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The Immigration Selection System: A Proposal for Reform

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This article reviews the historical background of our present immigration law and analyzes the policy goals of the present immigration law in light of major contemporary issues that bear directly on the immigration act: population growth, the requirements of the labor force, family reunion, illegal immigration, and refugee admission. The authors contend that the immigration act in its present form does not adequately deal with the ever-expanding nature of these problems, and they offer recommendations to reconcile present deficiencies with recent and foreseeable world developments. They suggest reforms that would balance humanitarian goals with domestic, political, socioeconomic, demographic, and foreign policy impacts.

INTRODUCTION

American society has traditionally been defined as "a nation of immigrants." With the exception of native Indian inhabitants, every United States citizen is either an immigrant or a refugee or a direct descendant of immigrants or refugees. Consequently, immigration represents the central issue relating to what kind of society Americans have built in the past and want in the future.

Historically, the United States has both welcomed and en-

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couraged new immigrants while expressing uncertainty about the nation's ability to absorb them culturally and economically. The Commission on Population Growth and the American Future observed in its 1971 *Interim Report* that immigration accounts for between twenty and twenty-five percent of population growth in the United States.¹ Through the years, our national pride in the unique historical legacy created through immigration has been clouded by misconceptions and misunderstandings or overwhelmed by the fear of illegal immigration. The interaction of these competing themes of nativist protectionism and humanitarian acceptance has produced the dialectic of the history of United States immigration policy.

HISTORICAL DEVELOPMENTS FROM 1790 TO THE PRESENT

The study of history is of primary relevance to any investigation of immigration because United States immigration policy has been a reflection of the times of which it is an outgrowth.

Immigrants arrived in North America as slaves and landowners, indentured servants and merchants, seekers of religious freedom and seekers of fortune. During the first years of nation-states, American policy essentially encouraged immigration.² However, during this period a pattern of nativism had begun, an "intense opposition to an internal minority on the ground of its foreign (that is, 'un-American') connections."³ Emerging anti-Catholic and antiradical traditions delineated the future of American society, while a widely professed tradition of Anglo-Saxonism was elevated to a cult.⁴

After the slave trade officially ended in the 1850s with Lincoln's Emancipation Proclamation, immigrants were imported for such specific jobs as laying railroads across the country.⁵ Contrary to the welcoming epithet inscribed on the Statue of Liberty—"Give me your tired, your poor, your huddled masses yearning to breathe free"—the immigrants were exposed to violent opposition and forced to perform menial jobs for low wages. Although indi-

1. COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, *POPULATION GROWTH AND THE AMERICAN FUTURE* 8-9 (1971).

2. E. HARPER, *IMMIGRATION LAWS OF THE UNITED STATES* 5-6 (3d ed. 1975).

With the exception of the Alien and Sedition Acts of 1798, which authorized the President for two years to deport anyone whom he deemed dangerous to the peace and safety of the country and which were not renewed, no federal legislation was passed to curtail immigration or permit selective deportation of aliens. C. KEELY, *U.S. IMMIGRATION* 8 (1979).

3. J. HIGHAM, *STRANGERS IN THE LAND* 4 (1965).

4. *Id.* at 5-6.

5. THE IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, *IMMIGRATION LAW AND DEFENSE* 2-2 (1979).

vidual states attempted to regulate immigration, the Federal government, motivated by the need of big business for cheap labor for ever-expanding industries, adopted a "hands-off" policy during the period between 1870 to 1874.⁶

Throughout the nineteenth century and the early part of the twentieth century, millions of immigrants were attracted to America by the growing number of jobs.⁷ However, each new wave of immigrants provoked uncertainty as to whether their poverty and lifestyle reflected an inherent inability to become American. Anti-immigrant hysteria was expressed during the 1850s in the "know-nothing" movement and in California's overtly racist, anti-Chinese legislation.⁸

In 1876, the United States Supreme Court struck down attempts by several states to regulate immigration.⁹ Of the federal immigration legislation passed between 1875 and 1920, the major laws barred admission to "persons with diseases, criminal records, and unacceptable moral standards or political beliefs."¹⁰ The "Gentlemen's Agreement" of 1907¹¹ extended to the Japanese the excludable class of the Chinese created by the legislation of 1882; the class included all Asians by 1917.¹²

The legislation of this period was designed to protect American labor. Organized labor pressed for prohibition of "servile classes" who actively participated in labor struggles as strikebreakers.¹³ Congress attempted to balance the interest of merging business in expanding the labor force with the interests of U.S. laborers in

6. *Id.*

7. Between 1860 and 1920, over 28.5 million immigrants arrived in the United States. E. HARPER, *supra* note 2, at 663-64.

8. C. KEELY, *supra* note 2, at 10-11. The "know nothing" movement fostered ethnic and religious bias, worker resentment of competition, and Southern apprehension of Northern population expansion and political power. *Id.*

9. *Henderson v. Mayor*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876). The Court held that the power to regulate immigration was vested exclusively in Congress pursuant to article 1, § 8 of the Constitution, which authorizes Congress "to regulate commerce with foreign nations, and among the several states, and with Indian tribes."

10. A list of "excludables" created by the various legislation of this period would include the following: paupers; felons; anarchists; chronic alcoholics; polygamists; prostitutes; and persons suffering from tuberculosis, epilepsy, mental illnesses, retardation, or any such condition that might affect their ability to earn a living. E. HARPER, *supra* note 2, at 5-10.

11. Report of Commissioner General of Immigration for the year 1908.

12. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874 (repealed 1952).

13. THE IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE 2-3 (1979).

preserving wages, working conditions, and organizing efforts. Thus, the immigration laws of 1885¹⁴ and 1887¹⁵ and the amendment of 1888¹⁶ sought to regulate the entry of immigrant workers into the country and to curtail labor organizing activities, but not to bar immigration completely.

The restrictionist movement that existed in immigration law during the period from 1875 to 1920 further spurred the growth of "scientific racism." This theory was founded largely upon distortions of Darwin's theory of evolution and the Social Darwinism of Herbert Spencer and attempted to reduce or exclude whole groups on "racial" grounds.¹⁷ The 1911 report of the Joint Commission on Immigration, chaired by Senator William Dillingham of Vermont, sought to establish the inferiority of the immigrant "races" and make them the scapegoat for the problems of American society. The national origins quota system of the 1920s reflected the full impact of the Dillingham Commission.¹⁸

During the first decade of the twentieth century, the "new" wave of immigrants who arrived from southern and eastern Europe did not assimilate easily into United States society. The volume of immigration, its changing composition, and the xenophobia accompanying World War I culminated in increasing demands for restrictive legislation, including numerical limitations and exclusionary mechanisms. The proposed immediate solution to reduce this "new" immigration was the legislative adoption of a literacy test.¹⁹ The Immigration Act of 1917 set forth qualitative grounds for exclusion.²⁰

The literacy tests instituted in 1917 provided the backdrop for the national origins quota acts of the 1920s. These acts, passed in 1920²¹ and 1924,²² imposed a ceiling on total immigration visas based on the national origins of the United States population in the advent of the alleged "innate inferiority" of southern and east-

14. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332.

15. Act of Feb. 23, 1887, ch. 220, 24 Stat. 414.

16. Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565.

17. C. KEELY, *supra* note 2, at 14. See generally J. HIGHAM, *STRANGERS IN THE LAND* (1963).

18. S. REP. NO. 1137, 82d Cong., 2d Sess., reprinted in [1952] 2 U.S. CODE CONG. & AD. NEWS 1664-1668.

19. Presidents Cleveland and Taft vetoed the literacy test requirement. However, in 1917 Congress enacted the measure over the second veto of President Wilson.

20. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874 (repealed 1952). This law codified the previous classes of excludable immigrants, created an "Asiatic Barred Zone" to exclude most Asians from the United States and added the literacy requirement.

