TESTIMONY September 13, 1995 JOHN FRASER DEPUTY ADMINISTRATOR, WAGE AND HOUR DIVISION EMPLOYMENT STANDARDS ADMINISTRATION U.S. DEPARTMENT OF LABOR SENATE JUDICIARY IMMIGRATION AND REFUGEE AFFAIRS OVERHAULING THE NATION'S IMMIGRATION LAW

Federal Document Clearing House Congressional Testimony

September 13, 1995, Wednesday

Section: CAPITOL HILL HEARING TESTIMONY

Length: 9211 words

Body

STATEMENT OF

JOHN FRASER

DEPUTY ADMINISTRATOR, WAGE AND HOUR DIVISION

EMPLOYMENT ***STANDARDS*** ADMINISTRATION

U.S. DEPARTMENT OF LABOR

before the

SUBCOMMITTEE ON ***IMMIGRATION***

OF THE SENATE JUDICIARY COMMITTEE

September 13, 1995

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear today to discuss reform of our ***Nation's*** system of legal ***immigration***, including the ideas embodied in the "discussion draft" bill prepared for consideration by the Subcommittee which you shared with us last week. This afternoon I will focus on a few issues of particular interest to the Department of Labor, but Secretary Reich asked me to remind you today of your earlier conversations in which he expressed his profound interest in the way ***immigration*** policy interacts with domestic workforce development policies so critical to our ***Nation's*** working people and future global competitiveness. As you know, Secretary Reich cares and has thought deeply about these relationships, and he asked me to tell you that he looks forward to another opportunity to come before you to share his views on these important matters. On the Secretary's behalf, let me also express the Department's eagerness to continue working with you on these issues and others which may arise from our ongoing review of the draft bill.

Before turning to legal ***immigration*** issues, let me ask your indulgence to address a closely related matter. Members of the Subcommittee understand and appreciate both the need to effectively control illegal ***immigration*** in order to preserve our legal ***immigration*** system, and the important role that the Department of Labor plays in helping control illegal ***immigration*** through worksite enforcement of minimum labor ***standards***. ***Immigration*** reform legislation currently being considered in the House - H.R. 2202, the "***Immigration*** in the National Interest

Act of 1995" contains a provision for "Strengthened Enforcement of Wage and Hour Laws" which authorizes (but, unfortunately, does not appropriate funding for) 150 additional staff positions for the Wage and Hour Division to investigate violations of basic labor laws in areas where there are high concentrations of undocumented workers.

This provision parallels the President's FY 1996 budget request, which, as part of the President's comprehensive strategy to more effectively control illegal ***immigration***, called for 202 additional positions for the Department - including 186 for Wage and Hour and 16 for the Solicitor's office to prosecute the most serious labor ***standards*** violations arising from our investigators' work.

The Administration supports this provision of H.R. 2202 - as did the Commission on ***Immigration*** Reform in principle in its recommendations last fall. It appropriately recognizes that the Department of Labor makes an important contribution to reducing incentives for illegal ***immigration***.

Curbing illegal migration and effectively enforcing worker protection laws have a direct if seldom noted policy connection. Illegal immigrants are attractive to some employers and are frequently subjected to exploitation in the form of sub-minimum wages, dangerous workplaces, excessively long hours and other poor working conditions because they are desperate for work and in an extremely weak position to protect their rights. Knowingly hiring illegal workers both reveals and rewards an employer's willingness to break the law, and undermines wages and working conditions for legal workers.

Vigorous enforcement of minimum labor ***standards*** serves as a meaningful deterrent to illegal migration by denying some of the unfair business advantage that can be gained through the employment of highly vulnerable and exploitable workers under substandard wages and working conditions. Effective labor ***standards*** enforcement - combined with our routine inspection of employers' compliance with their employment eligibility verification obligations - not only helps ensure fairness and minimally acceptable wage and employment conditions in the workplace, but also helps foster a level competitive playing field for the large majority of honest employers who seek to comply with the law.

The Administration strongly believes that enhanced worksite enforcement of both minimum labor ***standards*** and employer sanctions are essential components of the comprehensive strategy proposed by the Administration, and needed, to more effectively control illegal migration - which poses one of the greatest single threats to our system of legal ***immigration***.

As I said, we support this provision of H.R. 2202 - indeed, we strongly support the Administration's request for even more Wage and Hour enforcement personnel. I bring the matter up this afternoon not only because of its importance to preserving our legal ***immigration*** system, but also because the House has already acted to eliminate the President's request for these additional labor ***standards*** enforcement resources (though it approved funding for many other aspects of the President's ***immigration*** program) and most importantly because the Senate is just beginning its consideration of the Department's FY 1996 appropriation. I appreciate your letting me take this opportunity to urge all the Members of the Subcommittee - who have a special responsibility for seeing that our Nation effectively controls illegal ***immigration*** - to work to ensure favorable consideration in the Senate for appropriation of these additional labor law enforcement resources requested in the President's budget.

Turning to the subject of today's hearing, I will discuss three primary issues relating to employment-based ***immigration*** to the U.S.:

(1) the pressing need for reform of the multiplicity of nonimmigrant programs that allow entry of foreign workers for temporary employment in the U.S.;

(2) current proposals for changing the number and mix of employment-based immigrants; and,

(3) the process which should be employed for admitting employment-based immigrants.

