professionals with baccalaureate degrees, and certain skilled workers with three years experience would require labor market screening. This section also specifies that these latter classifications would face two additional requirements: first, they would be required to pass an English language proficiency test; second, their lawful permanent resident status would be "conditional" for two years.

This section allocates 90,000 visas for employment-based preferences which are to be allocated in the order listed above with each successive category eligible only for the number of

visas not used by the previous category. The "professionals with advanced degrees" and "professionals with baccalaureate degrees" categories each inherit one half of the "fall down" from the preceding categories that are exempt from labor certification requirements. This "fall down" scheme does not apply to the special immigrant category, which is limited to 5,000. This section would also remove the existing authority for the Attorney General to waive the requirement of a job offer for advanced degree holders.

The Administration supports the exclusion of the unskilled immigrant category from the employment-based immigration system and the repeal of the diversity visa category of admission. We also support the general structure of the employment-based immigrant preferences contained in the bill. The bill generally does not dictate admission ceilings for each of the preference categories and thereby retains desirable flexibility to accommodate future changes in demand. In this regard, we question the necessity and value of allocating visa numbers between the categories including "members of the professions holding advanced degrees" and "professionals with baccalaureate degrees." The Administration also would eliminate the admission ceiling of 6,000 visas for outstanding professors and researchers.

The Administration is gratified that the Subcommittee added back the admission category for "outstanding professors and researchers," but notes that this category is now subject to the bill's labor market screening mechanism, though it was previously in an exempt preference category. The Administration has expressed its support for retaining first preference treatment of "outstanding professors and researchers" as under current law. In adding the "outstanding professors and researchers" category to the other categories listed in the bill as exempt from the labor market screening requirements, the Administration would give it second priority, immediately following the category of "aliens with extraordinary ability," and ahead of "certain multinational executives and managers." Consistent with the position stated in the previous paragraph, the Administration also would eliminate the admission ceiling of 6,000 visas for the category.

The Administration also is concerned that the current definition of the classification of "outstanding professors and researchers" is restricted to employment at U.S. universities, other institutions of higher learning, or a department, division, or institute of a private U.S. employer. This narrow language would not allow the National Institute of Health (NIH) and other governmental agencies to utilize this classification for recruiting truly outstanding foreign researchers to conduct research at government labs, such as the NIH. The Administration would prefer that "federal and non-profit research organizations"

be added to the list of eligible entities.

While the Administration preferred most of the changes in minimum qualifications and experience required of employment-based immigrants who would be subject to labor market screening as contained in S. 1394 before it was amended in Subcommittee, the new minimum qualification of English language proficiency for these categories of foreign workers is an unnecessary measure in managing employment-based immigration, and where it is a bona fide occupational requirement, is a requirement which would best be left to the employer. We are concerned that a federal agency would have to determine what test to use and what score passes regardless of whether the skills measured by the test are appropriate or necessary for diverse employment situations. We are also concerned by the uneven application of this requirement. S. 1394's English language proficiency is not required of those employment-based immigrants who would not be subject to labor market screening, including multinational executives and managers, investors, and "special" immigrants. We urge the Committee to delete this requirement from the bill.

The Administration is also pleased that the Subcommittee eliminated a provision from S. 1394 which would have required three years of work experience outside the United States. Nonetheless, the Administration continues to urge that new minimum qualifications requirements be tailored to address the use of work experience of all kinds while in a nonimmigrant status that can lead to adjustment of status -- a back door to legal immigration. Such measures could include disallowing work experience gained with the petitioning employer (to address misuse of the work experience connection), and certainly any experience gained if the prospective immigrant resided and worked illegally in the U.S., including as a visa overstayer. We would be pleased to work with the Committee staff to develop ways to address the essential objective of such proposed requirements.

Section 303 continues to include the concept of "conditional status" applicable to all employment-based immigrants who are subject to labor market screening. The Administration vigorously supports the goal of ending abuse of employment-based immigration categories, but must restate its strong belief that this new "conditional status" scheme raises grave concerns. We strongly urge that the Committee reconsider this provision. The Administration is concerned that the proposal, binding the immigrant to an employer for two years, creates the potential for exploitation in the workplace.

