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Cover Page Footnote

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The Move to Employment-Based Immigration in the Immigration Act of 1990: Towards a New Definition of 'Immigrant'

William V. Roebuck, Jr. *

I. Introduction

The recent Immigration Act of 1990 ("The Act"),¹ passed in Congress on October 27 and signed into law by President Bush on November 29, 1990, is the most extensive reform of the legal immigration laws of the United States passed in the last quarter century.² The Act is long and complex, with provisions affecting a wide range of immigration issues. The Act continues the established policy of favoring family reunification by increasing the number of visas available for this purpose,³ and underlines the importance of a newer policy, the strengthening of the economy and American competitiveness, by nearly tripling the number of visas available for employment-based immigrants.⁴ The Act also reopens the door to immigrants from Ireland, Italy, Poland, and other countries "that traditionally were sources of immigration in the past," but whose citizens had been "foreclosed from immigrating due to the vagaries of the 1965 law."⁵ The Act makes further critical changes in the immigration law provisions relating to exclusions (barring from entry) and deportations based on health and national security grounds, and eliminates much of the archaic language and many of the specific provisions originally enacted as part of the McCarren-Walter Act of 1954 (which banned entry into the United States "on the basis of

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¹ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990)(to be codified at 8 U.S.C. §§ 1151, 1153 and other sections).

² 136 CONG. REC. S17,106 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy) ("[T]his bill represents the first major expansion of our immigration system in a quarter century").

³ *Id.*

⁴ *Id.* at S17,107. The total increase in legal immigration, from current levels of approximately 490,000 to 700,000 represents a nearly forty percent increase. *Id.* at S17,106.

⁵ 136 CONG. REC. H12,358 (daily ed. Oct. 27, 1990) (statement of Rep. Brooks).

homosexuality and ideology").⁶

Of all the changes made to the Act, the most significant is the move to employment-based immigration. The move represents a fundamental change in United States immigration policy; one brought about by a variety of factors including changed social and economic circumstances, the experience gained from nearly twenty-five years with the old policy, and the changing views of immigration experts and constituencies. This Article will focus on this aspect of the new immigration law by explaining its legal aspects, describing the legislative background, and exploring some of the rationales and criticisms of this new approach to United States immigration law.

II. The Act

The Immigration Act of 1990 nearly triples the number of visas available based on employment criteria, from 54,000 to 140,000.⁷ This number is subdivided into several different employment-related categories. Forty thousand visas are set aside for "priority workers,"⁸ a category which includes "aliens with extraordinary ability in the sciences, arts, education, business, or athletics;"⁹ outstanding professors and researchers;¹⁰ and "certain multinational executives and managers."¹¹ Aliens admitted under this category of "priority workers" must be seeking entry to "continue work in the area of extraordinary ability" and their entry must be shown to be of "substan-

⁶ *Id.* at H12,365-66. ("[The Act] reforms our outmoded system of immigration exclusions . . . [It] eliminates onerous and discriminatory aspects of the McCarran-Walter Act of 1954 . . ."). The Act creates an exclusion category for aliens whose entry would have "serious adverse foreign policy consequences for the United States." The Secretary of State makes this determination; critical to this exclusion is a "first amendment exception": an alien cannot be excluded solely on the basis of his beliefs, statements, or associations, if these "would be lawful within the United States" (unless such entry, as personally determined by the Secretary of State and reported to Congress, "would compromise a compelling United States foreign policy interest.") Immigration Act of 1990, Pub. L. 101-649, § 601, 104 Stat. 4978, 5070-71 (amending the Immigration and Nationality Act § 212(a)(3)C(i),(iii)).

⁷ Pub. L. 101-649, § 121(a), 104 Stat. at 4987 (amending the Immigration and Nationality Act § 203(b)).

⁸ *Id.* (amending the Immigration and Nationality Act § 203(b)(1)).

⁹ *Id.* (amending the Immigration and Nationality Act § 203(b)(1)(A)(i)). Such ability must have been "demonstrated by sustained national or international acclaim . . . [and] recognized in the field through extensive documentation." *Id.*

¹⁰ *Id.* § 121(a), 104 Stat. at 4988 (amending the Immigration and Nationality Act § 203(b)(1)(B)). Applicants must be "recognized internationally as outstanding in a specific academic area . . . [with] at least three years of experience," and must be seeking a tenured or tenure track position within a university or institution of high education. *Id.*

¹¹ These executives must have been employed for one year during the previous three years and must be seeking entry into the United States to continue such work, in a capacity that is managerial or executive. Those terms are defined in the Act (see § 123(a), 104 Stat. at 4995). The executive must be seeking to continue working for the same employer (or for a subsidiary or affiliated business). Pub. L. 101-649, § 101-649, 104 Stat. at 4988 (amending the Immigration and Nationality Act § 101(a)).

tia[l] benefit prospectively" to the United States.¹²

The second allotment of employment-based visas, also numbering 40,000, is for "aliens who are professionals with advanced (masters' or higher) degrees or who have exceptional ability in the sciences, arts, or business."¹³ In addition, to obtain a visa in this category, the alien must show that his "services . . . are sought by an employer in the United States."¹⁴ In determining whether an immigrant has exceptional ability, the possession of a degree or professional license will not "by itself be considered sufficient evidence of such exceptional ability."¹⁵

The third major category for employment-based immigration, also with an annual allotment of 40,000 visas (plus any visas not used in the above-mentioned categories), is for "skilled workers, professionals, and other workers."¹⁶ Skilled workers are defined as "those capable of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States."¹⁷ "Professionals" in this category should have a baccalaureate degree to accompany their professional status.¹⁸ "Other workers" are immigrants who are capable of performing "unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States."¹⁹ Immigrants in this third major category must have labor certification from the Secretary of Labor showing that there are insufficient qualified workers in the United States to perform such work.²⁰

The most detailed provisions of the employment-based immigration component deal with visas set aside for "employment crea-

¹² Pub. L. 101-649, § 121(a), 104 Stat. at 4988 (amending the Immigration and Nationality Act § 203(b)(1)(A)(ii),(iii)).

