



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

an alien entered the United States (U.S.) rather than on the merits of the asylum claim. This would be detrimental to immigration law enforcement and humanitarian protections for true asylees.

Employer sponsored visas should be set at a level, 100,000 visas per year, to address both the needs of American businesses and workers. Family-sponsored visas for adult children of U.S. citizens and unlimited visas for mothers and fathers of U.S. citizens must be maintained to protect our cherished principle of family reunification. Similarly, we support and want to reach agreement with Congress on an appropriate and equitable grandfathering process for persons in the fourth preference backlog that is consistent with our overall framework, priorities and principles.

The deeming provision for benefit eligibility should not create an unprecedented, unconstitutional second class citizenship by extending beyond naturalization. The legislation should clarify that it does not call into question the full participation of any child in public elementary and secondary education, including pre-school and school lunch programs. We oppose the health and long term care insurance mandate imposed upon the mothers and fathers of U.S. citizens and disabled sons and daughters of U.S. citizens and lawful permanent residents. As currently drafted, the legislation requires purchase of coverage that is simply not available.

Repeal of the Cuban Adjustment Act would detract from the Administration's goal of returning democracy to Cuba and regularizing the flow of immigration from Cuba. In addition, restricting the Attorney General's parole authority will jeopardize the Attorney General's ability to quickly and appropriately respond to compelling immigration emergencies. Finally, we urge the Committee to ensure the bill's consistency with our international treaty obligations.

Many of the provisions in S. 1394 advance the Administration's strategy to control illegal immigration. This strategy calls for regaining control of our borders; removing the job magnet through worksite enforcement; aggressively pursuing the removal of criminal aliens and other illegal aliens; and securing from Congress the resources to assist states with the costs of illegal immigration. Many of the provisions of S. 1394 are identical or similar to provisions in the Administration's bill, S. 754, the "Immigration Enforcement Improvements Act of 1995."

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 promotes naturalization to encourage full participation in the national community.

This Administration appreciates the continued opportunity to work with you and other members of the Committee. Our positions on the individual provisions of S. 1394 are outlined in the following section-by-section discussion.

Title I--Immigrant Control

Part 1--Additional Enforcement Personnel

The Administration has already demonstrated that our borders can be controlled when there is a commitment to do so by the President and Congress. With an unprecedented infusion of resources since 1993, we have implemented a multi-year border control strategy of prevention through deterrence. We have carefully crafted long range strategic plans tailored to the unique geographic and demographic characteristics of each border area to restore integrity to the border. The results of our flexible approach are reflected in the successful implementation of Operations "Hold-The-Line" in El Paso, "Gatekeeper" in San Diego, and "Safeguard" in Arizona. We have increased the number of Border Patrol agents by 40% since 1993 -- higher levels of staffing than ever before. Those agents are also backed up by the highest level of support than ever before. For the first time in over a decade we are backfilling positions previously left vacant by attrition. We are committed to achieving a strength of more than 5,600 Border Patrol agents by the end of Fiscal Year 1996 and more than 7,000 agents by the end of Fiscal Year 1998. Border Patrol personnel are now equipped with new and sophisticated technology and basic support allowing them to work more effectively. We appreciate the efforts by Congress to authorize and appropriate more funds for Border Patrol agents and equipment. We look forward to working together to further improve border management and control.

Section 101 mandates the Attorney General in Fiscal Years 1996 through 2000 to increase the number of Border Patrol agents by no fewer than 700 each year and authorizes the Attorney General to increase by not more than 300 the number of Border Patrol support personnel each Fiscal Year from 1996 through 2000.

For Fiscal Year 1996, the Administration will start the training of 1480 new Border Patrol agents and complete the training of and deploy 700 new agents. We note with approval the similarity between S. 1394 and S. 754. However, we urge the Committee to incorporate the Administration's language which

would require that the hiring of Border Patrol agents be to the maximum extent possible consistent with standards of professionalism and training and to strike the limitation on the number of support personnel who can be hired.

Section 102 authorizes funding for 300 new positions for each of Fiscal Years 1996 through 1998 for investigators and support personnel to investigate alien smuggling and enforce employer sanctions.

We support an increase for personnel to investigate alien smuggling and enforce employer sanctions. However, we are concerned that this section does not provide the level of enforcement resources sought by the President. The President's Fiscal Year 1996 budget contained such an increase and also requested 202 new DOL Wage and Hour and other personnel to enhance enforcement of employer sanctions and labor standards laws. In order to underscore Congress' commitment to this important law enforcement function, we urge that section 102 be amended to specifically authorize this increase in DOL personnel.

This section would also limit administrative expenditures for the payment of overtime to an employee for any amount over \$25,000. The restrictions on overtime expenditures currently apply because they are included in the Fiscal Year 1995 Commerce, Justice, State Appropriations Act. The President's Fiscal Year 1996 budget request also includes these restrictions.

Section 103 mandates the Attorney General and Secretary of the Treasury to increase the number of land border inspectors by approximately equal numbers in Fiscal Years 1996 and 1997 to a level that will provide full staffing to end undue delay and facilitate inspections.

We strongly support increased service and inspections at land ports of entry. S. 754 includes a Border Services User Fee for this purpose. We urge the Committee to adopt the language from the Administration provision both here and in section 211 of S. 1394.

Part 2--Eligibility to Work and to Receive Public Assistance

Jobs are the greatest magnet for illegal immigration. Thus, a comprehensive effort to deter illegal immigration, particularly visa overstaying, must make worksite enforcement a top priority. The President's Fiscal Year 1996 budget requested 202 new DOL Wage and Hour and other personnel to enhance enforcement of laws prohibiting employment of unauthorized aliens and assuring minimum labor standards, including sweatshop enforcement. Enforcement efforts will focus on selected areas of high illegal immigration. Already the Atlanta and Dallas District Offices of the Immigration and Naturalization Service (INS) have

successfully conducted Operation SouthPAW (Protecting America's Workers) and Operation Jobs, unprecedented interior enforcement initiatives which are designed to place authorized U.S. workers in job vacancies created by the arrest of unauthorized workers during worksite enforcement surveys. The Administration is deeply concerned by the provisions in this bill that will weaken employer sanctions and anti-discrimination enforcement.

With regard to Federal benefits, under current law the status of aliens applying for major federal benefits is generally verified through direct access to INS via the Systematic Alien Verification for Entitlement program (SAVE), enacted by section 121 of the Immigration Reform and Control Act of 1986 (IRCA). The SAVE process seeks to ensure that each applicant born outside the U.S. is properly identified as a U.S. citizen, or as an eligible immigrant and to prevent unauthorized immigrants from receiving benefits for which they are ineligible. The SAVE process of verifying eligibility has worked well. Recently, SAVE was awarded the Federal Technology Leadership Award for 1995. Nevertheless, the Administration is conducting a review of the SAVE system to determine if improvements or changes are appropriate. We believe that the creation of a new system at this time would be premature, duplicative and unnecessary and would also siphon resources away from other enforcement priorities.

Section 111(a) requires the Attorney General, together with the Commissioner of Social Security, to establish within eight years a system to verify eligibility for employment and eligibility for benefits provided or funded by any Federal, State, or local government agency, as described in section 201 of this Act.

While we agree that verification systems are critical to immigration enforcement, we strongly oppose the requirement that permanent national verification systems be established within eight years. Under the Administration bill, pilot programs will be tested and evaluated for three years so that the technical feasibility, cost effectiveness, resistance to fraud, and impact on employers and employees can be assessed and determined. S. 754 authorizes employment verification pilot projects, which will improve the INS databases; expand the Social Security Administration (SSA) databases; simulate links of INS and SSA databases; expand the Verification Information System, formerly called the Telephone Verification System, for non-citizens to 1,000 employers; and test a new two-step process for citizens and non-citizens alike to verify employment authorization using INS and SSA data. The pilots will be built to guard against document fraud, discrimination, and violations of privacy. After three years, the pilots will be evaluated on the bases of deterrence of illegal immigration, discrimination, privacy, technical feasibility, cost effectiveness, impact on employers, and

susceptibility to fraud. We will request permanent authority from Congress only for methods that work, are cost-effective, and prove themselves capable of protecting citizens' and legal workers' rights. While we are pleased with the initial success of our pilot programs, careful review and evaluation are critical before mandated nationwide implementation both to improve their effectiveness and to prepare the nation's employers and employees.

As stated in our introduction to Part 2, under current law the status of aliens applying for benefits is generally verified through direct access to INS via the SAVE program. The SAVE program attempts to ensure that each applicant born outside of the U.S. is properly identified as a U.S. citizen, or as an eligible immigrant and prevents unauthorized immigrants from receiving benefits for which they are ineligible. Since our review of the SAVE program is currently in process, we have not included the benefit programs in our proposed pilot projects.

We also urge the Committee to clarify that the phrase "eligibility for benefits provided or funded by any Federal, State, or local government agency, as described in section 201 of this Act" is limited to programs that provide benefits directly to individuals, and not programs such as Federal assistance provided to schools to assist disadvantaged children.

Under section 111(b), the system must be capable of reliably determining whether the person is eligible and whether the individual whose eligibility is being verified is claiming the identity of another person. It requires any document used by the system to be tamper-proof and prohibits its use as a national identification card except to verify eligibility for employment or benefits, to enforce the fraud provisions of Title 18, U.S.C., if the document was issued by the INS, or, if the document was designed for another purpose (e.g., driver license, certificate of birth, Social Security card), as required under law for that other purpose.

We agree that no legislative language should be included that could be construed to authorize, directly or indirectly, the establishment, issuance or use of national identification cards.

Section 111(b)(3) provides that the system may not be used other than to enforce the INA, the fraud provisions of Title 18, U.S.C., local laws relating to eligibility for certain Government-funded benefits, or laws relating to any document used by the system that was designed for another purpose. We support this provision.

Section 111(b)(4) provides that the privacy and security of personal information and identifiers obtained for and utilized in the system must be protected in accordance with industry

standards for privacy and security of confidential information. No personal information obtained from the system may be made available to any person except to the extent necessary for the lawful operation of the system.

Protecting citizens' and other authorized workers' privacy rights is fundamental. The bill's reliance upon industry standards is vague and is not adequate to protect the important personal privacy and security interests of employment authorized individuals. The Administration proposal requires that an employer participating in a pilot program have in place such procedures as the Attorney General shall require to safeguard all personal information from unauthorized disclosure and condition redisclosure of such information to any person or entity upon its agreement also to safeguard such information. The Administration proposal also (1) requires notice to all individuals of the right to request an agency to correct or amend the individual's record and of the steps to make such a request; (2) applies appropriate remedies and civil fines for unauthorized disclosure; and (3) provides that no adverse employment action (e.g. firing, demotion, change of title or duties) occur while the employee is challenging the accuracy of the eligibility information during the secondary verification or thereafter, until the situation has been corrected or verified. We strongly urge the inclusion of these privacy safeguards.

Section 111(b)(5) provides that a verification of eligibility may not be withheld or revoked for any reason other than the person's eligibility. We support this provision.

Section 111(c) relieves an employer from liability under section 274A of the INA if (1) the alien appeared throughout the term of employment to be prima facie eligible for employment, (2) the employer followed all procedures required in this new verification system, and (3) the alien was verified under such system as eligible for employment, or a secondary verification procedure was conducted with respect to the alien and the employer discharged the alien promptly after receiving notice that the secondary verification procedure failed to verify the eligibility of the employee.

We do not support this provision because it is unnecessary and potentially confusing. An employer who complies with employee verification requirements is not liable for employer sanctions penalties under current law and regulations. We are concerned that this provision could have an unintended effect of increasing employer challenges to 274A enforcement efforts. Furthermore, the Administration's pilot program called the Verification Information System gives an employee an additional opportunity after a failed secondary verification to verify eligibility for employment.

Section 112 directs the Attorney General, together with the Commissioner of Social Security, to conduct 3-year demonstration projects in five States to verify eligibility for employment and for benefits provided or funded by any Federal, State, or local government agency, as described in section 201 of this Act.

S. 754 provides for pilot projects to test various employment eligibility verification methods as described in the previous section. As described in our introduction to Part 2, we believe demonstration pilots are unnecessary for verification of eligibility for benefits, since our current system, SAVE, works well for noncitizens. We also believe that demonstration pilots must be evaluated before the creation of permanent new verification systems. Simultaneous implementation of both pilot projects and a permanent national verification system is a burdensome, unnecessary, and costly duplication of effort.

Section 113 provides for an automated system with on-line access for verifying employment and public assistance eligibility to be administered by a newly established Office of Employment and Public Assistance Eligibility Verification within the Department of Justice (DOJ).

We support enhancing the various immigration database systems and are currently doing so. S. 754 authorizes employment verification pilot projects that will expand the Social Security Administration (SSA) databases and simulate links of INS and SSA databases. However, we do not support section 113 because it builds the specifics of an automated verification database into statute when the technical feasibility, cost effectiveness, resistance to fraud, and impact on employers and employees have not been assessed and determined through pilot projects. We are concerned that the requirement that information be placed into the system within 10 business days will create an undue burden on INS resources. We also must reiterate our concerns that, as with section 111(b), privacy is not adequately protected. For example, a realtor or lender could request and obtain employment eligibility information on a customer without running afoul of section 1113(b)'s limitation on data use. Moreover, such information could be used by the realtor or lender to discriminate against U.S. citizens and legal aliens who look or sound "foreign."

As described in sections 111(a) and 112, the Administration supports testing various verification approaches over the next three years. We will request permanent authority from Congress for pilot projects that work based upon a thorough evaluation. Creation of a new Office of Employment and Public Assistance Eligibility Verification within the DOJ is duplicative of ongoing programs within the INS and other federal agencies. We believe that the effective way to administer this program is to retain the current responsibilities of gathering and verifying data

within the contributing agencies, INS and the SSA.

Section 114 authorizes the Attorney General to require an individual to provide his or her Social Security account number for purposes of complying with this section. S. 754 has a similar provision, and we support this provision.

This section also limits the documents which establish both employment authorization and identity to the U.S. passport and resident alien card containing appropriate security features. It limits the documents that establish employment authorization to the Social Security card and Employment Authorization Document. The section also gives the Attorney General the authority to restrict the use of certain documents establishing employment authorization or identity, if she finds the document is being used fraudulently to an unacceptable degree. This section shall apply to hiring beginning no more than 180 days from the date of enactment of the Act.

S. 754 has a similar provision, and we support this section's limitation on the number of documents. Although S. 754 contained the same effective date, on further consideration of technological capabilities we would like to work with the Committee on an appropriate timeframe for implementation.

Sec. 115 provides that an employer's request for more or different documents to verify an employee's employment eligibility or an employer's refusal to honor documents that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice only if made for the purpose or with the intent of discriminating against the employee because of his or her national origin or citizenship status.

We strongly oppose this section because of its potentially harmful and discriminatory impact on U.S. citizens, legal permanent residents, and all work-authorized persons who appear or sound "foreign". Under this section, all work-authorized persons--including citizens and legal permanent residents--who possess valid acceptable documentation of work eligibility under the law, but who do not possess the specific documents required by a certain employer, could lose a job and have no legal remedy. The DOJ Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC) currently litigates on behalf of such employees. In Texas, a publishing company refused to hire a native born U.S. citizen of Hispanic descent because she presented a state identification card and a Social Security card instead of a birth certificate. In Virginia, a janitorial service firm fired a naturalized U.S. citizen of Guatemalan descent after demanding to see his "green card" and U.S. passport and rejecting his driver's license, Social Security card and voter registration card. In Colorado, a major meatpacking

company discharged seven work authorized employees when they could not produce INS-issued work authorization extension documents although all seven had other legally sufficient evidence of their continued employment eligibility. This section would provide no remedy for such individuals who are unfairly denied jobs.

