

January 1990

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## Recommended Citation

Austin T. Fragomen, *Impact of U.S. Immigration Law Based upon International Business*, 16 Can.-U.S. L.J. 29 (1990)  
Available at: <https://scholarlycommons.law.case.edu/cuslj/vol16/iss/8>

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## **Impact of U.S. Immigration Law Based Upon International Business**

*Austin T. Fragomen*

**A**s the current internationalization of investment and trade continues, the globalization of human resources will become an ever more prevalent phenomenon. Ideally, from the corporate perspective, access to the best management or scientific talent should occur without regard to nationality or country of origin. Viewed in this context, restrictions on the cross-border flow of people is as significant a restriction on the deployment of international personnel as protective tariffs upon the free flow of goods. Of course, I do not suggest that the United States espouse a policy of open borders, but I do suggest that immigration policy embody a national objective of providing access to necessary international human resources.

In today's highly competitive atmosphere, this nation's large businesses need access to the best available managers and specialists; they also must be able to avoid delays caused by documented and growing labor shortages in this country. For major employers, at least, those shortages relate exclusively to highly skilled occupations, most often in research and high-technology fields; only in the rarest case is an immigration benefit sought for a semi-skilled or unskilled worker. The foreign nationals targeted for immigration benefits by major U.S. corporations, then, cannot easily be replaced in the near term through the training of U.S. workers. Education and training programs for the skilled workers needed by major employers are long-term projects in which all major U.S. corporations are engaged, but cannot provide the immediate results which would be available for lesser-skilled or unskilled positions.

Presently, it seems to me, there are several factors which typically lead U.S. corporations to hire foreign nationals. First, penetrating foreign markets necessitates having personnel who are familiar with those markets, as well as local customs and economic preferences. In order to obtain such personnel, companies and, increasingly, professional service firms, recruit and train foreign nationals in the United States for eventual assignment in their home countries. Career development assignments are widely utilized to develop effective international managers and executives. Employees with U.S. or home office experience can better represent a company or firm abroad through a special understanding of the meth-

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ods, procedures and culture of the company or firm. Of course, this phenomenon is universal and not limited to the United States.

Second, in the United States in particular, and to a lesser extent in Canada, there is an acute shortage of highly qualified scientific personnel. Major American corporations must be able to establish and maintain a technological edge in order to remain competitive internationally. Yet, over fifty percent of all graduates of Ph.D. programs at U.S. universities are foreign nationals. Because of this fact, it is virtually impossible to adequately staff a major academic or corporate research facility without recruiting foreign nationals from U.S. universities or directly from abroad. In fact, recently a major Japanese high-technology company sought my advice with regard to expansion of its American research and development facility. After bemoaning the deplorable lack of scientific personnel in the U.S. labor market, the company requested my assistance regarding the immigration requirements for the recruitment of foreign graduates of U.S. universities. The company perceived that its objective of creating a first-rate U.S.-based research facility would be frustrated by the lack of sufficient scientific personnel. Until American society can stimulate an interest in its students in pursuing science careers, this phenomenon will continue unabated.

Third, just as the United States has labor shortages in selected fields, the country faces the specter of widespread shortages in many fields based purely on demographic factors, and those shortages may need to be addressed through U.S. immigration policy in order to assure that sufficient workers are available to permit general expansion of the U.S. economy. With unemployment standing slightly above five percent the supply of young workers continues to shrink.

From mid-1985 to mid-1989, eleven million new jobs were created in the U.S. economy while the total working-age population, including additions to the work force through immigration, grew by only five million persons. The U.S. Census Bureau medium variant population projection for the United States over the next fifty years shows a continuing slow-down in population growth, leading eventually to a period of no growth and finally to a decline in overall population. In this context, it is likely that much higher levels of immigration than currently provided will become not only desirable, but absolutely imperative.

Is U.S. immigration policy up to the challenge presented by these factors? The proper goals for U.S. immigration policy are best understood in the context of the evolving international business climate and the place of U.S. labor market needs within that environment. When the larger picture is properly viewed and understood, the best solutions to reform the current immigration laws are actually quite apparent. The present system for selecting immigrants and permitting non-immigrant entries is not so illogical as it sometimes seems. The points at which problems arise do not radically affect the basic structure; a few well-defined technical changes to the law, including an increase in the number of

immigrant visas to match the documented labor shortages, would make a major difference to U.S. corporations competing in the international market place.

### *U.S. Business in the Global Marketplace*

The effectiveness of U.S. business in competing internationally is affected by a number of factors, including exchange rates, express and *de facto* foreign government restrictions on trade, and the structures of our domestic industries, including their efficiency in operations, personnel management, and response to the demands of the consumer marketplace. The success of U.S. business internationally in turn can beneficially affect the living standard of all Americans, by making secure the jobs counted upon by U.S. workers, by enhancing the balance of payments of the United States and infusing the American economy with capital that ultimately circulates through the pockets of most Americans, and by indirectly helping to keep inflation and interest rates low.

The business community can do little to control exchange rates or the extent of foreign government restrictions on trade, but it must do all it can to assure efficiency in business operations and the optimal dedication of personnel resources to respond to market demands. The ability to put the best manager or the most expert technician in the right position within the company at the precise moment that he or she is needed is an absolute requirement to assure that a business stays even with, or ahead of well-financed and highly efficient overseas competitors.

To achieve the mobility of high-level managers and skilled technical personnel, U.S. companies need immigration laws that provide maximum flexibility in planning and minimum time delays in effectuating those plans. They also need laws that permit a rapid determination of U.S. labor shortages and procedures that provide immediate access to foreign personnel to fill those shortages. Major American corporations are ready to continue their extensive record of preparing American workers to fill those shortages, particularly in the technical fields in which such shortages have typically occurred and in which business has the greatest needs. Rapid technological changes, however, will continue to make it difficult to predict with precision the areas in which long-term education and training is needed; the availability of access to foreign-trained skilled labor will therefore always be necessary. In addition, companies often already have access to precisely the person they need within their own organizations or through international contacts, and the benefits to the company and the domestic economy of importing that person to fill a particular position are abundant.

Among the many benefits of an efficient and flexible immigration system are the following:

- (1) Foreign employees with U.S. work experience can represent the company's interests better when reassigned abroad by properly un-

- derstanding the methods and procedures of the company and U.S. business generally.
- (2) Employees with U.S. experience usually return abroad with a positive impression of U.S. business procedures and products that can lead to a continuing relationship with U.S. firms — resulting in orders for goods or technology transfers and a direct inflow of foreign dollars.
  - (3) In many important science and engineering fields, foreign employees have done some of the most innovative research which U.S. companies must have access to in order to compete.
  - (4) Foreign managers and marketing specialists can bring to U.S. firms their unique knowledge of local marketing conditions and consumer preferences that can make the difference between success and failure in penetrating foreign markets.
  - (5) The foreign nationals who will manage the foreign affiliates and subsidiaries of U.S. companies must be given the opportunity to advance without restriction up the management ladder to the U.S. corporate headquarters, or these foreign nationals will opt to work for the foreign competition. American companies cannot afford consistently to get second choice of the best foreign managerial personnel.

These benefits can be obtained without cost to U.S. labor because the foreign nationals who provide these benefits are not in competition with the U.S. labor market, but are filling documented U.S. labor shortages, or are creating employment for U.S. workers through their innovative research and product development.