21. Act of May 10, 1920, ch. 174, 41 Stat. 593.

22. Act of May 26, 1924, ch. 190, § 11, 43 Stat. 153 (repealed 1952).

ern European immigrants.²³ These restrictive immigration measures ended more than a century of unencumbered immigration into the United States.²⁴

The McCarran-Walter Act of 1952,²⁵ which reflected the restrictionist attitude of the United States in the early 1950s, was passed over President Truman's veto during the aftermath of World War II and in the wake of the Korean War, McCarthyism, and the Cold War with Russia. This Act codified and promulgated the quota concept, with some modifications, as well as those provisions of the Internal Security Act of 1950²⁶ relating to the exclusion of Communists. The result of this period of international instability on the American outlook was that the concept of racial inferiority as a justification was displaced by arguments favoring groups of immigrants from countries with historical and cultural ties to the United States.²⁷

Although the bill partially achieved the aims of nativists, one historian noted that the passage of the 1952 Act was "in essence

23. The national origins quota system remained the foundation of U.S. immigration policy until 1965, although the underlying concept was periodically altered. C. KEELY, *supra* note 2, at 14.

24. Only 500,000 persons immigrated to the United States between 1931 and 1940, compared with 8.8 million arriving between 1911 and 1920. Following 1930, there were years during which greater numbers of people departed from the United States than entered. [1975] INS ANN. REP. § 1.

25. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (current version at 8 U.S.C. §§ 1101-1557 (1976)).

26. Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (codified in scattered sections of 18, 22 U.S.C. (1976)).

27. President Truman vetoed the bill, citing it as contrary to the great American tradition of accepting immigrants:

This quota system—always based upon assumptions at variance with our American ideals—is long since out of date . . . The greatest vice of the present quota system, however, is that it discriminates, deliberately and intentionally, against many of the peoples of the world. . . .

The basis of this quota system was false and unworthy in 1924. It is even worse now. . . . It is incredible to me that, in this year of 1952, we should again be enacting into law such a slur on the patriotism, the capacity, and the decency of a large part of our citizenry.

Today, we are "protecting" ourselves as we were in 1924, against being flooded by immigrants from Eastern Europe. This is fantastic. The countries of Eastern Europe have fallen under the communist yoke . . . no one passes their borders.

In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration.

Truman, *The President's Veto Message (of the McCarran-Walter Immigration Act of 1952) (June 25, 1952)*, reprinted in PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, *WHOM WE SHALL WELCOME* 277-79 (1953).

an act of conservatism rather than of intolerance."²⁸ Limitations on immigration had been institutionalized; no serious political choice advocated return to a policy of unlimited entry checked only by minimal health and moral standards as that which had existed between 1875 and 1920.²⁹

During the period from 1953 to 1965, the immigration and refugee policy was characterized by the friction between the nativists' aim to reduce the number of "undesirable" aliens through the racial or nationality criteria of the quota system and the generally perceived humanitarian goals of admission of refugees and displaced persons and family reunification.³⁰ Marking a deviation from the policy reaffirmed by the McCarran-Walter Act, Congress enacted a series of temporary programs during this period to provide for the nonquota admission of refugees, thereby circumventing the heavily subscribed quotas under the Act. These programs included: The Refugee Relief Act of 1953,³¹ the Refugee-

28. R. DIVINE, *AMERICAN IMMIGRATION POLICY, 1924-52*, at 190 (1957).

29. The 1952 Act reaffirmed the policy of the legislation it superseded. However, the significant modifications embodied in the Act have been summarized as follows:

Different from the earlier laws, the 1952 Act:

- (1) made all races eligible to naturalization and eliminated race as a bar to immigration;
- (2) eliminated discrimination between sexes with respect to immigration;
- (3) introduced a system of selective immigration by giving a quota preference to skilled aliens whose services are urgently needed in the United States;
- (4) placed a limit on the use of the governing country's quota by natives of colonies and dependent areas;
- (5) provided an escape clause permitting the immigration of certain former voluntary members of proscribed organizations;
- (6) broadened the grounds for exclusion and deportation of aliens;
- (7) tightened criteria for the regularization of status of deportable aliens in the United States and added a provision for adjustment from nonimmigrant status to that of permanent resident; and
- (8) provided greater procedural safeguards to aliens subject to deportation.

E. HARPER, *supra* note 2, at 21-22.

30. In three messages on the subject of immigration to each Congress that sat during his two terms (83rd to 86th), President Eisenhower urged for major compromise legislation: "certain interim measures which should be taken to remove obvious defects in the present quota system." H.R. Doc. No. 85, 85th Cong., 1st Sess. 3 (1957).

31. Act of Aug. 7, 1953, ch. 336, 67 Stat. 400 (current version at 50 U.S.C.A. app. § 1971 (West Supp. 1979)).

[This] omnibus refugee law . . . included provisions for German expellees; for escapees in Germany and Austria; and for Italian, Dutch and Greek refugees and relatives. It also made visas available for 4,000 war orphans. Particularly significant were its provisions for 3,000 visas for Far Eastern refugees; 2,000 for Chinese refugees; and 2,000 for Arabs. This represented a departure from the basic United States immigration policy which had practically excluded Asians.

Smith, *Refugees* 367 *ANNALS* 43, 45 (1966).

Escapee Act of 1957,³² the Fair Share Refugee Law of 1960,³³ a series of alien orphan measures, legislation providing for the adjustment of status of Hungarian parolees,³⁴ and the nonquota admission of Portuguese nationals from the Azores and Dutch-Indonesians expelled from Indonesia.³⁵ In addition, a series of temporary programs was enacted during this period to alleviate quota backlogs by according nonquota status to immigrants who had registered under the different preferences and who had their applications approved by specified dates. Finally, Congress passed a myriad of private bills during these years for the relief of aliens.

During the time from 1951 to 1965, the total immigration numbered 3,983,971, the highest since the 1920s.³⁶ In light of the occurrence of the Great Depression and World War II during the intervening decades, this is not an unexpected statistic. The fact that few of these immigrants were admitted under the quota system led to an increasing awareness of the deficiency of the national origins quota system in regulating immigration. This recognition was a primary reason behind the major policy revision in 1965. Moreover, the Kennedy Administration Immigration

32. Act of Sept. 11, 1957, Pub. L. No. 85-316, 71 Stat. 639 (current version codified in scattered sections of 8 U.S.C. (1976)). This act helped to alleviate the problem of quota oversubscription by removing the mortgages on quotas imposed under the Displaced Persons Act and other acts. Also, it was the first of a series of enactments to provide for the granting of nonquota status to aliens who qualified under the first three preference groups and on whose behalf petitions had been filed by a specified date. The act further authorized the issuance of nearly 19,000 nonquota visas that had remained unused under the Refugee Relief Act.

In addition, the 1957 Act amended the Immigration and Nationality Act to grant nonquota stays under the definition of "child" to certain stepchildren, adopted children, and illegitimate children of U.S. citizens; authorized a temporary program for the issuance of nonquota immigrant visas to certain alien orphans; provided the Attorney General discretionary authority to admit certain relatives of U.S. citizens and permanent resident aliens who would be otherwise excludable on criminal or moral grounds, for misrepresentation, or, until June 30, 1959, because of tuberculosis; and permitted the waiving of fingerprint requirements in the case of nonimmigrants.

33. Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504 (amended 1965).

This program, mainly limited to Western Europeans, provided for the adjustment of status of such refugees to that of permanent resident after a two-year residence in the United States, provided they were otherwise eligible. This procedure continues in the present permanent law, embodied in the provision for "conditional entry" of refugees who may adjust to permanent resident status after two years. Immigration and Nationality Act, § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976).

34. Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419 (codified at 8 U.S.C. § 1182 (1976)).

35. Act of Sept. 2, 1958, Pub. L. No. 85-892, 72 Stat. 1712 (amended 1960).

36. [1976] INS ANN. REP. 39.

Reform Bill for "revising and modernizing our immigration law,"³⁷ constituted a major impetus to the enactment of the 1965 amendments signed into law by President Johnson.