Under section 114, it will be difficult, if not impossible, for the OSC to demonstrate that the employer's conduct regarding documentation is tied to the national origin or citizenship status of the individual. Under section 115, all work authorized persons, citizens and non-citizens alike, who possess valid acceptable documentation under the law, but who do not possess the exact documents required by a specific employer, could lose an opportunity for employment and livelihood on that basis alone and have no legal remedy. If the driving force behind an employer's conduct is fear of INS sanctions, very few cases will be actionable, since it will be extremely difficult, if not impossible, to meet the proposed intent requirement. The employer will claim to be avoiding sanctions rather than discriminating intentionally. Clearly, the brunt of this change will fall on those who look or sound "foreign" -- legal immigrants and minority U.S. citizens -- because employers will be most critical of documentation produced by those persons most likely to lead to sanctions. Employers could pretextually support their alleged non-discriminatory position by highlighting the percentage of minority and non-U.S. citizens in their workforce to show that they have no reason to treat minorities or non-U.S. citizens more harshly in the employment verification process, but the effect on those authorized workers who do not have the specific documents requested by the employer will be the same: loss of employment and livelihood.

Congress knew when it enacted IRCA's anti-discrimination provision that fear of sanctions could result in employer discrimination against citizens and work-authorized aliens, especially those who "look or sound" foreign. When IRCA's antidiscrimination provision became law in 1986, Congress did not include an intent element in the prohibitions against citizenship-status or national origin discrimination. In 1990, when the document abuse provision was added to the law, the intent element was also absent. Thus, the protection afforded by the antidiscrimination provision was designed to protect workers not only from invidious discrimination, but also from employment discrimination resulting from employers' negligence or ignorance.

The Administration has worked closely and cooperatively with employer associations to educate them about their responsibilities under the law. Employer education efforts, including directly funding efforts by employer associations themselves and reducing the number of documents an employer must accept, have reduced the burdens on employers. By contrast,

section 115 would allow discrimination against U.S. citizens and authorized workers to go unchecked. We strongly urge the Committee to delete this section.

In addition, we urge the Committee to clarify the authority of the OSC to litigate pattern and practice cases and to grant the OSC the authority to investigate and prosecute discrimination charges involving the terms and conditions of employment.

Sec. 116 provides that all copies of birth certificates distributed by states or local agencies be issued in a standard form whose requirements are to be set forth by regulations issued by the Department of Health and Human Services (HHS) after consultation with other agencies. State and local government agencies would be prohibited from accepting for evidentiary purposes a birth certificate issued in any other form, or issued by any entity other than a state or local government agency. No state or local government agency may issue an official copy of a birth certificate unless it has ascertained from the Social Security Administration (SSA) whether the person to whom the requested birth certificate pertains is deceased. No state or local government agency may accept a birth certificate for any evidentiary purpose, unless it has verified the certificate with the issuing agency or a new national birth registry that the SSA may establish, and unless it has verified with the SSA that the certificate does not pertain to a deceased person. A copy of any death certificate issued in the U.S. must be sent to the SSA (presumably by the issuing entity).

The Administration supports the objective of addressing breeder document fraud. However, this section presents myriad constitutional, operational, and programmatic concerns, on which we want to work with the Committee. First, it is not clear what enumerated power gives the federal government the authority to regulate birth certificates in this way. The Supreme Court has interpreted the federal government's authority over immigration quite broadly, but the relevant cases involved statutes that explicitly dealt with immigrants. See Fiallo v. Bell, 430 U.S. 787 (1977); Mathews v. Diaz, 426 U.S. 67 (1976). Section 116, though part of an immigration bill, does not by its terms involve immigration or immigrants; rather, it applies to all birth certificates. Indeed, by its silence with regard to foreign birth certificates, it appears to apply only to U.S. citizens and to make a foreign born person's birth certificate unacceptable for identification. In light of the scope of section 116 and the absence of relevant cases, we are uncertain whether the Court would conclude that the bill is within the federal government's immigration authority. In addition, insofar as section 116 imposes non-ministerial duties on the states or compels policy decisions, it could be challenged as violative of the principles underlying the Tenth Amendment, under New York v. United States, 112 S. Ct. 2408 (1992).

We strongly oppose requiring Social Security Numbers (SSNs) and fingerprints on all birth certificates. Given the wide distribution and use planned for them, placing SSNs on birth certificates could actually facilitate fraud. Under this provision, every person's name, along with other identifying information, including a fingerprint, would be joined on the birth certificate with a verified SSN. Placing the SSN together with so much other personally identifying information would make it much easier for criminals who obtain copies of these birth certificates to commit fraud by assuming an individual's identity. The documents will be used extensively and subject to loss or theft. Moreover, the provision does not require the States to maintain the confidentiality of the SSN information that would be placed in their vital statistics records. Without such safeguards, the effect of this provision could be to make the SSNs and fingerprints of every individual born in the United States a matter of public record and, therefore, available to the public at large, including to individuals who intend to use the information to commit fraud. No state now makes this information generally available to members of the public simply upon request. In addition, requiring SSNs and fingerprints on all birth certificates would make the birth certificate a de facto national identification document, which is contrary to the intent of S. 1394 and S. 754.

Although SSA is not an official custodian of death data, SSA does receive death data from States and other sources. However, SSA is missing death data for an estimated 50 million persons to whom SSNs were issued. Since most of these represent deaths occurring before SSA began receiving death data from the States, the States would have to furnish such data. Furthermore, because many deaths involve children who were never issued SSNs, SSA could not maintain death records for these individuals without first assigning them SSNs. Moreover, current State death data are only 94 percent accurate. For the remaining six percent of cases, we are troubled by the anomalous and quite inadvertent predicament in which section 116 might place a live U.S. citizen--denial of a birth certificate because of the existence of a discrepancy in a record or a missing record indicating the person is dead.

Section 116 would impose a tremendous unfunded mandate with prohibitive costs on States and localities, as well as subject private individuals to burdensome requirements, such as having their fingerprints added to their birth certificates by age 16. This section also would impose very substantial unbudgeted workload requirements on the SSA and the INS. SSA does not have the existing technological infrastructure or FTE's to accept the responsibilities required in section 116(a)(4) and (5). Since SSA is not authorized to use its trust funds for non-program purposes such as those envisioned by section 116, a specific appropriation of new funds would be required. The requirement

that INS verify the authenticity of each birth certificate would cause an excessive workload burden on INS offices. The INS inspects over 500 million persons each year. We cannot verify every birth certificate presented as evidence of citizenship.

We ask that the following issues be clarified: (1) whether the requirements of this provision would be prospective only or retroactive; and (2) whether persons born abroad would have to obtain new birth certificates. Sec. 116(a)(3) and 116(b)(4) should be amended to replace "Passport Office" with "Department of State". Sec. 116(a)(3) also should be modified to read at the end "unless it is a foreign birth certificate for a person who is claiming acquisition of citizenship through birth abroad." Sec. 116(a)(5) should be modified to read "A copy of every death certificate issued in the United States and Report of Death Abroad issued by the Department of State shall be sent to the Social Security Administration." In addition, the term "birth certificate" should be defined as the certified copy of the birth certificate which is issued to individuals by state and local agencies for identification and other purposes.

Sec. 117 amends section 274(e)(4)(A) of the INA to increase the civil penalties for employer sanctions for first violations from the current range of \$250 to \$2,000 to a range of \$1,000 to \$3,000. The subsection also increases penalties for second violations from the current range of \$2,000 to \$5,000 to a range of \$3,000 to \$8,000. The penalties for subsequent violations are increased from a range of \$3,000 to \$10,000 to a range of \$8,000 to \$25,000.

This provision is identical to the Administration's proposal, and we support it. However, we believe that the penalties for immigration related discrimination, as covered by section 274B(g) of the INA, should be similarly increased. Members of this Committee made an important decision in the Immigration Act of 1990 to have the same penalties for both the anti-discrimination provisions and employer sanctions. Symmetry remains critical in these closely associated areas. Imbalance has the potential to create a financial incentive for employers to violate the lesser penalized statute of anti-discrimination law to avoid the higher penalties of the employer sanctions statute. This section will also eliminate the perception that there is an order of preference in enforcement efforts.

To further harmonize the sanctions and the anti-discrimination provisions of the INA, we urge the Committee to grant express authority to the Office of Special Counsel to pursue pattern or practice violations based on independent investigations, and that penalties equal to those set forth in the pattern or practice section of the employer sanctions provision be added for engaging in a pattern or practice of the antidiscrimination provision.

Sec. 117(b) increases the penalties for employer sanctions paperwork violations from the current range of \$100 to \$1,000 to a range of \$200 to \$2,500.

We support this provision. S. 754 increases the penalties to a range of \$200 to \$5,000. However, for the reasons described above, we believe that the penalties for immigration-related discrimination, as covered by section 274B(g) of the INA, should be similarly increased.

Sec. 117(c) increases the criminal penalty for pattern and practice violations of employer sanctions to a felony offense, increasing the applicable fines from \$3,000 to \$9,000 and the criminal sentence which may be imposed from not more than six months to not more than two years.

We support this provision. S. 754 has a similar provision which raises the applicable fines to \$7,000 and the maximum criminal sentence to two years.

Sec. 117(d) authorizes an administrative law judge to increase the civil penalties provided under employer sanctions to an amount up to two times the normal penalties if labor standards violations are present.

This provision is identical to the Administration's proposal, and we support it. However, we believe that this authority should also be extended to cover immigration-related discrimination, as covered by section 274B(g) of the INA.

Sec. 118 credits any employer sanctions penalties received in excess of \$5,000,000 to the INS Salaries and Expenses appropriations account that funds activities associated with employer sanctions enforcement.

This provision is identical to the Administration's proposal, and we support it.

Sec. 119 authorizes the Attorney General to hire for Fiscal Years 1996 and 1997 such additional Assistant U.S. Attorneys as may be necessary for INA prosecutions.

The President's Fiscal Year 1996 budget request includes resources to hire new Assistant U.S. Attorneys and support personnel to enhance immigration law enforcement. We support this provision.

Sec. 120 amends the INA to clarify that immigration officers may issue subpoenas for investigations of employer sanctions offenses under section 274A. This section also authorizes the Secretary of Labor to issue subpoenas for investigations relating to the enforcement of any immigration program. It makes the

authority contained in sections 9 and 10 of the Federal Trade Commission Act available to the Secretary of Labor. The Federal Trade Commission Act provisions allow access to documents and files of corporations, including the authority to call witnesses and require production of documents.

This provision is identical to the Administration's proposal, and we support it.

Sec. 120A creates an Office for the Enforcement of Employer Sanctions within the INS. The functions of this Office are to investigate and prosecute employer sanctions violations and to educate employers on the requirements of the law to prevent employment discrimination. This section authorizes \$100,000,000 to be appropriated to the Attorney General to carry out the functions of the Office.

Creation of a new Office for the Enforcement of Employer Sanctions is duplicative of ongoing programs within the INS and the DOJ OSC. The INS and the OSC are effectively carrying out their responsibilities to investigate and prosecute employer sanctions violations, employer discrimination violations, and to educate both employers about their responsibilities and employees concerning their rights under the Act. Thus, we urge the Committee to strike this section altogether as unnecessary and duplicative. It is critical that the protection of employees from employment discrimination remain within the jurisdiction of the Civil Rights Division which has tremendous expertise and experience in this area. Resources, not reorganization, will assist these important law enforcement and education efforts. Without resources, reorganization is ineffective. With resources, reorganization is unnecessary.

As we stated in sections 115 and 117, Congress recognized that a symmetry was necessary between penalizing the hiring of unauthorized workers and protecting employees from employment discrimination. An emphasis on penalizing unauthorized workers without a parallel emphasis on protecting employees from discrimination could create an unacceptable imbalance. In protecting employees from discrimination, educating employees about their rights under the law is just as important as educating employers about their responsibilities under the law. This section fails to mention employee education. In 1990, the Congress authorized the OSC to educate both employers and employees about the law's antidiscrimination provisions. We urge the Committee to create a balance between efforts to educate employers and efforts to educate employees. We support appropriation of additional funds to support Administration efforts to fight illegal employment and discrimination.

PART 3--ALIEN SMUGGLING; DOCUMENT FRAUD

The Administration is aggressively investigating, apprehending, and prosecuting alien smugglers. The INS, Federal Bureau of Investigation, Department of State, and Coast Guard have been sharing and developing information on numerous smuggling endeavors. As a result of these efforts over 200 significant alien smuggling investigations were initiated in Fiscal Year 1994. Similar efforts are being conducted to combat document fraud. INS is adding new staffing positions to investigate and prosecute an increased number of fraudulent document vendors. This includes targeting major suppliers of fraudulent documents and employers who knowingly accept such documents as proof of employment authorization. In general Part 3 appropriately cracks down on alien smugglers and individuals involved in document fraud. We are pleased the Committee has adopted many provisions from the Administration's bill.

Sec. 121 grants wiretap authority for investigations of alien smuggling, identification document fraud, citizenship and naturalization procurement and document fraud, and passport and visa fraud.

This provision is similar to the Administration's proposal, and we support it.

Sec. 122 amends 18 U.S.C. 1961(1) to include alien smuggling, identification document fraud, naturalization and citizenship procurement and document fraud, and visa and passport fraud offenses committed for personal financial gain as predicate offenses for racketeering charges.

S. 754 contains a similar provision, but it does not include identification document fraud, naturalization and citizenship procurement and document fraud, and visa and passport fraud offenses (18 U.S.C. §§ 1028, 1425, 1426, 1427, 1541, 1542, 1543, 1544, 1546). We urge the Committee to adopt the S. 754 provision. We would prefer that the Committee directly increase the penalties for violating these statutes rather than adding them as RICO predicates. Direct increases in penalties would be the more effective way to strengthen the punishment for these crimes.

Sec. 123 adds conspiracy and aiding to alien smuggling offenses. This would subject conspirators to increased penalties for alien smuggling offenses rather than the penalty under the general conspiracy statute. This section provides that a person who smuggles aliens shall be fined or imprisoned for each alien to whom a violation occurs and not for each transaction constituting a violation, regardless of the number of aliens involved. This section also increases the penalties for alien smuggling offenses to not less than 3 years or more than 10 years for a first offense, to not less than 5 years or more than 10 years for a second offense, and to not less than 10 years or more

than 15 years for subsequent offenses.

S. 754 also adds conspiracy and aiding to alien smuggling offenses. We support the requirement that an alien smuggler be fined or imprisoned for each alien rather than for each transaction. However, while we do not object to increasing the maximum penalties for alien smuggling offenses, we do not believe that mandatory minimums are appropriate in this context. Providing for mandatory minimum penalties in this context would produce anomalous results compared to penalties for other offenses of comparable severity. The penalty for each alien rather than each transaction is a vastly more potent weapon against alien smugglers.