Under current law, employment-based immigrants gain lawful permanent resident status on entry (or adjustment of status) and all the rights attendant to such status, including freedom of movement in the labor market. "Conditional" status would bind the immigrant to the employer, and at the end of the two-year

period the immigrant would have to petition for removal of "conditional" status and obtain the cooperation of the employer to appear for a personal interview to demonstrate that the worker had remained employed by the employer and had continued to receive the required wage during the prior two year period. This requirement could easily foster a great, and entirely avoidable, potential for workplace exploitation.

Obtaining lawful permanent resident status is a primary motivation for employment-based immigrants. Therefore, this "conditional" status gives the employer tremendous power over the worker -- extending beyond any period of employment in nonimmigrant status during which the worker is also bound to the specific employer (but, in some cases at least, is better protected under the law).

The bill acknowledges the possibility of such exploitation by providing for waiver of the two-year employment requirement where the employer "committed illegal acts" or "so materially altered the terms and conditions on which employment was offered to and accepted by the alien, such that a reasonable person in the alien's position would feel compelled to resign the employment...." Both definitions are quite vague and extremely difficult to apply. In addition, in such circumstances, it is likely that the troubled employment relationship would either continue while the issue is contested, investigated and adjudicated, or would -- perhaps, more likely -- be terminated by the employer leaving the worker without a means of support, at least temporarily.

For all these reasons, the Administration opposes the creation of "conditional" status for employment-based immigrants. Because employment-based immigrants are frequently not paid the wage promised in the labor certification, and often actually are employed in a lesser capacity than described in the certification application, we believe that these problems should be effectively addressed through the enforcement mechanism discussed below.

Nonetheless, if "conditional status" is to be retained in the bill, we strongly urge changes in the proposed waiver criteria which would allow both reasonable worker protection and the prospect of being administrable. We would be pleased to work with the Committee toward such ends.

Under the bill, the wage requirement that must be satisfied during a period of such "conditional status" equates to "at least the compensation specified under section 212(a)(5)(A)(i) (including any increases that have occurred in the compensation because of increases in the actual or prevailing compensation)." As the bill goes on to replace the referenced section of the INA, it is unclear as to what this wage obligation actually is. We presume -- but it should be made clear -- that the reference is

to the wage level at which U.S. workers must be recruited -- i.e., "compensation (including wages, benefits, and all other compensation) equal in value to at least 100 percent of the actual level of compensation (including wages, benefits, and all other compensation) paid by the employer to other individuals with similar experience and qualifications for the specific employment in question, or 105 percent of the prevailing compensation for individuals in such employment (including wages, benefits, and all other compensation), whichever is greater...." We strongly agree that the prospective employer's wage obligation -- with or without "conditional status" -- should include consideration of the wage level that the employer actually pays similarly-employed workers (in addition to the locally prevailing wage level) so that such workers' wages cannot be undercut in those situations where they exceed the prevailing wage.

The Administration also recommends that Congress clarify the meaning of several phrases and terms used in this section that are problematic for adjudication of visas. Phrases such as "appropriate experts" and "potential for extraordinary achievement" are vague and may pose difficulties during the adjudication of visa requests. We suggest that the current exceptional ability classification might serve the same purpose as the "potential for extraordinary ability" category, without posing those difficulties.

The Administration supports inclusion of a definition of multinational company as a way to reduce fraud. We believe, however, that the threshold numbers in S. 1394 are too low to have much impact. We also note that the term "substantially common ownership" is vague and would be hard to use in adjudication.

Sec. 304 establishes new "labor market screening" systems which would replace the current labor certification system. Both of the new labor market screening systems proposed (discussed further below) would require (except for outstanding professors and researchers) the employer applicant to pay a fee which would provide a market-based mechanism to encourage employers to look first to the U.S. -- rather than the international -- labor market to meet their employment needs. The fee is intended to serve, over time, to increase the supply and competitiveness of U.S. workers with the requisite skills to meet these needs. Employers would be required to pay a fee equal to "\$10,000 or ten percent of the value of the annual compensation (including wages, benefits, and all other compensation) to be paid to the alien whose services are being sought, whichever is greater, minus the lesser of the amount that the employer expended in the employer's most recent taxable year for formal training of its employees in specialty occupations ... or 25 percent of the [above-described] amount" This "training fee" is to be paid into a private fund certified by the Secretary of Labor "as dedicated to

reducing the dependence of employers in the industry of which the petitioning employer is part on new foreign workers" with the expenditure of the fee proceeds directed in equal parts to college scholarships/fellowships and skills training.

