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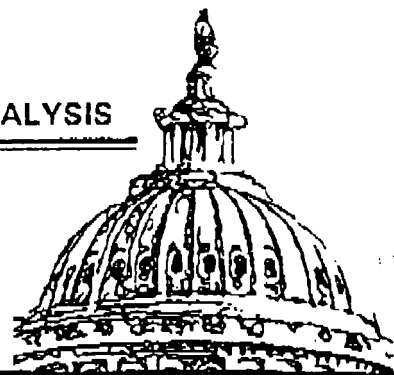
**OLPA ~ FAX****OFFICE OF LEGISLATIVE POLICY AND ANALYSIS**

NATIONAL INSTITUTES OF HEALTH

Bethesda, Maryland 20892

Fax: (301) 496-0840

Phone: (301) 496-3471



DATE:

09/25/95

TO:

Irene Buena

Facsimile No.

(202) 690-6351

Telephone No.

FROM:

Stephanie Toter

Irene -
As per our conversation - Thanks for
your assistance on this issue!

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Bethesda, Maryland 20892

September 15, 1995

Note to Diane Wax

Subject: Brief of H.R. 2202 and Prevailing Wage Rate Issue

A major immigration reform initiative introduced by Lamar Smith (R-TX), Chairman of the House Immigration Subcommittee, has been approved by that Subcommittee and now awaits consideration by the House Judiciary Committee. The Immigration in the National Interest Act of 1995 (H.R.2202) would significantly alter immigration law.

Several provisions of the legislation will affect NIH and the research universities it supports. First, a new configuration of visa classifications and allocations may result in fewer immigrant visas available to scientists. Secondly, the deletion of a special category for "outstanding professors and researchers" would considerably increase burdens on prospective employers, who now would be required to file visa petitions on behalf of the candidate and obtain labor certifications.

Perhaps most significantly, and most favorably, the proposed legislation would modify the method for determining the salary level to be paid to non-immigrant temporary workers (H-1B visa). This five year visa is used to recruit and retain established foreign nationals to NIH under the Visiting Program. Its term is six years, in total. The proposed legislation would enable academic institutions to provide a salary that is competitive only with other academic institutions, rather than the private sector, which is currently required.

Under the Immigration and Nationality Act of 1990, NIH and academic institutions must attest to the fact that an H-1B worker will be paid the "prevailing wage level" for those similarly employed. An administrative ruling last year, known as the Hathaway decision, determined that "similarly employed" is not limited to occupational peers within that or a similar institution, but must extend to the profession generally, regardless of the nature of employment (e.g., public or private sector, multinational or individual proprietorship, secular or religious).

This decision compels the federal government, nonprofit and educational institutions to determine a salary that reflects an average of both public and industrial sector wages. It forces

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NIH to offer a salary determined by a pay scale that includes the pharmaceutical and medical products industry, as well as academia.

To cite one recent example: the local prevailing wage determined by the State Employment Services Agency for a research cardiologist is \$98,000, taking into account both private and public sector employments. An ICD that desired to recruit a foreign cardiologist into the Visiting Program was prepared to provide a salary of \$50,000, the equivalent wage for NIH peers at his career level.

Because of the Hathaway decision, the ICD could not employ the cardiologist as an H-1B worker. The ICD was compelled to recruit the scientist as an exchange visitor (J-1 visa). This is a shorter term visa, used to recruit foreign fellows, and allows only incidental patient contact. As a result, the ICD was compelled to alter substantively the visiting scientist's clinical research program.

The Hathaway decision generally has constrained our capacity to recruit established foreign scientists, especially in clinical research fields.

Both the Department of Labor (DOL) and the Department of Justice urge that Congress should not at present pursue a legislative solution to the Hathaway decision, pending further attempts by DOL to resolve this problem through the rule-making process. These efforts are ongoing.

FIC's concern is as follows. We endorse efforts to overturn the Hathaway decision, either through rule-making or through legislation. However, it is key that any modification explicitly apply to federal agencies, since NIH and the Department of Energy are major employers of H-1B workers within their intramural programs.