Sec. 123(a)(5) makes it a criminal offense to hire an alien with knowledge that the alien is not authorized to work and that the alien was smuggled into the U.S. The penalty for violating this section is a fine and imprisonment for not less than 2 years or more than 5 years.

S. 754 also criminalizes the employment of an alien knowing that such alien is not authorized to work and that the alien was smuggled into the U.S. However, S. 754 provides for a term of imprisonment for not more than 5 years. The Administration does not believe that mandatory minimums are appropriate in this context. Such mandatory minimums would produce anomalous results in this context.

Sec. 123(b) creates a new offense for smuggling aliens with the intent or with reason to believe that the alien brought into the U.S. will commit an offense against the U.S. or any State punishable by imprisonment for more than one year.

This provision is substantially similar to the Administration's proposal, and we support it.

Sec. 123(c) directs the Sentencing Commission to promulgate or amend guidelines to provide that an offender convicted of smuggling, transporting, or harboring an unlawful alien under dangerous or inhumane conditions shall be assigned a base offense level of at least 22 for a first offense, at least 26 for an offender with one prior felony conviction, at least 32 for an offender with two prior felony convictions, an enhancement of between 2 and 6 levels in the case of bodily injury to such alien in proportion to the severity of the injury inflicted, and a base offense level of at least 41 in the case of the death of an alien.

Although the direction to the Sentencing Commission generally would provide for higher sentences than what the DOJ had proposed to the Sentencing Commission during this amendment cycle, we do not object to it.

Sec. 124 provides that the videotaped deposition of a witness to a violation of section 274(a) of the INA who has been deported from the U.S. may be admitted into evidence in an action brought for that violation if the witness was available for cross examination.

We support this provision.

Sec. 125 provides that any property, real or personal, which facilitates or is intended to facilitate, or which has been used in or is intended to be used in the commission of a violation of, or which constitutes or is derived from or traceable to the proceeds obtained directly or indirectly from a commission of a violation of subsection 274(a) or section 274A(a)(1) or 274A(a)(2) of this Act, or of sections 1028, 1425, 1426, 1427, 1541, 1542, 1543, 1544, 1545, or 1546 of title 18, U.S.C., shall be subject to seizure and forfeiture. No property used by any person as a common carrier in the transaction of business shall be forfeited unless the owner or other person in charge of such property was a consenting party or privy to the illegal act. Also, no property shall be forfeited by reason of any act or omission established by the owner to have been committed or omitted by any person other than the owner while the property was unlawfully in the possession of a person other than the owner in violation of federal or state criminal laws. No property may be forfeited to the extent of an interest of any owner, by reason of any act or omission established by the owner to have been committed without the owner's knowledge or consent, unless the act or omission was committed by an employee or agent of the owner, and facilitated or was intended to facilitate, or was used in or intended to be used in, the commission of a violation of subsection (a) or section 274A(a)(1) or 274A(a)(2) of this Act, or of sections 1028, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of title 18, U.S.C., which was committed by the owner or which was intended to further the business interests of the owner, or to confer any other benefit upon the owner.

It amends section 274(b)(2) by striking "conveyance" and inserting "property" and by striking "is being used in" and inserting "is being used in, is facilitating, has facilitated, or was intended to facilitate." It provides that before the seizure of any real property, the Attorney General shall provide notice and an opportunity to be heard to the owner of the property.

This section is similar to the Administration's proposal. However, section 125's proposed new paragraph (E) to section 1324(b)(4) is unnecessary. The statute incorporated by reference therein (19 U.S.C. § 1616a(c)) is already incorporated into and made applicable to 8 U.S.C. § 1324(b) forfeitures. See 8 U.S.C. § 1324(b)(3) (incorporating the customs laws forfeiture procedures (19 U.S.C. § 1602 et seq.) by reference). We also recommend that conspiracy to commit any of the violations

included in this section be added as predicate offenses.

Sec. 126 provides that any person convicted of a violation of subsection 274(a) or section 274A(a)(1) or 274A(a)(2) of this Act, or of sections 1028, 1425, 1426, 1427, 1541, 1542, 1543, 1544, 1545, or 1546 of title 18, U.S.C., shall forfeit to the U.S. any conveyance, including any vessel, vehicle, or aircraft used in commission of a violation of 274(a) of the INA, and any property, real or personal, that constitutes or is derived from or traceable to the proceeds obtained directly or indirectly from a commission of a violation of, or that facilitates or is intended to facilitate, or has been used in or is intended to be used in the commission of a violation of subsection 274(a) or section 274A(a)(1) or 274A(a)(2) of this Act, or of sections 1028, 1425, 1426, 1427, 1541, 1542, 1543, 1544, 1545, or 1546 of title 18, U.S.C.

The criminal forfeiture of property under this provision, including any seizure and disposition of the property and any related administrative or judicial proceeding shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, except for subsections 413(a) and 413(d) which shall not apply to forfeitures under this provision.

The provision is similar to the Administration's proposal, and we support it. We note, however, that the appropriate reference to the criminal provisions for alien smuggling are sections 274(a)(1) and (2) of the INA, and not 274A. We also recommend that conspiracy to commit any of the violations included in this section be added as predicate offenses.

Sec. 127 establishes the illegality of bringing inadmissible aliens from foreign contiguous territories. It increases from \$3,000 to \$5,000 the fine for bringing in an alien unlawfully.

This provision is identical to the Administration's proposal, and we support it.

Sec. 128 increases the term of imprisonment for identification, passport, visa, naturalization, and citizenship document fraud from not more than five years to not more than 10 years for a first offense if the offender is under the age of 21. If the offender is 21 years of age or older, the term of imprisonment for a first offense is not less than 2-1/2 or more than 10 years; for a second offense, not less than 5 years or more than 10 years; for subsequent offenses, not less than 10 or more than 15 years. The maximum term of imprisonment is up to 15 years if committed to facilitate a drug trafficking offense, and up to 20 years if committed to facilitate an act of international terrorism.

S. 754 amends 18 U.S.C. 1028(b)(1) on identification document fraud to increase the maximum term of imprisonment from 5 to 10 years. S. 754 has identical provisions for section 1028(b)(1) violations committed to facilitate a drug trafficking offense or an act of international terrorism.

For consistency we believe that any provisions affecting sections 1542-1546 in Chapter 75 (passports and visas) of title 18 U.S.C. should include section 1541 (relating to passport issuance without authority), which currently carries the same maximum penalties as the other Chapter 75 statutes.

The Administration does not object to increasing the maximum penalties for third and subsequent offenses. However, we do not believe that the mandatory minimums in this section are appropriate. Providing for mandatory minimum penalties in this context would produce anomalous results compared to penalties for other offenses of comparable severity, particularly many white collar crimes.

The Sentencing Commission recently adopted guideline amendments which became effective on November 1, 1995, and will significantly increase the punishments for these offenses. In our view, the Commission's guideline amendments should be given an opportunity to work before additional changes are made.

Sec. 129 adds a new penalty to 18 U.S.C. 1546(a) for presenting a document that contains a false statement or that fails to contain any reasonable basis in law or fact.

We support this provision.

Sec. 130 adds a new criminal provision to section 274C of the Act which penalizes any person who knowingly and willfully fails to disclose, conceals, or covers up the fact that he or she has prepared or assisted in preparing an application for asylum which was falsely made for immigration benefits. A violation of this provision is a felony and a fine or imprisonment for 2 to 5 years, or both, may be imposed. This section prohibits a person who has been convicted of this offense from any further involvement in the immigration application process. Anyone convicted of a subsequent violation is punishable by a fine, 5 to 15 years imprisonment, or both.

Current criminal statutes are adequate to punish this type of illegal conduct. Stepped up investigation efforts have led to indictments for fraudulent preparation of spurious asylum claims in New York, Los Angeles, San Francisco, and Arlington, Virginia. We do not believe that a new and special offense is needed to prosecute a person involved in assisting in fraud in the asylum process. Furthermore, mandatory minimum sentences are not appropriate in this context.

Sec. 131 inserts an additional violation to section 274C of the Act, by prohibiting preparing, filing, or assisting another in preparing or filing documents which are falsely made, in reckless disregard of the fact that the information is false or does not relate to the applicant. This section also adds a penalty for those aliens who present a document upon boarding a carrier bound for the U.S. and then fail to present a document to the inspector at the port of entry. A discretionary waiver for penalties is provided if an alien is subsequently granted asylum or withholding of deportation.

This provision is substantially similar to the Administration's proposal, and we support it.

This section also creates new civil penalties if the document fraud is committed in order to obtain a benefit under the INA. This section authorizes an administrative law judge to double civil penalties for document fraud if labor standards violations are present.

We support this provision.

Sec. 132 adds to the current exclusion ground for misrepresentation at section 212(a)(6) a ground for document fraud and for failure to present documents to the inspector at the port of entry. It makes excludable any alien who, in seeking entry to the U.S., or upon boarding a common carrier for the purpose of coming to the U.S., presents any document which, in the determination of the immigration officer, is forged, counterfeit, altered, falsely made, stolen, or otherwise contains a misrepresentation of a material fact. It makes excludable any alien who is required to present prior to boarding a common carrier a document relating to the alien's eligibility to enter the U.S. but fails to present such document upon arrival.

We do not believe either of these provisions is needed. Current law at section 212(a)(6) is broad enough to cover fraudulent documents of any nature and already makes a person excludable who attempts to gain entry through use of such documents. Section 212(a)(7) makes excludable both immigrants and nonimmigrants who seek to enter without the required documents. Consequently, we do not support this section.

Sec. 133 provides that aliens excludable because of document fraud under the new section 212(a)(6)(C)(iii) and excludable aliens brought or escorted into the U.S. having been interdicted at sea are ineligible for relief from exclusion, including withholding of deportation and asylum, subject to a "credible fear of persecution" exception.

Because the new section 212(a)(6)(C)(iii) subsumes much of what is now covered by section 212(a)(6)(C)(i), it may

effectively eliminate the waivers for exclusion for fraud provided by the INA. Section 212(d)(3) provides for a general waiver of excludability for nonimmigrants. In addition, section 212(i) of the INA currently provides for a waiver for exclusion for fraud for an immigrant who is the spouse, parent, or son or daughter of a U.S. citizen or of a lawful permanent resident, or if the fraud occurred at least 10 years before an application for a visa or entry. We believe that the availability of these discretionary waivers is consistent with a fair and humanitarian immigration policy.

Similarly, the restriction on withholding of deportation in section 133 for an alien who is inadmissible under section 212(a)(6)(C)(iii), as written, would apply irrespective of whether special exclusion is invoked. We do not support this provision, and we recommend limiting the restriction to those in special exclusion proceedings.

As a technical matter, we urge the Committee to replace the term "special inquiry officer" with "immigration judge" and to adopt the following definition for "immigration judge": an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including proceedings under section 240. An Immigration Judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe.

Part 4--EXCLUSION AND DEPORTATION

Our comprehensive strategy for identifying and removing undocumented aliens has had significant success over the past three years. In Fiscal Year (FY) 1994, the INS deported a total of 39,788 illegal aliens. An additional 1,023,000 aliens were voluntarily removed. A total of 5,597 aliens were excluded from entry, and another 5,794 were subject to required departures. We had even greater success deporting aliens in 1995. We surpassed our FY 1995 goal of 28,500 criminal alien removals and set a new record of 31,654 non-criminal alien removals. Our calendar year removals for 1995 are 14 percent higher than our removals in 1994 and 74 percent higher than the removals in 1990. The prospects for 1996 are even better. We will substantially increase the number of non-criminal alien removals in FY 1996 by establishing absconder removal teams and by making strategic use of enhanced detention and transportation capacity.

Sec. 141 provides that the Attorney General may, without referral to an immigration judge or after such a referral, order the exclusion and deportation of an alien who appears to be excludable when (1) the alien has entered the U.S. without having been inspected and admitted by an immigration officer, unless such alien has been physically present in the U.S. for a

continuous period of two years since entry without inspection, or the alien is excludable under section 212(a)(6)(C)(iii); (2) when the alien is brought or has arrived on board a smuggling vessel; or (3) the Attorney General determines that the numbers or circumstances of aliens en route to or arriving in the U.S. present an extraordinary migration situation. The judgement whether an extraordinary migration situation exists or whether to invoke these provisions is committed to the sole and exclusive discretion of the Attorney General. The Attorney General may invoke the provisions of this section during an extraordinary migration situation for a period not to exceed 90 days, unless within such 90 day period or extension thereof, the Attorney General determines, after consultation with the House of Representatives and Senate Committees on the Judiciary, that an extraordinary migration situation continues to warrant such procedures remaining in place for an additional 90-day period.

A person will not be subject to expedited exclusion if he or she claims asylum and establishes a credible fear of persecution in his or her country of nationality. A special exclusion order is subject to administrative review only if an alien claims under oath to have been and appears to have been lawfully admitted for permanent residence.

We are pleased that this section has moved significantly closer to the Administration's provision. We strongly support making the applicability of the special exclusion procedures discretionary and explicitly authorizing the special exclusion of aliens who are intercepted on the high seas, within the territorial sea or internal waters. The Coast Guard frequently interdicts illegal aliens on the high seas and is required to keep the aliens at sea while arrangements are made for a third country to accept the aliens so they may be resettled. This is neither resource efficient nor cost effective. Two interdiction cases in 1995 consumed a total of 105 cutter days and 548 aircraft hours in order to deliver the interdicted migrants to El Salvador and Mexico. Using standard rates, these cases cost in excess of \$7 million. Clearly, there is a need for special exclusion authority. Rapid delivery of the aliens to the United States for special exclusion would allow the Coast Guard vessels to promptly return to their primary law enforcement mission, including drug interdiction and search and rescue.

However, we have concerns about making special exclusion applicable to aliens who entered without inspection. For those aliens who have been here for lengthy periods after having entered without inspection, the determination of when they entered will be difficult and could lead to protracted litigation. If such authority is to be used at all, it should be invoked only in extraordinary migration situations and only in circumstances that would support a strong presumption that the person's entrance without inspection was quite recent. We would

be willing to work with the Committee to revise this provision in response to our concerns.

As we stated in section 133, we urge the Committee to replace the term "special inquiry officer" with "immigration judge" and to adopt our definition of "immigration judge".

Sec. 142 streamlines judicial review of Orders of Exclusion or Deportation. This section revises and amends section 106 of the INA. Many of the provisions are similar to that of S. 754.

This section provides for judicial review of final administrative orders of both deportation and exclusion through a petition for review, filed in the judicial circuit in which the immigration judge completed the proceedings. Under current law, an order of exclusion is appealable to a district court and then appealable to the court of appeals. This provision is similar to the Administration's proposal.

This section requires that a petition for review be filed within 30 days, except that an aggravated felon must file within 15 days. We recommend that the uniform filing period of thirty (30) days contained in S. 754 be adopted, to avoid an additional issue for the courts which, if litigated, would take far more than fifteen days to resolve.

The filing of a petition stays deportation except for aggravated felons, who must apply to the court for a stay. S. 754 contains a similar provision.

Under this bill, there is no review of discretionary denials under sections 212(c), 212(i), 244(a) and (d), and 245. We do not support this provision. We do not believe that appeals to the courts of such denials have unduly burdened the courts or unduly delayed deportations.

Denials of asylum are "conclusive unless manifestly contrary to law and an unconscionable abuse of discretion." S. 754 provides that all the administrative findings of fact supporting an order of exclusion or deportation are conclusive unless a reasonable adjudicator would be compelled to conclude to the contrary. We recommend that the language of S. 754 be substituted as consistent with current decisional law and more workable.