### *The Impact of Immigration on Business and Labor Market Strategy*

Immigration traditionally has been seen as a great catalyst to U.S. economic development, leading to few restrictions on immigration to the United States until the 1880s. In that decade, the first restrictions were imposed on the importation of labor, based in part on racial prejudices against Asians and Southern and Eastern Europeans, and in part on the severe economic swings of that period. From the very beginning, however, exceptions from labor restrictions were created for “persons belonging to any recognized professions.” The Supreme Court upheld the law in 1892, rightly viewing the congressional bars on labor-based immigration as a means of preventing the influx of “cheap unskilled labor” to compete with low-skilled U.S. workers, with the exemptions meant to encourage immigration of persons with knowledge and skills that could contribute to America’s growth.

While the goal of imposing labor-based immigration restrictions has been to protect the least-skilled U.S. workers from potential unemployment, the effect of U.S. immigration policy has been overwhelmingly to favor immigrants who are unskilled or semi-skilled, by giving strong preference within our system to immigrants whose primary connection to the United States is a close family tie or who are refugees from foreign

persecution. These categories of immigrants rightly take priority in any sound immigration policy, but it must be recognized that relatively little priority has been given to immigration of skilled professionals and managers, and consequently the admission of such immigrants has had a miniscule effect on the U.S. labor market.

In fiscal year 1987, only 15,000 of 600,000 immigrants were actually selected because of their professional or managerial skills; another 9,000 immigrants were selected for other job skills. The remainder of immigrants were either close relatives of U.S. citizens, or permanent residents, or family members of other persons selected to immigrate. Fifty-five percent of the immigrants were unemployed, lived at home, or were students. In all, 240,000 immigrants entered the labor market, only ten percent of whom were actually chosen because of labor market skills that were in documented short supply. Over three-quarters of the rest listed their occupations in semi-skilled or unskilled fields, such as factory work, service personnel, and clerical and sales help. It must be remembered that in addition to this total, one million aliens were apprehended at the southern border in fiscal year 1987, leading to many estimates that at least two million undocumented workers entered the United States that year, at least half entering the labor force almost exclusively to fill unskilled jobs.

These figures give us a basis to analyze the impact of current immigration policy on both the unskilled and skilled end of the U.S. labor market. Those immigrants with the skills needed by multinational employers—the professionals, managers, and technicians who are the primary immigration interest of large employers—totalled about 60,000 persons, 15,000 of whom were actually sponsored by U.S. employers. While thirty-four percent of the skilled immigrants listed their occupation as managers, less than one-fifth of that total were sponsored by U.S. employers for managerial positions, indicating that many of the rest were entrepreneurs or shop owners abroad who will generally set up their own businesses here or work for family enterprises. Another forty percent were persons in professions unrelated to business, such as health-related fields, teaching, social work, and artistic or athletic fields. The remaining twenty-five percent of skilled immigrants (about 16,000) were in business-related fields such as engineering, computer science and high-technology occupations.

This very small group is part of a global market in human resources from which the world's largest corporations draw. The globalization of this market is evident in the growing uniformity in salary scale for professionals and managers seeking employment in this market. The scale bears little relationship to the economic conditions of the country where the professional or manager is located (unless the salary scale ranges far above the international norm for local reasons, as in Japan). Most of these persons have attended universities that are recognized internationally and have specialized degrees indicating an expertise held by only a

small fraternity of persons in each field. Their numbers indicate the specialized roles that they play within any particular company, yet their skills indicate the significance of that role.

It would be absurd to think that these 16,000 or so skilled immigrants have a negative impact on U.S. labor market opportunities, particularly when their presence has been preceded by a determination that U.S. workers are unavailable in their fields. Even if sufficient numbers of visas were made available to meet current backlogs, the numbers required for business professionals and managers would be insignificant within the larger labor picture.

The shortage in the U.S. labor market in these fields represented by these numbers cannot be termed a major problem for American labor, although the failure to fill these key positions can represent a major crisis for U.S. business competitiveness. For example, only 3,000 engineers were certified for immigration in fiscal year 1987, along with 650 computer professionals, and 500 scientists. Some proportion of these individuals would be desirable for immigration regardless of U.S. labor market shortages. Major corporations jointly have substantial programs to educate and train U.S. workers to fill the remaining gap, and are ready to commit themselves to continue these programs over the long haul to try to entice U.S. workers to fill our needs.

The above comments do not address the impact of the remaining ninety percent of the legal immigrant pool who are entering the labor market in unskilled or semi-skilled positions, in addition to the refugee population and the million or so undocumented workers. Too little is known empirically about this group. Although we do know that large segments of these groups do not compete with U.S. workers because

- (1) they fill jobs chronically short of U.S. workers, e.g., household workers;
- (2) they are entrepreneurs who establish their own businesses and create employment for U.S. workers or for other immigrants;
- (3) they enter a support network of employment within their own ethnic community; or
- (4) they perform work that U.S. labor is loathe to perform.

While it is arguable that U.S. labor is loathe to perform jobs for which aliens are available because the availability of aliens depresses the wages and working conditions to levels unacceptable to U.S. workers, in today's global economy those jobs are just as likely to go off-shore if the alien pool disappeared, rather than wages rising to levels that would make the employer noncompetitive with overseas producers. These thorny issues need careful study; their resolution should not affect the much clearer picture for major employers.

### *The Provisions of the Immigration and Nationality Act Affecting Immigrants*

The system through which such little preference is given to skilled immigrants was put into place in its present form in 1952, through the Immigration and Nationality Act (the "1952 Act"). However, the 1952 Act, was based in large measure on prior laws that had been enacted piecemeal over the previous forty years. Those laws were primarily intended to impose restrictions on immigration based on the national origin of the immigrants. Restrictions based on occupational classification were also imposed without an overall plan, however, as a particular problem arose or a narrow interest group raised its voice. The 1952 Act, therefore, in encapsulating the provisions of prior laws, was not a coherent statement of national immigration policy, but instead a codification of uncoordinated and piecemeal restrictions with no connection to clearly articulated policy goals.

The 1952 Act has undergone several major amendments (principally in 1965 and 1976) to remove its bias against natives of some global regions. However, the basic policies underlying the 1952 Act remain the same. The 1952 Act permits immigration, with a few narrow exceptions, for only two groups of foreign nationals: (1) close family members of U.S. citizens and permanent residents and (2) persons with offers of permanent employment in the United States, provided U.S. workers cannot be found to undertake the employment.

The system is heavily weighted in favor of family members, with no annual numerical limitation placed on the immigration of the immediate family (spouses, minor children, and parents of adult citizens) of U.S. citizens. Nor is the impact on the labor market of family members immigration considered in determining whether and how many such persons should be permitted to enter the United States in any one year. The goal of family reunification is considered paramount, without regard to the effect of such immigration on U.S. employment or the job opportunities of U.S. workers. Although this choice in immigration policy may well be correct, it renders illogical and ineffectual the strict review of labor market impact carried out with regard to the relatively small proportion of foreign nationals whose immigration is specifically sought based on job skills.

Nevertheless, the second underpinning of U.S. immigration policy is that U.S. workers must be protected from competition from foreign nationals, but only when the importation of those foreign nationals is sought specifically for the purpose of filling U.S. jobs. Employers are under an obligation to seek qualified workers to fill positions being offered to foreign nationals, even when the skills of the foreign national are outstanding, in demand and exceed those of U.S. workers. Only aliens of "exceptional ability" in their fields, (with the terminology being defined quite restrictively), can be hired without regard to the availability of min-



imally qualified U.S. workers. Managers and executives being transferred within an international company can also avoid labor market tests for their skills, because they are not filling positions available to U.S. workers generally, but are filling positions that are available only to those other workers within the closed universe of the company.