Reflecting the increased social awareness brought about by the civil rights movement, the Immigration and Nationality Act Amendments of 1965³⁸ displaced the quota system and its emphasis on nationality and ethnic considerations with a new preference system based essentially on reunification of families and needed labor skills.³⁹ One major innovation of this legislation incorporated a ceiling of 120,000 persons on Western Hemisphere immigration, effective July 1, 1968.⁴⁰ Although the Johnson administration opposed the imposition of this quota on foreign policy grounds,⁴¹ the proponents of population control represented a strong faction.⁴²

The 170,000 visas allotted to the Eastern Hemisphere were to be distributed according to seven preferences, with no single country to receive more than 20,000 visas annually. Those admitted under a worker preference (third or sixth preference) were subject to the labor certification provision. This provision, section 22(a)(14) of the Act, was revised to affirmatively vest the Secretary of Labor with more power to protect the American labor market from competition resulting from immigration. All nonrelative and nonrefugee immigrants were required to obtain a labor clearance certifying that American workers were not available for their jobs and that the immigrants would not adversely affect the prevailing wage rate or average working conditions.⁴³ Thus, the 1965 statute shifted the burden of proof to the alien to affirmatively establish his compliance with admissions requirements.⁴⁴ In 1976, the law

37. This bill was introduced by Senator Philip Hart as S. 1932 to the 88th Congress.

38. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified in scattered sections of 8 U.S.C. (1976)).

39. These amendments also eliminated the Asian discrimination provisions. C. KEELY, *supra* note 2, at 19.

40. E. HARPER, *supra* note 2, at 51.

41. Representative Emanuel Celler expressed concern that such a numerical ceiling would "muddy the waters of foreign affairs." 111 CONG. REC. 20,955 (daily ed. Aug. 25, 1965).

42. The most compelling reason for placing a numerical ceiling upon the Western Hemisphere relates to the worldwide population explosion and the possibility of a sharp increase in immigration from Western Hemisphere countries. Testimony before the Judiciary Committee identified Latin America as the area of greatest future population growth. H.R. REP. NO. 745, 89th Cong., 1st Sess. 48 (1965).

43. E. HARPER, *supra* note 2, at 68-69.

44. This change may be contrasted with the previous system whereby the burden of proving an alien's ineligibility for entrance vested with the factfinding of the Secretary of Labor.

was reformed so that the Western Hemisphere provisions mirrored the Eastern Hemisphere selection system, with the sole major distinction that the overall numerical ceilings for each remained unchanged.

Since July 1, 1968, when the 1965 amendments became effective, United States immigration policy has focused primarily on the following problems: regulation of immigration from the Western Hemisphere; "illegal, undocumented" aliens; refugees; family re-union; and labor protection balanced against admitting persons with needed skills. In furtherance of the evolving trend towards a larger proportion of immigrants from Southern Europe, the 1976 legislation⁴⁵ completed the task undertaken by the 89th Congress.⁴⁶ The 1976 amendments applied a revision of the seven-category preference system, with the 20,000 per-country limit, to both hemispheres under the separate ceilings of 170,000 for the Eastern Hemisphere and 120,000 for the Western Hemisphere.

Only the provision extending the 20,000 per-country limit to Mexico evoked any significant controversy. Prior to January 1, 1977, the effective date of this Act, immigration from independent countries in the Western Hemisphere had been subject only to the numerical limitation posed by the overall ceiling of 120,000 im-

45. Act of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703 (amending Immigration and Nationality Act, 8 U.S.C. §§ 1101-1557 (1976)).

46. [B]ecause the Western Hemisphere has no preference system and no per-country limit, in effect, the United States has two different immigration laws for the two hemispheres. For example, under the provisions determining Eastern Hemisphere immigration, the 22-year-old British citizen daughter of a U.S. citizen or the Spanish wife of a permanent resident alien would receive preferential treatment compared to other intending immigrants whose relational ties were more distant, or who were entering under the occupational preferences. However, the 22-year-old Brazilian daughter of a U.S. citizen or the Canadian wife of a permanent resident alien would be required to line up behind the other intending immigrants from this hemisphere—now numbering close to 300,000—and to wait more than 2 years for a visa. In contrast, immigrant visas for the Eastern Hemisphere are immediately available under the relative preference categories for all countries except the Phillipines and Korea. . . .

In short, when repealing the national origins quota system, the 89th Congress did not provide an adequate mechanism for implementing the Western Hemisphere ceiling, nor did it sufficiently integrate the ceiling into the immigration law as a whole. The result, completely unforeseen and unintended, has been considerable hardship for intending immigrants from this hemisphere who until 1968 enjoyed the privilege of unrestricted immigration. It is the express purpose of this legislation to correct the situation.

H.R. REP. NO. 1553, 94th Cong., 2d Sess. 3-4 (1976).

migrant visas exclusive of immediate relatives; there existed no per-country limitations. Since the date of the enforcement of the Western Hemisphere ceiling, July 1, 1968, Mexican immigration has exceeded 20,000 according to the annual statistics compiled by the Immigration and Naturalization Service.⁴⁷

In October 1978, President Carter signed into law a bill providing for a single worldwide ceiling which permits 290,000 visas to be distributed annually with a limit of 20,000 per country.⁴⁸ This

47. Mexican Immigration, Fiscal Years 1966-76

	Total	Western Hemisphere Ceiling	Eastern Hemisphere Ceiling	Numerically Exempt
1966	45,163	NA*	NA	NA
1967	42,371	NA	NA	NA
1968	43,563	NA	NA	NA
1969	44,623	31,933	18	12,672
1970	44,469	27,044	20	17,405
1971	50,103	31,695	15	18,393
1972	64,040	41,694	13	22,333
1973	70,141	43,510	71	26,560
1974	71,586	45,156	91	26,339
1975	62,205	41,894	83	20,228
1976	57,863	39,314	145	18,404

* NA = not applicable
[1966-1976] INS. ANN. REP.

Following a position advocated by President Ford upon signing the 1976 amendments into law, President Carter endorsed legislation before the 95th Congress to increase the number of visas available annually to the contiguous territories of Mexico and Canada. H.R. Doc. No. 202, 95th Cong., 1st Sess. 6 (1977).

48. Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (amending Immigration and Nationality Act, 8 U.S.C.A. §§ 1101-557 (West 1970 & Supp. 1979)). The preference system applied under this single worldwide ceiling is as follows: first preference (unmarried sons and daughters of U.S. citizens): 20 percent of the overall limitation of 290,000 in any fiscal year; second preference (spouses and unmarried sons and daughters of aliens lawfully admitted for permanent residence): 20 percent of overall limitation, plus any numbers not required for first preference; third preference (members of the professions or persons of exceptional ability in the arts and sciences): 10 percent of overall limitation, plus any numbers not required by the first two preference categories; fourth preference (married sons and daughters of U.S. citizens): 10 percent of overall limitation, plus any numbers not required by the first three preference categories; fifth preference (brothers and sisters of U.S. citizens 21 years of age or over): 24 percent of overall limitation, plus any numbers not required by the first four preference categories; sixth preference (skilled and unskilled workers in short supply): 10 percent of overall limitation; seventh preference (refugees): 6 percent of overall limitation; and nonpreference (other immigrants): number not used by the seven preference categories. SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, COMM. ON THE JUDICIARY, U.S. SENATE, U.S. IMMIGRATION LAW AND POLICY, 1952-1979, at 86 (1979).

legislation was motivated by an attempt to make available any seventh preference refugee visa numbers not utilized by the Western Hemisphere for refugees from the Eastern Hemisphere. The cumulative effect of the Acts of 1965, 1976, and 1978 in the development of a worldwide policy has been a trend toward a larger proportion of immigrants from Southern Europe, Asia, and Latin America. Moreover, the resulting complicated application process has created a system that favors those possessing the knowledge and finances needed to cope with it.