As in current law, a court may review a final order only if the alien has exhausted all administrative remedies. This section adds a requirement that no other court may decide an issue, unless the petition presents grounds that could not have been presented previously or the remedy provided was inadequate or ineffective to test the validity of the order. S. 754 also includes this provision.

Under section 106(f) there is no judicial review of an individual order of special exclusion or of any other challenge relating to the special exclusion provisions. The only authorized review is through a habeas corpus proceeding, limited to determinations of alienage, whether the petitioner was ordered specially excluded, and whether the petitioner can prove by a preponderance of the evidence that he is an alien admitted for permanent residence and is entitled to further inquiry. In such cases the court may order no relief other than a hearing under section 236 or a determination in accordance with sections 235(a) or 273(d). There shall be no review of whether the alien was actually excludable or entitled to relief. S. 754 contains similar provisions. However, S. 754 does not make special exclusion applicable to all the same cases as S. 1394 does, as noted in our comments on section 141 above.

Under new section 106(g), no collateral attack may be brought by an alien subject to penalties for improper entry or reentry. S. 754 contains a similar provision, at section 106(d).

Sec. 143 subjects an alien who willfully fails to depart on time pursuant to a final order of exclusion and deportation or a final order of deportation to a \$500 per day penalty.

This provision is similar to the Administration's proposal, and we support it.

Sec. 144 permits deportation proceedings to be conducted by video conference or telephone. The alien must consent to such a hearing by telephone if it is to be a full contested evidentiary hearing on the merits.

This provision is identical to the Administration's proposal, and we support it.

Sec. 145 clarifies the authority of immigration judges to issue subpoenas in proceedings under sections 236 (exclusion) and 242 (deportation) of the INA.

This provision is identical to the Administration's proposal, and we support it.

Sec. 146 amends section 242B of the Act to eliminate the requirement that an order to show cause be issued in Spanish to every alien.

We believe that this section would create more litigation on the adequacy and accuracy of the notice in English only. A written notice in a language the alien understands, which is most often Spanish, protects the INS from unnecessary delays of enforcement actions based upon whether sufficient notice was provided as well as informs the alien of the nature of the

action. In order to avoid unnecessary and costly due process litigation, it would be best not to amend this provision of the INA.

This section would also amend the requirement at 242B(b)(1) that an alien be given 14 days from service of an order to show cause to obtain counsel before a hearing is scheduled, to provide that a hearing may be scheduled within three days for an alien who is detained. The section also amends section 292 to provide that the alien's right to obtain counsel must not unreasonably delay proceedings.

We believe that the current 14-day period gives the alien a fair and better opportunity to obtain counsel. The INS' experience has been that deportation proceedings move more quickly if an alien does have counsel. In addition, immigration judges normally provide at least one continuance to allow an alien a reasonable opportunity to obtain counsel. S. 1394's proposed shortening of the time period in which aliens may obtain counsel may not achieve the intended result of speeding up deportation proceedings. Like the notice language requirement, the 14 day period is not burdensome to INS and its repeal may unintentionally cause delay in deportations or encourage frivolous appeals. We do not support this provision.

Sec. 147 authorizes withholding of nonimmigrant visas to nationals of countries that refuse or unduly delay acceptance of their nationals for deportation.

S. 754 contains a similar provision, but S. 754's provision allows the Secretary of State maximum flexibility in implementing this section of the law. We recommend that the suspension of nonimmigrant visas be discretionary and not automatic because there may be foreign policy, national security, or other reasons in a particular circumstance where suspension would not be in the best interest of the U.S. We recommend that the Committee change the "Secretary of State shall" to the "Secretary of State may".

Sec. 148 authorizes appropriation of \$10,000,000 in a special "no-year" fund for detaining and removing aliens who are subject to final orders of deportation.

We support this provision.

Sec. 149 authorizes appropriations for the Attorney General to conduct a pilot program or programs to study methods for increasing the efficiency of deportation and exclusion proceedings against detained aliens by increasing the availability of pro bono counseling and representation. The Attorney General may use funds to award grants to not-for-profit organizations assisting aliens.

This provision is identical to the Administration's proposal, and we support it.

Sec. 150 limits relief under section 212(c) of the INA to a person who has been lawfully admitted to the U.S. for at least 7 years, has been a legal permanent resident for at least 5 years, and is returning to such residence after having temporarily proceeded abroad not under an order of deportation. The 5-year and 7-year periods would end upon initiation of exclusion proceedings. An alien who has been convicted of one or more aggravated felonies and has been sentenced for such felonies to a term or terms of imprisonment totalling, in the aggregate, at least 5 years is ineligible for 212(c) relief and cancellation of deportation. Also, relief under INA section 212(c) will be available only to persons in exclusion proceedings, and persons in deportation proceedings will need to apply for cancellation of deportation.

Cancellation of deportation is available to an alien who has been a lawful permanent resident for at least 5 years who has resided in the U.S. continuously for 7 years after being lawfully admitted and has not been convicted of an aggravated felony or felonies for which the alien has been sentenced to a term or terms of imprisonment totalling, in the aggregate, at least 5 years.

The cancellation of deportation provisions basically replace both the 212(c) remedy for legal permanent resident aliens who have not departed the United States, and the suspension remedy for aliens who have been here unlawfully. However, section 150 omits the current provision at section 244(a)(3), providing for suspension of deportation for battered spouses of U.S. citizens or lawful permanent residents, who have been physically present for three years. This provision was added to the INA by section 40703(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103-322, September 13, 1994). We recommend that the provisions of current section 244(a)(3) be included in section 150. Because this provision was just recently enacted and because of the special circumstances involving these applications, we recommend that for battered spouses of U.S. citizens or lawful permanent residents the physical presence period not be deemed to end upon service of the order to show cause. Also, current subsection 244(g), relating to evidence submitted by abused or battered spouses, should remain.

This section does not permit appeal from a denial of a request for an order of voluntary departure. S. 754 allows such an appeal provided that no court shall have jurisdiction over an appeal regarding the length of voluntary departure where the alien has been granted voluntary departure for 30 days or more. We oppose eliminating judicial review as an unwarranted departure from longstanding procedural rights. We recommend that the

Committee adopt the S. 754 provision.

Sec. 151 defines a stowaway as any alien who obtains transportation without consent or through concealment or evasion. This section also clarifies that a stowaway is subject to immediate exclusion and deportation; however, a stowaway may apply for asylum or withholding of deportation. The carrier will be required to detain a stowaway until he or she has been inspected by an immigration officer and to pay for any detention costs incurred by the Attorney General should the alien be taken into custody. It raises the fine for failure to remove a stowaway from \$3,000 to \$5,000 per stowaway.

This provision is identical to the Administration's proposal, and we support it.

Sec. 152 directs the Attorney General, after consultation with the Secretary of State, to establish a pilot program for up to two years for deterring multiple unauthorized entries. The program may include interior repatriation, third country repatriation and other disincentives for multiple unlawful entries into the U.S. This provision also requires the Attorney General, together with the Secretary of State, to submit a report to the Senate and House Committees on the Judiciary on the operation of the pilot program and whether the pilot program or any part thereof should be extended or made permanent.

This is an area of enforcement in which the Administration already has made progress. This provision is similar to the Administration's proposal, and we support it.

Sec. 153 authorizes the Attorney General and the Secretary of Defense to establish a pilot program for up to 2 years to determine the feasibility of the use of closed military bases as detention centers for INS. Within 35 months after enactment, they must submit a feasibility report to the House and Senate Committees on the Judiciary, and the House and Senate Committees on Armed Service.

The use of closed military bases would make additional detention space available to INS. At present, INS is forced to release many aliens who are awaiting proceedings due to lack of detention space. We have worked with the Department of Defense in conjunction with the Bureau of Prisons and other agencies to explore the use of closed bases. Conversion costs and staffing have been the most difficult problems to resolve. Accordingly, this provision does not address the underlying obstacles that would permit such a pilot to be conducted.

Sec. 154 would amend section 212 of the INA to exclude prospective immigrants who have not received immunizations against vaccine-preventable diseases for aliens seeking permanent

residency.

While reducing the number of unvaccinated persons in the United States is a laudable goal, the mechanism outlined in this section would present a number of implementation and other difficulties that may actually jeopardize the public health in the United States.

In many countries, the vaccines specified under this section might not be licensed. Even if these vaccines are licensed, they may not be readily available or the costs of these vaccines may be prohibitive for some prospective immigrants. In addition, an immigrant's visa could be delayed as much as 18 months in order to allow time to receive all recommended doses of the specified vaccines, over the interval recommended by the Advisory Committee Immunization Practices (ACIP).

The ACIP-recommended vaccine schedule is complex and lengthy and subject to regular revisions. It would be difficult and labor intensive for Department of State and INS officials at entry points in the U.S. to check individual immunizations records against ACIP schedule and to ensure that U.S. government officials are using the most up-to-date revisions. Neither the Department of State nor the INS have the resources to verify the authenticity of most vaccination certificates.

The requirements outlined in section 154 could subject immigrants to serious delays, considerable expense, and the prospect of having to choose between emigrating as a family or splitting up the family to allow, for example, an adult to emigrate to begin employment in the United States while other family members stay behind to complete the immunization requirements. The result might be that the immigrant might choose to secure false immunization records rather than attempt to comply with the requirements imposed by section 154. If that were to happen, the immigrant, once admitted to the U.S., would be thought to have been vaccinated. Yet, the immigrant could become infected and could transmit a vaccine-preventable disease to others in the U.S. To further confound the matter, the unimmunized person may be unwilling to admit he was not vaccinated, fearing that he could become subject to deportation.

Under current state laws, children in the U.S. are required to comply with immunization requirements before they enter school. Therefore, the current public health system would "capture" school-aged immigrant children almost immediately upon entry into the U.S. Even without the proposed provision in the immigration bill, these children would be vaccinated once they came to the U.S. In addition, in many states, licensed day care establishments also have immunization requirements.

We would like to work with the Committee to develop an

amendment to reduce the number of unvaccinated persons in the United States but that would address our concerns.

Sec. 155 requires immigrants and nonimmigrants, except physicians, who seek to work in the U.S. to obtain a qualifications certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS) or from an equivalent independent credentialing organization approved by the Secretary of Labor. Such certificate must verify that (1) the individual's education, training, and experience meet statutory and regulatory requirements for admission to the U.S. under the classification specified and are comparable to that required for U.S. workers in the health care occupation; (2) any foreign license submitted is authentic and unencumbered; (3) the individual has English language proficiency; and (4) foreign registered nurses have passed a nursing skills examination.

The Administration believes that this provision, as drafted, is far too broad and would require substantial additional resources for affected agencies to administer. In addition, the imposition of the credentialing requirement may not be in conformity with U.S. obligations undertaken in NAFTA, Chapter 16, and the English language requirement for all health care workers does not appear to be in conformity with U.S. obligations undertaken in NAFTA and GATS. If this provision is to be retained in the bill, we would recommend the following changes.

Since the INS has responsibility for and experience in determining the qualifications of aliens to be admitted to the U.S. and the acceptability of Credential Evaluation Services for such purposes, the Administration believes that any approval of a credentialing organization in lieu of CGFNS would be more appropriately administered by INS in consultation with the HHS rather than the Secretary of Labor.

The proposed provision covers all health care workers (except physicians) under any visa classification. This would involve more than 100 different occupations, many of which do not require licensure or formal minimum industry requirements for entry into the occupation. While CGFNS may now have the capacity to expand its operations to determine U.S. requirements for health care occupations, to evaluate foreign credentials, and to develop and administer occupational and English language proficiency tests world-wide, we know of no other equivalent organization in the United States. We would, therefore, recommend defining health care occupations to include only those which involve treatment of patients, dispensing of medication, operation of diagnostic equipment, and performing laboratory tests on blood or tissue. Further, only if the CGFNS ceased issuing certificates should INS, in consultation with HHS, designate another acceptable credentialing organization which may, or may not, be equivalent to CGFNS.

With regard to section 9(iv), which concerns requiring foreign nurses to pass a nursing examination, this section should be expanded to state that "if the alien is a registered nurse, the alien has passed an examination testing both nursing knowledge and English language proficiency."

Finally, Canadian and Mexican health care workers should be treated in a manner consistent with the NAFTA agreement. In addition, requirements applicable to other alien health care workers will need to take into account our other international trade obligations. We would be pleased to work with the Committee to effect such needed changes to this provision.

PART 5--CRIMINAL ALIENS

The Administration has made removals of criminal aliens a priority and achieved dramatic success. The number of criminal aliens removed from the U.S. jumped by 12% in 1993, and by 17.6% in 1994 over 1992 levels. More than four times as many criminal aliens were removed in 1994 than in 1988. We surpassed our FY 1995 goal of 28,500 criminal alien removals and set a new record of 31,654 non-criminal alien removals. Even more criminal aliens will be deported next year as we further streamline deportation procedures, expand the Institutional Hearing Program, and enhance the international prisoner transfer treaty program. In addition, other INS initiatives, such as the National Alien Transportation Program, provide for the detention and removal of more criminal aliens. INS technology enhancements are playing a critical role in removing criminal aliens, as are INS alternatives to formal deportation, such as stipulated, judicial, and administrative deportation.

Sec. 161 amends the definition of aggravated felony contained in 8 U.S.C. Sec. 1101(a)(43) to include: (1) an offense relating to laundering of monetary instruments or relating to engaging in monetary transactions in property derived from specific unlawful activity is an aggravated felony if the amount of funds exceeds \$10,000 (down from \$100,000); (2) a crime of violence, a theft offense (including receipt of stolen property) or burglary offense, or an offense relating to trafficking of fraudulent documents, for which the term of imprisonment is a minimum of at least two and one half years or a maximum of at least five years (down from 5 years imposed); (3) a RICO offense, as well as offenses described in 18 U.S.C. 1084 or 1955, for which the term of imprisonment is a minimum of at least two and one half years or a maximum of at least five years (down from 5 years); (4) offenses relating to transportation for the purpose of prostitution for commercial advantage; (5) a violation of Section 601 of the National Security Act relating to protecting the identity of undercover agents; (6) an offense that involves fraud or deceit in which the loss to the victim exceeds \$10,000 (down from \$200,000) or involves tax evasion in which the revenue

loss to the Government exceeds \$10,000 (down from \$200,000); (7) alien smuggling without regard to commercial advantage except for a first offense in which the alien has affirmatively shown that he or she committed the offense for the purpose of aiding only the alien's spouse, child or parent; (8) any violation of 18 U.S.C. 1546(a) (relating to document fraud) except for a first offense in which the alien has affirmatively shown that he or she committed the offense for the purpose of aiding only the alien's spouse, child or parent; (9A) any offense relating to commercial bribery, counterfeiting, forgery or trafficking in vehicles whose identification numbers have been altered, which is punishable by imprisonment for a minimum of at least two and one half years or a maximum of at least five years; (9B) any offense relating to perjury or subornation of perjury which is punishable by imprisonment for a minimum of at least two and one half years or a maximum of at least five years; (10) any offense relating to a defendant's failure to appear for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years (down from 15 years) or more.