In addition to the unlimited number of immediate relatives of U.S. citizens who can enter the United States each year as immigrants (about 225,000 in recent years, but explosive growth is likely with the recent legalization of over one million aliens), the 1952 Act establishes six preferences for immigration. These preferences are subject to an annual numerical limit of 270,000 immigrants. Of the six preference categories for immigration subject to the annual 270,000 visa ceiling, four are set aside for family-related immigration and two are set aside for immigration based on an offer of permanent employment by an employer in the United States. The four family-related immigration categories are:

First Preference: Unmarried sons and daughters of U.S. citizens who are not considered immediate relatives because they are 21 years old or older;

Second Preference: Spouses and unmarried sons and daughters (of any age) of U.S. permanent residents;

Fourth Preference: Married sons and daughters (of any age) of U.S. citizens; and

Fifth Preference: Brothers and sisters (married or unmarried) of U.S. citizens, provided the U.S. citizen is 21 years old or older.

The two job-offer preferences each have ten percent of the annual visa allotment assigned to them 27,000 visas for each category. However, note that this allotment of visas covers not only the foreign nationals with job offers but also their family members. Therefore, only about 23,000 foreign nationals per year actually immigrate based on a job offer from a U.S. employer, with the other 34,000 visas assigned to family members of the principal alien. Before the Immigration and Naturalization Service ("INS") will determine that an alien is qualified for immigration in one of these two categories, the Department of Labor ("DOL") must have first determined that qualified U.S. workers are unavailable to fill the position (the "labor certification" requirement is discussed in more detail below). The categories are:

Third Preference: Foreign nationals of exceptional ability in the sciences or arts, as well as members of the professions (including degreed engineers), offered a U.S. position requiring exceptional ability or professional skills; and

Sixth Preference: All other skilled or unskilled workers offered a permanent position in the United States.

Because there are obviously more persons who qualify for immigration in the Sixth than the Third preference, the waiting list for one of the

numerically-limited visas in the Sixth preference category is much longer than the Third preference waiting list: about thirty-eight months as against about sixteen months. Both waiting lists, however, are far too long and require that companies and firms hiring foreign nationals plan well in advance and make use of nonimmigrant categories to bring the foreign nationals to their U.S. positions temporarily while awaiting the availability on an immigrant visa.

This use of the nonimmigrant categories, principally the H-1 category for professionals and the L-1 category for intracompany transferees, has been condoned by INS through its doctrine of "dual intent," although the 1952 Act on its face bars the use of nonimmigrant categories as a *de facto* means of immigration. Business reality has left the government and business no choice but to accept dual intent, the long-term intent to have the foreign-national employee immigrate while maintaining the present intent to remain in the United States temporarily pursuant to the terms of the nonimmigrant visa. Under dual intent doctrine, the employer and foreign national must intend to terminate the employment relationship and have the foreign national leave the United States upon completion of his or her authorized period of nonimmigrant stay (plus permissible extensions of stay) if the permanent residence process has not been completed by the end of authorized stay.

The Third preference category, as noted, is set aside for persons of exceptional ability in the sciences and arts, as well as for members of the professions. INS regulations define what constitutes "exceptional ability." In general, a person needs to be recognized nationally or internationally in his or her field, through published materials by or about the foreign national, conferral of prizes or awards, or other recognition by experts in the field. The field itself must be one for which a university degree can be conferred (although the foreign national need not have the degree), e.g., a business field, one of the sciences, or fine arts.

The 1952 Act contains a definition of "members of the professions," but that definition is a nonexclusive listing of some professions, e.g., teaching, engineering and medicine. The INS rule regarding a profession mandates that the field have a minimum entry level requirement of a bachelor's or higher degree (e.g., a law degree to be an attorney) and that the position require the application of skills and knowledge commensurate with professional standing. A number of business specialties have been included by INS as professional fields, but "business" as a generic field is not included; the particular job duties of an offered position must be analyzed to determine whether it can be considered a professional one.

INS has shown great reluctance to classify managerial and executive positions as professional, even when the executive has been president or chief operating officer of the company. Although some small firms do not require the services of a person with a degree to run the company, in today's sophisticated business world, major companies need well-trained business professionals mid- and top-level managerial and executive posi-

tions. Federal courts have almost uniformly overturned INS denials of Third preference classification for persons in filling managerial and executive positions.

Members of the professions must not only be filling a professional position, they must also have the credentials of a professional. Generally this rule means that the foreign national must possess the entry-level university degree for that profession, but INS allows the foreign national to establish the equivalence of a professional-level degree through several methods, usually by showing that the foreign national has a certain number of years of experience in a field that has been evaluated by an expert in that field to be the equivalent of the entry-level degree. Unlike for the H-1 nonimmigrant category, precise regulatory guidelines for professional equivalency have not been established for the Third preference category, but it can be assumed that the methods laid out in the regulations for the H-1 category apply as well for Third preference immigrants; those methods and standards are discussed below. Federal courts have usually been more willing than INS to find that an alien has equivalent credentials qualifying him or her as a professional even in the absence of a professional degree.

The Sixth preference category covers all foreign nationals with an offer of permanent employment who are not filling professional positions, cannot qualify as professionals, or do not have exceptional ability in the sciences or arts. This category is filled predominantly by live-in household workers and specialty chefs, but is also widely used by business managers and executives who lack professional credentials or are filling non-professional positions. While there is no qualitative restriction placed on the type of skilled or unskilled labor that can qualify for Sixth preference classification, the availability of a Sixth preference visa is limited by the possibility of obtaining a labor certification for the job offer—certification that qualified U.S. workers are unavailable for the position. The Department of Labor maintains a schedule of occupations for which it has determined that U.S. workers are readily available and many of these occupations are semi-skilled or unskilled.

Before a foreign national can immigrate to the United States based on an offer of permanent employment here, the U.S. DOL must certify that qualified U.S. workers are unavailable to fill the position and the employment of a foreign national will not adversely affect the wages or working conditions of U.S. workers. This requirement applies to all aliens for whom permanent residence is sought in the Third and Sixth preference categories, although some occupations appear on a schedule which indicates on a blanket basis that there is a shortage of qualified U.S. workers in the occupation. As noted above, the requirement does not apply to aliens for whom residence is sought on the basis of a family relationship to a U.S. citizen or permanent resident. It also does not apply to refugees or to family members of aliens who have received job offers.

To obtain the required labor certification, the employer must follow detailed procedures specified in the DOL regulations. The employer must file an application with the DOL stating a detailed description of the job offered, the minimum requirements for filling the job and the salary to be offered. The minimum requirements cannot be "preferences;" they must be the actual minimum requirements for the job, even though the employer would prefer the foreign national who has more than the minimum requirements. The reason for this rule is that the DOL must determine whether any minimally qualified U.S. worker is available, regardless of the employer's preference for the foreign national.

The DOL evaluates the application to assure the salary being offered is the "prevailing" one for that position, and that the position has not been described with any unduly restrictive requirements, e.g., a foreign language requirement not justified by "business necessity." After determining that the application fairly describes the position at a prevailing rate of pay, the employer is required to conduct a recruitment campaign for U.S. workers, usually involving advertisements in appropriate publications. For professional engineering positions, the DOL might require advertisements to be placed in the *New York Times*, the national edition of the *Wall Street Journal*, or for advanced positions, in professional engineering journals.

Responses to the recruitment campaign are sent directly to the DOL which forwards them to the employer for evaluation. The employer must explain for every response why the U.S. worker is not qualified or available for the position; only "lawful, job-related" reasons can be specified. Reasons such as "seems uncooperative" are subjective and not acceptable. The reasons must relate strictly to deficiencies in the U.S. worker's credentials compared to the job requirements specified in the labor certification application.