This section provides that, as one alternative, the employer also certify that it attempted to recruit U.S. citizens or lawful permanent residents for the job, offering -- as cited above -- "compensation...equal in value to...the actual level of compensation...paid by the employer to other individuals with similar experience and qualifications for the specific employment in question, or 105 percent of the prevailing compensation for individuals in such employment...whichever is greater...." The section further provides that, as the second alternative system, if the Secretary of Labor determines that a national labor shortage exists with respect to an occupational classification, certification for petitions for that classification shall be deemed to have been issued. Conversely, if the Secretary of Labor determines that a labor surplus exists with respect to an occupational classification, petitions for that classification may not be issued. Any person may petition the Secretary of Labor for a surplus or shortage determination.

The Administration strongly supports reform that relies on market-based mechanisms. The Administration endorses the training fee, and the training fund which would be built from these fees, as the principal mechanism for ensuring that U.S. employers undertake appropriate efforts to first recruit, retain and retrain U.S. workers to meet their employment needs.

Employment-based immigration to fill skill shortages, as well as the temporary admission of skilled foreign workers, is sometimes unavoidable. But the Administration firmly believes that hiring foreign over domestic workers should be the rare exception, not the rule. And we believe that such exceptions should become even rarer, and more tightly targeted on gaps in the domestic labor market than is generally the case under current law. If employers must turn to foreign labor, this is a symptom signaling defects in the Nation's skill-building system. Our system for giving access to global labor markets should be structured to remedy such defects, not acquiesce to them. Our immigration system should progressively diminish, not merely perpetuate, firms' dependence on the skills of foreign workers.

Our primary public policy response to skills mismatches due to changing technologies and economic restructuring must be to prepare the U.S. workforce to meet new demands. Importing needed skills should usually be a short-term response to meet urgent needs while we actively adjust to quickly changing circumstances. In this larger context, the Administration supports a shift towards an immigration system which relies more on market-type incentives to discourage employers from abandoning the domestic

workforce in favor of foreign labor while, at the same time, making it less necessary for them to do so. A fee levied on employers sponsoring skill-based immigrants, with the proceeds dedicated to building the skills and enhancing the competitiveness of U.S. workers, forges an admirably direct and efficient link between the problem of skill shortages and the only valid long-term solution -- investment in the U.S. workforce -- while at the same time providing a safety valve of access to foreign labor markets to meet skill demands that the U.S. workforce cannot supply in sufficient quantity or with sufficient speed.

The bill sets the required fee at "\$10,000 or ten percent of the value of the annual compensation (including wages, benefits, and all other compensation) to be paid to the alien whose services are being sought, whichever is greater, minus the lesser of the amount that the employer expended in the employer's most recent taxable year for formal training of its employees in specialty occupations ... or 25 percent of the [above-described] amount" An employer's financial contribution to the fund (the fee) must create a real incentive for employers to look first to the domestic labor market to recruit, retain, and retrain U.S. workers. In addition to creating an incentive to develop U.S. workers, the fee contribution should create a disincentive for employers seeking lower-skilled immigrant workers. We have examined the wage distribution of immigrant workers subject to labor certification in fiscal years 1993 and 1994; the large majority of immigrant workers in those years were to earn between \$15,000 and \$50,000. We have already pointed out to the Committee that if the amount of the fee that an employer must pay equates proportionately to the value of the compensation package it will provide the immigrant employee, this builds in incentives to keep these compensation costs as low as possible, creating the potential for abuses as well as undermining the wages and benefits offered similarly-employed U.S. workers. In addition, it creates an incentive for employers to seek lower-skilled, lower-paid immigrant workers, which works against the basic thrust of our employment-based immigration policy. On the other hand, a flat dollar amount fee allows employers of higher-skilled, higher-paid workers to pay a comparatively small fee that would have less effect in creating the proper incentives/disincentives. We are gratified that the bill now better accommodates these concerns while maintaining a "meaningful" contribution to increase the supply and competitiveness of U.S. workers.