POLICY GOALS

The Immigration and Nationality Act of 1952 with extensive amendment remains our basic law today. A major recodification of legislation dating from a quarter of a century earlier, the 1952 Act reflected the restrictionist atmosphere of an era daunted by the aftermath of World War II and the height of the Cold War with Stalin's Russia. Congress, recognizing the need for a comprehensive review of immigration law, created a Select Commission on Immigration and Refugee Policy,⁴⁹ which was signed by President Carter on October 5, 1978. Amid so many conflicting passions, the most significant policy perspectives that will give rise to new legislation include: the political and economic goal of adjusting immigration to labor force requirements, the demographic goal of controlling population growth, the social goal of maintaining liberal family reunion, and the humanitarian goal of maintaining liberal refugee admittance.

Requirements of the Labor Force

The relationship among immigration, the domestic labor market, and the maintenance of American standards of wages and working conditions is fundamental to policy analysis. Immigrants are one of the more controllable factors of the labor market. The government, through the regulation of immigration, can take immediately effective steps to add or subtract people from the labor force or to increase or decrease the number of persons with particular skills. The Secretary of Labor, Ray Marshall, has noted that employment and immigration policy are essentially interde-

49. Act of Oct. 5, 1978, Pub. L. No. 95-412, § 4, 92 Stat. 907.

pendent.⁵⁰

In a report on immigration policy prepared for the National Commission for Manpower Policy,⁵¹ authors North and LeBel reject any expansion of the temporary labor program and establish their position on illegal migration as wholly "restrictionist."⁵² Further, the authors advocate the integration of immigration and labor policy:

We recommend that the Congress give the Executive the discretion, each year, to set the immigration totals for the coming year within an arbitrary range of 300,000 to 500,000 Although the Executive would announce the target figure early in the year, it would be free to increase it . . . but not to decrease it, as this would adversely affect persons who had made plans on the basis of the earlier announcement.

The annual total would be based on two, totally separate calculations. The first would be the absorptive capacity of the nation, based primarily on the unemployment rate; the other consideration would be the nation's sense of responsibility for refugees and perhaps for other overseas political considerations.⁵³

However, the inadequacy of the current data bases and organizational resources of the Department of Labor and of state employment services inhibit prospective revisions of the immigration law which would consider the labor market implications.⁵⁴ Two reasons have been cited for this inadequacy of available data. First, the Immigration and Naturalization Service (INS) is not dedicated to either research or statistics, which it gathers largely for management purposes. Second, the data is secured from those seeking a benefit from the government, and there is a temptation to adjust one's declared occupation by overstatement or understatement to that which one thinks will help secure a visa.⁵⁵ Moreover, the competing goals of refugee resettlement and foreign relations represent separate considerations af-

50. [I]mmigration laws have profound effects on both the level of unemployment in the country and our ability to enforce protective labor legislation Obstacles to legal immigration encourage people to enter the country illegally. Since most of the people who come to the United States work . . . our immigration policy should be developed in direct relationship to current and anticipated future labor needs. . . .

Alien Adjustment and Employment Act of 1977: Hearings on S. 2252 Before the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 201, 205 (1978) (statement of F. Ray Marshall, Secretary of Labor) [hereinafter cited as *Hearings on S. 2252*].

51. NATIONAL COMM'N FOR MANPOWER POLICY, *MANPOWER AND IMMIGRATION POLICIES IN THE UNITED STATES* (1978) [hereinafter cited as *MANPOWER*].

52. *Id.* at 15.

53. *Id.* at 225.

54. S. TOMASI & C. KEELY, *WHOM HAVE WE WELCOMED? THE ADEQUACY AND QUALITY OF UNITED STATES IMMIGRATION DATA FOR POLICY ANALYSIS AND EVALUATION 57-72* (1975).

55. See *Hearings on U.S. Caribbean Policy, Part 1, Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs*, 93d Cong., 2d Sess. 15 (1973) (statement of Roy S. Bryce-LaPorte, Research Sociologist, Smithsonian Institution).

fecting immigration policy; the resulting decisions conflict with employment goals.

In addition, the authors note with respect to reunion as a foremost policy goal: "There must be considerably more emphasis placed on the allocation of a publicly generated good, the immigrant visa, to meet the needs of society as a whole rather than those of individual members of society."⁵⁶ North and LeBel further characterize family reunion policies as having "an aura of nepotism," particularly in light of the fifth preference established by the 1965 Act favoring brothers and sisters of U.S. citizens.⁵⁷

Organized labor, as represented by the AFL-CIO, views immigration policy from the standpoint of its impact on wage earners of the United States, its opportunities for employment, and its impact on the maintenance of decent standards of wages and working conditions. The AFL-CIO recommends legislation that would impose criminal penalties on employers of illegal aliens.⁵⁸ Further, the AFL-CIO advocates the following: an employment identification system based on the worker's Social Security number; an adjustment of status program for undocumented aliens that weighs heavily such subjective values as family and community attachments; intensified border control and labor law enforcement;⁵⁹ repeal of those sections of the Tariff Code providing special economic incentive to such "twin-plant" operations as electronics assembly and garment work, whereby companies in the United States utilize low-wage workers from a border country to assemble components made in the United States and then reimport the finished product subject to a tariff only on its added value, not its full value; and a United States foreign investment program to alleviate the "push" factors of unemployment and low income in those countries from which illegal aliens come.⁶⁰ The AFL-CIO also approves of an amnesty program pertaining to illegal aliens who entered the United States before January 1, 1970.⁶¹

Organized labor's primary objective lies in its protectionist concern for the American worker. Consequently, it strongly supports

56. MANPOWER, *supra* note 51, at 216.

57. Immigration and Nationality Act, § 203(a) (5), 8 U.S.C. § 1153 (1976).

58. *Hearings on S. 2252, supra* note 50, at 319, 323 (statement of Rudolph Oswald, Director of Research, AFL-CIO).

59. *Id.* at 322-24.

60. *Id.* at 321.

61. *Id.* at 322.

the goals of the labor certification program of the 1965 Act.⁶² Moreover, the AFL-CIO lauds the termination of any type of "Bracero" program, which authorizes the temporary entry of low-wage alien workers to harvest farm crops in California and the Southwest. Organized labor cites this temporary worker program as the source of the many present difficulties with respect to illegal aliens.⁶³

As a representative of Mexican-Americans, Domingo Gonzalez⁶⁴ has expressed the group's opposition to temporary worker programs, citing the adverse effects of contract labor, as demonstrated in the Bracero program which operated from 1940 to 1960.⁶⁵ Gonzalez has stated that measures such as employer sanctions and added enforcement to apprehend illegal entrants at the border would increase the discrimination that already exists against people of Mexican origin.⁶⁶ It is the role of such Mexican-American groups to safeguard against the real possibility that

62. The Secretary of Labor is to determine and certify to the Secretary of State and to the Attorney General that:

(A) There are not sufficient workers in the United States who are able, willing, qualified and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

Immigration and Nationality Act, § 212(a)(14), 8 U.S.C. § 1182 (1976). *See also* 8 C.F.R. § 204.2(e)(4) (1979).

63. *Hearings on S.2252, supra* note 50, at 324.

The Bracero program has been identified as being among the causes of the upward swing in illegal entries beginning in 1944:

Apparently, the relation between this Mexican contract labor program and the spiraling illegal immigration was this: Contract workers returned with exciting tales of the money that could be earned in the United States. The next year these same workers wanted to repeat their performance and their neighbors wanted to join. The result was that there were many more Mexicans who wanted to come to the United States than there were certifications of need issued by the Secretary of Labor. Further, managing to be among the workers selected by the Mexican officials for the program characteristically required the persuasion of a bribe. Thus, it seemed to many much simpler to seek American employment on their own. Accordingly, those with experience volunteered or were persuaded to lead others.

Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW AND CONTEMP. PROB. 334, 344 (1956) (citations omitted).

64. *Hearings on S. 2252, supra* note 50, at 255 (statement of Domingo Gonzalez, National Representative for Farm Labor and Rural Affairs, American Friends Service Committee).

65. *Id.* at 290-91.

66. A nationality test for employment would provide another instrument for divisiveness and unfair practices. Employers should not be placed in the position of determining who is here legally and who is not; they are not immigration experts.