If all of the U.S. workers who responded to the recruitment campaign are found to be unqualified, the DOL will generally issue the labor certification. The procedure can take as long as two years in some parts of the country, e.g., New York, and as short as a few months in other regions. Therefore, the period of time involved in obtaining labor certification can sometimes exceed the period of time needed to wait for an immigrant visa based on the visa-availability waiting list. Note that the alien's place on the waiting list is reserved from the moment that the labor certification application is filed with the DOL, and not at the time that an actual visa petition is filed with the INS after a labor certification has been obtained.

The DOL does not require the complex individual certification procedures in some instances, which are listed on Schedule A of its regulations. These occupational groups are considered precertified. Included on Schedule A are very few groups, including licensed physical therapists, professional nurses, and religious workers. **GROUP TWO OF SCHEDULE A** is one of the few that is useful to business; it covers foreign nationals of

exceptional ability in the sciences and arts whose exceptional services are needed by the employer. This group has encompassed renowned scientists with documented career achievements, as well as artists. Extensive documentation of international renown must be submitted. GROUP FOUR OF SCHEDULE A covers managers and executives who have worked abroad for a related corporate entity for at least one year prior to transfer to the United States operations. The managers and executives can be coming directly to the United States to immigrate or can already be in the United States in the L-1 category. The requirements for qualification in GROUP FOUR are identical to the requirements for the L-1 non-immigrant category, discussed below. This group is the most useful of the Schedule A occupations. To qualify under Schedule A, no application needs to be filed with the DOL. Instead, application papers are filed with INS together with the preference petition in one of the two preference categories described above.

To establish eligibility in the Third or Sixth preference categories, the employer must file a petition with INS on Form I-140. This petition must be accompanied by the original labor certification from the DOL, or application papers establishing that the foreign national qualifies for Schedule A certification. It must also be accompanied by evidence of the professional credentials of the foreign national in Third preference cases, evidence that the foreign national meets the employer's minimum requirements for the job, and documentation of the company's ability to pay the foreign national the offered salary.

Establishing eligibility in one of the preference categories is insufficient to permit the foreign national to immigrate. He or she must also establish that one of the thirty-two grounds for exclusion from the United States does not apply. This determination is made at the time that the foreign national actually applies for an immigrant visa at a U.S. consulate, where the approved preference petition is sent by INS.

As an alternative, however, foreign nationals who are legally through working illegally or overstaying are eligible to adjust their status to permanent residence through INS without the need to travel abroad to a U.S. consulate. This application for adjustment of status is made on INS Form I-485. It is often filed simultaneously with the employer's preference petition in the following situation:

The foreign national establishes his or her place on the waiting list when the employer first files a labor certification application with the DOL. By the time that the labor certification is approved, the foreign national's place on the waiting list has often been reached already. In this case, the foreign national is eligible to file the adjustment of status application simultaneously with the preference petition. If the waiting list has not yet moved fast enough, the employer can still file his or her preference petition, but the foreign national must await availability of an immigrant visa to file the adjustment of status application or commence processing his or her immigrant visa application at a U.S. consulate.

### *Impediments in the Current Provisions of the Act Affecting Immigrants*

The system for selection of immigrants just described has several structural impediments that hinder the ability of business to obtain the services of foreign personnel when those services become necessary on a long-term or permanent basis. Most basically, sufficient immigrant visas are not provided on an annual basis to meet even the limited needs demonstrated by the business community to date. An effective allotment of about 23,000 annual visas out of a total system of 270,000 preference category visas and 600,000 overall annual admissions is hardly a significant number. An increase would clearly have only a minimal impact on overall immigration and even less of an impact on employment opportunities for U.S. workers, particularly when every additional job-offer immigrant would still be subject to the requirement that U.S. workers be unavailable for the position offered to the immigrant.

A doubling of job-offer immigrant visas to about 50,000 principal immigrants per year would still leave the proportion of job-offer immigration at less than ten percent of total annual immigration, but would probably be sufficient to remove the existing backlog at least for professional and exceptional ability aliens who are most needed by U.S. employers. A large proportion of the existing backlog arises from just one country, the Philippines. Except for natives of that country, it is probable that visas would be available on a current basis of all other foreign nationals whose services are sought by U.S. companies competing in the international market.

If immigrant visas were available on a current basis, the other major problem with the existing immigrant selection system would be highlighted: the long processing delays and hypertechnical requirements in the labor certification procedure. In some parts of the United States, a labor certification application can take almost two years to process which is clearly unacceptable in view of the extensive recruitment efforts for U.S. workers undertaken by most major American workers. Documenting these recruitment efforts and showing the unavailability of U.S. workers should not require the amount of time that is currently required.

The reasons for the delays are clear. First, the labor certification system is clogged with repetitive applications by the same employers for positions which have already been shown to be the subject of documented labor shortages. Yet, the DOL refuses to use its regulatory regional schedules of preapproved occupations. The schedules are underutilized and have not changed in years, except actually to remove some occupations in the health professions. Enhanced scheduling of shortage occupations after a certain number of repetitive applications have been approved would serve to unclog the present system and speed up determinations.

Second, the system suffers from the current DOL policy of subjecting applications to review for conformity with hypertechnical recruit-

ment requirements. The result of this review is that the extensive recruitment efforts undertaken by most major employers are not usable to document shortages of U.S. workers because they do not conform in all specifics to the DOL rules, e.g., the specification of an exact rate of pay or all pertinent job requirements in a classified ad.

The DOL would be able to expedite the labor certification procedure by encouraging submission of prior recruitment efforts by the employer and reviewing those efforts under a "substantial compliance" standard. This standard is included in the DOL rules but is rarely used to waive further recruitment efforts for employers, no matter how extensively those employers have recruited for U.S. workers, e.g., display ads in national publications, on-campus recruitment, job fairs. The DOL would be compelled to give effect to its substantial compliance rule if it had a limited time period within which to adjudicate all applications. For example, the DOL could be given a thirty-day period within which to raise objections to an application, including prior recruitment efforts and if no objections were raised in that time period, the application would be deemed to be certified. This compressed time period would compel the DOL to apply its limited resources to those cases not in substantial compliance or with the highest likelihood of noncompliance or fraud based on DOL experience.

These changes to the labor certification procedure would result in shorter adjudication periods and do not require legislative action. Such action has been proposed, however, in view of the DOL's reluctance to act to streamline labor certification procedures. Proposals for reform of the labor certification system are discussed below.

### *Temporary Admission of Foreign Nationals and Their Impact on U.S. Business and Labor Market Policy*

There is another point of interface between immigration policy and labor market impact, and that is regarding the temporary admission of foreign workers. The nonimmigrant admission system is much more favorable to business than the immigrant selection system, but it is replete with narrowly drawn definitions which bear little relationship to business needs. For example, one nonimmigrant category is set aside for intracompany transferees, but the qualifying organizations that can use the category excludes consortia, some joint ventures and international professional services firms organized through committees representing each national entity, e.g., international accounting firms.

There are fourteen nonimmigrant categories, each of which is denominated by a letter. The A, G, AND N categories are set aside for foreign diplomats, their employees, representatives and employees of international organizations, and their family members. The C category is for aliens in transit through the United States and the D category is for crew members such as flight attendants and cargo ship crew. The F, M,

and J categories are for students and “exchange visitors,” the latter category often consisting of foreign students and scholars but also including foreign nationals coming to the U.S. for business training. The I category is devoted to media employees. The K category is meant for fiancées of U.S. citizens who will eventually become permanent residents.

The principal categories for businesses are the following:

**THE E CATEGORY:** This category is set aside for foreign nationals employed by foreign-owned companies making an investment in the United States or engaged in trade with the United States. A treaty providing for trade or investment must exist between the United States and the foreign national’s and foreign company’s country in order for the category to be used. About thirty-five such treaties currently exist. Trade in services has only recently been recognized as a legitimate form of trade for E visa qualification.