Let me first offer a general context for discussion of these subjects.

Employment-based ***Immigration*** Policy Principles

The ***Nation's*** goals for employment-based ***immigration*** policy must continue to be twofold. First, the policy must provide U.S. employers with needed access to international labor markets to promote our global competitiveness and high-skill, high-pay job growth in the U.S. Second, it must also assure adequate protections for U.S. workers and employers against unfair domestic competition while providing real incentives to develop the domestic workforce for the high-skill jobs and high-performance workplaces of the future. In light of an increasingly global economy and workforce, U.S. ***immigration*** policy must carefully balance these objectives if a viable, relatively receptive ***immigration*** system is to be maintained.

In recent years as our ***immigration*** system has tilted towards expanding employment-based ***immigration*** and to favoring higher-skilled workers, these dual goals have come to be recognized as the general framework for our employment-based ***immigration*** policy. However, as our ***immigration*** system has ***evolved*** within this overall framework, it has treated particular issues in quite different ways. Thus, criteria governing access to immigrant workers vary depending on the preference category, and these criteria differ in kind from those which apply to various employment-based nonimmigrant categories. Similarly, the manner in which the basic policy goals are implemented in law for employment-based nonimmigrants differ significantly among the various programs, some of which lack any labor market protections.

These two guiding policy goals are by no means incompatible, but do contain inherent tensions that must be recognized and appropriately resolved. The ***evolving*** efforts to effectively implement ***immigration*** programs which provide an appropriate balance between the larger policy goals offer some lessons and raise issues that deserve careful consideration.

First, the need for timely, appropriate access to international labor markets may well warrant shifting the focus from often cumbersome and time-consuming preadmission screening processes - of, at best, questionable effectiveness, as I will discuss later - to a greater reliance on less intrusive application procedures coupled with post-admission compliance requirements. Moreover, the array of inconsistent employment-based immigrant and nonimmigrant admission processes still require the involvement at various stages of at least three Federal agencies - Labor, Justice/INS, and State. Whether the wide variability of these processes and three separate steps are truly necessary warrants careful reexamination.

Second, we need to consider whether the employment-based ***immigration*** system should continue to be employer-driven. If it should be determined that an employer-driven system should be maintained to reflect real needs in the marketplace and economy, then the system needs to become much less susceptible to manipulation by intending immigrants (and their relatives who are employers) as well as unscrupulous employers who seek to take advantage of the benefits of possible ***immigration*** to the U.S. as a means of exploiting their workers. The very real potential of indenture which derives from nonimmigrants - and, under some proposals, certain immigrants - being bound to an individual employer poses one of the greatest dangers for serious worker abuse and exploitation in these programs.

Employment-based Nonimmigrant Program Reform

Consistent with these general principles, the Department of Labor believes that any reform of our legal ***immigration*** system must also address the nonimmigrant programs which allow temporary entry of individuals to the U.S., in many cases for employment purposes. While many acknowledge this need, few proposals have yet been offered. Perhaps this is because the Commission on ***Immigration*** Reform, while looking at the matter, has not yet provided its analysis or made any recommendations. We have been working with the Commission on this and look forward to hearing from it on this important subject. We note that the Subcommittee's "discussion draft" bill contains no provisions affecting employment-based non-immigrant programs. We would urge that it be expanded to include such provisions, for two main reasons.

First, many more foreign workers legally enter the U.S. for temporary employment - sometimes for as long as six years - than enter (or, more commonly, adjust) as permanent employment-based immigrants. Second, in most

cases, temporary foreign workers become the subject of immigrant petitions after a period in nonimmigrant status, which often follows completion of their education at U.S. colleges and universities. Of the current employment-based immigrants who are subject to the Department of Labor-administered permanent labor certification process, we estimate that over 90 percent are already in the U.S. and about two-thirds are already working-- sometimes illegally-- for the employer which files the immigrant petition on their behalf. Nonimmigrant foreign students and workers already in the U.S. (many previously foreign students) are predominantly those whom U.S. employers subsequently seek for permanent residency for employment purposes. Thus, our employment-based immigrant selection system - whatever its form - in practical terms is mostly a system for deciding which foreign students and temporary workers will be allowed to remain, rather than enter, to live and work permanently in the U.S. The actual employment-based immigrant selection system occurs much earlier in the process when students are admitted to our colleges and universities, and when employers seek temporary nonimmigrant workers from abroad. A coherent employment-based ***immigration*** policy-- sensitive both to the needs of the marketplace and our obligations to adequately protect U.S. workers and businesses, and provide appropriate job opportunities for the domestic workforce--must recognize these facts and, therefore, address real deficiencies in the nonimmigrant programs through which the first level selection is really made.

We wish to offer several suggestions in this regard and continue to work with the Subcommittee as it considers these matters.

First, the various employment-based nonimmigrant programs could benefit immensely from harmonized, concordant criteria and procedures. These programs need to be consolidated, streamlined, and simplified.