¹³ *Id.* (amending the Immigration and Nationality Act § 203(b)(2)(A)). This represents an increase of about 13,000 over the amount allotted this category under prior law. Also any visas in the first above-mentioned category, left unused, would be available in this category. This addition should "assure that the current backlogs in the category are eliminated and that visas are immediately available." Bell, *Overview of Legislative, Administrative and Judicial Changes in Immigration Law During 1989*, 1990 IMMIGR. & NATURALIZATION L. REV. xi, xxi.

¹⁴ Pub. L. 101-649, § 121(a), 104 Stat. at 4988 (amending the Immigration and Nationality Act § 203(b)(2)(A)). The Attorney General may waive this requirement if he deems entry "to be in the national interest." *Id.* (amending the Immigration and Nationality Act § 203(b)(2)(B)).

¹⁵ *Id.* § 121(a), 104 Stat. at 4988-89 (amending the Immigration and Nationality Act § 203(b)(2)(C)).

¹⁶ *Id.* § 121(a), 104 Stat. at 4989 (amending the Immigration and Nationality Act § 203(b)(3)).

¹⁷ *Id.* (amending the Immigration and Nationality Act § 203(b)(3)(A)(i)).

¹⁸ *Id.* (amending the Immigration and Nationality Act § 203(b)(3)(A)(ii)).

¹⁹ *Id.* (amending the Immigration and Nationality Act § 203(b)(3)(A)(iii)). The number of annual visas that can be made available for "other workers" is limited to 10,000. *Id.* (amending the Immigration and Nationality Act § 203(b)(3)(B)).

²⁰ *Id.* (amending the Immigration and Nationality Act § 203(b)(3)(C)).

tion.”²¹ These visas are for immigrants seeking to enter the United States “for the purpose of engaging in a new commercial enterprise.”²² The number of annual visas designated for this category is limited to 10,000.²³ The alien must invest one million dollars in a new commercial enterprise²⁴ which will “benefit the United States economy and create full-time employment for not fewer than ten United States citizens” or lawfully admitted aliens who are authorized to work.²⁵ There are no requirements concerning what type of business investment must be made.²⁶ Such “industrial policy tests” were rejected as stifling to entrepreneurial creativity.²⁷

Of these 10,000 annual visas, 3,000 will be set aside for “targeted employment areas.”²⁸ Such an area is defined as either a rural area or an area “which has experienced high unemployment (of at least 150 percent of the national average rate).”²⁹

To ensure that visas granted for employment creation actually serve that purpose, the Act establishes strict oversight procedures.³⁰ Visas in this category are granted on a conditional basis for two years.³¹ If during that period, the Attorney General determines that the alien entrepreneur has not properly fulfilled the requirements for investment and establishment of the commercial enterprise, the Attorney General shall terminate the permanent resident status of the alien and his family.³² Such termination proceedings may be

²¹ *Id.* § 121(a), 104 Stat. at 4989-90 (amending the Immigration and Nationality Act § 203).

²² *Id.* § 121(a), 104 Stat. at 4989 (amending the Immigration and Nationality Act § 203(b)(5)(A)).

²³ *Id.*

²⁴ *Id.* § 121(a), 104 Stat. at 4989-90 (amending the Immigration and Nationality Act § 203(b)(5)(A)(ii), (C)(i)).

²⁵ *Id.* § 121(a), 104 Stat. at 4989 (amending the Immigration and Nationality Act § 203(b)(5)(A)(iii)).

²⁶ *See id.*; 136 CONG. REC. S17,112 (daily ed. Oct. 26, 1990)(statement of Sen. Simon: “Neither the Senate nor the House bill establishe[s] any sort of criteria about the type of business investment”).

²⁷ 136 CONG. REC. S17,112 (daily ed. Oct. 26, 1990) (statement of Sen. Simon: “As long as the employment goal is met, it is unnecessary to needlessly regulate the type of business We should encourage and not cripple the creativity of these enterprising immigrants.”).

²⁸ Pub. L. 101-649, § 121(a), 104 Stat. at 4990 (amending the Immigration and Nationality Act § 203(b)(5)(B)(i)).

²⁹ *Id.* § 121(a), 104 Stat. at 4988 (amending the Immigration and Nationality Act § 203(b)(5)(B)(ii)). For these areas, the Attorney General may, in specific cases, lower the dollar amount of investment required by as much as one half. *Id.* § 121(a), 104 Stat. at 4990 (amending the Immigration and Nationality Act § 203(b)(5)(C)(ii)). Where the rate of employment is high, the Attorney General may raise the dollar amount to as much as three times greater than the one million dollar amount. *Id.* (amending the Immigration and Nationality Act § 203(b)(5)(C)(iii)).

³⁰ *Id.* § 121(a), 104 Stat. at 4990-94 (amending the Immigration and Nationality Act § 216A(a)-(f)).

³¹ *Id.* § 121(b)(1), 104 Stat. at 4990-91 (amending the Immigration and Nationality Act §§ 216A(a)(1), 216A(b)(1)).