**THE H CATEGORY:** This category is set aside for three types of temporary workers. H-1 covers temporary workers who are persons of distinguished merit and ability, including professionals such as engineers (this group is discussed in more detail below). H-2 covers temporary workers who will fill temporary positions, such as farm workers or summer resort personnel; before foreign nationals can enter under this subcategory the DOL must certify that U.S. workers are unavailable to fill the temporary position being offered to the foreign nationals. H-3 covers foreign nationals coming to the United States for training in an established corporate training program, but only if the trainee will not engage in productive employment displacing a U.S. worker; such onerous conditions have been placed on this subcategory, that it is not widely used.

**THE L CATEGORY:** This category is set aside for intracompany transferees of international companies, i.e., companies with offices, subsidiaries, or affiliates in the United States and abroad. Technical definitions must be met to establish the proper connection between the U.S. and foreign corporate entities, and only certain types of employees may be transferred - executive, managerial, or specialized knowledge personnel - and only after at least one year of prior employment abroad with the company. This category is discussed in more detail below.

**THE B CATEGORY:** This category covers routine business visitors (B-1) and tourists (B-2). Business visitors are not permitted to engage in “local employment for hire” in the United States. This rule usually means that such visitors must not be on a U.S. payroll. They can come to the United States to engage in contract negotiations, make purchases for foreign employers, engage in consultations with the U.S. offices of their employers and in some cases service U.S. contracts while remaining on the foreign payroll of the employer. The border line between acceptable and unacceptable business activities in the B-1 category can sometimes be difficult to draw, particularly in the case of service businesses in which the foreign national is a principal, such as a partner in a consulting firm. Fortunately, the most common problem in the past, re-



garding Canadian consulting professionals, has been alleviated by the Canada-U.S. Free Trade Agreement (discussed in more detail below).

The H-1 nonimmigrant category is set aside for the temporary admission of foreign nationals of distinguished merit and ability whose services are sought by U.S. employers for positions requiring such merit and ability. The position can be permanent in nature, but the employer's intention must be to employ the foreign national temporarily in that position. The current limitation on H-1 employment is five years, with a sixth year available if the employer can show extraordinary and unforeseen circumstances.

Distinguished merit and ability is currently interpreted to include all members of the professions. This term covers such professions as engineering, architecture, law and teaching. The employer must show that it needs a professional to fill the position. Generally, this is not a problem, particularly for clearly defined positions in engineering. The employer must also establish that the foreign national has the credentials required of such professional by the United States.

The clearest way to establish professional credentials is to document that the foreign national has the education necessary to enter the field and engage in professional practice. For engineering, a bachelor's degree in engineering is sufficient to establish professional credentials, even without any documented work experience.

An employer can also establish that the foreign national, while lacking a degree, has the equivalent of a degree, through a combination of education and work experience. INS applies a rule of thumb that three years of work experience at a professional level is equivalent to each year of education that is lacking for a degree. Thus, two years of engineering education and six years of professional experience is acceptable to INS under current standards for an engineering position. Twelve years of professional experience at a professional level, even with no formal engineering education, could also be acceptable under the INS rule. Note that the alien without a degree in his or her field should also be able to demonstrate "professional standing" as well, usually through such factors as membership in a professional organization or the evaluation of his or her level of skills and knowledge by two "recognized authorities" in the field.

Under current guidelines, a person who does not meet criteria for a professional position might still qualify for H-1 classification based on his or her "prominence." To establish that a person is prominent in his or her field, the employer must show that the foreign national can meet three of the following factors:

- (1) he or she commands a high salary (\$75,000 or more);
- (2) he or she has at least ten years of increasingly responsible experience;
- (3) he or she has responsibility for a "sizeable" work force including professional, managerial, or supervisory personnel;

- (4) he or she has managerial responsibility for a part of the organization with annual income of at least \$20 million;
- (5) he or she has developed a system or product of major significance to the industry (as reported in published materials or recognized by industry experts); or
- (6) he or she has been recognized for achievements and significant contributions to the industry by recognized experts.

A truly outstanding individual can establish his or her exceptional ability and renown even without meeting these specific criteria, by such evidence as published articles by or about the alien and statements by recognized experts in the field attesting to the alien's renown and achievements.

Note that state licensing requirements must also be met by a professional before he or she can be classified in the H—1 nonimmigrant category. If a state permits a professional in a licensed field to practice the profession without a license but under the tutelage of a licensed professional, then the particular individual sought for H-1 classification need not have a license. This rule often applies to engineers and architects.

To hire a temporary employee for a professional position in the H-1 category, the employer must file a petition with INS. The petition, INS Form I-129B, must be accompanied by evidence that the position is professional, that the foreign national has professional credentials or is a prominent member of his field, and that the employer intends to employ the foreign national temporarily.

Upon approval of the petition, INS issues a Notice of Approval on INS Form I-171C or I-797. The original of this form must be given to the foreign national to take to a U.S. consulate abroad to apply for an H-1 visa. At that time, the foreign national must establish to the consular officer that he or she has a foreign residence that he or she has no intention of abandoning. This showing can sometimes be difficult to make when the foreign national is from a country with a history of visa violations, and when he or she does not appear to have roots in his or her home country, e.g., young, single, no substantial property.

On occasion, the foreign national is already in the United States, e.g., a recent engineering school graduate. In this case, his or her current nonimmigrant status - usually F-1 - can be converted to the H-1 category by filing an application for change of nonimmigrant status simultaneously with the filing of INS Form I-129B, as described above. The application for change of nonimmigrant status is filed on INS Form I-506. Approval of the change to H-1 category by INS means that the foreign national can commence employment and remain in the United States, but the first time that he or she leaves the United States, he or she must still go to a U.S. consulate and obtain an H-1 for reentry.

A three-year period of stay is normally granted when the H-1 case is first approved; in unusual cases, less time might be granted. This period of stay can be extended for a two-year period to the maximum of five

years (a sixth year may be granted in unusual circumstances). The extension application is made by filing INS Form I-539, Application for Extension of Nonimmigrant Stay, supported by an employer letter (the petition form, I-129B, need not be filed on an extension application). Again, while the extension of stay permits the foreign national to remain and continue working in the United States, the first time he or she leaves the country, he or she must go to a U.S. consulate and obtain a new H-1 visa for reentry. Alternatively, when an extension of stay is involved (but not when a change of status has occurred), an application for a new visa can be made through the Visa Office in Washington, D.C.

The L-1 category is one of the most useful for companies that operate U.S. and foreign branches. It permits the transfer of key employees for periods of up to five years (a sixth year is permissible under extraordinary and unforeseen circumstances). Three essential requirements must be met to undertake an international transfer of personnel:

- (1) the U.S. and foreign operation must be connected in one of several specified manners;
- (2) the foreign national must have been employed by the foreign entity for at least one year; and
- (3) the foreign national must have been employed abroad in managerial, executive, or specialized knowledge capacity, and must be employed in the United States in one of the same three capacities (not necessarily the same one in which he or she was employed abroad).

With regard to the type of qualifying corporate organization for international transfers, the U.S. and foreign entity must have a "common control," which generally entails a common financial control, e.g., ownership percentage or pooled profits. Companies in a parent-subsidiary relationship (at least fifty percent ownership) are connected in a valid manner. Affiliated companies (each at least fifty percent owned by the same parent) are also legitimate participants in a transfer. When the "parent" is an individual or group of individuals, the identity of the individuals and the relative ownership shares must be the same for each affiliate. A fifty-fifty joint venture may be a participant in a transfer with either parent. Even with less than fifty percent ownership of one company by another, a transfer can occur if one of the companies has a significant economic interest and management control of the other. Thus, in situations in which one company owns fifteen percent of the stock of another, but the rest of the shares are widely disbursed and the fifteen percent interest gives the first company effective management control of the second, a transfer can also occur.