Second, perhaps the best way to accomplish this - while at the same time providing flexibility to deal with rapidly changing conditions in the economy and labor market - may be to return to a more general but coherent statutory framework, with program implementation more through the regulatory process.

Third, to achieve the needed balance between the overall objectives of our employment-based ***immigration*** policy, especially with streamlined and expedited admission processes emphasized, there should be basic criteria commonly applicable to all employment-based nonimmigrant programs. The Department of Labor believes that among such basic criteria at least the following should be considered:

- An effective test of the labor market. This would not have to be excessively time-consuming nor performed by the government, but would need to be done honestly and in good faith before the employer seek approval for admission. Too often, employers use the nonimmigrant system to retain foreign student or illegal immigrant employees even where there is an abundance of available, qualified U.S. workers.

- Lay-off and strike/lockout protections. Access to foreign workers should be prohibited where domestic workers have been or are being laid-off or otherwise displaced, or during a strike/lockout involving the target occupation.

- Significant, extraordinary efforts by the employer to train or otherwise develop domestic workers for the target occupation. Such a requirement is not only sound public policy, but would help thwart the growth of contractor "body shops" with workforces composed predominantly or entirely of nonimmigrant employees - from which we believe the greatest potential for adverse effects on U.S. workers and competing businesses derives. Access to temporary foreign workers should indeed be temporary; employers which use nonimmigrant workers should be seriously discouraged from developing dependency on foreign workers and, rather, be required to reduce any dependency as quickly as possible.

- Meaningful protection against adverse effects on the compensation and working conditions of domestic workers in the same occupation.

- Appropriate actions on duration of stay and change of status by nonimmigrants to keep the proper focus on meeting employment and economic needs. Again, temporary foreign workers should, in fact, be temporary and certainly not benefit from any period of illegal employment in the U.S. or derive a competitive advantage over U.S. workers through their employment during a temporary admission.

- Restrictions on Access. Access to foreign workers should not be unlimited. Mechanisms that act as a brake on the size and potential growth of these programs and moderate potential adverse effects on the domestic workforce could be considered. Such mechanisms include numerical limitations and user fees, consistent with our international obligations, which would have the program beneficiary bear the program's costs and also provide some disincentive to its use.

These criteria should not be rigid and, particularly if implemented through regulation rather than statutory language, appropriate flexibility could be provided to reflect, for example, differences in skill levels or labor market demand and availability.

I would like to make three more specific points about proposed changes to existing nonimmigrant programs. The first point deals with proposed amendments to the H-1B nonimmigrant program which are supported by the Administration.

In September 1993, Secretary Reich requested Congress to amend the criteria which still apply under the program for admission of nonimmigrant "professionals" for temporary employment in "specialty occupations" (and fashion models of distinguished merit and ability) with H-1B visas. Unfortunately for many U.S. businesses and workers, the Congress has yet to act on his proposals.

Our experience with the operation of the H-1B program has raised serious concerns that what was conceived as a means to meet temporary business needs for unique, highly-skilled professionals from abroad is, in fact, being used by some employers to bring in relatively large numbers of foreign workers who may well be displacing U.S. workers already affected by structural changes in our economy. Some employers, though a minority of those who use the H-1B program, have been using this program to request the admission of scores, even hundreds of workers, especially for work in computer-related and health care occupations. Many of these employers are "job contractors," some of which have a workforce composed predominantly or even entirely of H-1B workers, which then lease these employees to other U.S. companies or use them to provide services previously provided by laid off U.S. workers.

The amendments requested by Secretary Reich were carefully designed to assure continued business access to needed high-skilled workers in the international labor market while increasing the likelihood that the H-1B program is not susceptible to use to the detriment of U.S. workers and the businesses which employ them. Briefly stated, the two requested amendments would require employers which seek access to temporary foreign "professional" workers to attest that:

(1) they have not laid off or otherwise displaced U.S. workers in the occupations for which they seek nonimmigrant workers in the periods preceding and following their seeking access to such nonimmigrant workers; and,

(2) in certain circumstances, they have taken timely and significant steps to develop, recruit and retain U.S. workers in these occupations.

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

Enactment of these amendments is in extremely critical. First of all, abuses of this program which these amendments would help stem have become increasingly well-documented. Secondly, there appears to be a trend of growth of companies which are predominantly or entirely dependent on nonimmigrant workers and are thus able to compete unfairly with U.S. companies which employ mostly U.S. workers. Thirdly, the nonimmigrant registered nurses (H-IA) program has recently expired and some foreign nurses will now be entering under the H-1B program, with significantly lesser protection than under the predecessor program. Finally, I think all would agree that in most situations it is 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 should be 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 this situation, perhaps encourages it, and it must change.

In addition to the amendments that the Secretary has already proposed, we would also urge that the allowable period of stay under the H-1B program be reduced from six to three years to better reflect the "temporary" nature of the presumed employment need.

Additionally, if this and other employment-based nonimmigrant programs are really to serve as "Probationary" or "test" employment situations to select and transition foreign students and workers into the permanent labor force as employment-based immigrants, the n the programs ought to be redesigned to reflect that purpose and not a fiction that they are intended to meet urgent, short-term demand for very highly-skilled, unique individuals who are simply not available in the domestic workforce.