³² *Id.* (amending the Immigration and Nationality Act § 216A(b)(1)). Any alien sub-

brought on several grounds: first, if the Attorney General determines that the commercial enterprise was established solely as a means of evading the immigration laws of the United States;³³ second, if the commercial enterprise was not established;³⁴ third, if the alien did not invest the requisite capital;³⁵ fourth, if the alien was not sustaining the investment and the establishment of the enterprise throughout the two year period;³⁶ or fifth, if in some other way the alien did not conform to the specified requirements.³⁷

To have the conditional status lifted, the alien entrepreneur must petition the Attorney General, supplying the necessary facts and information, and submit to an interview, during which such information would be corroborated.³⁸ Failure to file the petition or have the interview would be grounds for termination of permanent resident status.³⁹ If the alien entrepreneur receives a favorable determination from the Attorney General, the conditional status is removed.⁴⁰ Otherwise, the alien entrepreneur's permanent status is terminated.⁴¹ An alien who knowingly establishes a commercial enterprise in order to evade any provision of the immigration laws could be subject to up to five years imprisonment.⁴²

To complement the employment-based immigrant visa program, the Act establishes a three-year pilot program to assist the Secretary of Labor in determining labor shortages or surpluses in up to ten occupational classifications.⁴³ Where there is a labor shortage with respect to an occupational classification, certification by the Secretary of Labor for petitions in that classification is automatic.⁴⁴

III. Legislative Background

The legislative effort for legal immigration reform, which culminated in the passage of the Immigration Act of 1990, began in 1978 when the Select Commission on Immigration and Refugee Policy ("Select Commission" or "Commission") was established.⁴⁵ The

ject to such termination may request a hearing. The burden of proof "shall be on the Attorney General to establish, by a preponderance of the evidence," that the action is justified. *Id.* (amending the Immigration and Nationality Act § 216A(b)(2)).

³³ *Id.* (amending the Immigration and Nationality Act § 216A(b)(1)(A)).

³⁴ *Id.* (amending the Immigration and Nationality Act § 216A(b)(1)(B)(i)).

³⁵ *Id.* (amending the Immigration and Nationality Act § 216A(b)(1)(B)(ii)).

³⁶ *Id.* (amending the Immigration and Nationality Act § 216A(b)(1)(B)(iii)).

³⁷ *Id.* (amending the Immigration and Nationality Act § 216A(b)(1)(C)).

³⁸ *Id.* § 121(b)(1), 104 Stat. at 4992 (amending the Immigration and Nationality Act § 216A(c)(1)).

³⁹ *Id.* (amending the Immigration and Nationality Act § 216A(c)(2)(A)).

⁴⁰ *Id.* (amending the Immigration and Nationality Act § 216A(c)(3)(B)).

⁴¹ *Id.* (amending the Immigration and Nationality Act § 216A(c)(3)(C)).

⁴² *Id.* § 121(b)(3), 104 Stat. at 4994 (amending the Immigration and Nationality Act § 275(c)).

⁴³ *Id.* § 122(a), 104 Stat. at 4994.

⁴⁴ *Id.* § 122(a)(2)(A), 104 Stat. at 4994.

⁴⁵ See STAFF OF SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, 97TH CONG.,

Commission was set up "to study and evaluate existing laws, policies and procedures governing admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and to the Congress as are appropriate."⁴⁶

That the Immigration Act of 1990 is heavily indebted to the work of the Commission is evident from the comments legislators made in support of passage of the legislation.⁴⁷ Senator Kennedy, one of the original sponsors of the immigration bill and a member of the Commission, underlined this indebtedness: "This measure is the culmination of a decade long effort which began in 1977 with the Select Commission on Immigration and Refugee Policy. The Commission's Report laid the basis for the most comprehensive reforms of the Nation's immigration laws in our history."⁴⁸

The impact of the Commission on the employment-based provisions of the 1990 Act is unmistakable. The Commission recommended "that [a] provision be made in the immigrant admissions system to facilitate the immigration of persons without family ties in the United States."⁴⁹ Also mentioned was the "desirability of facilitating the entry of immigrants with exceptional qualifications" and the need for "creating a small, numerically limited subcategory . . . to provide for the immigration of certain investors."⁵⁰

In analyzing the immigration system, the Commission made clear that it was in favor of immigration and in its recommendations accentuated the positive economic effects of immigration.⁵¹ The

1ST SESS., U.S. IMMIGRATION POLICY AND THE NAT'L INTEREST (Comm. Print No. 8 1981) [hereinafter SELECT COMM'N].

⁴⁶ *Id.* at xi. The Commission made recommendations on both illegal and legal immigration issues. Its impact on legislation dealing with illegal immigration is evident in the Immigration Reform and Control Act, passed in 1986. See 136 CONG. REC. H12,358 (daily ed. Oct. 27, 1990) (statement of Rep. Fish), *infra* note 48.

⁴⁷ See, e.g., 136 CONG. REC. S17,111 (daily ed. Oct. 26, 1990) (statement of Sen. Simon: "My colleagues on the subcommittee began this process in the 1970's as part of the select commission on immigration reform chaired by Ted Hesburgh.").

⁴⁸ 136 CONG. REC. S17,106 (daily ed. Oct. 26, 1990). See also 136 CONG. REC. H12,358 (daily ed. Oct. 27, 1990) (statement of Rep. Fish) ("Ten years ago I served on the Select Commission on Immigration and Refugee Policy. . . . [After dealing with the problem of illegal immigration, the Congress] then turned to the issue of legal migration, also studied by the Select Commission. As Father Hesburgh, the Chairman of the Commission said, 'once we closed the back door to illegal immigration, we can open the front door a little wider'").

⁴⁹ SELECT COMM'N, *supra* note 45, at xx.

⁵⁰ *Id.*

⁵¹ *Id.* at 99-100.

Economists agree that immigration has been and continues to be a force for economic growth in the United States and, as a consequence, has a beneficial effect on wages and employment possibilities for most U.S. citizens over time Immigrants tend to benefit the economy in other ways. As consumers, they cause an expansion of demand for goods and services. As self-selected persons of high motivation and ingenuity, they tend to plan, save, invest and contribute disproportionately to entrepreneurial activity.