This section also prohibits the Attorney General from withholding the deportation of aliens who have been convicted of one or more of the following: an aggravated felony or an attempt or conspiracy to commit an aggravated felony for which the term of imprisonment imposed or served is or was at least five years; a crime of violence or attempt or conspiracy to commit such a crime of violence for which the term of imprisonment imposed or served is or was at least three years; or any of the following aggravated felonies or attempt or conspiracy to commit such offense: murder, illicit drug trafficking, illicit firearms trafficking, explosive materials offenses, demand for ransom, child pornography, racketeering, national security offense, slavery.

We oppose expanding the definition of aggravated felon to include persons convicted of crimes punishable by imprisonment for 2 1/2 years or more. The grave consequences of being considered an aggravated felon include being ineligible for withholding of deportation and asylum, and being subject to mandatory detention and expedited deportation proceedings, and should be imposed only on serious criminals. Current law gives immigration judges the discretion to weigh the seriousness of the crime against the positive equities of each individual case and to grant relief only where it is appropriate. Immigration judges should be allowed to retain this discretion. The expanded definition would also impose a burden on the operations of the INS which is required to detain all aggravated felons, except for certain lawful permanent residents. Finally, wide imposition of aggravated felon consequences run afoul of our obligations under the 1967 Protocol relating to the Status of Refugees not to return a refugee who has not committed a particularly serious crime to a place of persecution and hinder law enforcement's

ability to enter into cooperation agreements with aggravated felons.

We recommend that the Senate adopt the provisions in S. 754 which provide that an alien is ineligible for withholding of deportation based on an aggravated felony conviction when the sentence imposed is 5 years or more. This provision will ensure compliance with U.S. obligations under the 1967 Refugee Protocol by only permitting the return to possible persecution of refugees who have committed a particularly serious crime and will facilitate application of the definition and make the law truly effective in removing aggravated felons.

Regarding section 161(a)(8) we believe that the "commercial advantage" language found in section 406 of S. 754 provides a more flexible approach for compelling cases than the narrower approach in section 161(a)(8). We urge the Committee to adopt the S. 754 "commercial advantage" language.

Sec. 162 makes an alien convicted of an aggravated felony ineligible for suspension of deportation and adjustment of status.

We support this provision.

Sec. 163 provides that the expeditious deportation of aggravated felons creates no enforceable right for aggravated felons.

This provision is identical to section 604 of S. 754, and we support it.

Sec. 164 permits the Attorney General to release an alien convicted of an aggravated felony if the alien is not a threat to the community and release from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member of such person. The section provides that the Attorney General shall take into custody any alien convicted of an aggravated felony when the alien is released and may release the alien only if he was lawfully admitted into the U.S., likely to appear for any scheduled proceeding and not a threat to the community or when the Attorney General determines that release from custody is necessary to provide protection to a witness, a person cooperating with an investigation into major criminal activity, or an immediate family member.

This provision is identical to section 308 of S. 754, and we support it.

Sec. 165 amends section 242A(d) of the INA to provide that a

U.S. District Court shall have jurisdiction to enter a judicial order of deportation at the time of sentencing against an alien (A) whose criminal conviction causes the alien to be conclusively presumed to be deportable as an aggravated felon; (B) who has at any time been convicted of a violation of section 276(a) or (b); (C) who has at any time been convicted of a violation of section 275; or (D) who is otherwise deportable pursuant to sections 241(a)(1)(A) through 241(a)(5).

It provides that a U.S. Magistrate shall have jurisdiction to enter a judicial order of deportation at the time of sentencing where the alien has been convicted of a misdemeanor offense and the alien is deportable under this Act. The U.S. Attorney, with the concurrence of the Commissioner, may enter into a plea agreement which calls for the alien, who is deportable under this Act, to waive the right to notice and a hearing under this section, and stipulate to the entry of a judicial order of deportation as a condition of the plea agreement or as a condition of probation or supervised release, or both.

The existing judicial deportation statute authorizes a U.S. District Court to order deportation at the time of sentencing if the conviction renders an alien deportable as an aggravated felon or for certain crimes involving moral turpitude. This provision, however, would allow U.S. District Judges and U.S. Magistrates (in misdemeanor cases) to order deportation on any grounds of deportability.

We believe that in order to maintain a coherent national immigration policy, close questions relating to alienage, deportability, and particularly relief from deportation should be initially decided in the context of administrative proceedings, followed by judicial review, rather than in criminal cases. Therefore, in view of the DOJ responsibility to administer and enforce immigration laws, we believe that judicial deportation authority should be limited to situations in which the alien is before the court for sentencing for an aggravated felony or a serious crime involving moral turpitude. The phrase "conclusively presumed to be," should be deleted from the proposed amendment to section 242A(d)(1)(A). It is confusing and adds nothing to an otherwise clear statement that an alien who has been convicted of an aggravated felony is deportable.

Sec. 166 permits the entry of orders of exclusion and deportation stipulated to by the alien and the INS and provides that stipulated orders are conclusive. Such orders may be entered without a personal appearance by the alien before the special inquiry officer. DOJ shall provide that an alien who stipulates to an exclusion or deportation order waives all appeal rights.

This provision is identical to the Administration's proposal, and we support it. However, as we stated in section 133 and 141, we urge the Committee to replace the term "special inquiry officer" with "immigration judge" and to adopt our definition of "immigration judge".

Sec. 167 permits a U.S. District Court or Magistrate to order deportation pursuant to a stipulation entered into by the defendant and the U.S. In the absence of a stipulation, the Court or Magistrate may order deportation as a condition of probation, if, after notice and hearing pursuant to section 242A(c), the Attorney General demonstrates by clear and convincing evidence that the alien is deportable.

We do not support this provision because we believe it is unnecessary. Under 18 U.S.C. 3583(d), the District Court presently has the authority to order deportation as a condition of supervised release. Under that provision, if the District Court issues such an order, the alien is referred to INS for deportation. Section 302(d) of the Administration proposal would amend that section to provide that such an order be made "pursuant to the procedures of the Immigration and Nationality Act." This amendment would address an issue in litigation in which District Court judges have interpreted this section to authorize them to order deportation irrespective of the provisions of the INA. We urge the Committee to add section 302(d) in place of this provision.

Sec. 168 requires the Attorney General to submit within one year of the date of enactment and annually thereafter a report to the Committees on the Judiciary of the House and Senate on the number of illegal aliens incarcerated in state and federal prisons stating the number incarcerated for each type of offense; the number of illegal aliens convicted for felonies in any federal or state court but not sentenced to incarceration in the previous year, by type of offense; DOJ programs and plans underway to ensure the prompt removal from the U.S. of criminal aliens subject to exclusion or deportation; and methods for identifying and preventing the unlawful reentry of aliens who have been convicted of criminal offenses in the U.S. and removed from the U.S.

We are concerned that paragraph (2) requires the Attorney General to report on the number of aliens convicted but not sentenced to incarceration. Without providing any resources, this provision would require significant effort on the part of state prosecutors and courts which are not under the administrative jurisdiction of the DOJ. We do not support this provision.

Sec. 169 authorizes INS to use appropriated funds to lease space, establish, acquire, or operate business entities for

undercover operations, proprietary corporations or businesses to facilitate undercover immigration-related criminal investigations. INS may deposit funds generated by these operations or use them to offset operational expenses. Authority may be exercised only upon written certification of the INS Commissioner in consultation with Deputy Attorney General.

This provision is identical to the Administration's proposal, and we support it.

Sec. 170 provides that the Secretary of State, together with the Attorney General, may enter into an agreement with any foreign country providing for the incarceration in that country of any individual who is a national of that country and is an alien who has been convicted of a criminal offense under federal or state law and who is not in lawful immigration status or is subject to deportation, for the duration of the prison term to which the individual was sentenced. Any such agreement may provide for the release of such individual pursuant to parole procedures of that country. The Secretary should give priority to concluding an agreement with any country for which the President determines that the number of such individuals who are nationals of that country in the United States represents a significant percentage of all such individuals in the United States.

This section also provides that it is the Sense of Congress that no new treaty should permit the prisoner to refuse the transfer. It also provides that, except as required by treaty, the transfer of an alien shall not require the alien's consent.

We agree that some level of nonconsensual prisoner transfer should be implemented; however, the current proposal is problematic in several areas. A number of concerns must be resolved prior to implementing such a regime.

Initially, the proposed legislation effectively directs the President to negotiate certain treaty provisions; the Administration believes that this type of Congressional direction is undesirable and may be inconsistent with the President's authority to make treaties and conduct foreign relations.

Section 170(a) provides that transferred aliens will be incarcerated for the duration of their sentences; however, this conflicts with the balance of that section which further provides for the release of such transferred persons pursuant to the parole procedures of that country. Section (b)(1) seeks to clarify the focus of 170(a) -- to expedite the transfer of affected aliens and ensure that the balance of their sentences are served, but it appears to contradict (a). This provision, however, may infringe upon the sovereignty of the parties in administering the transferred sentence thus raising concerns

related to international treaty obligations and relations with our treaty partners.

The proposal appears to offer little incentive for countries with large numbers of their nationals in U.S. prisons to renegotiate prisoner transfer treaties, or negotiate nonconsensual transfer agreements. Even to the extent that such countries have large numbers of U.S. nationals in their prisons, it is not clear that the transfer of U.S. prisoners is a high priority for the governments of these countries or, indeed, a desirable goal at all. To the extent that the U.S. has to put pressure on a reluctant country to renegotiate a prisoner transfer agreement, we are concerned that such pressure might lead to minimal or nominal compliance. Foreign governments that have entered into such agreements under duress may not vigorously honor their commitments to keep potentially dangerous convicted felons in prison.

The State Department has also noted that involuntary transfers of prisoners whose crimes were not particularly serious or who do not present a danger could run afoul of our obligations under the 1967 Protocol relating to the Status of Refugees not to return a refugee to a place of persecution. Further, the U.S. is severely limited in its ability to monitor activities in foreign countries' prisons, most importantly with respect to potential human rights abuses which might be directed against the transferred prisoners. The State Department notes that the U.S. might bear some legal responsibility in such human rights abuse cases. Finally, such agreements would almost certainly have to contain a reciprocal provision for the involuntary transfer of U.S. citizens imprisoned in foreign countries back to the U.S. Non-consensual transfers of U.S. citizens from foreign prisons back to the U.S. may well raise issues of a constitutional nature.

In 1994, we transferred 424 prisoners abroad, including 394 to Mexico. The Mexican transfers alone resulted in a savings of over \$7.5 million for the DOJ. As of December 31, 1995, we transferred 438 prisoners abroad, including 266 prisoners to Mexico. In May 1995, the United States and Mexico had committed to returning 400 Mexican nationals to Mexico pursuant to the prisoner transfer program, by the end of December 1995. By December 31, 1995, the DOJ had approved over 506 Mexican prisoner transfer applications. Due to the large number of prisoners scheduled to transfer to fulfill our commitment of 400, the December transfer was to be completed in January 1996; however, due to the government furlough, the second phase will occur at the end of February.

Limited prison capacity in other countries seriously inhibits our ability to increase significantly the number of prisoner transfers. In our view, the premature release of

transferred prisoners due to a lack of prison space would be unacceptable and inconsistent with the purposes of the transfer treaty.

Sec. 170A requires the Secretary of State and the Attorney General to submit to Congress not later than 180 days after this Act's enactment a report that describes the use and effectiveness of the prisoner transfer treaties with the three countries with the greatest number of their nationals incarcerated in the U.S. in removing from the U.S. such incarcerated nationals. The report shall include the recommendations of the Secretary of State and the Attorney General to increase the effectiveness and use of the treaties. In considering the recommendations, the Secretary of State and the Attorney General shall consult with State and local officials in areas disproportionately impacted by criminal aliens.

As a general matter, the Administration discourages the imposition of reporting requirements, which necessarily divert a significant commitment of resources away from prisoner transfers, particularly when the resources of the DOJ's Office of Enforcement Operations (OEO), which has responsibility for the International Prisoner Transfer Program, are already limited. Moreover, much of the information requested in the study would have to be collected by the states which have similar resource concerns. Previous reviews of the prisoner transfer program and requests for information from the states have been met with mixed responses.

When OEO assumed responsibility for the International Prisoner Transfer Program, only 34 states had implementing legislation. As a result of our outreach efforts, four more states enacted implementing legislation. Many of the states without the legislation expressed no interest in prisoner transfer because of the limited number of foreign nationals in their systems. Other states that expressed an interest have other major priorities, so state legislation to implement prisoner transfer has been delayed. Further, according to the American Correctional Association, which is comprised of correctional specialists from the various states, very few states have adequate prisoner tracking systems. Indeed, most do not include a question relating to nationality or citizenship in their intake process. Consequently, the ability to gather the data contemplated by the Congress would be haphazard, at best, because many states do not maintain such records. The DOJ is working to help states collect such data. DOJ's Office of Justice Programs has initiated a process to identify foreign nationals incarcerated in state and local institutions, but this system is only partially on-line and is not expected to be completed in time for the report mandated by this provision.

Sec. 170B modifies the filing requirement for individuals

who keep, maintain, control, support, or harbor in any house or place an alien for the purpose of prostitution. It limits application of the filing requirement to whomever knows or recklessly disregards the fact that said individual is an alien; expands application to any alien; and reduces the time period in which to file; increases the term of imprisonment from two to ten years; and clarifies that the information contained in the filing may be used in an action to enforce Section 274A of the INA.

This provision is identical to the Administration's proposal, and we support it.

Sec. 170C makes a technical correction to the Violent Crime Control Act of 1994. It also clarifies that the INS may place an alien in administrative deportation proceedings if a Federal district court judge has declined the Government's petition to issue a judicial deportation order.

This provision is identical to the Administration's proposal, and we support it.

PART 6--MISCELLANEOUS

Sec. 171 permits reimbursement of other Federal agencies, as well as the States, out of the immigration emergency fund. Reimbursements may be made to other countries for repatriation expenses without the requirement that the President declare an immigration emergency. It also permits the control and seizure of vessels when the Attorney General determines that urgent circumstances exist due to a mass migration of aliens. This section also authorizes the Attorney General to designate local enforcement officers to enforce the immigration laws when the Attorney General determines that an actual or imminent mass migration of aliens presents urgent circumstances.

This provision is identical to the Administration's proposal, and we support it.

Sec. 172 repeals the ban on open field searches by the INS.

Prior to 1986, searches of open agricultural areas constituted a substantial portion of the INS's interior enforcement efforts. However, since the employer sanctions provisions of IRCA became effective in 1987, the INS has focused its attention in this area on employer compliance and enforcement of section 274A. We intend to continue with that approach. Accordingly, while we do not object to the repeal of the "open field" restrictions, we do not anticipate a change in the INS's enforcement strategy as a result.

Sec. 173 makes it unlawful for any alien to vote in any general or special election in the U.S. A violation is subject

to a fine of up to \$5,000 or by imprisonment for up to three years, or both.

This provision is unnecessary because laws prohibiting unlawful voting already exist. False voter registration is a violation of federal law under the National Voter Registration Act, with more stringent penalties than those proposed in section 173 of S. 1394. 42 U.S.C. §1973gg-10(2). False assertion of citizenship is also a violation of federal law. 18 U.S.C. §911. Voter registration forms must list eligibility requirements, which include citizenship in all states. Persons must attest that they are eligible under penalty of perjury.