When an international organization is made up of an international partnership, such as is the case with many professional service firms, the international partnership must vote jointly on partnership matters and the economic interests of the partnership must encompass all locations. Economically insulated partnerships joined through an "international committee," as many accounting firms are operated, do not have suffi-

cient economic integration to be considered legitimate transfer participants in the current INS interpretation. Also disqualified are consortiums where a number of companies have a substantial but non-controlling interest, e.g., each of five firms with twenty percent of the consortium, and franchise arrangements.

With regard to the one-year abroad requirement, any time during the preceding year spent in the United States by the foreign national, such as for training, cannot be counted toward the one-year period. However, if the foreign national has a year abroad with the company in addition to those periods in the United States, he or she does qualify for transfer. For example, the foreign national has spent two months in the United States during his or her fourteen months of employment with the company abroad; since he or she has a total of one year abroad when the two months are subtracted, the requirement is met.

Finally, the foreign national must qualify in one of the required capacities: executive, managerial and specialized knowledge. These categories can be particularly difficult to meet for professional personnel and require a great deal of care in providing descriptions of the transferee's duties to the INS. Managerial and executive capacities require that the foreign national be engaged "primarily" in managerial duties, involving the exercise of discretion in decision making, and often requiring some personnel responsibilities such as authority to make or recommend hiring and firing decisions. The transferee cannot be engaged directly in activities creating the product or service of the organization. INS has often rejected L-1 classification in cases involving professionals who have risen to a managerial level but still make broad use of their professional knowledge in exercising their managerial functions. This controversial interpretation has been repeatedly challenged and may well be changed by INS. It is important, however, to emphasize the managerial aspects of a position when the transferee is also a professional.

Specialized knowledge capacity is more appropriate for persons with technical expertise, such as professional engineers, provided they hold knowledge that is more than generic, i.e., regarding the employer's particular methods, products, or ways of doing business. The agency has required that the knowledge held by the transferee be proprietary to the employer (not simply professional or technical knowledge of a generic nature). INS will look at "specialized knowledge possessed by an employee of the organization's product, service, research, equipment, techniques, management, or other interests that is different from or surpasses the ordinary or usual knowledge of an employee in the particular field." An employee with this type of knowledge may possess knowledge that is valuable to the employer's competitiveness in the market place; he or she is uniquely qualified to contribute to the employer's knowledge of foreign operating conditions; he or she has been utilized as a key employee abroad and has been given significant assignments that have enhanced the employer's productivity, competitiveness, image, or financial posi-

tion; and, he or she possesses knowledge that can be gained only through extensive prior experience with the employer.

To make an international transfer in the L-1 category, the U.S. employer must file a petition with INS, using Form I-129L. The petition must include evidence documenting the corporate or business relationship of the entities (annual report, Form 10-K Securities and Exchange Commission filings, tax returns, or partnership agreement), a letter from the foreign entity documenting the transferee's period of employment and employment duties abroad (from well-known companies, the U.S. employer can vouch for these facts in its supporting letter) and the employment duties to be performed in the United States.

Upon approval of the petition, the INS issues a Notice of Approval on INS Form I-171C or I-797. The original of this form must be given to the foreign national to take to a U.S. consulate abroad to apply for an L-1 visa.

A three-year period of stay is normally granted when the L-1 case is first approved; in unusual cases, less time might be granted. This period of stay can be extended for a two-year period to the maximum of five years ( a sixth year is available in extraordinary circumstances). The extension application is made by filing INS Form I-539, Application for Extension of Nonimmigrant Stay. While the extension of stay permits the foreign national to remain and continue working in the United States, the first time he or she leaves the country, he or she must go to a U.S. consulate and obtain a new L-1 visa for reentry. Alternatively, an application for a new visa can be made through the Visa Office at the State Department in Washington, D.C.

Large employers that frequently use the L-1 category are eligible for the INS blanket L-1 petition program. Under this program, the company establishes its eligibility and lists all of the qualifying entities between which transfers will be made. Upon approval by INS, the employer does not need to file an individual petition in each case, but instead issues its own "certificate of eligibility" to the transferee who takes it to the U.S. consulate to obtain issuance of an L-1 visa. The transferee must present evidence at the consulate regarding his or her one-year employment period and the capacity in which he or she has been employed and will be employed in the United States.

Under the Canada-U.S. Free Trade Agreement ("FTA"), which came into effect on January 1, 1989, Canadian business persons, whether self-employed or employed for a firm or company in Canada, can enter the United States to engage in a long list of legitimate business activities in the B-1 category. The principal criterion is that the business person be paid from a Canadian source. If this criterion is met, the business person can come to the United States to service sales contracts, solicit contracts, negotiate and make purchases and consult with U.S. clients. Some of these activities had previously been a problem for Canadian business persons, particularly self-employed consultants and principals in profes-

sional service firms and partnerships. No visa is required for entry; simply a letter, explaining the purpose of the entry is needed.

Canadian professionals whose occupations appear on Schedule 2 of the FTA are permitted to work in the United States in a new nonimmigrant category, the TC-1 category, without obtaining prior approval from the INS as is required for H-1 professionals. Engineers, architects and many types of science and research personnel are included on Schedule 2. Canadian firm and can be paid in the United States. They are admitted to the United States for one-year periods each time they enter. Therefore, they can extend their stay simply by leaving the United States and reentering from Canada; extension applications can also be made in the United States. No outside limit is placed on the stay, although the intention of the professional must be to temporarily remain in the United States.

The only application that needs to be made is at the port of entry or preflight clearance station, where documentation must be presented that the Canadian qualifies as a professional included on Schedule 2, and that he or she will be temporarily employed in the United States in a professional position. A filing fee must be paid with the application and the application must be submitted at least three hours before flight time to allow for processing.

Intracompany transfers of Canadian citizens can be made without first filing a petition with the INS. The same criteria that apply to the L-1 category, described above, also apply to Canadians, but the application can be made, with supporting documentation, directly at the port of entry or preflight clearance station. Again, a three-hour processing time should be allowed.

Under the FTA, Canadian firms can send Canadian citizen-employees to the United States to undertake a investment in the United States or work for an enterprise engaged in U.S.-Canada trade. For this type of nonimmigrant entry in the E category, the Canadian citizen must process an application for a visa through a U.S. consulate in Canada, since the documentation is extensive and prescreening is required.

### *Impact of Nonimmigrant Admissions on the U.S. Labor Force*

The first category of workers I have listed, the H-2 category, accounted for about 30,000 admissions to the United States in fiscal year 1987 (note that INS counts admissions, with each worker potentially making multiple admissions if he or she travels abroad during the period of stay; thus, the actual number of workers is certainly less than the 30,000 figure). Each one of those admissions was based on a determination by the Secretary of Labor that a shortage of U.S. workers existed in fields such as farm work, hotel resort labor, entertainers and semi-skilled labor predominate in this category, which is little-used by major U.S.

employers. In any event, the labor market impact of this group is already measured through the labor certification process.

The H-1 category, according to INS statistics, accounted for 65,000 admissions in fiscal year 1987. This group has traditionally been exempted from labor market tests because of the view that professional-level employment does not threaten the most vulnerable U.S. workers; in fact, employment of additional professionals is likely to create additional employment opportunities for lower-skilled workers who service the professionals or follow through on ideas or products that the professionals conceive. Many of these persons would be desirable admissions on a temporary basis regardless of the supply of U.S. workers because of the contributions that they can make to the U.S. economy through their original ideas and records of research and achievement. The INS study shows that even with regard to engineers, regarding whom some complaints have arisen, less than 0.2% of the U.S. engineering labor force is represented by the annual influx of H-1 engineers. These numbers can have only negligible labor market impact, and that impact must be disproportionately small compared to the benefits received from the foreign engineers.