Commission's recommendations favoring employment-based immigration did not signal an abandonment of the family reunification principles that dominated the immigration laws at that time.⁵² On the contrary, the Commission emphasized its support of the major role that family reunification principles play in our immigration laws.⁵³ The Commission noted that the *two* purposes of immigration, encouraging "family unification and bringing in persons with needed skills," were merged under the old system to the detriment of the latter.⁵⁴ The two tracks should be separated, the Commission urged, to ensure that both purposes of the immigration laws were being fulfilled.⁵⁵

Not all members of the Commission agreed with the various proposals for increasing the emphasis on employment-based immigration.⁵⁶ The Chairman, Father Hesburgh, disagreed with the investor visa recommendation.⁵⁷ A few other members felt that employment-based immigration had been over emphasized in the Commission's recommendations.⁵⁸ Nevertheless, the overall thrust of the Commission's recommendations was that employment-based immigration should be an important component of any revision of the legal immigration laws.⁵⁹

In 1987, after several years spent dealing with the problem of illegal immigration, Congress began to address the issue of legal immigration.⁶⁰ Senator Kennedy sponsored S. 1611, the Immigration Act of 1987 (also introduced in the House as H.R. 3143 by Rep. Donnelly), which was largely based on the findings of the Select Commission and made many of the same basic recommendations.⁶¹

⁵² *Id.* at 112 ("The select commission recommends that the reunification of families should continue to play a major and important role in U.S. immigration policy").

⁵³ *Id.*

⁵⁴ *Id.* at 111 ("This mixing of family and independent worker (non family) groups . . . has resulted in widespread inequities and confusion concerning the two main goals of immigration . . .").

⁵⁵ *Id.* This separation was necessary because "[t]he low priority accorded non-family immigrants and a cumbersome labor certification process for clearing them for admission has made it difficult for persons without previous family ties in the United States . . . to immigrate." *Id.* at 90.

⁵⁶ *See, e.g., id.* at 338, 346-47 (statements of Chairman Hesburgh and Commissioner Holtzman).

⁵⁷ *Id.* at 338 ("When immigration is so strictly limited, as it must be, it seems wrong to set aside 2000 visas, out of a total of 350,000, for persons who come primarily to invest. There is nothing wrong with persons who wish to invest, and investment is good for the U.S.A., but the rich should not be able to buy their way into the country"). The recommendation to create such a program passed in the Commission 15-1. *Id.* at 312.

⁵⁸ *See, e.g., id.* at 346-47 (Statement of Commissioner Holtzman).

⁵⁹ *Id.* at xxi.

⁶⁰ These efforts culminated in the passage of the Immigration Reform and Control Act of 1986.

⁶¹ *Legal Immigration Reforms: Hearings on S. 1611 Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 275 (1987)* [hereinafter *Senate Hearings on S. 1611*] (statement of Ira J. Kurzban, President, American Immigration Lawyers Association).

The bill did not reach the full Senate in 1987.⁶² The following year a compromise bill, S. 2104, based partly on Senator Kennedy's bill and partly on another reform measure (S. 2050) sponsored by Senator Simpson, passed in the Senate on March 15, 1988.⁶³ The compromise bill "proposed a reorganization of the preference system, allocating separate quotas for family-related and work-related immigrants"⁶⁴ The bill was re-introduced in the Senate as S. 358 and was passed "overwhelmingly" in 1989.⁶⁵ Floor amendments brought the "bill's provisions into close alignment with areas of concern expressed in past years by the Democratic majority in the House."⁶⁶

In the House, the first legislation addressing some of the concerns of legal immigration (H.R. 2921) was introduced in 1987 by Representative Mazzoli, then chairman of the House Judiciary Committee's Subcommittee on Immigration, Refugees, and International Law. The bill, focusing "on the economic ramifications of current immigration policy," did not pass in the House.⁶⁷ It was not until Representative Bruce Morrison took over chairmanship of the House Subcommittee on Immigration, Refugees, and International Law that serious reform of legal immigration, including employment-based aspects, became a real possibility.⁶⁸ Several different bills were introduced, but it was Representative Morrison's bill (H.R. 4300), The Family Unity and Employment Opportunity Act of 1990, that was finally passed in October 1990.⁶⁹ Eventually the Immigration Act of 1990 (S. 358) was reported out of conference and approved by both Houses on October 27, 1990.⁷⁰

IV. Analysis

Sponsors and supporters of the Immigration Act of 1990 (and its preliminary formulations in the House and Senate) have offered different justifications supporting the emphasis on employment-based immigration. First, they point out that family reunification is still the "cornerstone" of legal United States immigration and that the reforms aimed at increasing employment-based immigration do not require a cut in the number of visas for family-sponsored immi-

⁶² Blum & Wald, *Recent Judicial Legislative, and Administrative Developments Relating to Immigration and Nationality Law*, 1988 IMMIGR. & NATURALIZATION L. REV. xi, xiv.

⁶³ Bell, *Overview of Legislative, Administrative and Judicial Changes in Immigration Law During 1988*, 1989 IMMIGR. & NATURALIZATION L. REV. xi, xvi.

⁶⁴ *Id.*

⁶⁵ Bell, *Overview of Legislative, Administrative and Judicial Changes in Immigration Law During 1989*, 1990 IMMIGR. & NATURALIZATION L. REV. xi, xvii.

⁶⁶ *Id.*

⁶⁷ Blum & Wald, *supra* note 62, at xiii-xiv.

⁶⁸ Bell, *supra* note 65, at xvi.

⁶⁹ 136 CONG. REC. H8,720 (daily ed. Oct. 27, 1990).