The second specific matter also relates to the H-1B program. The only provision of H.R. 2202 which modifies current law affecting nonimmigrant categories (Title VIII, Section 806) makes a number of changes in the H-1B program. While apparently still ***evolving***, these provisions would:

(1) Overturn a provision of the Department's regulations so that employers of H-1B workers would not be required to have an objective system to determine the actual wages of their workers.

(2) Make certain of the Department's regulations inapplicable to a subset of H-1B program users--"Non-H-1B-Dependent Employers." Such employers which use relatively few H-1B workers would:

--not be required to provide notice of employment of H-1B workers at multiple worksites within an area of employment for which the employer had filed a Labor Condition Application (LCA);

--not be required to file a new LCA - nor, apparently, comply with any requirements attendant to such LCA - to place any H-1B worker in an area of intended employment for which it has not previously filed an LCA so long as each nonimmigrant worker is not assigned to the new area for more than 45 days in any 12-month period, nor more than 90 days in any 36-month period. Nor would the employer of such H-1B worker be required to pay per them or transportation costs at any specified rate for the worker during such assignment; and,

--not be subject to compliance investigation except based on a complaint alleging violations, retroactively effective on January 15, 1995;

(3) Increase the time allowed to adjudicate the LCA of an 'H-1B- Dependent" employer.

(4) Require all employers filing H-1B LCAs to attest that they have not laid off workers with substantially similar qualifications and experience in the specific employment for which the nonimmigrant is being sought within the six months preceding the date an H-1B nonimmigrant begins employment, and will not lay off protected individuals within 90 days following the date the nonimmigrant begins employment and for so long as the application remains active or a visa remains in effect - unless the employer pays an actual wage to each nonimmigrant that is at least 110 percent of the mean of the last wage earned by the laid off employees. In addition, a "job contractor" must attest that it will not place an H-1B worker with another employer unless the other employer has executed an attestation that it is complying and will continue to comply with these requirements in the same manner as they apply to the contractor. We perceive the last of these proposed changes to represent a welcome effort to implement one of the modifications in the H-1B Program previously requested by secretary Reich - to prevent U.S. workers from being laid off or otherwise displaced by nonimmigrants - but it does not reflect the language requested by the Secretary and provides a means of circumvention. In other words, this provision would allow a U.S. employer to lay off U.S. workers and replace them with foreign workers in the same job so long as the employer paid the foreign workers more than it had paid its U.S. workers. H.R. 2202 does DDI include the additional change to the H-1B program requested by the Secretary - the requirement that H-1B employers attest to taking timely and significant steps to recruit and retain U.S. workers in the jobs for which they are seeking foreign workers. In addition, these

proposed changes need to be consistent with U.S. international obligations in the General Agreement on Trade in Services under the World Trade Organization.

While we have a number of serious concerns about the changes to the H-1B program contained in H.R. 2202 - and, as I have stated, would @ to see legislation address more nonimmigrant programs, and in the broader context of the array of nonimmigrant programs for which the Department has responsibility - we find promise in the general framework provided in the bill and will be working with the Congress and interested parties to address our concerns and attempt to fashion H-1B amendments which the Administration could endorse.

Thirdly, with respect to reform of nonimmigrant programs, there has been some talk about the potential need for a new agricultural guestworker program should the Administration's illegal ***immigration*** initiative effectively reduce the flow of illegal migrants across the southwestern border. Apparently, Western growers in particular fear resulting labor shortages and disdain the existing nonimmigrant agricultural worker program - the H-2A program - as inappropriate to their perceived needs. As the Subcommittee Members may know, the President opposes such a new agricultural guestworker program. In June, agreeing strongly with the Commission's recommendation on this subject, 1 the President said, "A new guestworker program is unwarranted for several reasons:

- It would increase illegal ***immigration***.

- It would reduce work opportunities for U.S. citizens and other legal residents.

- It would depress wages and work ***standards*** for American workers."

The Department of Labor suggests an analytical framework for examining the need for any new agricultural guestworker program through three questions:

(1) Is there a problem - a shortage of farmworkers in the U.S.?

(2) If there is a problem, is a new foreign guestworker program the only way to address it?

(3) If a foreign guestworker program is the only way to deal with supplying labor to U.S. agriculture, there already exists a temporary farm program program which provides such a "safety valve." Is there something fundamentally wrong with the existing H-2A nonimmigrant program? 1 In June, the Commission said, "The Commission believes that an agricultural guestworker program, sometimes referred to as a revised "bracero" program, is not in the national interest and seriously and strongly agrees that such a program would be a grievous mistake."

Our careful analysis of these questions concludes that the answer to each is unambiguously "No" - a new agricultural guestworker program is simply not in the national interests of the United States.

Finally, Mr. Chairman, we understand that the Subcommittee may be considering holding another hearing focused on possible reforms of the current nonimmigrant programs. We hope that the views offered today help inform your further deliberations, and we look forward to returning to discuss these issues in greater detail. It is worth repeating though that - in our view - reform of the employment-based nonimmigrant programs is so integral and essential to effective reform of our entire system of legal ***immigration*** that it should be included in any such legislation. This is yet another reason why the Administration believes that in order to assure passage of a bill this session addressing illegal ***immigration***, it may be best to deal with legal ***immigration*** reform as a separate matter in the Congress, and commends the Chairman for his efforts in this regard.