We had urged that the legislation clarify that an employer's training fee be a genuine incentive -- that employers should not be able to satisfy the fee requirement by pointing to existing training that they may fund. However, the bill now does just that, introducing new layers of complexity in administration and new opportunities for fee avoidance. We urge that no such fee

offsets be allowed. The training fee provides a weak incentive, or no incentive at all, to invest in U.S. workers if employers can simply reduce its value by counting existing expenditures for training and education to satisfy their fee requirement. Further, as contemplated by the bill, employers must be expressly prohibited from shifting the cost of the fee to the immigrant worker, either directly or indirectly. Such a provision will restrain, although not entirely block, employers that want to exploit immigrant workers or "game" the training fee requirement. The Administration supports the mechanisms contained in the bill to prevent and penalize such cost-shifting, although reimbursement to the worker should be made either by the fund or by the employer as appropriate to the circumstances. In addition, in order to assure that employers do not recover the cost of the fee by reducing wages -- and as an appropriate safeguard of the wages and working conditions of similarly-employed U.S. workers -- employers of immigrant workers must be required to pay the immigrant worker the higher of the applicable prevailing wage or the actual wage paid to similarly-employed U.S. workers (as discussed above).

With respect to the structure of the training fund, the bill now refers to "a private fund certified by the Secretary of Labor as dedicated to reducing the dependence of employers in the industry of which the petitioning employer is part on new foreign workers" This statement of purpose has been amended to eliminate the parallel goal of "increasing the competitiveness of [U.S.] workers" which we believe is equally critical and should be explicitly stated in the bill.

While the amended bill is clearer about the use of training fund monies, we believe that still greater clarity is needed with regard to how the fund would accomplish its stated goals and how it would be managed. The Administration would like to work with the Committee to develop criteria for the use of fund monies that achieve the goals of the bill and a workable fund structure that provides the accountability that the public expects. Also, due to the uncertainty of the Federal government's employment and training structure, the Administration would like flexibility in assigning the responsibility of managing the criteria for the use of the fund. Thus, the Administration urges the reference to the Secretary of Labor in this instance changed to the "the Secretary of Labor and other departments as designated by the President."

In any case, the scope and content of the certification process as contemplated by the bill should be left to regulations; the issues involved in the certification criteria are simply too complicated to address in legislation. Also, greater flexibility will ensure that the goals of the training fund are achieved over time as the best means to regulate the fund and to adjust certification standards accordingly become apparent.

Consistent with this framework, a nexus between the disbursement of the training fee's proceeds and the labor shortage being addressed by the immigrant workers is needed. However, it is important to take a broad view of the problems that cause domestic skills shortages. Accordingly, the Administration believes that the bill should encourage, but not require, the use of the funds generated by the fee for training for the occupations in which the immigrant workers will be employed; broader use, including basic skills training -- but excluding anything that does not directly involve human resource development -- should be permitted.

We are pleased to see that the bill now also requires payment of additional fees to cover DOL "costs of administering the labor market screening required ..., including all enforcement activities in connection therewith." In these stringent budgetary times, it is best if taxpayers do not have to foot the bill for the cost of providing the benefits received by employers and immigrants who use this system.

As previously noted, the training fee/fund is a common component of the two new labor certification systems established by the bill. One of these systems supplements the training fee with a labor shortage/surplus determination system. The Administration opposes an employment-based immigrant admission system based on labor shortage/surplus determinations.

Under this system, if the Secretary of Labor found and declared that a national labor shortage exists in an occupational classification, certification for that occupation "shall be deemed to have been issued" provided that the training fee has been paid. On the other hand, if the Secretary found and declared that a national labor surplus exists in an occupational classification, certification could not be issued for that occupation.

This proposed system parallels one used under the current labor certification system. Nonetheless, as we have expressed on numerous occasions, the Administration has serious concerns about the technical feasibility of this approach which may make it unworkable. Based on our experience with a parallel "labor market information" pilot program a few years ago, while simple in concept, this approach is terribly complex and difficult in execution given its essential dependency on labor market information which is insufficient for this purpose. While the bill contemplates that such labor shortage/surplus findings would be based on evidence presented by parties seeking to establish the existence of national occupational shortages/surpluses, the very best data available has -- in our view -- already proven ill-suited and not sufficiently up-to-date nor sensitive to circumstances in the localities where immigrant workers are actually being sought. Development of current labor market

information on a locality basis would be prohibitively costly. Also, a complete exclusion rule tends to be a much blunter tool than is necessary to redress the abuses with which we should be concerned.

The other new labor market screening system created under Section 304 of the bill would replace the current labor certification system with one which requires the Secretary of Labor to certify that, in addition to making the required fee payments, the prospective employer has: (1) attempted to recruit U.S. workers for the job in which the immigrant would be employed, and (2) has filed an application with the Secretary stating that (a) it has not laid off similarly-employed U.S. workers during certain time periods relating to the application, and (b) it is not involved in a strike or lockout involving the target occupation. Recruitment procedures must meet industry-wide standards and offer a total compensation package as discussed previously.