Section 173 also raises constitutional concerns. Although no states currently allow aliens to vote in state or federal elections, some states permit their local governments to allow non-citizen residents to vote in local, usually school board, elections only. However, Congress has no authority to regulate these local elections in the manner proposed in section 173. U.S. Const. art. 1, sec. 2, art. 1, sec. 4. The Constitution does not confer on Congress any general authority to regulate the qualifications for voters in state or local elections. On the contrary, the power to regulate their own elections was exclusively and intentionally reserved to the States by the Framers of the Constitution. See U.S. Const., Amdt. X. As Justice Black wrote in Oregon v. Mitchell, "[T]he whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States." 400 U.S. 112, 125 (1970); accord Gregory v. Ashcroft, 501 U.S. 452, 461-62 (1991); Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

Our federal system of government thus recognizes the States as distinct sovereign entities with the inherent power to define their political communities. Sugarman, 413 U.S. at 643. The Supreme Court has said that the regulation of voter qualifications in state and local elections is a necessary aspect of this broad power: "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices" Oregon v. Mitchell, 400 U.S. at 125. By dictating to the States which of its residents may or may not be permitted to exercise the right to vote in local elections, Congress would be intruding upon the States' sovereignty over their own electorate. Only where Congress is acting pursuant to its enforcement powers under constitutional amendments that limit this traditional State authority -- such as the Fourteenth and Fifteenth Amendments -- has the Supreme Court sanctioned such intrusions. See, e.g., Oregon v. Mitchell, 400 U.S. 112 (upholding Congress' power to ban use of literacy tests

in state elections); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (same); cf. Gregory v. Ashcroft, 501 U.S. at 461-68 (States' sovereignty over issues that "go to the heart of [their own] representative government" has force even as against proscriptions of Fourteenth Amendment). Such a situation is not present here.

Of course, Article I, § 8, cl. 4 of the Constitution does give Congress "broad power over immigration and naturalization." Mathews v. Diaz, 426 U.S. 67, 79-80 (1977). Congress' plenary authority to regulate both the status of aliens and the terms under which they enter and remain in the country, DeCanas v. Bica, 424 U.S. 351, 355 (1976), may be broad enough to justify legislation which makes it a crime for aliens to vote in the United States. Whether it is also broad enough to justify Congress' intrusion upon the States' sovereignty over their own political communities is unclear.

We are also concerned that section 173 may encourage discrimination against and harassment of people who look foreign and/or are language minorities, primarily Hispanics, Asians and Native Americans. This section could potentially dilute the vote of these groups of Americans by discouraging their participation in the electoral process.

Sec. 174 amends section 202(a)(1) of the INA, which provides that immigrant visas must be issued without discrimination because of race, sex, nationality, place of birth, or place of residence, to state that nothing in this subsection limits the authority of the Secretary of State to determine procedures for processing visas. This section would reverse a recent judicial decision which interpreted the existing language to require the Secretary of State to process visas in a specific location.

This provision is identical to the Administration's proposal, and we support it.

Sec. 175 clarifies the content and format for passenger lists and manifests to be prepared and submitted by carriers to INS, including name, date of birth, gender, citizenship, travel document number, and arriving flight number.

This provision is identical to the Administration's proposal, and we support it.

Sec. 176 requires the Attorney General to develop not later than 2 years after the enactment of this Act an automated entry and exit control system that can identify lawfully admitted nonimmigrants who overstay their visas.

The Administration is generally supportive of this provision's concept, which would allow us to more systematically

track nonimmigrant visa overstayers. We do not, however, believe that a two year statutory deadline is appropriate or feasible. INS is already reviewing new ways to identify overstayers, and it would be important to pilot test and evaluate some of these concepts before implementing a new automated entry and exit control system. We are prepared to brief the Committee on the Administration's plans for strengthening enforcement against illegal immigration by visa overstayers.

Sec. 177 provides that a carrier, in consideration for bringing an alien transitting the U.S. without a visa, must agree to indemnify the U.S. for any costs of detaining or removing such an alien if the alien is refused admission to the U.S., fails to continue his or her journey to a foreign country within the time prescribed, or is refused admission by the foreign country to which the alien is travelling while transitting the U.S.

This provision is identical to the Administration's proposal, and we support it.

Sec. 178 authorizes the Attorney General to provide information furnished under the Legalization and Special Agricultural Worker programs when such information is requested in writing by a duly recognized law enforcement entity in connection with a criminal investigation or prosecution, or to an official coroner for purposes of affirmatively identifying a deceased individual (whether or not related to a crime). It allows the Attorney General, in her discretion, to furnish the information in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce. The criminal penalties for violation of these provisions is retained.

We agree that confidentiality provisions should be modified because it is very difficult to obtain crucial information contained in these files, such as fingerprints and photographs, when the alien becomes a subject of a criminal investigation. However, we support a waiver of the confidentiality provisions, along the lines of S. 735, the Antiterrorism Amendments Act of 1995, the bipartisan antiterrorism bill which the U.S. Senate passed in June of 1995, that is, only if a federal judge authorizes disclosure of information to be used for identification of an alien who has been killed or severely incapacitated or for criminal law enforcement purposes against an alien if the alleged criminal activity occurred after the legalization or SAW application was filed and such activity poses either an immediate risk to life or to national security or would be prosecutable as an aggravated felony.

Sec. 179 clarifies that the Attorney General is not required to rescind the lawful permanent resident status of a deportable alien separate and apart from the deportation proceeding under

section 242 or 242A. This provision will allow INS to place a lawful permanent resident who has become deportable into deportation proceedings immediately.

This provision is identical to the Administration's proposal, and we support it.

Sec. 180 prohibits governmental entities from restricting availability of information related to the immigration status of an alien in the U.S.

We have a number of concerns with this provision as drafted. In some instances the provision could raise troubling privacy and due process issues. While information restrictions may have been a problem in the 1970s or 1980s, we know of no existing local or state government policies on information availability which burden the INS. We do not support this provision, but will work with the Committee to explore appropriate alternatives.

Sec. 181 authorizes the Attorney General to accept, administer and utilize services of volunteers to assist in administering programs relating to naturalization, adjudication at ports of entry, and removal of criminal aliens. Such volunteers may not administer or score tests and may not adjudicate.

This provision is similar to the Administration's proposal, and we support it.

Sec. 182 authorizes the Attorney General to acquire and utilize any federal equipment determined available for transfer to the DOJ by any other Federal agency upon request of the Attorney General in order to facilitate the detection, interdiction and reduction of illegal immigration.

We support this provision.

Sec. 183 denies any court jurisdiction of any cause or claim by or on behalf of any person asserting an interest under section 245A (regarding legalization applications) of the INA unless such person in fact filed a complete application and application fee to an authorized legalization officer of the INS but had the application and fee refused by that officer.

This provision would affect several major class action lawsuits that involve the legalization program where district courts have granted relief to aliens who did not timely file for legalization. We support this provision.

Sec. 184 prohibits any alien who seeks adjustment of status as an employment-based immigrant and who is not in a lawful nonimmigrant status and any alien who worked while unauthorized

to work or who has otherwise violated the terms of a nonimmigrant visa from adjusting their status under section 245(a).

Section 245(c)(2) of the INA already provides that an alien "who ... continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States" may not apply for adjustment of status. Accordingly, we believe the proposed amendment does not represent a significant addition to current law and is unnecessary.

Subtitle B--Other Control Measures

Part 1--Parole Authority

Sec. 191 tightens parole authority by changing the acceptable reasons from "emergent reasons" and "reasons deemed strictly in the public interest" to "urgent humanitarian reasons or significant public benefit," and by requiring a case-by-case determination.

We oppose this provision as an inappropriate restriction on the Attorney General's parole authority. The case-by-case determination requirement would dangerously limit the Attorney General's ability to deal with emergency situations involving numerous aliens. Current law provides the Attorney General with appropriate, needed flexibility to respond to compelling immigration situations.

Sec. 192 reduces the world-wide level of family-sponsored immigrants in a fiscal year by the number of parolees who were paroled in the two previous fiscal years and who remained in the U.S. for more than a year.

We oppose this provision because it may have a significant adverse effect on family reunification and result in longer waiting times for admission of relatives of U.S. citizens and legal permanent residents. Humanitarian parole and family-sponsored immigration advance two vital, but distinct, national interests. This section blurs the distinction between the two and hinders both. It could also affect our ability to carry out the Cuban Migration agreements.

Part 2--Asylum

Pursuant to a presidential directive, the DOJ dramatically restructured the asylum process in January 1994. In addition, the Administration secured and Congress provided the resources necessary to do the job in the Violent Crime Control and Law

Enforcement Act of 1994 which more than doubled the authorized number of INS asylum officers from 150 to 325, and increased the number of Immigration Judges from 116 to 179. In FY 1996 we expect to have approximately 200 immigration judges. The new asylum process allows the INS to quickly identify and promptly grant valid claims, and to refer all other cases to immigration court for deportation proceedings; to grant work authorization only to applicants who are granted asylum or when an applicant's case is not adjudicated within 180 days; and to streamline procedures to help asylum officers keep current with incoming applications.

To date, these reforms have had tremendous positive results. New asylum claims filed with the INS dropped 57 percent. Asylum officers completed 126,000 cases in calendar year (CY) 1995 compared to 61,000 in CY 1994. Immigration Judges completed 40,000 asylum cases in CY 1995 compared to 17,000 in CY 1994--an increase of 135 percent. More than 98 percent of the new non-American Baptist Churches v. Thornburgh cases were completed by Immigration Judges within 180 days from the initial INS receipt of the asylum application. We have streamlined procedures without reducing the quality of our asylum decisions. INS has instituted quality assurance procedures to monitor the new system. Approval rates have not changed significantly.

In addition to restructuring the asylum process, the INS has stepped up its fraud investigation of preparers of spurious asylum claims. As noted earlier, investigations have resulted in indictments of preparers in Los Angeles, San Francisco, New York, and Arlington, VA. In addition, INS has requested additional funding in FY 1996 for detention and deportation of failed asylum seekers.

Sec. 193 precludes an alien who used any fraudulent document to enter the U.S. or destroyed his or her document en route to the U.S. from applying for asylum unless the alien had to present such document to depart from a country in which he or she had a credible fear of persecution and travelled directly from such country to the U.S. The alien shall be referred to an asylum officer for interview to determine credible fear. If the asylum officer determines that the alien does not have a credible fear of persecution, the alien may be specially excluded and deported. The Attorney General shall provide for prompt supervisory review of the determination that the alien does not have a credible fear. If the asylum officer determines that the alien does have a credible fear of persecution, the alien shall be taken before an immigration judge for an exclusion hearing.

Pursuant to this section, "credible fear" means there is a substantial likelihood that the statements made by the alien in support of his or her claim are true, and there is a significant possibility in light of such statements and of country

conditions, that the alien could establish eligibility as a refugee.

We do not support this provision. We believe that the provisions for special exclusion in S. 754 are sufficient to allow us to process efficiently the asylum applications of excludable aliens. Absent smuggling or an extraordinary migration situation, we can handle asylum applications for excludable aliens under our regular procedures.

Furthermore, the concept of "presentation" of fraudulent documents pursuant to "direct departure" from a country in which the alien has a credible fear of persecution is problematic. The "presentation" of such documents is not necessary for departure, and transit countries may refuse to accept the return of aliens who did not travel directly to the U.S. In addition, the concept of "direct departure" is unnecessary and confusing. Section 208(3)(5)(B) adequately addresses asylum shopping by an alien already present in a country in which she or he has no fear of persecution. Adding "direct departure" may cause needless litigation and confusion in the context of connecting air flights. It may also disadvantage individuals fleeing persecution from countries which lack direct flights to the United States such as countries in Africa.

Sec. 194 requires that an application for asylum must be filed within 30 days of entry unless the alien who seeks to apply affirmatively shows that the claim is based on circumstances that arose after the alien's entry and that the claim is filed up to thirty days after the alien knew or reasonably should have known of such circumstances.

We strongly oppose this provision as a matter of policy. To return a refugee to a country where he or she would face a threat to life or freedom simply because the refugee failed to make a timely request for protection violates a fundamental duty. Failure to file a timely asylum claim does not relieve the U.S. of its non-refoulement obligation under the Refugee Protocol. In addition, it will require the INS to divert resources from adjudication of the merits of asylum applications to adjudication of the timeliness of filing. Since eligibility for withholding of deportation is not affected by this section, the Attorney General must still adjudicate the merits of a refugee claim. Our proposed special exclusion proceedings, limitations on judicial review, and standard of judicial review, along with the asylum regulations we have implemented give the INS sufficient mechanisms for processing asylum applications and preventing asylum abuse. We do not believe that this provision is needed.

Sec. 195 limits the employment authorization of an asylum applicant. The section provides that the Attorney General may deny any application for, or suspend or place conditions on any

grant of, employment authorization of anyone who makes an application for asylum.

We do not support this provision. Section 208(e), which was added by section 130004 the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, September 13, 1994, is sufficient to address this concern. The provision in S. 1394 would terminate employment authorization in some instances, such as when a nonimmigrant who already has employment authorization applies for asylum. Current INS procedure to withhold employment authorization for 180 days while an application for asylum is pending review has reduced the incidence of asylum abuse.

Sec. 196 authorizes the Attorney General, for two years, in order to reduce the asylum backlog, to expend out of funds such amounts as may be necessary for leasing or acquiring property.

We have no objection to this provision as it relates to the leasing or acquiring of property for security and detention space. However, with regard to office space, this provision should be modified to require the Attorney General to lease space pursuant to the Federal Property and Administrative Services Act of 1949. Under the 1949 Act the Attorney General could request a delegation of the authority to lease office space from the General Services Administration's Administrator.

This section also authorizes the Attorney General to employ temporarily up to 300 persons, who by reason of retirement on or before January 1, 1993, are receiving annuities or retired or retainer pay as retired officers of regular components of the uniformed services.

This provision is unnecessary. Under the Federal Employees Pay Comparability Act of 1990 (5 U.S.C. §§ 8344(i) and 8468(f)), such reemployment can now be handled administratively. Nevertheless, if this provision remains in S. 1394, we recommend that a parallel provision be added to authorize the Secretary of State to increase the number of personnel who address the asylum backlog.

Part 3--Cuban Adjustment Act

Sec. 197 repeals the Cuban Adjustment Act, P.L. 89-732 (1966). The Act provides for adjustment of status, in the discretion of the Attorney General, of any national or citizen of Cuba who has been inspected and admitted or paroled into the U.S. and has resided here for one year. This section repeals the Act except as to individuals who will be paroled into the U.S. pursuant to the Cuban Migration Agreement of 1995.

We oppose repeal of the Cuban Adjustment Act. Our long term goal, to which we are absolutely committed, is to bring democracy

to Cuba. Until Cuba has a democratic government, we need flexibility to respond appropriately to changing conditions in Cuba. We look forward to the time when Cuban migration to the U.S. is normalized and on par with migration from other countries. We took major steps towards normalizing migration from Cuba to the U.S. when we concluded the Cuban Migration Agreements in September 1994 and May 1995.

While we are pleased that this section extends application of the Act to individuals who will be paroled into the U.S. pursuant to the Cuban Migration Agreement of 1995, we are concerned that this section fails to mention the Cuban Migration Agreement signed on September 9, 1994, the announcements by the President on October 14, 1994, and by the Attorney General on December 2, 1994, and thus continues to lack a means to adjust the immigration status of individuals who will be or have been admitted, inspected, or paroled from Havana or from the safehavens in Guantanamo and Panama into the U.S.