Employment-based Immigrants - Ceilings and Categories

Let me turn now to employment-based ***immigration*** and existing proposals to change the number and mix of such immigrants.

The Administration supports the Commission on ***Immigration*** Reform's recommendation that the number of employment-based immigrants be reduced from 140,000 under current law - which is nearly three-fold more than

prior to the 1990 amendments (54,000) - to 100,000 per year. The Commission acknowledges that this level of employment-based ***immigration*** actually represents a modest increase over current market demand when unskilled workers and admissions under the expiring Chinese Student Protection Act are excluded.

H.R. 2202 would allow 135,000 annual employment-based immigrant admissions, an apparent reduction from the current level, but actually a significant increase compared to current demand. The Administration thinks this level is too high.

The Subcommittee's "discussion draft" bill would allow 75,000 annual employment-based admissions, about 50 percent more than prior to the 1990 amendments, but less than current market demand. While we appreciate that this lower level could help tighten the labor market and encourage employer efforts to invest in developing the domestic labor market to meet future skill demands, it may be too low in the short term, especially in light of the increasing globalization of certain labor markets.

The Administration also supports the Commission's recommendation that the annual employment-based admission ceiling exclude unskilled immigrants. This appears to be a consensus change as H.R. 2202 and the Subcommittee's "discussion draft" bill would both do this as well. Since 1990, this category is limited to 10,000 admissions annually and currently has an existing backlog (as of January 1995) of nearly 80,000 approved applicants, or an eight year waiting list. It is indeed hard to understand how a prospective employer could wait eight years to obtain the services of an unskilled foreign worker, so it is highly likely that most of these workers are already living and working in the U.S., in many cases illegally. Nonetheless, these 80,000 approved applicants have already been found eligible for admission through a test of the domestic labor market, albeit several years ago, and some have called for Congress to consider a means to "grandfather" these approved applicants should there be a change in the law.

The Administration supports the Commission's recommendation that the minimum qualifications for certain workers admitted in the 'labor market tested" category--skilled workers without a bachelor's degree-- should be increased (from three years) to a minimum of five years of specialized work experience.

H.R. 2202 would also raise the minimum ***standards*** of training and experience required to qualify for employment-based immigrant admission to a bachelor's degree plus five years of experience, or seven years of combined training and work experience for those without a bachelor's degree. H.R. 2202 does not address the question of whether training and experience gained in the U.S. while an individual worked in nonimmigrant status - or even illegally - counts toward meeting the minimum qualification requirements.

On the other hand, the Subcommittee's "discussion draft" bill would raise the minimum qualifications for employment-based immigrant admission to a bachelor's degree plus five years of experience, or five years of experience in skilled labor without a bachelor's degree. In both cases, the immigrant must have obtained the work experience In this matter, the Administration prefers the approach contained in the Subcommittee's draft bill. However, as this new requirement is likely to garner considerable controversy, the Subcommittee may wish to consider other alternatives such as disallowing any work experience gained with the petitioning employer, and certainly any experience gained if the immigrant resided and worked illegally in the U.S.

There are differences between both bills' minimum requirements for the jobs for which the lowest preference skill-based immigrants can be sought, and the minimum qualifications and experience of the prospective immigrants (which are significantly higher). H.R. 2202 would require that the prospective immigrant be capable of performing skilled labor requiring at least two years of training or experience, which is not of a temporary or seasonal nature, "for which qualified workers are not available in the U.S." The Subcommittee's "discussion draft" bill, however, requires that such immigrants be capable of performing skilled labor which is not of a temporary or seasonal nature, and which requires at least two years of training or experience (or combination of the two), but does not explicitly require any showing that qualified U.S. workers are unavailable to perform the work. In this regard, the Administration prefers the approach contained in H.R. 2202.

Unlike the Subcommittee's "discussion draft" bill, H.R. 2202 retains separate numerical limitations for employment-based immigrant preference categories. (It is not yet clear whether or how the Commission will address this issue.) H.R. 2202 would significantly reduce the annual ceiling on the admission of the most highly qualified and talented employment-based immigrants--those with "extraordinary ability"-- while increasing the ceilings for advanced degree professionals, and professional and skilled workers. We understand that these preference category ceilings were established to generally comport with current demand, but we have raised questions about the wisdom of this approach as it reduces future flexibility should demand in the higher preference categories grow unexpectedly. Since all approaches seem to retain the concept that unused visas in higher preference employment categories would be available for use in the lower preferences, such ceilings also seem unnecessary.

The Commission, H.R. 2202, and the Subcommittee's "discussion draft" bill all propose a new concept in the employment-based ***immigration*** system - the concept of "conditional status." While H.R. 2202 does this in a very narrow context, the Subcommittee's draft bill seems to parallel the Commission's recommendation that such "conditional" status accrue to all employment-based immigrants subject to the labor market test. While we understand that this approach is based on the "marriage fraud" precedent, the Administration believes that this new scheme raises grave concerns and deserves very careful reconsideration.