The bill would require the Secretary of Labor to certify that the prospective employer had attempted to recruit "a citizen of the United States or an alien lawfully admitted for permanent residence for the job that will be done by the alien whose services are being sought" Certainly, we understand the bill to intend that the employer conduct *bona fide* recruitment in the domestic labor market, and -- while it would be preferable that the bill language be explicit in these regards -- we understand the intent of the bill to require certification of such recruitment in the domestic workforce, not limited to a single individual, and that the employer's domestic recruitment would, of course, have to be unsuccessful. In this regard, it would also be useful if the bill clarified the intended standards against which such unsuccessful recruitment would be measured to address the currently common practice of employers "tailoring" job descriptions to suit only the immigrant worker, thereby assuring that any domestic recruitment will be unsuccessful.

In its recruitment an employer would be required to offer "105 percent of the prevailing compensation for individuals in such employment (including wages, benefits, and all other compensation)." We agree that no loophole should be allowed which would permit undercutting U.S. workers' working conditions (and reduce the incentives/disincentives created by the training fee) by depriving immigrant workers of benefits that are typically provided. Yet the inherent difficulty of determining prevailing compensation packages for various occupations should not be underestimated. We have explored the availability of reliable, up-to-date information regarding total compensation by occupation and area and found very little. Further, the development of such information can be extremely costly and burdensome, and the legislation is too vague to provide guidance. To remedy this problem (which does not occur in the context of

the fee obligation) but still serve the goals stated above, we strongly recommend that the bill be revised -- wherever a "prevailing wage" payment or recruitment obligation is set forth -- to invoke the applicable prevailing wage plus the same benefits and additional compensation provided to similarly-employed workers by the employer.

The bill does not indicate that prevailing wage determinations would be made for the area where the immigrant will be employed. This deficiency, which we have previously pointed out, will create undesirable and probably unintended consequences. For example, employers in major metropolitan areas -- where wage rates and benefits tend to be higher -- could be encouraged to use the system due to their advantage of being able to recruit by offering compensation packages that meet a nationally prevailing wage standard -- but which might well be less than they actually pay their U.S. workers in those locations. On the other hand, employers in lower wage areas of the country could be discouraged from using the program because they would be seriously disadvantaged by being required to recruit offering a compensation package which satisfies the test but which actually represents much more than the applicable prevailing wage rate they pay similarly-employed U.S. workers in their location. However, requiring determination of prevailing compensation for an occupation only on a locality basis could be extremely resource intensive, so we again urge that the bill afford the flexibility to require determination of the prevailing wage on a local, State-wide, regional or national basis depending on the availability of reliable, up-to-date data for various occupations and industries.

In the Administration's view, the labor market screening system contained in S. 1394, as introduced, did not adequately protect U.S. workers from unfair competition with immigrant workers. In this regard, the Administration had strongly urged that, beyond requiring unsuccessful recruitment in the domestic labor market, additional labor protections be built into the proposed labor market screening system. We are gratified to see that the amended bill reflects our most important concerns -- that if employers are trying to find foreign workers to fill labor shortages caused by a breakdown in the nation's skill development system, there can be no legitimate justification for laying off or otherwise displacing U.S. workers or using immigrant workers as strike breakers.

Given the serious problems with the bill's "conditional" status concept (as discussed above) and the need to assure that the obligations of participation in the program are fully complied with by the employer, the Administration believes strongly that the bill needs to provide appropriate enforcement powers to the DOL. Such enforcement powers are important not only as a safeguard for workers' rights; they also ensure that

the market mechanism created by the training fee/fund functions properly. For example, an employer that can avoid paying the required wage or shift costs to the immigrant worker with impunity will have defeated the market-based incentive to recruit, retain, and retrain U.S. workers. In order to ensure that the requirements of the new labor market screening admission process are observed, the Labor Department must have the ability to seek out and identify employers that violate the law, assure that U.S. and immigrant workers are protected or made whole, and impose substantial penalties that will deter future violations and promote compliance. Thus, the legislation should vest the Labor Department with additional enforcement powers -- including the right to seek injunctive relief, the right to initiate investigations, and whistleblower protections -- and require remedies for employer violations that include "making whole" workers injured by the violation -- e.g., reinstatement of wrongfully laid off workers -- as well as substantial penalties for violations. These specific provisions must be included in the legislation as some cannot be created by regulation or administrative action.