For engineers, as with many of the science fields, about one-half or more of the graduate students in U.S. graduate schools are foreign nationals, and this factor indicates why some reliance is placed by major employers on foreign nationals for such professional positions. I can catalog a long list of programs backed by substantial resources in which major corporations are engaged to try to lure U.S. workers into the engineering and science fields. Studies show that U.S. citizens entering those fields prefer to enter the labor market before obtaining the high-level degrees usually needed by major employers for the sophisticated and complex research that they undertake, but U.S. employers will continue their strenuous efforts to change this pattern and get U.S. workers into engineering and science graduate programs. In the meantime, the use of several thousand foreign engineering and science professionals a year, most trained in U.S. graduate schools, must have a far greater benefit on the U.S. economy than it does a detriment to the U.S. labor force.

The third group I have enumerated, the intracompany transferee in the L-1 category accounted for 18,000 workers in fiscal year 1987, according to the independently-commissioned INS study. The very existence of this category evidences the view that movement of managers and persons with special skills within multinational corporations has no labor market impact, since those employers must be able to relocate managers internationally as required by corporate planning needs. Over the years, far more Americans have been transferred to head U.S. subsidiaries abroad than foreign nationals who have entered the United States for periods of experience at company headquarters prior to assignment as top-level managers abroad. The INS study clearly indicates that these persons have no impact on the labor market.

The investors who enter the United States must meet a standard that requires job creation for U.S. workers; in addition, one of the benefits of their admission is a reciprocal right of investment in the countries with which the United States has bilateral investment treaties. The labor market impact for these persons is all on the positive side.

In short, it is difficult to discern any labor market impact, except perhaps in very selective segments of the economy, often narrowly-defined geographically, for any of the nonimmigrant workers who enter the United States. The impact that does exist, as with nurses or agricultural workers, can be addressed as the problem is discerned. Other shortages that can be pinpointed, such as in some Ph.D.-level science, computer and engineering fields, number in the low thousands of persons, a marginal number that requires careful stroking of the U.S. labor market to eventually fill the needs, but that does not have a significant impact on U.S. job opportunities. And as already noted, even without a labor shortage, admission of foreign nationals in these professional fields would be warranted for the ideas and research that those persons can contribute to the U.S. economy — the traditional view of U.S. immigration policy that has sound underpinnings.

### *Proposals of Immigration Reform*

Immigration reform has reached a critical juncture in the 101st Congress that is in session through the end of 1990. For the first time, there seems to be a consensus building in Congress that immigration policy should be more balanced, with a greater emphasis given to planning for and allocating visas for business needs. This trend is reflected in the current legislative initiatives, such as the Kennedy-Simpson bill, which has passed the Senate by an overwhelming majority. That bill, while still placing principal emphasis on family-based immigration, would significantly increase the number of immigrant visas available to job-offer immigrants; the bill does not address nonimmigrant issues, which Senator Kennedy intends to deal with in a separate bill.

The bill in the House of Representatives, submitted by Rep. Bruce Morrison (D-CT), Chairman of the House Immigration subcommittee, also dramatically increases the number of immigrant visas available to job-offer immigrants. The bill contains many more changes to the overall immigrant and nonimmigrant structures than does the Kennedy-Simpson bill. Many of these changes reflect a concern regarding the impact of foreign workers, both immigrants and nonimmigrants, on the U.S. labor market. Because that concern is principally a labor union issue, a number of the changes proposed in the Morrison bill would be extremely detrimental to the efficient operation of businesses and to their competitive position in the global marketplace.

The Kennedy-Simpson bill increases the number of job-offer immigrants to 80,200 from the current level of 54,000 (both numbers include



dependent family members given immigrant visas with the principal immigrant). These visas would be divided between two preference categories. The top job-offer preference is limited to persons with exceptional ability in the sciences or arts and professionals with advanced degrees. The requirement of an advanced degree for a professional is a limitation on the current Third preference category which this top preference category would parallel. The second job offer preference is set aside for other skilled workers with U.S. job offers.

A "skilled" worker is defined under the bill to include only those workers filling positions requiring at least two years of experience; note that it is the experience required for the job, and not whether the alien has two years of experience, that matters. Therefore, an alien with five years of experience filing a position which requires only six months of experience to perform adequately would not be qualified for this preference. On the other hand, because two years of experience are considered equivalent to a year of education, those aliens with entry-level degrees in a professional field — professionals excluded from the top preference under the bill — would be included in the skilled-worker preference.

The immigrant selection system in the Kennedy-Simpson bill excludes completely those aliens sought for non-skilled positions — those requiring less than two years of experience. These aliens are currently classifiable under the Sixth preference category. Because of the removal non-skilled workers from the immigrant selection system, the increase in available job-offer immigrant visas to almost 30,000 should meet the existing demand in the proposed preference categories. Non-skilled workers in many cases will be eligible to immigrate through a proposed allotment in the bill for "new-seed" immigration—immigration by persons without family ties to the United States but who can accumulate a sufficient number of points based on such factors as age, education, experience in a shortage occupation, and pre-arranged employment. 54,00 immigrant visas annually would be available under the point system.

The Kennedy-Simpson bill also addresses the criticism, noted above, of the labor certification procedures by mandating that the Secretary of Labor use national labor market data, without regard to the specific job opportunity, to determine whether a shortage of qualified U.S. workers exists. This mandate should lead the Secretary to create more comprehensive schedules of certifiable occupations, thereby minimizing the need for repetitive applications by employers who have already demonstrated a shortage of U.S. workers in the occupational field.

The Morrison bill provides 95,000 annual immigrant visas for employment-based immigration; that number is set aside for those aliens qualifying with a job offer, with family members awarded visas without regard to the numerical limit. Therefore, the Morrison bill almost quadruples the number of immigrant visas available from the current level of about 23,000 annual visas for the principal aliens with job offers (the rest of the 54,000 annual visa allotment is used by family members).

A few narrowly defined priority categories would receive visas first before any visas became available to other workers. Priority category workers would be exempt from obtaining a labor certification. The first category of priority workers is set aside for aliens of extraordinary ability in the sciences, arts, education, business, or athletics. The term "extraordinary" has never been used before in the immigration field (current usage refers to "exceptional" ability), but it can be assumed that very few persons would qualify in this priority category. The second category of priority workers is set aside for outstanding professors and researchers with three years of experience and international recognition, provided that they will work for universities and research institutions. Because the category does not cover work for private employers, it can be anticipated that this category will also receive limited use.

The third category of priority workers is set aside for intracompany transfers of managers and executives, provided that the alien has worked abroad for the company or a related entity for at least one year out of the last three. This category roughly parallels the current category for blanket labor certification encompassed by Group IV of Schedule A of the DOL regulations. The category would have great utility for international businesses, who would be able to transfer key executives and managers with little time delay or paperwork.

The fourth priority category is set aside for aliens with advanced degrees with special expertise in business. Although this category could have some utility to the business community, a numerical limit is placed on the category of only 1,000 annual visas. It can be anticipated that an extensive waiting list would form for these visas, virtually assuring that the employer would have to file simultaneous applications under this category and in the general preference category, which, however, would require that a labor certification be obtained.