Under current law, employment-based immigrants gain lawful permanent resident status on entry (or adjustment) and all the rights attendant to such status, including freedom in the labor market. In fact, the single best protection against potential abuse in the workplace is a worker's freedom to change jobs, change employers, even change occupations. This "conditional status" construct would eliminate that fundamental protection, binding the immigrant to the employer and to an occupation for two years. of even greater concern is that 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 prove that the worker remained employed by the employer and had continued to receive the required wage during the prior two year period. This construct could easily foster a great - and entirely avoidable - potential for workplace exploitation.

If one assumes that lawful permanent resident status (and eventually citizenship) is the primary motivation for employment-based immigrants, this "conditional status" gives the employer tremendous power over the worker--extending it beyond any period of illegal employment, or employment in nonimmigrant status during which the worker is also bound to a specific employer--and there are no parties with any interest in preventing or exposing possible exploitation (with the possible exception of any similarly-employed U.S. workers who may become aware of the situation). While the Commission and the Subcommittee's draft bill contemplate the possibility of such exploitation by providing for waiver of the two year employment requirement in the case of an unfair labor practice, both seem to overlook the problem of how such unfair practices would ever be identified (much less the burden of proving same) if there are really no interests at play that would expose such practices. If the bill contemplates that a complaining "conditional" immigrant worker would get earlier conversion to unconditional permanent residency in the event that such labor abuses are exposed and then proven, this might provide a modest incentive. At the same time, it seems to ignore the fact that the troubled employment relationship would either continue while the issue is contested, investigated, and adjudicated, or would more likely - be terminated by the employer, leaving the worker without a means of support, at least temporarily. Further, since conversion from "conditional" to permanent resident status would require a second adjudication by the INS, the numbers involved pose significant workload and related resource implications that need to be addressed.

While we do have very serious concerns about the effect of such "conditional" status, the Subcommittee should know that it has been our experience that it is not uncommon that employment-based immigrants do change jobs from those for which they were certified within the first few years after gaining permanent status, are frequently not paid the wage that was offered in the labor certification, and often work in a lesser capacity than described in the certification application.

Employment-based Immigrant Admission Procedures

Let me now turn to the last general subject I wish to address today--the appropriate procedure for testing the domestic labor market to avoid adverse impact from employment-based ***immigration***. The Commission recommended that individuals admissible as employment-based immigrants be differentiated between those whose admission would be subject to a labor market test, and those who would not. H.R. 2202 and the Subcommittee's "discussion draft" bill would both do this, though in somewhat different ways. The Administration supports this approach generally, though we have some concerns regarding how the lines would be drawn and, as you will hear, the nature of the market test mechanism.

Under current law - which, in this regard, would not be changed by H.R. 2202 - certain employment-based immigrants are excluded unless the Secretary of Labor certifies that there are no qualified U.S. workers available for the job and that the admission of the immigrant worker will not adversely affect the job opportunities, wages and working conditions of U.S. workers. These requirements have given rise to what is known as the permanent labor certification system.

The permanent labor certification system is administered by the Employment and Training Administration's United States Employment Service, assisted by State employment security agencies. The labor certification system scrutinizes an employer's efforts to recruit U.S. workers for the job for which it is seeking an immigrant worker and surveys locally prevailing wage rates for such occupations.

Labor certification, as it currently operates, constitutes a pre- admission screening regime that is very expensive for both the taxpayers and employers - who often transfer their costs to the foreign worker. It often imposes lengthy delays in processing. And, the labor certification process does little to effectively protect U.S. workers since so many immigrants being sought for permanent residency are already present and working in the country as students, nonimmigrants, or illegally.

Labor certification begins as a "no win" situation. The employer has necessarily already offered employment to the immigrant when the labor certification application is first filed. Requiring the employer to then recruit U.S. workers in good faith to replace the desired immigrant sets up an adversarial process which is frustrating and incomprehensible to many employers, and ineffective in determining the real availability of qualified U.S. workers. Thus, the chances of a U.S. worker being hired through this process are extremely small. As I said earlier, in over 90 percent of labor certification applications filed, the prospective immigrant is already in the U.S.; in about 65 percent of the cases, the immigrant is already working for the employer, sometimes illegally. In only about one-half-of-one percent of cases does a U.S. worker actually get hired, and this is almost always in a different job than the one for which the immigrant is being sought.

Over 90 percent of all labor certification applications are handled by ***immigration*** attorneys. Ironically in what is supposedly an employer-driven system, these attorneys are often representing--and being paid by--the prospective immigrant. In a system that ostensibly delegates authority to U.S. employers to select a good portion of new permanent residents in our country, many employers who should be driving the system have become rather passive participants in the process in that they leave all of the details of meeting certification requirements to the immigrant's attorney, and often are not even aware of what is transpiring. The large numbers of attorneys involved in the process have helped make it more complex, more adversarial, and more time consuming.