Sec. 305 modifies the special immigrant classifications by adding a new category for certain disabled sons and daughters of U.S. citizens and lawful permanent residents. This section imposes insurance requirements upon the parent sponsor of such disabled immigrant sons and daughters similar to the insurance requirements imposed in section 301 upon son and daughter sponsors of elderly immigrant parents.

The Administration objects to this section for reasons similar to those described relating to section 301 regarding elderly immigrant parents. In addition, this requirement is even more impractical than the insurance requirement for elderly parents; private individual health insurance policies are even less likely to be available or affordable to the severely disabled.

This section also appears to offer a benefit which could, as a practical matter, only be met by a parent whose employer offers health insurance coverage that would extend to an adult son or daughter without pre-existing condition limits or exclusions. Very few parents are likely to have such coverage. While we note the exemption for changes in the sponsor's financial circumstances, this exemption would not cover changes in the sponsor's employment status or changes the sponsor's employer makes in health insurance coverage. It is also unclear who would be held responsible regarding health insurance coverage for a disabled son or daughter if the parent dies first, as would frequently be the case. We prefer retention, as noted above, of current first and third family preference categories, which necessarily would include this group of sons and daughters of U.S. citizens rather than creating a new special immigrant

category.

Sec. 306 would modify the effect of an approved immigrant visa petition by providing that the approval of an immigrant classification petition does not relieve the alien of the burden of proving to a consular officer that he/she has established eligibility to receive an immigrant visa in all respects. This section further provides that the denial of an immigrant visa by a consular officer, notwithstanding the presence of an approved petition, is non-reviewable.

Although the Administration supports efforts to prevent the issuance of visas based on the presentation of fraudulent immigrant visa petitions, section 306, as currently drafted, does not appear to achieve that result. For example, under section 212 of the INA, the mere presentation of a fraudulent visa petition does not automatically constitute a basis for denying a visa. Section 306 appears to reiterate the existing authority of consular officers to deny visas, rather than conferring additional authorities. At the same time, it raises questions. Would the INS be required to revoke the petition upon its "return to the Attorney General"? If so, would the revocation be subject to review? Under current law, there are mechanisms in place to correct errors if the consular officer believes a mistake has been made on a visa petition. Therefore, we strongly object to this new provision as written and would be happy to work with the Committee to clarify this section.

Sec. 307 would establish limitations and conditions on judicial review of agency actions relating to petitions for a visa or adjustment of status. The Administration believes these limitations and conditions on judicial review should include both immigrant and nonimmigrant visa petitions. The Administration also believes that, because the petitioner seeking relief under this section may be a U.S. citizen, the venue should lie in the district in which the petitioner resides. The requirement that the venue for these matters lies only in the U.S. District Court for the District of Columbia may also overburden this court which, in any case, does not have a particular history or expertise in immigration matters over the other federal courts.

Secs. 308 & 309 contain conforming amendments and repeals and transition provisions, respectively.

Subtitle B--Changes in Numerical Limitations on Immigrants

Sec. 311 establishes a worldwide numerical limitation on family-sponsored immigration of 85,000, plus any visas authorized for backlog reduction under section 314 (2nd preference). As stated in relation to section 302, the Administration strongly supports its own framework for legal immigration reform which lowers the level of legal immigration while providing stronger

support for family reunification principles.

Sec. 312 establishes a worldwide numerical limitation on employment-based immigration of 90,000 per year. The Administration supports an admission level of 100,000, which represents a substantial reduction from current law (140,000) but which allows U.S. employers to hire the employees they need to remain competitive in the global market.

Sec. 313 changes current law on per-country limits, providing that the level of family-sponsored and employment-based immigrants may not exceed 20,000 for non-contiguous foreign states, 40,000 for contiguous foreign states, or 5,000 for dependent areas. This limit would be reduced for a country in any fiscal year by the number of immediate relatives above 20,000 (or 40,000 for contiguous countries and 5,000 for dependent areas) admitted during the prior year. Immigrant visas made available to spouses and minor children of lawful permanent residents for backlog reduction are exempt from the per country limit.

The Administration has reservations about changing the nation's policy of equity among all countries, including our contiguous neighbors. The per country ceilings established in the bill may also create problems because of the increasing number of naturalizations and their resulting impact on immediate relative petitions. We hope to work with the Committee to explore the full potential impact of these and other changes in levels of admissions.