Since it would be impossible to keep tabs on every employer and since present experience shows that some employers find it very advantageous to hire undocumented persons outside the law, the sanctions against em-

Mexicans will bear the brunt of uneven enforcement or blatant discrimination.

Control of Population Growth

The question of economic optimum population⁶⁷ constitutes another important consideration in the analysis of immigration problems. In its 1971 report, the Commission on Population Growth and the American Future stated that immigration accounts for approximately twenty percent of overall annual growth.⁶⁸ Moreover, one member of the Commission endorsed the theory that the achievement of a no-growth, stationary population and the continuation of present levels of immigration are not incongruous goals. The Commission submitted the following two proposals:

The Commission recommends that Congress immediately consider the serious situation of illegal immigration and pass legislation which will impose civil and criminal sanctions on employers of illegal bordercrossers or aliens in an immigration status in which employment is not authorized.

The Commission recommends that immigration levels not be increased and that immigration policy be reviewed periodically to reflect demographic conditions and considerations.⁶⁹

The middle of the road recommendation of the Commission, phrased negatively, was not to increase present immigration levels; there was no majority support for the reduction of immigration. However, the Commission did not prescribe any specific means by which to accomplish its proposals. Zero Population Growth, Inc. (ZPG) is another advocate of manipulation of immi-

ployers would not altogether halt employment of undocumented workers. . . .

The border cannot be sealed completely. Added enforcement will simply add to the risks and costs of crossing for the migrant.

Id. at 289.

67. Sociologists, economists, and demographers differ widely in their views on an economic optimum population for the United States. Some feel that this country is already overpopulated. Others maintain that we can support twice the present population at a standard of living higher than that which we now enjoy. The opinion of many who have studied the problem is that on the basis of present material resources, the economic optimum population of the United States is at least several million less than the present population and may be as low as 100 million. U.S. BUREAU OF THE CENSUS, FORECASTS OF THE POPULATION OF THE UNITED STATES, 1945-75, at 64 (1947).

68. Coale, *Alternative Paths to a Stationary Population*, in 1 COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, DEMOGRAPHIC AND SOCIAL ASPECTS OF POPULATION GROWTH 598 (1972).

69. COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, POPULATION AND THE AMERICAN FUTURE 116-17 (1972).

gration as a population control device. To achieve its goal of no-growth population, ZPG is devoted to the continuation of low fertility. In 1976, ZPG endorsed the reduction of immigration by more than half to an annual average of 150,000, calculated on a five-year total of 750,000 to allow for annual fluctuations. According to its calculations, 150,000 net additions from immigration would be an acceptable level consistent with zero growth by the year 2008, with a population totaling 243 million.⁷⁰

ZPG is aligned with the views of organized labor on the issue of illegal migration.⁷¹ ZPG recommends employer sanctions, intensified border enforcement, and a foreign aid program to promulgate methods of population control and to alleviate unemployment in "sending" countries.⁷² On the issue of legal immigration, ZPG supports organized labor in its call for "tightening criteria for the Labor Department's imported labor certification program."⁷³

Maintenance of Family Reunion and Refugee Resettlement

A third policy perspective elevates the goals of the maintenance of the family reunion and refugee resettlement in immigration policy. When Congress enacted the Immigration Reform Act of 1965, it declared that "(re)unification of the family is to be the

70. *A Population Policy for the U.S.*, ZERO POPULATION GROWTH NATIONAL REPORTER, Nov., 1976, at 6-7.

71. The advocates of reduced population growth state their point of view: Illegal immigration is creating and perpetuating a subclass of workers deprived of civil and labor rights . . . undocumented workers depress wages and working conditions in certain regions and fields of work. . . . In the Southwest, where employers openly rely upon an endless supply of low-wage workers, illegal Mexican workers compete for jobs with legally resident Mexican-Americans. . . . In other labor markets, undocumented workers compete against native ethnic minorities including U.S. Blacks. . . . Usually pay and working conditions are too poor to attract legal U.S. residents. Legal residents often can turn to welfare payments when employers offer no better option, but undocumented workers are neither permitted nor inclined to seek welfare. If these lower-level jobs were upgraded in pay, working conditions and status, many could be filled by legal workers. . . . It's still highly advantageous to hire undocumented workers. They are valued as hard workers, and some employers can get away without paying medical insurance, sick leave, overtime wages, unemployment compensation and Social Security payments. It's difficult for a native worker to compete with a deal like that. The availability of the large pool of illegal labor undermines labor union organizing among low-skilled workers.

ZERO POPULATION GROWTH, ZPG LOOKS AT IMMIGRATION: QUESTIONS AND ANSWERS ON U.S. IMMIGRATION AND POLICY 9-11 (1978). Zero Population Growth, Inc., a citizens' organization, advocates a planned, voluntary stabilization of U.S. and world population.

72. *Hearings on S. 2252, supra* note 50, at 122 (statement of Peter D. Willson, political representative, Zero Population Growth, Inc.).

73. *See* note 62 *supra*.

foremost consideration."⁷⁴ Thus, of the seven preferences within the annual numerical limitation of 290,000 visas, seventy-four percent is allotted to family members. Additionally, spouses, children, and parents of United States citizens are exempt from any numerical restriction. Consequently, of the average annual 400,000 legal immigrants who enter this country, more than seventy-five percent are family members. Moreover, family relationships constitute a significant factor in applications for waivers of excludability.⁷⁵

In deportation cases based on fraud, family relationships may provide the basis for relief under section 241(f). Family relationships may be significant in establishing hardship and equity in applications for permission to reapply, voluntary departure, and suspension of deportation, as well as in tipping the balance of equities for the favorable exercise of discretion in adjustment cases. However, there is no unanimity on the issue of maintaining all the family preferences at current levels.

The following statement of Hubert Humphrey reflects the general philosophy of advocates of family reunion and refugee resettlement:

The most energetic, hardworking people of each generation of Americans have been those newest to our country. So when we want to put a little more zest into America, add a little more flavor to this great Republic, give it a little more drive, just let there be a little infusion of new blood, the immigrant. He is restless, he seeks to prove himself.⁷⁶

Advocates of a "stationary population" have criticized this point of view as a vestige of outmoded sentimentalism and unwary idealism, not attuned to the present concern of reconciling immigration and labor policies.

The parties in interest representing the diverse and overlapping perspectives of population control, labor force protection, family reunion, and refugee resettlement will direct the focus of Congress in its efforts to reform the current immigration system. The self-serving policies supported by groups such as foreign and na-

74. S. REP. NO. 1748, 89th Cong., 1st Sess., *reprinted in* [1965] 2 U.S. CODE CONG. & AD. NEWS 3322.

75. See § 212(b) (illiteracy), (e) (exchange act restrictions), (g) (tuberculosis and mental illness), (h) (criminal and prostitution grounds), (i) (fraud). Immigration Reform Act of 1965, § 212(b), (e), (g), (h), (i), 8 U.S.C. § 1182(b), (e), (g), (h), (i) (1976).

76. Speech presented at the Annual Conference of the American Immigration and Citizenship Conference (March 4, 1965), *quoted in* AICC NEWS, Jan. 23, 1978, at 1.

tional business corporations, voluntary organizations, and ethnic councils are subordinate to the interests of American society as a whole. Specific issues addressed in the course of formulating an acceptable immigration policy must be resolved within the framework of these overriding perspectives.

ISSUES AFFECTING POLICIES AND PROGRAMS

Population Growth

The population of the United States can grow only through net immigration and natural increase. In past decades, immigration has materially affected population growth. It is estimated that from 1840 to 1910, over one-fourth of the total gain in white population was because of net immigration.⁷⁷ During the decade from 1880 to 1890, immigration contributed forty-three percent of the total population increase. The passage of the quota acts and the depression of the 1930s curtailed immigration to this country and thus materially reduced this source of population growth. Moreover, during World War II, the flow of immigrants to this country was greatly reduced. Through the years, therefore, natural increase has supplanted the importance of net immigration as a factor in the growth of the population of this country.