There are flagrant abuses of the labor certification process. Abuses by prospective immigrants, their employers, and the representatives and attorneys involved include fictitious employers, accommodation of relatives, nonexistent jobs, shell corporations, overstated job duties and qualifications, and the intentional rejection or discouragement of qualified U.S. workers. In the employment-based permanent ***immigration*** system - as well as the nonimmigrant programs - employers can quickly become dependent on the use of foreign workers in an occupation. A major goal of an effective national ***immigration*** policy should be to prevent and reduce such dependency.

While the labor certification system can be responsive to the needs of the economy and operate to discourage frivolous applications, it is not too much of an exaggeration to say that the way the current labor certification system

operates diminishes the integrity of all of its participants. Employers are forced to engage in a costly recruitment process at a point when they have no interest whatsoever in considering a qualified U.S. worker for the job. Unemployed U.S. workers are "used" and abused in the process when they are referred to jobs for which they have almost no chance of really being considered. The administering State staff must engage in a recruitment process that they know is almost always futile, undermining the goodwill of U.S. workers and employers who they are also trying to serve in other, more legitimate ways. And our Federal staff do a tremendous amount of work with little gain or appreciation from the employers they are trying to serve.

I trust that this depiction cannot be mistaken for a vigorous defense of the labor certification system as it currently operates. In fact, it is an admission that the system is fundamentally broken and urgently needs to be fixed. The Department of Labor is actively undertaking to fix it through a reinvention initiative, as well as through examination of regulatory and possibly legislative changes that may be needed. We are painfully aware of the many deficiencies in the labor certification system and are intent on remedying them, either within the overall context of the current system or through an entirely new one.

To this end, last January the Employment and Training Administration launched a major effort to reengineer the current labor certification system's case processing procedures and prevailing wage policies in order to streamline processes, make the system more efficient and effective, save resources, and improve customer service. This reengineering project is a collaborative effort of Federal and State staff involved in the administration of the system, supported by process reengineering consultants. Through this project, the agency has mapped the current processes, gathered measurement data on the processes, benchmarked the process against the "best" comparable processes, and sought public input through notice in the Federal Register.

In the next few months we expect to develop and begin consideration of various options for improving the system, including obtaining the "buy in" of our State partners and stakeholders including outside interest groups.

Despite the very serious problems with the existing system, we cannot lose sight of the essential premise that our ***Nation's immigration*** policy, and its implementation, must assure that employment-based immigrants--and nonimmigrants--do not undermine the job opportunities, wages and working conditions of U.S. workers. A viable ***immigration*** policy could not survive such a failure. I know you agree, Mr. Chairman, that it is incumbent on us to examine carefully any proposals to replace the labor certification system to assure that this essential objective is achieved.

In this regard, the Subcommittee's "discussion draft" bill, consistent with many of the Commission's recommendations, would replace the current labor certification requirement with two alternatives.

First, if the Secretary of Labor found and declared that a labor shortage exists in the U.S. in an occupational classification, certification for that occupation would be "deemed to have been issued." On the other hand, if the Secretary found and declared that a labor surplus exists in the U.S. in an occupational classification, certification could not be issued for that occupation.

This system parallels one used under the current labor certification system, though somewhat more ambiguously. In this regard, the Department would support legislation which would codify what we started doing in 1965 through regulation. The difference from current practice embodied in the Subcommittee's draft legislation is that it would require denial of certifications for labor surplus occupations - called "Schedule 80 occupations - which had been the Department's practice until 1977 when the courts ruled that the statute requires a determination of able, willing, qualified and available workers. Nonetheless, while the feasibility of the approach contained in the draft bill deserves much more discussion based on our experience with the "labor market information" pilot program a few years ago, it should suffice today to say that, while simple in concept, this approach is terribly complex and difficult in execution given its essential dependency on labor market information which is wholly insufficient for this purpose.

The second alternative contained in the Subcommittee's "discussion draft" bill would replace the labor certification system with one which requires the Secretary of Labor to certify that the prospective employer has:

(1) Paid a fee, equal to 30 percent of the value of the total compensation package it will pay to the immigrant, into a private fund certified by the Secretary as dedicated to the goal of increasing the competitiveness of U.S. workers by making grants for education and training or similar such purposes; and,

(2) Attempted to recruit a U.S. worker for the job in which the immigrant would be employed using recruitment procedures that meet industry-wide ***standards*** and offering a total compensation package equal in value to at least 110 percent of the prevailing compensation package for such employment.

The draft bill would appropriately preclude the transfer of the cost of the fee from the employer to the immigrant, and provides remedies should this happen.

Without getting into a discussion of the myriad of administrative issues which would have to be worked out to implement such a new certification process, let me raise a few issues which we think may deserve further consideration.

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

In its recruitment an employer would be required to offer 110 percent of the prevailing compensation for individuals in such employment (including wages, benefits, and all other compensation).* The inherent difficulty of determining prevailing compensation packages for various occupations should m be underestimated. We are exploring the availability of reliable, up-to-date information regarding total compensation by occupation and area, but we know that the development of such information can be extremely costly and burdensome. In addition, the fact that the draft bill does not appear to contemplate that these determinations would be made for the locality would create some undesirable and probably unintended consequences. For example, employers in major metropolitan areas--where wage rates and benefits tend to be higher-- could be encouraged to use the system due to their advantage of being able to recruit by offering compensation packages that meet the 110 percent test - against a nationally prevailing ***standard*** but which might well be less than they actually pay their U.S. workers in those locations. On the other hand, employers in lower wage areas of the country could be discouraged from using the program because they would be seriously disadvantaged by being required to recruit offering a compensation package which satisfies the test but which actually represents much more than 110 percent of what they pay similarly-employed U.S. workers in their location. However, requiring determination of prevailing compensation for an occupation only on a locality basis could be extremely resource intensive, so we would suggest that the bill afford the Department the flexibility to require determination of the prevailing compensation package on a local, State-wide, regional or national basis depending on the availability of reliable, up-to-date data for various occupations and industries.