Any visas not used by the priority categories (and excluding an annual 1,000 visa allotment for investors of at least one million dollars in a new commercial enterprise) would become available to any aliens who have an offer of permanent employment when qualified U.S. workers cannot be located. Therefore, in place of the two existing preferences, a single preference category would be created. Any person, skilled or unskilled, who could obtain a labor certification would be eligible to immigrate in this preference category. Note that an employer must pay a fee of \$1,000 per immigrant, to be directed to a fund for the education and training of U.S. workers.

The key change in the Morrison bill is with regard to the labor certification procedure. The Morrison procedure would require that employers conduct their own recruitment efforts for U.S. workers (currently the recruitment campaign is conducted under the close supervision of the DOL). Once recruitment is completed, based on a prevailing wage determination for the job made by the Bureau of Labor Statistics, the employer would file a labor attestation with the DOL. In that attestation the

employer must affirm that it has engaged in positive recruitment reasonably designed to locate qualified U.S. workers, that it will pay the prevailing wage rate to the alien and to all similarly employed U.S. workers in the recruitment area, that the position is not the subject of a strike or lockout, and that it has given notice of the attestation to a labor union in the recruitment area that represents similar positions, even if the actual position to be filled by the alien is not unionized.

A labor union or employee representative would have thirty days from the date of the employer's filing of the attestation to submit a statement of facts challenging the attestation. If no challenge is made, the certification would be deemed to have issued. If a challenge is made, a hearing procedure would commence which would last a little over three months. If an employer is determined to have misrepresented any item in the attestation or to have failed to meet a condition attested to, it is liable both to civil penalties and to a bar on job-offer immigration for one year. It is important to note that the Morrison bill proposal for the first time injects a third party into the labor certification procedure, which until now has been conducted strictly between the employer and the government. The inclusion of outside parties in the procedure is certain to create additional expense and paperwork for an employer seeking to hire a foreign national.

The Morrison bill also provides for automatic scheduling of shortage occupations if ten certifications have been issued for the occupation in the recruitment area in a one-year period. When an occupation is scheduled, the employer no longer needs to attest to and document an extensive recruitment effort, but must attest that it has given "public notice" of the job opening prior to filing the attestation. This scheduling provision has only minimal advantages in streamlining current procedures. A better scheduling provision would permit the employer to file an immigrant visa petition with INS, making reference to the appearance of the occupation on the DOL schedule and affirming that prevailing wage will be paid to the alien.

In addition to problems with including third parties in the labor certification procedure and with the efficacy of the scheduling provision, the Morrison bill's proposal for labor certification would have several other undesirable consequences. The requirement that the "prevailing wage" be paid to all similarly employed personnel in the recruitment area, which for many professional positions will be nationwide, could lead to the incursion of dramatic new expenses for the employer. Because the bill does not differentiate between professional and unskilled workers in the preference category, and because it is unlikely that third parties will mount challenges with regard to many unskilled or semi-skilled positions, such as household workers, it is probable that even the increased number of immigrant visas will be quickly oversubscribed. In that case, a company's key engineer or scientist would be on the same waiting list as an individual's household worker. Finally, even with the injection of la-

bor organizations into the adjudication procedure, it is likely that the DOL will continue review applications for compliance with regulatory standards for recruitment “reasonably designed” to locate U.S. workers; therefore, the present rules are likely to be carried over into the new system, creating two levels of review (DOL and labor unions) in place of one level of review under current law (the DOL alone).

As noted above, the Morrison bill provides, 1,000 visas for immigrant investors of at least one million dollars in a new commercial enterprise. Inclusion of an immigrant investor provision is a step ahead of current law, under which no provision is made for aliens seeking to invest or retire in the United States. This lack of access to immigrant investors and retirees is in stark contrast to the Canadian law, which favors the immigration of persons of means who will not take jobs away from domestic workers and who will, in fact, create employment through the use of their capital. In the U.S. Congress, there has been a vocal minority opposed to access to immigrant visas based on a large financial investment, on the theory that such persons are merely “buying” their immigrant visas while persons of lesser means cannot obtain access to the United States in this way. Even if such a spin can be put on an immigrant investor provision, it must be kept in mind that over ninety percent of all immigrants annually are persons with no employment or persons filling unskilled or semi-skilled positions. In fact, U.S. immigration policy is so heavily skewed against persons of wealth and in favor of persons with few or no skills, that a bare 1,000 annual visas hardly seems sufficient to redress the imbalance.

The one million dollar investment figure was chosen specifically to make it more difficult to qualify for the investment provision, and is excessive when compared to the immigrant investor programs in Canada and Australia. The investor must be putting his or her money in a new commercial enterprise, thereby excluding from the program those investors who put capital into ongoing businesses. The enterprise must employ at least ten U.S. workers (including permanent residents, temporary residents (legalized aliens) and refugees and asylees). A lesser investment of \$500,000 would be permissible in an area of high unemployment or designated rural areas. A dollar amount greater than one million dollars can be set for areas of low unemployment; in addition, the dollar amount for typical investments can be adjusted upward after consultation among the government agencies involved. The immigrant investor would be granted residence on a conditional basis for two years. At the end of the two-year period, a petition to remove the conditional nature of the status would have to be filed, demonstrating that the investment is still active and that the requisite number of U.S. workers are employed. If the investment still qualifies, the alien would become a full permanent resident; if the investment does not meet the statutory standards, the alien would be subject to deportation.

Given the mindset of many in Congress, it is unlikely that the

number of annual visas will be increased or that the dollar amount for an investment will be lowered. In addition, this proposal does not address the retiree situation important to many Canadian citizens. However, it is at least a first step in the right direction in reopening the door to immigrants who want to invest in the United States and create jobs in the U.S. economy.

The Morrison bill also makes some important changes regarding the nonimmigrant categories affecting the business community. On a positive note, the bill would extend the benefits of the E nonimmigrant category for investors and traders from countries with which the United States has bilateral treaties to nationals of all countries participating in GATT (currently about ninety-seven countries are participants). This provision would make it much easier for foreign investors to commence new commercial enterprises in the United States. The bill also improves the L-1 intracompany transferee category by providing liberal definitions of qualifying executives and managers, and by extending the period of stay for executives and managers to seven years. The bill would continue to limit the stay of specialized knowledge transferees to five years, and currently includes a restrictive definition of specialized knowledge. It seems likely that the restrictive definition will be eliminated before final action on the bill is taken.

The most important and detrimental nonimmigrant provision of the Morrison bill for the business community is a proposal to limit new H-1 nonimmigrant admissions to 25,000 aliens per year. It is likely that this limit would not meet the current needs of the business community for foreign professionals, scientists and researchers, thereby creating a waiting list and backlog for the available visas. Instead of relatively quick admission of such nonimmigrants to the United States, waiting periods of months are conceivable with this numerical limit. In addition, employers would have to pay the "prevailing wage" to the alien and all similarly employed workers, and would also have to pay a \$1,000 fee per H-1 alien, directed to a government fund to educate and train U.S. workers.

On balance, then, and despite the increase in job-offer immigrant visas, the Morrison bill is essentially restrictive. It addresses perceived problems regarding the impact of immigration on U.S. employment by imposing additional requirements and limitations on the use of foreign labor by U.S. employers. Perhaps the only hope for an improved environment for the movement of international personnel in view of the restrictive provisions being propounded in the Morrison bill is through the negotiation and enactment of bilateral treaties such as the U.S.-Canada Free Trade Agreement. Such treaties will take account of the importance of immigration as a component in trade and competitiveness. In the meantime, a special commission created by Congress in a 1986 immigration law is ready to suggest that immigration matters be vested in a new independent agency answerable directly to the President, in order to raise the level of debate on immigration matters. With a heightened visibility,

**it is possible that immigration will receive greater attention that could at last lead to the formulation of a national policy on immigration that accounts for business needs, economic impact and competitiveness concerns.**