The central issues raised in formulating an effective program of immigration and population control include determinations as to: (1) whether present immigration levels represent an insurmountable obstacle to achievement of zero population growth, (2) whether present immigration levels would retard the achievement of no-growth population, and (3) how significant the contribution of immigrants is to population.

In his study presented to the Commission on Population Growth and the American Future,⁷⁸ Coale concluded that at the current fertility rates of native and foreign born women, net immigration of 400,000 persons a year—a figure assumed for this analysis—is not incompatible with zero population growth.⁷⁹ However,

77. U. THOMPSON & P. WHELPTON, *POPULATION TRENDS IN THE U.S.* 303 (1933).

78. Coale, *Alternative Paths to a Stationary Population*, in 1 COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, *DEMOGRAPHIC AND SOCIAL ASPECTS OF POPULATION GROWTH* 589-603 (1972).

79. Coale assumed for his analysis that immigration accounted for 400,000 net additions to the population. Under that assumption, if total fertility of foreign-born women equalled replacement level—i.e., 2.11 births per woman per lifetime—and the fertility of native-born women did not exceed 1.97, the population would stabilize. However, the total fertility rate for the nation is currently below 1.9 births per woman and the fertility of married foreign-born women aged 15 to 44, according to the 1970 census, was lower than that of native-born women. U.S. BUREAU OF THE CENSUS, *CENSUS OF POPULATION: 1970 SUBJECT REPORTS* table 3, at 14-16 (1973), quoted in C. KEELY, *supra* note 2, at 46-49.

taking into account a projected emigration from the United States of over one million foreign-born residents,⁸⁰ Keely estimated net legal immigration of about 265,000 annually for the early 1970s.⁸¹ Keely's methodology led him to conclude:

Claims that combined legal and illegal immigration will prevent achievement of zero population growth in the United States are unfounded Under current fertility trends, net immigration (legal and illegal) would have to total about 800,000 per year to prevent population decline. Given estimated net legal immigration of about 265,000, illegal migration would have to add 535,000 permanent residents indefinitely to prevent decline. There is no evidence, however, that current levels of permanent, uncounted net additions exceed a half-million annually.⁸²

Keely thus dispels the argument that the continuation of fairly substantial levels of immigration is synonymous with the continued expansion of the American population.⁸³ Keely concludes, "The question is not whether we can achieve zero population growth, but when and at what levels. Current immigration levels and fertility trends would result in zero growth by approximately the year 2030, with a population of 250 million."⁸⁴ Thus, if we posit a policy that immigration should not deter us from a goal of zero population growth, the maintenance of immigration at the current level appears acceptable.

Labor Force Requirements

Labor force skills constitute one criterion that has played some role in immigration legislation since 1885.⁸⁵ Although the primary focus of the preference system which allocates immigrant visa

80. R. Warren & J. Peck, *Emigration from the United States: 1960 to 1970* (paper presented at the Annual Meeting of the Population Association of America, Seattle, April 1975), *quoted in* C. KEELY, *supra* note 2, at 44-49.

81. Keely & Kraly, *Recent Net Alien Immigration to the United States: Its Impact on Population Growth and Native Fertility*, 15 *DEMOGRAPHY* 267-83 (1978).

82. C. KEELY, *supra* note 2, at 46-47.

83. *See* note 71 *supra*. Keely reaffirms Coale's conclusions: "It is not true that continued immigration at current, fairly substantial levels implies indefinitely continued growth of the American population." C. KEELY, *supra* note 2, at 47.

84. C. KEELY, *supra* note 2, at 47.

85. The Act of 1885 included certain interesting labor market provisions. It was deemed unlawful "to import aliens into the United States under contract for the performance of labor or services of most kinds . . ." but exceptions were created for artists, lecturers, and servants, as well as for skilled aliens working in an industry not yet established in the U.S. These special provisions for those at the top of the labor market—the artists and lecturers who apparently did not need protection—and for those at the bottom—the servants who did not receive protection—are an initial signal of a continuing theme in U.S. immigration law. E. HARPER, *supra* note 2, at 6.

numbers is the goal of family reunification, labor market objectives are also given priority towards the formulation of a positive manpower policy.⁸⁶ The worker preference categories—third and sixth preference—are intended to admit individuals whose occupational skills are in extraordinary demand in the United States. Although the third preference is directed to “elite” workers, the sixth preference is open-ended and available to any worker whose skill is needed in this country. However, the Department of Labor has determined by regulation (Schedule B)⁸⁷ that certain occupations are inherently capable of being filled from the domestic labor force notwithstanding the fact that poor wages, hard work, lack of prestige, and our social welfare system result in a chronic shortage of Americans willing to fill such positions.

Since 1965 when labor certification in its present form became effective,⁸⁸ laborious procedures and the classification of many occupations on Schedule B have resulted in the sixth preference often not being filled, while the third preference has been oversubscribed. However, sixth preference demand for the past year has increased, causing backlogs averaging nine months. Meanwhile, third preference availability has improved with the passage of the Health Education Assistance Act,⁸⁹ which subjects foreign medical graduates to a rigorous examination and more rigid labor certification for other professionals. During periods of heavy third preference demand, many professionals have sought the more available sixth preference status. Consequently, professionals have accounted for as many as one-third of sixth preference admissions, in addition to filling all the openings allotted to third preference admissions.⁹⁰ At the same time that worker preferences further labor market objectives, they theoretically provide a limited immigrant quota to skilled persons without refugee status or relatives in the United States. Moreover, this positive manpower policy permits the Labor Department to prevent the de-

86. The third and sixth preference categories constitute the occupational or worker preferences. The third preference category is reserved for members of the professions and persons of exceptional ability in the sciences and arts whose services are sought by U.S. employers. The sixth preference applies to both skilled and unskilled workers whose occupations are in short supply in this country. The two categories combined are allotted a maximum of only 20% of the total numerically limited immigration of 290,000. That 58,000 includes both spouses and children as well as the primary beneficiaries, the workers themselves, under these preferences. INTERAGENCY TASK FORCE ON IMMIGRATION POLICY, U.S. DEPT'S OF JUSTICE, LABOR, AND STATE, STAFF REPORT 297 (1978).

87. 20 C.F.R. § 656.11 (Schedule B) (1979).

88. Immigration and Nationality Act, § 212(a)(14), 8 U.S.C. § 1182 (a)(14) (1976).

89. Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, 90 Stat. 2243.

90. [1976] INS ANN. REP. 57.

pression of a specific labor market or work place by employers seeking alien workers through the labor certification program.⁹¹

There are also protective or negative effects of the current manpower policy. The use of the third, sixth, and nonpreference categories is largely unavailable to those who do not have connections in the United States. This protective policy is embodied in the previously discussed requirement of labor certification, which assures that an immigrant's employment will not adversely affect the prevailing wages and working conditions in the occupation. Accompanying the labor certification requirement is a stipulation that all aliens who seek certification, except for a small number of nonpreference immigrants, must first substantiate the existence of a job offer from a United States employer.⁹² Although some employers do recruit abroad, an alien in most cases, in order to obtain such an offer, must come to this country himself on a non-immigrant visa or illegally⁹³ and search for an offer or he must have one arranged by relatives or friends.⁹⁴

91. It should be noted that workers can immigrate even though they do not qualify for the third or sixth preferences. Most enter under one of the relative preferences, where the immigrant's status as a worker is merely incidental. If a worker does not qualify under the relative or the worker preference, he may still enter as a nonpreference immigrant. However, such status is not widely available, and if the worker lives in a country which consistently uses the total of its 20,000 annual ceiling for the preference categories, such status is not available at all. With the 1978 amendments to the Act creating a single worldwide ceiling, the State Department estimates that no nonpreference immigrants will be admitted for several years.

Some nonpreference immigrants are exempt from the labor certification requirement on the ground that they are either well-to-do retirees who will not enter the labor market or investors with at least \$40,000 in hand who will manage their investments in this country. Immigration and Nationality Act, § 212(a)(14)(i), 8 U.S.C. § 1182(a)(14)(i) (1976).