⁷⁰ 136 CONG. REC. H12,368 (daily ed. Oct. 27, 1990).

gration.⁷¹ Supporters also point out that employment-based immigration is not a new policy. Under prior law, there were categories for skills-based admissions.⁷² The reason the reform has struck many as a very radical change is because the old system had functioned in such a way that family-sponsored immigration almost totally dominated the supply of visas.⁷³

Employment-based immigration has also received support because it encourages diversity and innovation, two of the traditional justifications for United States legal immigration policy.⁷⁴ Data indicate that a policy favoring skills-based immigrant admissions tends to open up "immigration channels for applicants from ethnic groups and countries of origin which, for one reason or another, [were not] present in previous immigration streams."⁷⁵ Such a policy would not, as some critics of the reform have charged, favor European immigration and shut the door on immigrants from developing countries.⁷⁶

Employment-based immigration is also justified on several economic grounds.⁷⁷ Some experts believe that employment-based immigration will help the United States confront a skilled-worker shortage and will increase American competitiveness.⁷⁸ According to this view, the same declining transportation and communications costs "which have facilitated the increase in international trade [have] also heightened the international competition for skilled im-

⁷¹ 136 CONG. REC. S17,106 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy) ("These reforms will be achieved without reducing our traditional priority for family reunification."); *see also* 136 CONG. REC. S17,109 (daily ed. Oct. 26, 1990) (statement of Sen. Simpson) ("[T]his bill . . . does protect the cornerstone of our immigration policy [I]t increases the visas available for the closest family members of citizens and residents of the United States . . . [and] provides for skilled immigration.").

⁷² Immigration and Nationality Act of 1989, 8 U.S.C. § 1153. *See also* SELECT COMM'N, *supra* note 45, at 127.

⁷³ SELECT COMM'N, *supra* note 45, at 127 ("[In 1980] no more than 20 percent of the 270,000 visas assigned to the numerically limited third and sixth preferences [was] available to qualified nonfamily [employment-based] immigrants and their spouses and children."); *see also* *Immigration Act of 1989 (Part 3): Joint Hearings on S. 358, H.R. 672, H.R. 2448, H.R. 2646, and H.R. 4165 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary and the Immigration Task Force of the House Comm. on Education and Labor*, 101st Cong., 2d Sess. 247 (1990)[hereinafter *Joint Hearings (Part 3)*](statement of Professor Barry R. Chiswick, Research, Department of Economics, University of Illinois at Chicago). ("[In fiscal year 1988] 'skill-tested' immigrants were a mere 3.5 percent of the total legal immigration.").

⁷⁴ *Immigration Reform: Hearing on S. 358 Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 449-50 (1989)[hereinafter *Hearings on S. 358*](statement of Dan Stein, Executive Director, Federation for American Immigration Reform (Fair)).

⁷⁵ *Joint Hearings (Part 3)*, *supra* note 73, at 255-56 (statement of Professor Barry R. Chiswick, Research, Department of Economics, University of Illinois at Chicago).

⁷⁶ *Id.* at 255 ("[T]he shift to issuing visas on the basis of skill has tended to favor Third World applicants rather than Europeans.").

⁷⁷ *Id.* at 244.

⁷⁸ *Id.*

migrants. There is now not merely a national labor market for skilled immigrants, for skilled workers; there is now an international labor market for skilled workers."⁷⁹ If the United States does not look to its economic self-interest and compete for these immigrants, other countries will reap the benefits.⁸⁰ There already exists in the United States a demand for highly-skilled workers which employment-based immigrants will help to meet.⁸¹

A focus on immigrants with skills not only helps American competitiveness, it also benefits the American economy in two ways. First, it expands the productive capacity of the economy: "[T]he potential for job creation by immigrant scientists, engineers, and entrepreneurs can be substantial."⁸² Second, such a focus would improve "the relative earnings of lower skilled U.S. workers."⁸³ Such an effect is more easily understood by looking at the consequence of *not* focusing on skills in implementing an immigration policy. Statistics show that the lowest-skilled immigrant workers who have family already in the United States will predominate.⁸⁴ This increases competition among low-skilled workers for jobs and drives down wages.⁸⁵ Immigration of more highly skilled workers tends to reduce "relative differentials in wages . . . thereby promoting the policy objective of narrowing the inequality of income, reducing poverty and welfare dependency."⁸⁶

The investor visa program, authorizing visas for immigrants who can invest one million dollars in a business and create ten jobs for American workers, is a more focused application of this general view that highly skilled immigrants in certain fields can create job opportunities for Americans and increase both the productive capacity of

⁷⁹ *Id.*

⁸⁰ *Id.* at 244.

⁸¹ 136 CONG. REC. H12,358 (daily ed. Oct. 27, 1990) (statement of Representative Fish)("The [new immigration law] addresses America's business needs in order to compete in a global economy. At a time when the United States needs highly skilled workers — scientists, engineers, computer experts, and other professionals, the [new law] responds to that need.")

⁸² *Joint Hearings (Part 3)*, *supra* note 73, at 248 (statement of Professor Chiswick); *see also Hearing on S. 358*, *supra* note 74, at 451 (statement of Dan Stein, FAIR)("[H]ighly skilled immigrants with expertise in high growth, high technology fields have the capacity to generate increases in the productive potential of American industry. These kinds of immigrants expand the U.S. economy in a way that provides American workers with meaningful job opportunities.")

⁸³ *Joint Hearings (Part 3)*, *supra* note 73, at 244 (statement of Professor Chiswick).

⁸⁴ *Id.* at 247.