The NIH employs approximately 200 senior scientists each year as H-1B workers under the authority of the Public Health Service Act of 1944. These scientists are recruited based on the specialized needs of a research project and have been instrumental in several landmark discoveries. These include the development of a diagnostic test for HIV and the drug AZT. The contributions of these experienced scientists have been an invaluable component of the U.S. research effort.

If the DOL is successful in its efforts to pursue administrative, rather than legislative solutions to the prevailing wage rate determination policy, NIH should participate in the development of these provisions, in support of our intramural research program and the universities we support.

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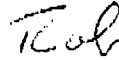
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We are continuing to analyze HR 2202 and will forward our assessment to OGC early next week.

There is one potential downside to becoming advocates on issues related to this proposed legislation. It may alert OMB to the numbers of foreign scientists employed on our campus under federal sponsorship. However, a larger and prevailing issue may be our responsibility to advocate reforms in immigration laws and policies that increase the research and training capacity of U.S. universities and scientific institutions. The Hathaway decision presents significant obstacles to academia. One might argue that universities should not face undue restrictions on the selective employment of foreign scientists, to meet highly specialized needs.

Please feel free to phone me with any questions at 496-1491. Ms. Sylvia Funk, Chief of the International Services and Communications Branch at FIC, has working knowledge on these issues. She may be reached at 496-6166.



Robert Eiss
Assistant Director for
International Science Policy and
Analysis
Fogarty International Center



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Bethesda, Maryland 20892

September 21, 1995

Note to Stephanie Foster

Subject: Proposed Changes in Employment-based Classifications
under H.R. 2202.

As discussed, I have reviewed proposed changes in employment-based classifications under H.R. 2202. Under the proposed bill, these classifications would be modified in a significant manner. Several employment-based categories under which foreign nationals are converted to permanent residents would be modified or deleted. Most significantly for NIH, the subcategory of "outstanding professors and researchers" would be deleted.

This category includes scientists seeking permanent faculty positions in a university or similar institution, or a comparable position in private industry. NIH employs this category to petition for permanent residence on behalf of individuals who have intent-for-tenure, are designated as tenure track, or have another type of permanent designation (e.g., staff scientist).

Since the enactment of the Immigration and Nationality Act of 1990 (creating this category), NIH has filed approximately 40 permanent resident petitions under this classification. Another 17 currently are being processed.

Deletion of this category places a significant administrative burden on NIH and the universities it supports. Under the proposed bill, most foreign scientists whom NIH desires to retain as permanent staff would now be classified as "aliens who are members of the professions holding advanced degrees or aliens of exceptional ability." Under this category, the provisions of H.R. 2202 would require NIH to obtain labor certifications before filing the permanent resident petitions. This certification signifies that no U.S. workers are able, willing, qualified, and available to perform the job.

NIH may encounter difficulties in obtaining labor certifications, which are based on minimal requirements for the occupation recruited. Further, the procedure is lengthy and will extend the processing time for new petitions for permanent residence from the current 6-9 months to 1 to 2 years.

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In past, on the rare occasion when a scientist has not qualified under the "outstanding professors and researchers" category (e.g., lack of doctoral credential), NIH has filed petitions under the category "exceptional ability." Under this category, the current law enables employers to seek a labor certification waiver based on "national interest" (i.e., importance of occupation to national welfare). NIH has obtained these waivers. However, under the proposed bill, the "national interest waiver" would be eliminated. The labor certification requirement would be mandatory, and this category would not offer a statutory means to bypass the certification process.

If the bill is enacted, NIH may be able to petition for more senior scientists under a preference category known as "extraordinary ability," which does not require labor certifications. However, prospects for approval are reduced, since NIH would be competing among a national pool of only 15,000 visas annually, as opposed to 40,000 for the other employer-based categories.

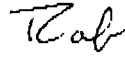
It is my understanding that around one-quarter of scientists who have been converted from non-tenured to permanent status at NIH over the past two decades have been foreign nationals (source: OIR). These modifications in employment-based classifications therefore would have a selected but significant impact: they would delay the recruitment and retention of foreign nationals selected for permanent staff positions, and more generally dissuade NIH and academic employers from recruiting foreign nationals into permanent positions. Reciprocally, some foreign applicants may elect to leave the United States, rather than await the lengthy resident petition process.