92. Until 1976 the job offer was a prerequisite to certification in low-skill occupations and was evaluated on a state and regional basis. The 1976 amendments to the immigration law require a job offer for all third and sixth preference immigrants.

93. The General Accounting Office reported that its staff examined the files on 442 certification cases and found that in 191 instances the aliens involved were already in the nation when the application was filed, and that 101 were already working in the job in question. Of the latter, 42 had nonimmigrant visas allowing them to work, and 59 were apparent visa abusers.

MANPOWER, *supra* note 51, at 58.

94. A recent government study reveals evidence on this point relating to the proportion of third and sixth preference primary beneficiaries who attained permanent resident alien status through the process of adjustment of status—almost one-half between 1967 and 1976. Adjustment of status is a mechanism provided to allow a person already in the United States in other than an immigrant status to

One hundred sixty-one thousand immigrants were primary beneficiaries of the third and sixth preferences—91,000 under the third preference and 70,000 under the sixth preference.⁹⁵ Between 1967 and 1976, the total constituted approximately four percent of all immigrants who entered the United States.⁹⁶ Thus, the number of immigrants with occupational skills who are admitted under the *relative* preferences is many times the number who come in under the *occupational* preferences. From 1967 through 1976, thirty percent of all immigrants who declared themselves professional workers entered under the third and sixth preferences,⁹⁷ seventy percent entered under relative preferences, as refugees, or as nonpreference immigrants.⁹⁸

During this ten-year period, the third and sixth preferences produced no significant negative impact on United States labor markets because they permitted only professional workers and individuals with needed occupational skills. In occupations such as physician, tailor, and nurse, these preferences have had positive impact on labor shortages in the United States. Further, the admission of outstanding scientists and artists must certainly have had a positive impact on the United States economy, although the migration of these persons may be viewed negatively by their countries of origin, especially those deficient in human capital.

become an immigrant (permanent resident alien) without going abroad to obtain an immigrant visa. This study showed that the third and sixth preferences are used frequently by people already in the U.S., who have a decided advantage in obtaining a job offer and labor certification. Although it is not possible to determine how the 7,200 primary beneficiaries granted worker preference while outside the country in 1976 received their job offers, the process described seems reasonably applicable. [1967-1976] INS ANN. REP. table 8A.

95. *Id.* If the experience of the Western Hemisphere under the preference system, which became applicable to it in 1977, is comparable to that of the Eastern Hemisphere, an annual worldwide total of approximately 29,000 primary beneficiaries of occupational preferences can be expected for the foreseeable future. INTERAGENCY TASK FORCE ON IMMIGRATION POLICY, U.S. DEPT'S OF JUSTICE, LABOR, AND STATE, STAFF REPORT 303 (1979).

96. [1967-1976] INS ANN. REP. table 8A.

97. *Id.* The occupational profile of the third and sixth preference immigrants differs substantially from that of all immigrants and from that of the total U.S. work force. Nearly three-fourths of the former in the period from 1967 through 1976 were professional workers, because of the fact that almost all third preference visas go to members of this occupational group. Craft and service workers are the next most frequently admitted under the occupational preferences, but their combined total was only one-quarter the number of professionals admitted. Very few occupational preferences are received by persons who are managers, sales and clerical workers, laborers, and farm workers. Within the professional category the major beneficiaries (60 percent) of worker preferences have been accountants, engineers, nurses, physicians, and teachers. In smaller numbers, the principal recipients of the sixth preferences have been mechanics and repairmen, tailors, cooks, and private household workers.

98. *Id.*

Moreover, the labor certification process is an essential vehicle for immigration based on needed labor skills; it is purely chauvinistic to presume that every labor skill demand can be filled from the United States labor resource pool. Also, corporations must have the capacity to deploy personnel on an international basis in order to compete in the same sphere.

It has been estimated that labor certification has affected less than ten percent of recent immigrants, whereas approximately fifty-two percent of immigrants have joined the labor force within two years of arrival.⁹⁹ Although this statistic may indicate the relatively small percentage of total immigrants whose entry is facilitated because of a need in the United States for their skills, it underplays the impact of labor certification in screening out workers with skills that are abundant here. As sixteen to twenty-seven percent of all work-age immigrants are labor certified, at least at time of entry, that number does not adversely affect the United States labor market.¹⁰⁰

In evaluating the experience with labor certification, it is significant to note that labor certification is not wholly effective in protecting United States labor markets from the impact of immigrant workers because most enter under the family reunification provisions—that is, preference and numerically unrestricted categories—for which labor certification is not required. In order to increase the effectiveness of the labor certification process, the principle of labor certification could be applied to the preference system with greater prevalence. The solution may lie in the institution of a preference system comprised of three categories. The first preference category would give priority based on immediate family relationships. The second preference category would be based on more distant family relationships—that is, those presently included under the fourth and fifth preferences—as well as the fulfillment of labor certification requirements. Finally, the third preference category would give priority solely on the basis of labor force requirements within the system of labor certification.¹⁰¹ In this way, the goals of labor and family reunification

99. MANPOWER, *supra* note 51, at 56.

100. INTERAGENCY TASK FORCE ON IMMIGRATION POLICY, U.S. DEP'TS OF JUSTICE, LABOR, AND STATE, STAFF REPORT 3 (1979).

101. This proposed system is somewhat analogous to the Canadian point system in which the following criteria are weighed by a discretionary authority to determine immigrant admissions:

would be served without creating tensions between them, which would prevent their fulfillment.

The real weakness of labor certification lies not in the concept, but rather in the implementation. The procedure has become exceedingly complex and the interpretation of the Department of Labor tortuous. Bureaucratic inertia and obsession with minutiae reduce the program to absurdity. Reversion to the pre-1965 methodology seems desirable. The Labor Department would be charged, through the use of elaborate schedules, with having to object to the proposed immigration of a particular person.

Further, the present occupational preference system must be revised to accord a higher priority to foreign investors who contribute substantially to the United States by generating business and labor needs. Foreign investors should be given high priority because of the present unavailability of nonpreference visas and the likelihood that none will ever again become available unless there is a change in the immigrant preference system. Moreover, such a business investor would not be taking a job away from an American or a permanent resident¹⁰² but rather would be making

<u>Selection Factors</u>	<u>Maximum Points</u>
1. Education	12
2. Specific Vocational Preparation	15
3. Experience	8
4. Occupational Demand	15
5. Arranged Employment or Designated Occupation	10
6. Location	5
7. Age	
8. Knowledge of English and/or French	10
9. Personal Suitability	10
10. Relative	10

Not every applicant is required to meet all selection criteria. Applicants are assessed only according to those factors which actually relate to their ability to successfully assimilate into the country. Greenbaum & Berger, *New Directions: A Look at Canada's Immigration Act and Regulations* (paper presented at the Annual Conference of the American Immigration and Nationality Lawyers, Toronto, Canada, May, 1979).

102. Although no statute authorizes the granting of resident status to an immigrant engaged in business in the U.S., the eligibility of a business investor is founded on the proposition that he or she is not subject to the provisions of § 212(a)(14) because the immigrant investor is not "performing skilled or unskilled labor" within the meaning of § 212(a)(14). An immigrant who is not subject to the provisions of § 212(a)(14) may qualify for admission to the U.S. for permanent residence on a nonpreference basis. 22 C.F.R. § 42.62(b) (1979).

Regulations of the State Department, applicable to immigrants applying for visas abroad, and of the INS, applicable to adjustment of status applicants, both exempt from § 212(a)(14) an immigrant who "has invested, or is actively in the process of investing, capital totaling at least \$40,000, in which enterprise he will be a principal manager, and that the enterprise will employ persons in the United States who are United States citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children." 22 C.F.R.

a significant contribution by increasing employment opportunities in the domestic labor market area. The priority presently accorded to "treaty traders and investors" does not alleviate the dilemma of foreign investors seeking admission to the United States because such status is less than permanent and is available only to nationals of countries that have treaties of navigation and commerce with the United States.¹⁰³

Special provisions should also be made for persons who make substantial passive investment in the United States and who will not be entering the employment market but will be self-supporting. Such persons are consumers and will be prospectively stimulating the economy through their investment. Of course, in the case of investors, some policy consensus will have to be reached concerning the appropriateness of the type of investment. For instance, national security could be an issue, not to mention a more typically controversial question such as foreign ownership of land.