⁸⁵ *Id.* at 258; *see also Joint Hearings (Part 3)*, *supra* note 73, at 558-59 (statement of Malcolm Lovell, Jr., Former Under Secretary of Labor, and Director, Institute for Labor and Management, George Washington University)("Many American women and minority youth are now overrepresented in low-skill, shrinking occupations. They will face even bleaker prospects if immigration continues to pour low skill workers into those same fields.")

⁸⁶ *Joint Hearings (Part 3)*, *supra* note 73, at 248-49 (statement of Professor Chiswick).

the economy and American competitiveness.⁸⁷ This program, according to its proponents, would “generate over eight billion dollars annually in new investment in small and independent U.S. businesses and provide up to 100,000 new jobs for Americans. . . .”⁸⁸ Such programs have been tried with great success in Canada and Australia, and have served as examples to which supporters of the new policy have pointed.⁸⁹ Failure to enact such a program, it was argued, would have discouraged productive investment, undercutting the “vigorous efforts by various states and regions to attract foreign investment that will create jobs. . . .”⁹⁰ Supporters countered the charge that visas were “up for sale” by pointing out that:

[o]ur entire immigration preference system makes choices based on individuals' attributes and circumstances. Individuals who have acquired the ability to invest and actively manage new enterprises to the direct benefit of U.S. workers and our economy, are not so less honorable or desirable than individuals who have acquired doctoral degrees or exceptional abilities in the arts and sciences, which also benefit our nation.⁹¹

Certain social and economic developments that have taken place since the family-sponsored immigration system was last examined in the 1960's justify a shift to a more employment-based immigration policy. First, because of tremendous reductions in transportation and communications costs, immigration is no longer the “gut-wrenching experience” it used to be.⁹² Previously, it “meant the virtual severance of all ties with family members who remained behind. This has not been the case for several decades”⁹³ Second, the

⁸⁷ Like the broader employment-based immigration program, this aspect is sometimes justified on the ground that it is nothing new. Entry for investors was possible prior to 1976, on a non-preference basis under the old system. But due to the continuing demand for visas by family-sponsored immigrants, visas are no longer available for immigrant investors. *Hearings on S. 358, supra* note 74, at 258 (statement of Charles C. Foster, Chairman, Coordinating Committee on Immigration Law, ABA) (“Until . . . 1976, it was possible for foreign investors in the United States to immigrate.”); *see also Joint Hearings (Part 3), supra* note 73, at 252-53 (statement of Professor Chiswick) (“The 1965 Amendments provided for the immigration of investors (‘entrepreneurs’)”).

⁸⁸ 136 CONG. REC. S17,112 (daily ed. Oct. 26, 1990)(statement of Senator Simon).

⁸⁹ *Id.* (“I hope we can learn from and build upon the track record and experiences of the Governments of Canada and Australia who have had great success in attracting talented people through their investor visa programs.”).

⁹⁰ *Senate Hearings on S. 1611, supra* note 61, at 283 (statement of Ira J. Kurzban). The system functioned in this manner because those investors who had no family relationship in the United States were “limited to seeking residence through the occupational preferences which [did] not directly address this situation.” *Id.* at 282.

⁹¹ *Id.* at 285.

⁹² *Joint Hearings (Part 3), supra* note 73, at 250 (statement of Professor Chiswick).

⁹³ *Id.* Along the same lines, supporters of employment-based immigration also pointed out that the opposing policy, family reunification, was anachronistic and no longer served the purpose for which it was designed. *Id.*

The [family-based] system, laid out in the 1965 act, was enacted under the banner of “family reunification,” a rhetorical holdover from post-war bills such as the Displaced Persons Act that sought to reunite families involuntarily separated by war. The term reunification implies an involuntary separa-

mid-1960's was a very different period, in economic terms, from the 1990's. What was justifiable in terms of the assimilation of immigrants then is less justifiable now. The mid-1960's was a "period of low and declining real costs for energy, unprecedented growth in productivity, shrinking unemployment and rapidly expanding real GNP per capita. Most important, it was a period during which Americans believed all these trends would continue indefinitely."⁹⁴ The times and corresponding expectations have changed. Slower economic growth, lower increases in productivity, increased international competition, and America's "declining position as a world leader in technology" required a reevaluation of United States immigration policy.⁹⁵

Many who supported the general idea of increased employment-based immigration qualified that support in one critical way. They argued that any increase should be tied to employer sponsorship and that labor certification requirements, indicating real labor shortages, should be strictly enforced.⁹⁶ The employer sponsorship and labor certification requirements that remain in the new law, in the second and third categories respectively,⁹⁷ are vestiges of prior law and could be interpreted to indicate congressional reservation about moving fully to an independent immigration system that is not based on any specifically demonstrable labor need for each immigrant. Supporters of employment-based immigration split on this issue.⁹⁸ Labor groups, like the AFL-CIO, supported the employer sponsorship and strict labor certification provisions: "worked [sic] based admissions to this country must be limited to admissions based on real need that cannot otherwise be met in the short term. Such a need

tion. It is a refugee term. To apply it to the current nepotistic system of family preference leaves a false impression among the general public. An immigrant who voluntarily comes here for a job should not expect to bring over brothers and sisters-in-law [and so forth] as a matter of right. Certainly not in 1990, when visiting the "old country" can be done in a matter of hours.

Id. at 461.

⁹⁴ *Joint Hearings (Part 3)*, *supra* note 73, at 250 (statement of Professor Chiswick).

⁹⁵ *Id.* at 249-50.

⁹⁶ *See infra* notes 97, 98.

⁹⁷ *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4987 (amending the Immigration and Nationality Act §§ 203(b)(2)(A), (b)(3)(C)).