Sec. 314 creates a special "transition" program to reduce the backlog of spouses and minor children of lawful permanent residents, calling for 150,000 visas in the first year and the lesser of 150,000 or the difference between the total level of family-sponsored immigration (including immediate relatives) for the prior fiscal year and the same numbers for fiscal year 1995. These visas are to be made available first to relatives of aliens who did not become lawful permanent residents due to IRCA's legalization programs.

The Administration has proposed a preferable alternative to this approach to backlog reduction. The Administration strongly favors relying on its naturalization initiative to reduce the backlog of spouses and minor children of lawful permanent residents, rather than creating a special program. We estimate that 80 percent of the backlog consists of relatives of aliens who became lawful permanent residents through IRCA's legalization programs. With this Administration's commitment to improve the naturalization process, these aliens have an opportunity to step forward affirmatively to become U.S. citizens. Upon taking that step, they may petition for their spouse and minor children as immediate relatives of a U.S. citizen. The 20 percent of the

backlog who are not relatives of aliens legalized pursuant to IRCA should have preference for visas in this category.

Sec. 315 calls for Congress to review the annual numerical limitations on family-sponsored and employment-based immigrant classifications after the present backlog of spouses and minor children of permanent resident aliens has declined to 10,000 or 5 years after enactment, whichever comes later. It also creates special procedural rules for consideration of such legislation. The Administration supports Congressional review of immigration levels after 5 years. We do not believe, however, that the decline in second preference backlog numbers to 10,000 is a valuable triggering mechanism for review. We urge the Committee to consider the Administration's legal immigration reform proposal that maintains the integrity of the family preference categories and does not require a substantial overhaul of the system.

TITLE IV -- NONIMMIGRANTS

The Administration agrees with the general objectives of the nonimmigrant program changes in the bill to address abuses in these programs and provide adequate protections to U.S. workers. However, there are a number of provisions which require additional and careful review with regard to their consistency with U.S. trade agreement commitments. For example, the bill proposes changes to various visa categories, including H-1B and L, for which the U.S. has undertaken international obligations under the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) and the North American Free Trade Agreement (NAFTA).

Secs. 401-403 and 405-406 make important changes to the H-1B nonimmigrant visa category which allows the admission (or adjustment) of foreign "professionals" to be employed in "specialty occupations" (as well as fashion models of distinguished merit and ability). The Administration has long and vigorously urged amendment of the H-1B admission criteria, consistent with our GATS and NAFTA commitments, to effectively address real abuses in the program and assure adequate protection for U.S. workers.

The bill's amendments to the H-1B nonimmigrant program would require employers seeking to employ such nonimmigrants to pay a fee prescribed by the Secretary of Labor to cover the Department of Labor's costs of administering and enforcing the program requirements.¹ In addition, such an employer would be required

¹ Notably, the bill seems to lack a needed mechanism, similar to that which exists with respect to the other fee provisions, to prevent cost-shifting from the employer to the

to attest:

- * that it will pay a total compensation package that is the higher of the package paid similarly-employed U.S. workers or 105 percent of the prevailing compensation for the occupation;
- * that during certain periods it has not and will not lay off or otherwise displace U.S. workers in the target occupation;
- * that it has unsuccessfully attempted to recruit in the domestic labor market for the target job using industry-standard recruitment procedures and offering the higher of the actual or 105 percent of the prevailing compensation level; and,
- * whether it is dependent on H-1B workers, as defined in the bill.

Further, "job contractors" seeking to use this program would be precluded from placing H-1B nonimmigrant employees at worksites of customers which had not also attested to complying with the H-1B program criteria. The bill would also establish new guidelines for prevailing wage determinations applicable under this program.

No H-1B nonimmigrants would be admissible to work for "employers dependent on H-1B workers" unless:

- * the Secretary of Labor certified that the employer paid a training fee similar to that set out for employment-based immigrants subject to labor market screening (as discussed previously), which could not be shifted to the nonimmigrant worker;
- * the nonimmigrant has "demonstrated to the satisfaction of the Secretary of State and the Attorney General that the alien has a residence abroad which he has no intention of abandoning";
- * such employer takes timely, significant and effective

nonimmigrant employee. This deficiency needs to be fixed. In addition, the bill indicates that such fees should cover the costs to DOL of conducting regular, random audits, including of "the qualifications of the petition beneficiaries." This particular function has traditionally been the responsibility of the INS and, therefore, we suggest that the bill indicate that the fee be set by the Secretary of Labor so as to cover the costs to both DOL and INS of performing the specified audit functions.

steps to recruit and retain sufficient U.S. workers in order to remove as quickly as reasonably possible its dependence on H-1B workers (though it is not clear whether such dependent employers would be required to make any enforceable attestation in this regard); and,

- * the prospective employer has not been found within the prior two years to have failed to comply with the H-1B program requirements.