Despite these initial concerns about the draft bill's recruitment protocol, it does address a number of weaknesses in the current labor certification system and would provide increased flexibility to allow the Department to revamp the current system.

The amount of the fee that an employer must pay equates to the value of the compensation package it will provide the immigrant employee. of course, 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 may discourage employers from seeking higher-skilled workers who would normally also be

the higher paid employees, which works against the basic interest of our employment-based ***immigration*** policy. Perhaps it would be better to define another baseline for such a fee that would invoke a more desirable set of incentives and disincentives.

The fee an employer would be required to pay would apparently go into a fund with the very general goal of increasing the competitiveness of U.S. workers. of course, there is nothing inherently problematic with this objective - one that, as you know, is very close to Secretary Reich's heart. Nonetheless, in the context of linkage to our ***immigration*** policy goals (and recognizing the complexities which would arise), consideration could be given to requiring payment of such a fee into a fund with the more specific goal of increasing the competitiveness of U.S. workers in the occupation in which the immigrant will be employed. This, we believe, could help prevent the development of dependencies on foreign workers in certain labor market niches, especially considering that unskilled workers would no longer be admissible.

As we have told the Commission and understand they intended in their recommendation, we think your bill could make clear that any such fee should be additional money paid by the employer for this specific purpose. I hope you would join with Secretary Reich in not wanting to encourage employers to simply redirect some of the funds they currently contribute to educational and training endeavors in their own interests and the interests of their employees in order to cover these fees.

The draft bill would require payment of the fee into a "private fund' for the purposes described. We have pointed out to the Commission and call to your attention that - while we agree completely with the goal of not creating any new government program for administering such a fund - this language would appear to preclude an employer from meeting its fee obligation through a contribution to, for example, a State or Federal training program where, in fact, the payment could be more appropriate, and useful for the purposes intended.

We trust that the "admission fee" contained in the "discussion draft" bill would not preclude the assessment of additional fees merely to cover the cost of processing the workloads and performing the other functions required of the government. It would be inappropriate, we believe, to have the taxpayers continue to foot the bill for any part of the cost of obtaining the benefits derived by employers and immigrants through this system.

Finally, Mr. Chairman, we must return to the most important question regarding the "discussion draft" bill's proposed new certification system - will it serve to adequately assure that employment-based immigrants do not undermine the job opportunities, wages and working conditions of U.S. workers? This is the fundamental issue the Department will be examining as we review the Commission's report that was just released, as we further consider the Subcommittee"s draft bill, and as we continue to work with you on what you know better than most are exceedingly complex, interrelated issues.

We appreciate the interest shown by the Subcommittee staff in our views, and their consideration. We look forward to continuing to work closely and cooperatively with you and your staff as the legislation moves forward.

Mr. Chairman, that concludes my statement and I will be pleased to respond to questions from the Members of the Subcommittee.

Classification

Language: ENGLISH

Subject: ***IMMIGRATION*** (91%); LABOR DEPARTMENTS (90%); WAGE & HOUR LAWS (90%); ***IMMIGRATION*** LAW (90%); ILLEGAL IMMIGRANTS (89%); LABOR & EMPLOYMENT LAW (89%); WAGES & SALARIES (89%); ***IMMIGRATION*** REGULATION & POLICY (89%); LEGISLATION (89%); LEGISLATIVE BODIES (89%); INVESTIGATIONS (84%); WAGE VIOLATIONS (78%); PUBLIC POLICY (78%); MINIMUM WAGE (78%); FOREIGN LABOR (78%); HOUSEHOLD MANAGEMENT (74%)

Company: HOUR DIV (77%); WAGE&HOUR DIV (63%); HOUR DIV (77%); WAGE&HOUR DIV (63%); US DEPARTMENT OF LABOR (94%); US DEPARTMENT OF LABOR (94%); EMPLOYMENT ***STANDARDS*** ADMINISTRATION (93%); US DEPARTMENT OF LABOR WAGE & HOUR DIVISION (93%); EMPLOYMENT ***STANDARDS*** ADMINISTRATION (93%)

Organization: US DEPARTMENT OF LABOR (94%); US DEPARTMENT OF LABOR (94%); EMPLOYMENT ***STANDARDS*** ADMINISTRATION (93%); US DEPARTMENT OF LABOR WAGE & HOUR DIVISION (93%); EMPLOYMENT ***STANDARDS*** ADMINISTRATION (93%)

Industry: BUDGETS (60%)

Geographic: UNITED STATES (79%)

Load-Date: September 15, 1995