Sec. 197 also provides that the number of those obtaining lawful permanent resident status after being paroled into the U.S. will be counted as family-sponsored immigrants for purposes of the world-wide and per-country ceiling.

We oppose this provision because it may have a significant adverse effect on family reunification and result in longer waiting times for admission of relatives of U.S. citizens and legal permanent residents from countries other than Cuba.

Title II--FINANCIAL RESPONSIBILITY

PART 1--RECEIPT OF CERTAIN PUBLIC BENEFITS

The Administration generally supports the denial of means-tested benefits to undocumented immigrants. The only exceptions should include matters of public health and safety such as emergency medical services, immunization and temporary disaster relief assistance; every child's right to full participation in public elementary and secondary education, including pre-school and school lunch programs; and benefits earned as a result of U.S. military service. In so doing, care must be taken not to limit or deny benefits or services to eligible individuals or in instances where denial does not serve the national interest. The Administration generally supports tightening sponsorship and eligibility rules for non-citizens and requiring sponsors of legal immigrants to bear greater responsibility through legally enforceable sponsorship agreements for those whom they encourage to enter the U.S. The Administration, however, opposes application of new eligibility and deeming provisions to current recipients, particularly with regard to the disabled who are exempted under current law, to immigrants who have become U.S. citizens, and to lawful immigrants seeking to participate in

student financial aid programs. The Administration also opposes the application of deeming provisions to Medicaid and other programs where deeming would adversely affect public health and welfare.

Section 201 defines "eligible alien" as an alien: lawfully admitted for permanent residence; granted refugee or asylee status; whose deportation has been withheld under section 243(h) of the Immigration and Nationality Act; or who has been granted parole for a period of 1 year or more. All other aliens would be 'ineligible aliens' and would not be eligible for needs-based benefits under any Federal, state, or local program, except: (1) emergency medical services under title XIX of the Social Security Act; (2) short-term emergency disaster relief; (3) assistance or benefits under the National School Lunch Act; (4) assistance or benefits under the Child Nutrition Act of 1966; and (5) public health assistance for immunizations and for testing and treatment for communicable diseases. Ineligible aliens would be ineligible to receive any grant, contract, loan, professional license, or commercial license provided or funded by any Federal, state, or local government. Only aliens eligible to work would be able to receive unemployment benefits.

This section also requires the Secretary of the Department of Housing and Urban Development (HUD), within 90 days of the date of enactment, to submit a report to the Committees on Banking and Committees on the Judiciary of the House and Senate describing how HUD is enforcing section 214 of Housing & Community Development Act of 1980, including statistics of individuals denied assistance.

This section also limits benefits under the Social Security Act to U.S. citizens and eligible aliens who have been granted work authorization and then only those benefits attributable to the authorized employment. Ineligible aliens may not be reimbursed amounts paid into SSA accounts.

While we support the goal of establishing a uniform definition of alien eligibility, we oppose section 201 as drafted. The provision would affect many diverse Federal, state, and local programs; represents a new mandate to many state and local governments; and targets current immigrant beneficiaries, some of whom are residing lawfully in the U.S. with the knowledge and permission of the INS.

We encourage you to examine the definition of "qualified" alien as the Administration proposed in its welfare reform bill, introduced in 1994, the "Work and Responsibility Act of 1994" and in the Administration's Balanced Budget proposal.

We recommend this definition of eligibility apply only to the four primary needs-based programs--AFDC, SSI, and Medicaid.

The Food Stamps Act already defines an eligible alien. We would also allow state and local programs of cash and medical general assistance to utilize the same alien eligibility criteria. Finally, we support the provision in section 201 that would retain the current law provision for illegal aliens to receive only emergency medical services under Medicaid.

The Administration's approach would avoid a number of problems that would result under S. 1394. For example, the eligibility provision in S. 1394 might be read to deny needs-based, education-related services and assistance paid for with Federal, State, or local funds--except for services under the National School Lunch Act--to undocumented alien children. The principal reasons given by the Supreme Court in Plyler v. Doe for not permitting States to do so remain powerful. In addition, students who are not undocumented aliens could be stigmatized based on name or appearance, and parents, fearful of their children's well-being, might keep them at home. These results are in direct conflict with the Administration's policy of encouraging better education for all students and are likely to adversely affect, and be divisive within, our communities. Moreover, instead of making progress towards becoming productive, responsible adults, uneducated children are vastly more likely to wind up on the streets, possibly engaged in unlawful behavior. Finally, schools and school systems are ill-suited to make determinations about the citizenship status of students and should not be forced to bear the uncompensated expense and burden of doing so. We urge that this section be revised so that it does not call into question the full participation of any child in the U.S. in public elementary and secondary education, including participation in pre-school and school lunch programs.

In addition, the definition of an "eligible alien" in section 201(d) could be read to exclude certain postsecondary students currently eligible for student assistance under title IV of the Higher Education Act of 1965; the negative consequences of varying eligibility requirements on these students and their educational institutions must be considered.

This provision also should be modified to clarify that it has no effect on the applicability of section 214 of the Housing and Community Development Act of 1980 to HUD programs, and that it does not apply to assistance provided by HUD. Without such clarification, this provision would impose a great burden on States and local governments that administer HUD mortgage programs, Federal Housing Administration contract programs, and Community Development Block Grants to identify noncitizens who may indirectly benefit from these non-direct assistance programs. Furthermore, it would jeopardize progress made and cooperation by HUD, INS, housing authorities, and multifamily project owners to smoothly implement section 214 of the Housing and Community Development Act of 1980.

Furthermore, the definition of "eligible alien" does not include Cuban and Haitian entrants as defined under section 501 of the Refugee Education and Assistance Act of 1980. If Cuban and Haitian entrants are not included in the list of eligible aliens, ~~they no longer would be eligible for assistance and services under the refugee program.~~ The definition of "ineligible alien", by its silence, includes U.S. nationals, thus making natives of American Samoa ineligible for benefits under this section.

The definition of "eligible alien" also fails to include aliens lawfully admitted under temporary visas (e.g., B for business visitors, E for treaty traders and investors, L for intracompany transferees, and H-1B for professionals) and aliens outside the United States. Under section 201 ineligible aliens would be unable to receive, inter alia, contracts, professional licenses, or commercial licenses provided or funded by any federal, state, or local government. One concern is that by prohibiting the award of federal contracts and the granting of federal licenses, this section would preclude local acquisition by diplomatic posts and military bases in foreign countries to the extent that such acquisitions involve contracts with foreign individuals. In addition, section 201(a)(1), which would make ineligible aliens ineligible for government contracts, would be inconsistent with our obligations under the World Trade Organization's Agreement on Government Procurement.

Section 201 may violate NAFTA provisions on services and investment (chapters 11 and 12) and potentially violate our obligations under the GATS agreement and bilateral investment treaties if the class of ineligible aliens is not specifically narrowed. Furthermore, NAFTA parties have agreed to eliminate citizenship and permanent residency requirements for professional licenses, and section 201 would be in violation of those obligations.

This section appears to impose a duty on agencies to make new eligibility determinations for each individual served. There are many programs for which it would not be cost-effective, or in some cases feasible, to determine individual eligibility. These programs include soup kitchens, food banks, and public health programs such as community and migrant health centers. The Administration's approach which would apply this definition of eligibility to the four major federal entitlement programs would avoid these burdensome effects.

In addition, section 201(a)(3) requires agencies administering public assistance programs to notify individually or by public notices all ineligible aliens of the termination of their benefits. While we believe that it is important to notify individuals of their benefit determination, this requirement would place a significant burden on smaller benefit programs such

as those mentioned above. The effects of these requirements on smaller programs should be considered.

Section 201(c) has many undesirable effects on the operation of the Social Security program. The payment restrictions in this provision violate the terms of the bilateral Social Security totalization agreements with 17 foreign countries, including Canada and virtually all of Western Europe. Also, the U.S. has treaties with other countries that require the U.S. to pay Social Security benefits to foreign treaty nationals on the same basis as U.S. citizens. Legislation abrogating these agreements and treaties would presumably lead to retaliatory restrictions on the payment of such benefits by other countries to U.S. citizens. Furthermore, this provision would deny Social Security benefits as well as Social Security tax refunds to aliens legally admitted on a temporary basis to work in the U.S.

The payment restrictions are also inconsistent with current provisions of law that permit payment of benefits to aliens outside the U.S. if they are citizens of a country whose social insurance system does the same for U.S. citizens. About 65 countries meet this requirement.

It is not clear whether the payment restrictions would be prospective or retrospective. If the Social Security benefits payable to current or future beneficiaries should not reflect credit for past periods of unauthorized work, INS would have to provide SSA with the necessary information about the beneficiary's work authorization history. This is probably not feasible because much of the necessary INS information is stored in paper format in Federal Records Centers.

Although it would be feasible for SSA to suspend Social Security benefits payable to a person who is currently in this country illegally, assuming appropriate evidence were obtained, such an approach would not impose any sanctions on legally admitted aliens who received Social Security credit for past periods of unauthorized work.

Also the provision does not address the complex issue of Social Security benefit eligibility for citizens who are dependents or survivors of ineligible aliens, or ineligible aliens who are dependents or survivors of U.S. citizens.

The Administration would support a provision that would restrict the payment of Social Security benefits to aliens who are in the United States illegally if the provision were drafted in a manner that did not compromise existing international arrangements concerning payment of Social Security benefits. We look forward to working with the Committee to address these concerns.

We also would seek to ensure that programs of assistance to refugees under Title IV of the Social Security Act be designed to promote early economic self-sufficiency and social adjustment and to meet the specific needs of refugees. Our concern is that newly arriving refugees, for whom the federal government has a special responsibility, should be provided with services and work and training participation requirements that are adapted to their situation.

Sec. 202 defines "public charge" for purposes of deportation as the receipt of certain benefits for an aggregate of more than 12 months in the first five years after entry as an immigrant or, in the case of an individual who entered as a nonimmigrant, the first five years after adjustment to permanent resident status. Such benefits are limited to one or more of the following programs: AFDC, SSI, Medicaid, Food Stamps, state general assistance, or any other program of assistance funded in whole or in part by the Federal government for which eligibility is based on need (except the exempted programs noted in section 201).

This section also provides that any alien who during the public charge period becomes a public charge, regardless of when the cause arose, is deportable. This section exempts from the public charge definition refugees and asylees. Further, if the cause of the alien's becoming a public charge arose after entry as an immigrant or, in the case of a nonimmigrant, after adjustment to permanent resident status, and was a physical illness or injury that kept the alien from working or a mental disability that required continuous hospitalization, then the alien would be exempt. While this section now excludes refugees and asylees from the public charge provision, it would place Cuban and Haitian entrants at risk of deportation if they received benefits from one or more of the listed programs for more than an aggregate of 12 months. We strongly object to the effect of this provision and believe Cuban and Haitian entrants should be excluded from the public charge provision. We believe this would be consistent with the Administration's position on providing assistance to Cuban parolees to alleviate any State or local impact.

This section also requires the Attorney General to review applications for benefits under section 216, 245 or chapter 2 of Title III of the INA to determine whether the exception to the definition of public charge applies. If the exception does not apply, the Attorney General shall institute deportation proceedings unless she exercises discretion to withhold or suspend deportation.

The legislation would require increased administrative efforts to ascertain (1) whether an alien who had received benefits for more than an aggregate of 12 months during the public charge period was receiving such benefits due to a "pre-

existing condition," or one that arose since entry or since adjustment of status; (2) whether a physical illness or injury was so serious that the alien could not work at any job; or (3) whether the alien's mental disability required continuous hospitalization. Since this section would create a number of administrative and legal complexities as drafted, we do not endorse these provisions without further clarification or amendment.

Sec. 203 sets forth the requirements for a sponsor's affidavit of support. It requires that the affidavit of support be executed as a contract that is enforceable against the sponsor by the sponsored individual, the Federal government, a state, district, territory or possession or any subdivision thereof, providing any benefits to sponsored eligible aliens. In the affidavit, the sponsor must agree to financially support the sponsored individual until the sponsored individual has worked in the U.S. for 40 qualifying quarters. A sponsor must be age 18 or over, a citizen or legal permanent resident, domiciled in any of the several states of the U.S., the District of Columbia, or a territory or possession of the U.S. and demonstrate an ability to maintain an annual income of at least 125% poverty line for him or herself and the sponsored individual.

The governmental entities are authorized to seek reimbursement from sponsors of aliens who have received benefits, and to bring suit against sponsors that do not reimburse the relevant government agencies. No cause of action could be brought against sponsors after 10 years from an alien's last receipt of benefits. The sponsor is required to notify the Federal, state, and local governments of any change of the sponsor's address.

The Administration strongly supports making the current affidavit of support legally binding. However, we oppose requiring the affidavit to be effective for 40 qualifying quarters, particularly as this requirement interacts with the deeming provisions in section 204. We note that these two sections would require a sponsored immigrant to remain subject to deeming provisions for a minimum of 10 years, or potentially 5 to 7 years after becoming a citizen.

As more thoroughly described in our comments on section 204, the time period of the legally binding affidavit should specify a period of years but not extend beyond the time the immigrant becomes a U.S. citizen. The Administration strongly opposes such a provision which would treat naturalized citizens as second class citizens.

In addition, the definition of qualifying quarter is unworkable. Section 203(f)(3)(A) defines "qualifying quarter" as a 3-month period in which the sponsored individual has earned the

minimum amount necessary for the period to count as a Social Security quarter of coverage. Since the implementation of annual wage reporting in 1978, SSA no longer maintains quarterly records of earnings and thus could not determine the amount earned in a calendar quarter. Quarters of coverage are now based on annual earnings. We recommend changing the definition of quarters of coverage to be consistent with the Social Security Act. Also, individuals may become entitled to disability insurance benefits with less than 40 quarters of work. The bill should clarify that an immigrant that otherwise qualifies for title II disability insurance would be eligible for benefits under title II and would be exempt from the deeming requirements for purposes of disability benefits under title XVI if he or she became disabled after entry.

Section 203 should also clarify that a sponsor would not be liable for support during the time the sponsor may be bankrupt or in need of assistance. This could easily be accomplished by stipulating that a sponsor who received means-tested assistance would not be liable for assistance received by the sponsored alien during the time period the sponsor received assistance.

Sec. 203 (b) should provide 180 days--not 90 days--to develop a new affidavit of support in light of the complex interagency consultations called for by the provision. We suggest that the Secretary of Treasury and the Commissioner of Social Security be included in the list of those responsible for formulating the new affidavit of support since determining which immigrants have worked for 40 qualifying quarters would potentially involve activities managed by those agencies.

Furthermore, it should be clarified that notifications of changes of address should be made to the Attorney General and that the Attorney General--not the Commissioner of Social Security--shall promulgate regulations to carry out actions to obtain reimbursement for any federal or state assistance received by the sponsored individual.

Sec. 203 (e) would allow an action to enforce the affidavit of support to be brought against the sponsor in any Federal or State court, by a sponsored individual with respect to financial support, or by a Federal, state, local agency with respect to reimbursement. This section also would require that no state court may decline jurisdiction over any action brought against a sponsor for reimbursement of the costs of a benefit if the sponsored individual received assistance while residing in the state.

We do not object to this provision.