Finally, the bill would increase penalties for certain H-1B program violations and reduce the authorized period of stay of H-1B nonimmigrants from a maximum of six to three years.

The Administration appreciates and generally supports the thrust and objectives of these amendments. These provisions will help improve protections for U.S. workers. We must point out, however, that some of these H-1B program amendments raise a variety of technical and international trade agreement issues that need to be carefully examined and fully considered.

The Administration would strongly urge that the amendments it had previously proposed -- particularly with respect to the displacement of U.S. workers -- be adopted. The H-1B program amendments we requested in 1993 were carefully designed to assure continued business access to needed high-skill workers in the international labor market while adequately protecting U.S. workers and the businesses which employ them. These amendments are targeted especially to those employers who seek to obtain relatively low-skilled "professional" workers. Specifically, in nearly all situations it is entirely unreasonable that an employer in this country -- as a matter of public policy -- not only does not have to test the domestic labor market for the availability of qualified U.S. workers before gaining access to foreign workers, but is actually able to lay off U.S. workers to replace them with temporary foreign workers in their own employ or through contract. This is exactly what is happening now; our public policy tolerates it, perhaps encourages it, and our policy must change. The "no layoff" provision currently contained in S. 1394 should accomplish the desired change.

A second amendment we proposed in 1993 would require all employers of H-1B workers -- not just those who are already "dependent" on such workers -- to attest that they have and are taking timely and significant steps to recruit and retain U.S. workers in the jobs in which they seek to employ H-1B nonimmigrants. In this regard it is quite important that, if "significant step[s] to recruit and retain" U.S. workers are to be enumerated in the bill, they should be required to both be new actions by the employer and be meaningful. In our view, this is not the case with the current bill as drafted.

A new provision of the bill (compared to the original S.1394) would establish special procedures for determining prevailing wages for occupational classifications of employees in institutions of higher education or related or affiliated nonprofit entities or nonprofit research institutes. The Administration recommends two further amendments. In our view, this special procedure: (1) should be broadened to also apply to federal research organizations, such as the NIH, so that the government is not placed in the untenable position of having to match much higher salaries in the private sector, and (2) should be limited to only those individuals employed as researchers by academic, nonprofit, and federal research institutions.

The problem with the prevailing wage requirement (discussed above) in relation to section 304 (see page 67) also occurs in this section. The requirement should invoke the applicable prevailing wage plus the same benefits and additional compensation provided to similarly employed workers by the employer.

Sec. 404 of the bill would change the H-2B nonimmigrant visa classification -- for unskilled, non-agricultural temporary foreign workers -- to reduce the annual admission ceiling to roughly current usage, and to limit admission to workers who will provide "skilled services or skilled labor." While generally sympathetic with the goals of this latter change, and its consistency with the overall thrust of legal immigration reform in recent years, we strongly caution that this change could have significant and unintended repercussions, particularly in Guam.

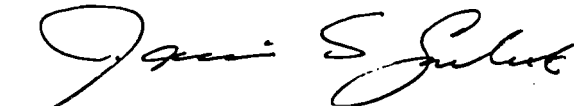
Sec. 405 makes changes to the L visa criteria including limiting the availability of the visa to employees of "multinational firms" as defined in section 303(a)(1)(B)(ii), and increasing the length of time an employee must be employed by a multinational firm outside the U.S. prior to application, and modifying the definition of "specialized knowledge." Although the Administration supports the goal of reducing fraud, these particular provisions require further review with regard to their consistency with U.S. international obligations.

Sec. 406 limits the maximum length of stay for L, H-1B and H-2B nonimmigrants to three years. The Administration strongly supports the limitation on length of stay in the H visa programs as comporting with the "temporary" nature of these nonimmigrant visa categories. As a result, H-2B visa holders are currently subject and will remain subject to recertification by regulation on at least an annual basis. The limitation on the L visa, however, would be inconsistent with some of our international trade obligations.

Sec. 407 changes the F, J, and M nonimmigrant classifications to limit the duration of admission for student

The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,



Jamie S. Gorelick
Deputy Attorney General