⁹⁸ An aspect of this disagreement over the advisability of admitting independent immigrants (without employer sponsorship) can be traced all the way back to the recommendation of the Select Commission in 1980:

The Select Commission believes that specific labor market criteria should be established for the selection of independent immigrants, but is divided over whether the mechanism should be a streamlining and clarification of the present labor certification procedure plus a job offer from a U.S. employer, or a policy under which independent immigrants would be admissible unless the Secretary of Labor ruled their immigration would be harmful to the U.S. labor market.

SELECT COMM'N, *supra* note 45, at xxi.

must be *demonstrated*, not simply asserted."⁹⁹

Others questioned the efficacy of having either the government or employers attempting to determine labor shortages.¹⁰⁰ Such a system, critics asserted, could not work. An immigrant could not be made to stay in a particular place with a particular job once given a visa.¹⁰¹ Second, the Department of Labor was incapable of determining where labor shortages existed.¹⁰² The market system and worker/employer negotiation, these critics argued, did a better job of identifying and rectifying such shortages than a government bureaucracy.¹⁰³ Finally, such policies would lead to strong political pressures on the Department of Labor to certify (or not certify) a shortage in a particular category, with employers and employees exerting pressure in opposite directions.¹⁰⁴ Despite such questioning, labor certification of some kind, to indicate that immigrants would not (in theory at least) be taking away jobs from Americans, proved a political necessity and remained in the final bill as enacted into law.¹⁰⁵ It served supporters well in their efforts to justify the new law.¹⁰⁶

The employment-based immigration portion of the new law represents less than a quarter of the total number of immigration visas that were to be available.¹⁰⁷ Nevertheless, the law was seen as a fundamental shift away from a nearly total focus on family-based immigration.¹⁰⁸ It was inevitable that such a shift, although relatively

⁹⁹ Some business-oriented groups like the U.S. Chamber of Commerce also questioned the need for "nonsponsored immigration of 'new seed' immigrants," (especially if such a program would be at the expense of employer-sponsored visa allotments). They argued instead for higher numbers of visas for employer-sponsored immigrants, citing the needs for highly specific, targeted job positions, especially managerial positions. *Immigration Act of 1989 (Part I): Hearings on S. 358, H.R. 672, H.R.2448, and H.R.2646 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 442-43 (1989)(statement of Daryl R. Buffenstein, U.S. Chamber of Commerce).

¹⁰⁰ See, e.g., *Joint Hearings (Part 3)*, *supra* note 73, at 256 (statement of Professor Chiswick).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 256-57 ("Forecasts of occupation-specific and local area specific labor 'demands' have been notoriously poor. These forecasters make meteorologists look good!").

¹⁰⁴ *Id.* at 257 ("This has, in fact, been the sorry history of the labor certification program under the [previous] third and sixth preferences for professionals and skilled workers.").

¹⁰⁵ Pub. L. 101-649, § 122, 104 Stat. at 4994-95.

¹⁰⁶ See, e.g., 136 CONG. REC. H12,360 (daily ed. Oct. 27, 1990) (statement of Rep. Morrison) ("[T]his legislation protects American jobs. Those who suggest that the admission of skilled workers for positions which go unfilled is contrary to the interests of the American economy and American workers are mistaken, because we provide for filling jobs that otherwise would not be filled.").

¹⁰⁷ See *supra* notes 1-4 and accompanying text. Employment-based visas represent 140,000 out of a total of 700,000 visas that will be available.

¹⁰⁸ See *infra* note 110.

small, would attract criticism; some of it cogent and probing.¹⁰⁹

First, critics felt that the employment-based immigration program came at the expense of family-sponsored immigration.¹¹⁰ Although supporters of the new law pointed out that no cuts were made in family-sponsored immigration (and in fact such allotments were increased),¹¹¹ the political shift away from family-sponsored immigration would greatly reduce any *increases* in allotments for family visas. Further, some adjustments in policies for family-based immigration were viewed as new restrictions.¹¹² Because the shift in emphasis represented a fundamental change in priorities, some critics recommended that the employment-based component be enacted on a trial basis.¹¹³ Accompanying this type of criticism was a reminder of the economic benefits of family-based immigration: the family provides a safety net for immigrants, helping them to assimilate and to find jobs; and families also provide child care and other services which "assist the immigrant's adjustment and social well-being" and thereby relieve drains on government-provided social services.¹¹⁴

Critics also questioned the key justification for the partial shift to employment-based immigration.¹¹⁵ There was no labor shortage, in their view, to justify an influx of skilled and semi-skilled immigrants.¹¹⁶ Instead, the real economic problems were high unemployment and a lack of job training and technical education.¹¹⁷ Employment-based immigration was the wrong solution to such problems. A variation on this argument was that even if a labor shortage existed, there was "no data to support the conclusion that the shortage of skilled workers in the United States [was] due to the quality of persons immigrating under the [old] preference sys-

¹⁰⁹ It should be pointed out that many detractors were selective in their criticisms and some succeeded in having their criticisms addressed so that they could eventually support the bill.

¹¹⁰ See, e.g., *Hearings on S. 358, supra* note 74, at 406 (statement of Cecilia Munoz, National Council of La Raza) ("In our view, several provisions of S. 358 would severely limit family-sponsored immigration to the United States, undermining a longstanding tradition of making family unification a priority in immigration policy.").

¹¹¹ See 136 CONG. REC. H12,358 (daily ed. Oct. 27, 1990) (statement by Rep. Brooks) ("Those supporting family reunification should applaud our efforts because we have proposed additional visas over the current allotment.").

¹¹² *Hearing on S. 358, supra* note 74, at 412 (statement of Cecilia Munoz, National Council of La Raza).

¹¹³ *Id.* at 415.

¹¹⁴ *Senate Hearings on S. 1611, supra* note 61, at 527 (statement of Ira J. Kurzban, President, American Immigration Lawyers Association).