Sec. 204 requires that in determining the eligibility for and amount of benefits of an individual (whether a citizen or

national of the U.S. or an alien) under any Federal program of assistance, or any program of assistance funded in whole or in part by the federal government for which eligibility is based on need, the entire amount of income and resources of the sponsor and sponsor's spouse would be presumed to be available to the individual. This section may also apply to any state or local program of assistance for which eligibility is based on need, or any need-based program of assistance administered by a state or local government.

This "deeming" period would continue for the period for which the sponsor has agreed in the affidavit or for five years from the date the alien was first lawfully in the U.S., whichever period is longer. Thus, immigrants that signed the new affidavit of support under section 203 would be deemed for a minimum of 10 years in order to meet the requirement of working 40 qualifying quarters. This requirement may lead to deeming even after the immigrant had become a naturalized citizen, a policy we oppose on constitutional and other grounds.

We have serious concerns about section 203's constitutionality as applied to naturalized citizens. So applied, the deeming provision would operate to deny, or reduce eligibility for, a variety of benefits including student financial assistance and welfare benefits to certain U.S. citizens because they were born outside the country. This appears to be an unprecedented result. Current federal sponsor-to-alien deeming provisions under various benefits programs do not apply after naturalization, (see, e.g., 42 U.S.C. § 615 (AFDC); 7 U.S.C. 2014(i) (Food Stamps)). As a matter of policy, we think it would be a mistake to begin now to relegate naturalized citizens -- who have demonstrated their commitment to our country by undergoing the naturalization process -- to a kind of second-class status.

This deeming provision, as applied to citizens, would contravene the basic equal protection tenet that "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." Schneider v. Rusk, 377 U.S. 163, 165 (1964). To the same effect, the provision might be viewed as a classification based on national origin; among citizens otherwise eligible for government assistance, the class excluded by operation of the deeming provision is limited to those born outside the U.S. A classification based on national origin, of course, is subject to strict scrutiny under equal protection review, see Korematsu v. United States, 323 U.S. 214 (1944), and it is unlikely that the deeming provision could be justified under this standard. See Barannikov v. Town of Greenwich, 643 A.2d 251, 265 (Conn. 1994) (invalidating state deeming provision under strict scrutiny); El Souri v. Department of Social Services, 414 N.W.2d 679, 683 (Mich. 1987) (same).

Also, a number of legal immigrant children would be adversely affected by basing the deeming period on the requirement to work 40 qualifying quarters. Sponsored children that we have permitted to reside permanently in the U.S. would be ineligible for most assistance due to deeming until they had worked for 40 qualifying quarters. Since we do not expect children to work, this particular restriction is unreasonable when applied to immigrant children and would not be in the national interest.

While we support the goal of making sponsors more responsible for the immigrants they sponsor, we strongly oppose section 204 as drafted. This section would affect many current immigrant beneficiaries; apply to immigrants that have become naturalized citizens if they have signed the new affidavit of support; repeal the current law exemption from deeming for sponsored immigrants who become disabled after entry; affect many diverse Federal programs--including Medicaid and student financial assistance for post secondary education; create new administrative complexities and requirements; and change the current deeming formula to include 100 percent of a sponsor's income and resources. By attributing 100 percent of a sponsor's income and resources to the sponsored immigrant, section 204 does not take into account the needs of the sponsor and his or her family and is inconsistent with current practice in the major entitlement programs. Legal challenges may also arise where the spouse was not a signatory to the affidavit or the spouse is separated from the sponsor.

The Administration supports strengthening deeming, and we would like to work with the Committee to establish a reasonable deeming policy that addresses the concerns identified above. The Administration is opposed to unilaterally applying the new deeming and eligibility provisions to current recipients, including the disabled exempted under current law. In addition, we oppose applying deeming provisions to the Medicaid and student financial assistance programs. Access to student assistance by legal immigrants assists them in obtaining a postsecondary education that can provide them a productive and self-sufficient life in the economic mainstream. We support providing state and local governments with the authority to implement the same deeming rules under their cash general assistance programs as the Federal government uses in its cash welfare programs.

Sec. 205 authorizes state and local governments to prohibit or limit assistance to aliens and to distinguish among classes of aliens in providing general public assistance so long as the restrictions are no more restrictive than those of similar Federal programs.

We support this provision.

Sec. 206 denies eligibility for the earned income tax credit to individuals who are not, for the entire tax year, U.S. citizens or lawful permanent resident aliens. It amends section 32(c)(1) of the Internal Revenue Code of 1986 (relating to individuals eligible to claim the earned income tax credit) by adding that the term "eligible individual" does not include any individual who does not include on his or her tax return the individual's taxpayer identification number and their spouse's taxpayer identification number (if married). The section further provides that for purposes of the earned income tax credit a social security number issued to an individual pursuant to clause (II) (or that portion of clause (III) that relates to clause (II)) of section 205(c)(2)(B)(i) of the Social Security Act, i.e., to qualify for federal benefits, would not satisfy the taxpayer identification number reporting requirement. The section also authorizes IRS to use simplified procedures if a taxpayer claiming the earned income tax credit omits a correct taxpayer identification number.

We support this provision. The President's FY 1996 Budget contained a similar provision.

Sec. 207 requires that whoever falsely makes, forges, counterfeits, mutilates, or alters the seal of any U.S. department or agency, or any copy thereof; knowingly uses, affixes, or impresses such altered seal or copy to or upon any instrument; or with fraudulent intent possesses, sells, offers to sell, furnishes, offers to furnish, gives away, offers to give away, transports, offers to transport, imports, or offers to import any such seal or copy, knowing it to have been falsely made, shall be fined under this title, or imprisoned for up to 5 years, or both. If any of the above was done with the intent or effect of facilitating an unlawful alien's application for, or receipt of a federal benefit, the penalties which may be imposed for each offense shall be double the maximum fine, and three times the maximum imprisonment, or both. Each instance of forgery, counterfeiting, mutilation, or alteration shall constitute a separate offense.

We support this provision.

Sec. 208 permits a State that is certified by the Attorney General as having high illegal immigration to establish and operate a program for the placement of anti-fraud investigators in State, county, and private hospitals to verify the immigration status and income eligibility of applicants for medical assistance under the State plan prior to the furnishing of medical assistance.

We note that current law would permit a State to operate such a program, and thus the provision is unnecessary.

deportations.

The Administration does not support this bill's imposing a mandatory land border user fee upon states and localities rather than granting states and localities the authority to choose whether or not to charge such a fee. As our proposal last year indicated, policy in this area must provide for greater local choice and flexibility. Unlike S. 1394, the Administration's proposal last year provided for a "local option" which allows each state to determine at which, if any, ports the fee is to be collected. A State that exercises this local option may establish a Border Service Council for each port to develop priorities for use of the fees collected, for submission to the INS Commissioner. The INS Commissioner must consider these priorities in funding port services. Funds remaining after payment of the costs of port services are to be granted to the Councils to spend on port-related enhancements. The Commissioner will allocate enhancement funds for ports that do not set up a Border Service Council. The Administration's proposal also supported a frequent crosser discount to facilitate trade and commerce.

Section 212 authorizes additional commuter border crossing fees pilot projects, one on the northern land border and another one on the southern land border.

The Administration proposal provides for projects along the southern and northern land borders and does not limit the number of pilot projects that may be established. We recommend that S. 1394 adopt the Administration proposal.

Sec. 213 removes the current exemption from payment of the \$6 immigration user fee for cruise ship passengers.

This provision is similar to the Administration's proposal, and we support it.

TITLE III - IMMIGRANTS

Subtitle A--Changes in Immigrant Classifications

The legal immigrant and nonimmigrant visa systems must serve our national principles, goals and priorities. One principle that legal immigration should serve is family reunification, especially for closest family members. The Administration urges the Committee to moderately reduce the overall level of legal immigration while providing stronger support for pro-family principles.

We affirm the United States' proud heritage of providing humanitarian protection to those persecuted and fearing for their life in their own country.

Reducing existing backlogs of family reunification immigrants who are waiting for visas, with priority to close family members of U.S. citizens, is of fundamental importance. These U.S. citizens have submitted petitions and paid fees to the U.S. to allow their family members to immigrate, and the federal government approved these petitions. In past decades, while others jumped ahead of the line by entering the U.S. illegally, these 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 for many years, in order to be legally reunited with their family members.

Our employment-based immigration policy must support the needs of both the U.S. workforce and employers. It must provide real incentives for business to prepare American workers for the high skilled jobs and high performance workplaces of the future while at the same time providing business 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 backbone of this country's edge in global competitiveness is the strength of our university, research, and technology communities. Therefore, in reforming employment-based immigration, the Administration will continue to work with Congress to ensure that the needs of employers who genuinely are unable to find U.S. workers to fill job openings are addressed.

Finally, we support a periodic review of the nation's immigration system to maintain flexibility and responsiveness in the system.

Sec. 301 narrows the "immediate relatives" classification by limiting the eligibility of parents of U.S. citizens to immigrate. This section defines a "qualifying parent" 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 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 the limitation of entry to parents who have a majority of children

who normally reside in the U.S. 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 self-sufficient and productive.

Section 301(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 U.S.

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 U.S. This section would require a demonstration of health insurance coverage prior to entry into the U.S. 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 required health insurance products would be prohibitively expensive. Our preliminary estimates indicate that, for parents age 65 and over, premiums for Medicare-comparable acute care coverage plus Medicaid-comparable long-term care coverage would average \$9,000 or more. 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.

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.

Sec. 302 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 -- e.g., 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. 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, 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

Sec. 209 bars costs, attorney fees or expenses from being awarded under the Equal Access to Justice Act (EAJA) in any civil action brought by or on behalf of any individual who is not a U.S. citizen or legal permanent resident.

We do not support this provision. Although there are some problems related to litigation abuse and the EAJA as presently formulated, these are not resolved by a blanket denial of access to certain classes of aliens, most particularly refugees and asylees.

Sec. 210 would require the Office of Refugee Resettlement to allocate grants to ensure that each qualifying county shall receive the same amount of assistance for each refugee and entrant residing in the county as of the beginning of the fiscal year who arrived in the United States not more than 60 months prior.

The amendment's formula for the allocation of Targeted Assistance (TA) funds is consistent with the Administration's policy to limit the provision of Office of Refugee Resettlement funded services to a refugee's first five years in the United States. We support the exception for the Targeted Assistance discretionary program. We note, however, that the amendment may limit Congress' ability to set aside special TA funds for Cuban and Haitian entrants which it has historically done through the appropriations process.

Part 2--User Fees

Sec. 211 authorizes the collection of a \$1 land border fee for each individual entering the U.S. as a pedestrian or in a noncommercial conveyance. The commercial conveyance fee shall be set by the Attorney General in consultation with the Secretary of State. The Attorney General shall establish frequent crosser discounts and may contract with private and public sector entities to collect the fee.

The section also provides that funds shall be deposited into the Fee Account as offsetting receipts and remain available until expended. The funds may be used to pay for inspection services and related expenses. Unused funds may be used for Border security, including hiring additional Border Patrol agents.

Revenues may be spent on providing inspection services and maintaining inspection facilities; expanding, operating and maintaining information systems for nonimmigrant control; employing additional permanent and temporary inspectors; minor construction costs, including commuter lanes; detecting fraudulent documents; and administering the border fee. Excess funds may be spent on additional border patrol, support and equipment resources. Any additional excess funds may be spent on

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

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 amendments in section 407(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.

Sec. 408, using language similar to section 407(b), also precludes a nonimmigrant student from obtaining a student visa to attend a public elementary or secondary school. The overlap and inconsistency between section 407(b) and section 408(a) should be resolved. Section 408(b) provides that a nonimmigrant admitted under section 101(a)(15)(F) for study at a private elementary and secondary school who fails to remain enrolled at such a school becomes excludable.

Sec. 409 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 Committee to develop appropriate language to support implementation of a revised, efficient tracking system.

Currently, the bill requires, in subsection (f) a report on the feasibility of expanding the program to cover the nationals of all countries while subsection (g), 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, regardless of the report's conclusions. These subsections should be reconciled.

The bill also should clarify that the fee it proposes is in addition to the fee currently collected for normal processing that 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 INS based on the costs they respectively incur.

The bill does specify that a fee will be collected for processing the J visa, and we oppose such a fee because it would adversely affect 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 U.S. Information Agency (USIA) to participate in the pilot program, i.e. 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) to read "...or as a condition of their continued designation as an exchange visitor program by the Director of the USIA under section 101 (a) (15) (J) of such Act."

TITLE V -- EFFECTIVE DATE

Sec. 501 establishes that the effective date of titles I and II is the date of enactment of this Act and that the effective date of titles III and IV is October 1, 1996, unless otherwise provided. The provisions of section 201 and 204 shall apply to benefits and to applications for benefits received on or after the date of enactment of this Act. The amendments made by sections 132, 133, 141, 142 and 195 shall be effective upon the date of enactment and shall apply to aliens who arrive in or seek admission to the United States on or after such date; the Attorney General may issue interim final regulations to implement these sections at any time on or after the date of enactment. Such regulations may become effective upon publication without prior notice or opportunity for public comment.

We object to the provision specifying that the Attorney General may proceed directly to interim final rule in this section. Decisions about the form in which regulation should be issued are governed by the Administrative Procedures Act (APA). The Attorney General has sufficient authority there to determine when exceptions to the APA's notice-and-comment and 30 day

delayed effective date provisions are appropriate. Given these concerns, section 501(b)(2)(B) should be deleted as redundant and inconsistent with the APA.

The new definition of eligible alien (section 201) and the 5 year deeming period (section 204) would apply to benefits being received at the time of enactment, and affect current recipients as well as future applicants. We are opposed to applying the new deeming and eligibility provisions to current recipients, including the disabled. Benefits received after the date of enactment would be counted towards the new public charge provisions (section 202), and we are concerned about the ability to adequately inform current immigrants of the new rules concerning public charge and the potential for becoming deportable.

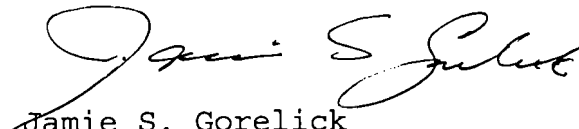
The provisions with the greatest SSI impact--the definition of "eligible alien" and sponsor-to-alien deeming--would be effective upon enactment. Such an effective date could eliminate benefit eligibility for as many as 250,000 legal immigrants under the SSI program. Even more immigrants would be affected when the other federal programs are considered. These are individuals who have already entered the country and "played by the rules." We do not support penalizing this group.

We are also concerned that it will be difficult to promulgate regulations, even interim regulations, before the date of enactment to allow for immediate implementation of the provisions such as special exclusion procedures. Special exclusion is a sensitive area that will require advance guidance to field officers to ensure fair and equitable treatment of aliens and to avoid unnecessary litigation. We believe that drafting proposed regulations and allowing public comment before implementation would be clearly preferable to issuing interim regulations for the many major changes made in this bill. Therefore, the effective date of this bill should be at least 270 days after enactment.

Mr. Chairman, we appreciate the continued support of this Committee for the initiatives taken by this Administration on urgent immigration matters. We have provided lengthy briefings to your staffs regarding the Administration's vision for immigration reform legislation, and we will continue to work with the members of this Committee on necessary improvements to achieve bipartisan immigration improvements legislation that is in the national interest.

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