The NIH should note its concern with deletion of the category for "outstanding researchers and professors" because of the burdens and uncertainties of labor certification. And we should note our concern with the deletion of the "national interest waiver". The general intent of these modifications is to protect the U.S. workforce from unfair competition. However, they fail to acknowledge the highly specialized nature of research and academic professions.

The current employment-based classifications distinguish between occupations that require standard skills, where it is reasonable to be concerned with possible displacements of U.S. professionals by foreign workers, and those professions that demand highly specialized and individual skills, where national labor supply is not a relevant issue. This distinction should be retained in legislative reforms to modify the classifications under which skilled foreign nationals are employed in the United States.

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Please feel free to contact me (496-1491) or Ms. Sylvia Funk
(496-6166).



Robert Eiss
Assistant Director for
International Science Policy
and Analysis
Fogarty International Center

CC:
Ms. Funk



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Bethesda, Maryland 20892

Mr. John Beverly
Deputy Director
U.S. Employment Service
Department of Labor
200 Constitution Avenue N.W. Room N4470
Washington, D.C. 20210

Dear Mr. Beverly:

The National Institutes of Health (NIH) has been following the progress of the Immigration in the National Interest Act (H.R.2202). Several provisions of the proposed legislation would affect NIH and the research institutions that it supports.

Perhaps most significantly, the bill and a subsequently passed amendment introduced by Rep. Carlos Moorhead (R-CA) would modify the method for determining the salary level to be paid to non-immigrant temporary workers (H-1B visas) employed by academic institutions and nonprofit scientific research organizations. Specifically, it would provide a salary for H-1B workers that is competitive only with other similar institutions, rather than with the private sector, as is currently required. At the NIH, this visa, which may be extended up to six-years, is one of the mechanisms used to permit established foreign nationals to conduct research at the NIH under a program known as the NIH Visiting Program.

Under the Immigration and Nationality Act of 1990, NIH and academic institutions must attest to the fact that an H-1B worker will be paid the "prevailing wage level" for those similarly employed. Last year, the administrative ruling set forth by the Department of Labor (DOL), commonly known as the "Hathaway decision," determined that the term "similarly employed" is not limited to occupational peers within that or a similar institution but must extend to the profession generally, regardless of the nature of employment (e.g., public or private sector).

By compelling the Federal Government to provide a salary that reflects an average of both public and private sector wages, the Hathaway decision has constrained our utilization of the H-1B visa for foreign scientists who conduct research at the NIH, particularly in the field of

Page 2 - Mr. John Beverly

clinical research. Specifically, it forces NIH to offer a salary that is determined by a computation that includes the pharmaceutical and medical products industry, as well as academia, rather than a salary comparable to that of peers at the same career level at the NIH. This may, in fact, be a salary unattainable under the current Federal salary scales.

The NIH currently employs approximately 150 senior scientists each year as H-1B workers under the authority of the Public Health Service Act of 1944. These scientists are recruited based on the specialized needs of a research project and have been instrumental in a number of landmark discoveries, such as the development of a diagnostic test for HIV and the drug zidovudine, for the treatment of AIDS. The contributions of these experienced scientists have constituted an invaluable component of the U.S. research effort.

We, at the NIH, fully endorse efforts to overturn the Hathaway decision, particularly as it applies to the Federal sector and to academic and non-profit institutions supported by the agency. We are aware that, in addition to a pending legislative solution to the "Hathaway decision," the DOL has already begun consultations with academic institutions to resolve the problem. They have also stated that they will initiate rule-making proceedings to rescind this administrative ruling. Because of these multiple activities, it is key that any modification explicitly apply to Federal agencies, since the NIH is a significant employer of H-1B scientists within its intramural research program. In this regard, the NIH would like to be actively involved in future discussions relating to the resolution of this issue, whether through the rule-making proceedings to rescind Hathaway, or through implementation of the new measure if it is signed into law.

Dr. Philip Schambra, Director of the Fogarty International Center, NIH, will be pleased to provide further assistance regarding this important matter.

We look forward to working with DOL to resolve this issue.

Sincerely,

Harold Varmus, M.D.
Director