¹¹⁵ See, e.g., 136 CONG. REC. H12,359 (daily ed. Oct. 27, 1990) (statement of Rep. Bryant) ("This bill will allow 140,000 permanent workers to enter the country every year based on the allegation that somehow we have a labor shortage in the United States, an allegation which I believe we could easily show to be totally frivolous.").

¹¹⁶ *Id.*

¹¹⁷ *Id.* ("We do not have a labor shortage in America today. What we have in America today is a job shortage and a training shortage.").

tem."¹¹⁸ Focusing on immigration to solve this problem, instead of focusing on the education system and on better government planning, would drastically alter the immigration system to the detriment of family-based immigration with little or no guarantee that the changes would have any effect on the problems.¹¹⁹

The investor visa program was harshly criticized as amounting to a "visa for sale" program.¹²⁰ Given the damage this would do to the traditional view of the United States as a haven for immigrants from around the world, any economic benefits would be unjustified.¹²¹ Critics failed to recognize that the program was limited in scope and had been developed from provisions of the prior immigration laws.¹²²

The move to create completely separate tracks for family-sponsored and employment-based immigration also drew criticism.¹²³ The argument against this move was based on functional grounds: the program would not work as planned.¹²⁴ The separation of "family connection immigrants and independent immigrants may not be realized or only imperfectly so, because of strenuous competition likely to occur between the two groups over time."¹²⁵ Immigrants admitted on the basis of employment would use family-sponsorship categories to bring over their spouses and children, thus increasing demand for these visas and creating longer waiting periods.¹²⁶ Instead of separating the two tracks the new law would merge them by increasing demand on both tracks:

These dynamics could imply an increased 'gaming' of the system through multiple applications, and an expanded effort by immigrants to seek the quickest route of entry—whatever it may be—depending on such variables as country of origin, family size, and nature of family relationships with persons in the United States.¹²⁷

One final criticism leveled at the employment-based system was

¹¹⁸ *Hearings on S. 358, supra* note 74, at 573 (joint statement of Asian American Legal Defense and Education Fund, et. al).

¹¹⁹ *Id.*

¹²⁰ 136 CONG. REC. H12,362 (daily ed. Oct. 27, 1990)(statement by Rep. Campbell).

¹²¹ *Id.*

Some argue that this is good for America's economy because we would invite the kind of investment [sic] that stimulates jobs But this is intolerable for me. However beneficial the investment may be, the fact remains that the investment is possible only by those capable of investing. It remains incapable that America would, for the first time in its history, be granting a statutory preference for citizenship based on wealth."

Id.

¹²² See *Hearings on S. 358, supra* note 74.

¹²³ See, e.g., *Hearings on S. 358, supra* note 74, at 356 (testimony of Eleanor Chelimsky).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 386.

¹²⁷ *Id.* at 387.

that it amounted to too little, too early.¹²⁸ That is, until *illegal* immigration was better controlled, nothing should be done to increase levels of legal immigration, even if employment-based immigration made up part of that increase.¹²⁹ Second, the change to employment-based immigration was far too modest.¹³⁰ A more radical overhaul of the immigration system was needed, which would severely restrain if not eliminate family-sponsored immigration and put an employment-based system in its place.¹³¹

V. Conclusion

The decision to include an employment-based component in the new immigration law represents a fundamental shift in immigration policy. The reform is not unprecedented, however, since some of its elements were taken from policies and procedures present (but largely neglected) in the Immigration Act of 1965. Nor is the reform disproportionate, since the employment-based component represents a relatively small portion of the total allotment of annual visas. In addition, this component, though not a trial program *per se*, is subject to review (as is the entire immigration legal system) by an independent commission established by the Immigration Act of 1990.¹³² Despite these somewhat tentative measures and the built-in safeguard of review, the new component of employment-based immigration did manage to embrace many of the critical reforms in immigration law that have been proposed with growing intensity by various experts and groups over the last decade. That mix of old and new, after some initial criticism and suggestions, eventually attracted widespread support, even from groups which had opposed earlier formulations of the law.¹³³

Obviously Senators and Representatives, experts and lobbyists all had their private agendas to pursue. What is unique about U.S. immigration, however, is that it encompasses certain shared values and traditions present on anyone's agenda as an American, for the United States is a nation of immigrants. As Senator Kennedy put it,

¹²⁸ *Hearings on S. 358, supra* note 74, at 447 (statement of Dan Stein: "[I]t is either too early or too late to tinker with the preference system").

¹²⁹ *Id.*

¹³⁰ *Id.* at 446-47.

¹³¹ *Id.*

¹³² See Immigration Act of 1990, Pub. L. 101-649, § 141, 104 Stat. 4978, 5001 ("Effective October 1, 1991, there is established a Commission on Legal Immigration Reform . . ."). The Commission will review the functioning of the immigration system every three years and report its findings to Congress, which is then required by law to review them and enact any appropriate legislation. *Id.* at § 141, 104 Stat. at 5002.

¹³³ See 136 CONG. REC. H12,367 (daily ed. Oct. 27, 1990), for a list of many of the organizations that supported the law. The group included, among others, the AFL-CIO, the American Bar Association, the National Association of Manufacturers, the National Counsel of La Raza Mexican American Legal Defense and Education Fund, the American Civil Liberties Union, and the Organization of Chinese Americans.

“what we are really talking about is how all of us basically arrived here. Whether it was 300 years ago or 100 years ago, it was immigration and immigration policy that really defined how America became America.”¹³⁴ With the passage of the Immigration Act of 1990, a slight addition to the definition of immigrant has been made. With time, we will know whether that new definition of immigrant is workable and enduring.

¹³⁴ 136 CONG. REC. S17,107-08 (daily ed. Oct. 26, 1990).