Family Reunion

The goal of family reunion as evidenced in our present immigration laws is not objectionable in theory, but in scope. The underlying theory of the immediate relative category and the first, second, fourth, and fifth preferences is that United States citizens and permanent resident aliens should be permitted to petition to have close relatives join them in the United States. Family relationships may serve as a meaningful foundation for assimilation

§ 42.91(a)(14)(ii)(d) (1979). The INS version, 8 C.F.R. § 212.8(b)(4) (1979), requires the employment of a "person or persons" who are citizens or residents. Presumably, the applicant for a visa abroad must hire more than one person, while the adjustment applicant needs only one.

103. An applicant who qualifies for treaty trader or investor status may remain in the U.S. indefinitely. Treaty traders and investors are defined by § 101(a)(15)(E) of the Immigration and Nationality Act as persons from a foreign country who are seeking to enter the United States "under and in pursuance of the provisions of a treaty of commerce and navigation" between the United States and the country of their nationality.

A treaty trader, (E)(i), seeks entry "solely to carry on substantial trade, principally between the United States and the country of which he is a national." A treaty investor, (E)(ii), seeks admission "solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital." Immigration and Nationality Act, § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E) (1976).

A list of the countries with which the U.S. has qualifying treaties may be found in 9 FOREIGN AFFAIRS pt. 2, 22 C.F.R. §§ 41.40 and 41.41 notes (1979).

into the United States community. However, this laudatory purpose has eroded with the advent of the nuclear family and the general disintegration of the extended family concept. Now a United States citizen residing in New York may petition to bring his married brother, his wife, and their seven children from Paterno, Italy, to Los Angeles. In most cases, the two families will see each other no more frequently than before immigration took place. Or a United States citizen permanently residing in Israel might petition for a married son to emigrate from Israel to the United States. This could be categorized as family disunification.

Currently, the four family preferences are accorded seventy-four percent of the visas, with unused visas falling into the next category.¹⁰⁴ The total number of situations in which the basic policy goal of the law is frustrated is unquestionably substantial, although no definitive study of this phenomenon has yet been conducted. The law should be amended to require some family unit concept, perhaps a pre-existing family unit prior to immigration with special consideration for extraordinary changes in family circumstances that result in subsequent unification. Alternatively, married sons and daughters or brothers and sisters should be eliminated from the preference system or rather permitted to immigrate only when there is evidence of either close family ties or compliance with a labor certification requirement. A realistic approach to family preferences would result in available numbers for meritorious cases, rather than the chronological consideration of applicants, all subject to rapidly increasing waiting periods. Any excess numbers from the family preferences could be shifted to the refugee category or the labor preferences. In this way, humanitarian goals would be served as the United States could accept its "fair share" of the victims of war and persecution and foster domestic and socioeconomic goals by admitting foreign investors and needed labor.

Illegal Immigration

Illegal immigration¹⁰⁵ has been the primary issue in the immi-

104. Immigration and Nationality Act, § 203(a)(1)-(6), 8 U.S.C. § 1153(a)(1)-(6) (1976).

105. As a matter of terminology, "illegal alien" is a popular expression which is not defined in the Immigration and Nationality Act, but which refers to aliens who have violated the immigration law. Most gain entry into the U.S. by escaping inspection. Others enter legally, but violate the terms of their admission by overstaying or accepting unauthorized employment. Synonymous terms include undocumented aliens, illegal immigrant, undocumented worker, and deportable alien. The Immigration and Naturalization Service estimates the illegal population at three to five million.

The provisions of the Immigration and Nationality Act relating specifically to il-

gration debate in recent years. The present large wave of illegal immigration, which flows primarily from Mexico, developed in the late 1960s and has continued unabated since. Following a decade of relatively few apprehensions of deportable aliens, the Immigration and Naturalization Service in 1965 began reporting rising apprehension figures. This number rose to 1,033,427 in 1977, representing only 56,156 fewer apprehensions than the all-time high reached in 1954. As the House Judiciary Committee commented in 1975: "This wholesale violation of the law disrupts the legal and orderly flow of aliens into the United States, and threatens the integrity of our system of immigration."¹⁰⁶ Illegal immigration reduces the predictability of trends in future population growth because such information as the number of aliens, age and sex composition, and fertility rates is not compiled. Additionally, the foreign policy implications of the illegal immigration problems were witnessed with respect to Mexico during the 1979 meeting between President Carter and President Portillo. Perhaps the primary effect of illegal immigration is economic, as evi-

legal or undocumented aliens are summarized below. The law includes criminal sanctions for illegal entry. Under § 275, 8 U.S.C. § 1325 (1976), any alien who enters the United States without examination by INS or through misrepresentation or fraud is guilty of a misdemeanor punishable by up to six months imprisonment and a \$500 fine or both. A second offense is a felony, punishable by not more than two years imprisonment and/or a \$1,000 fine. Section 276, 8 U.S.C. § 1326 (1976), provides that an alien who was previously deported and who enters without permission from the Attorney General is guilty of a felony punishable by not more than two years imprisonment and/or a fine of \$1,000.

Section 274 of the Immigration and Nationality Act, 8 U.S.C. § 1324 (1976), defines the smuggling, harboring, transporting, or encouraging of illegal entrants as felonies, punishable by a fine not exceeding \$2,000 or imprisonment for a term not exceeding five years or both for each alien involved. It also provides for the seizure and forfeiture of vehicles used in illegal transportation. However, the law specifically exempts the employment of illegal entrants from the penalties attached to harboring. Section 274(a)(4) contains the following proviso: "*Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

Aliens who accept employment or otherwise violate the conditions of their admission are subject to deportation under § 241(a)(9) of the Act, 8 U.S.C. § 1251(a)(9) (1976), which provides that an alien shall be deported if he "was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248, or to comply with the conditions of any such status." Aliens who accept unauthorized employment are also prohibited from adjusting their status from that of nonimmigrant to that of permanent resident alien, that is, immigrant, while remaining in this country. Immigration and Nationality Act § 245(j), 8 U.S.C. § 1255(c) (1976).

106. *Illegal Aliens: Part 4: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 1117 (1972).

denced in the labor market, because most illegal aliens come to the United States to secure employment and to escape poverty. As noted in a 1975 House Judiciary Committee report, "The basic conclusion reached by the majority . . . of the subcommittee . . . was that the adverse impact of illegal aliens was substantial and warranted legislation both to protect U.S. labor and the economy, and to assure the orderly entry of immigrants into this country."¹⁰⁷

Lack of information about the size and characteristics of the illegal migrant population further complicates the issue and impedes efforts to make policy. The Immigration and Naturalization Service currently estimates that there are three to six million illegal migrants in the country at any one time.¹⁰⁸ However, this estimate represents an extremely broad range and lacks significant scientific validation. Moreover, the characteristics of the illegal migrant population have been difficult to assess. A 1976 study for the Labor Department¹⁰⁹ reveals that Mexican illegal migrants apprehended by the Immigration and Naturalization Service while employed in the United States are typically male, unmarried, less than thirty years of age, unskilled, of rural background, poorly educated, not fluent in English, and likely to be employed in unskilled jobs. This description has been further documented by another researcher who interviewed Mexican migrants following their return to Mexico.¹¹⁰

The problem of illegal aliens was tackled under the direction of Attorney General Griffin Bell, INS Commissioner Leonel Castillo, and Secretary of Labor Ray Marshall. Their recommendations were embodied in a proposal by the Carter administration,¹¹¹ sub-

107. H.R. REP. NO. 506, 94th Cong., 1st Sess. 3 (1975).

108. *Immigration to the United States: Hearings Before the House Select Comm. on Population*, 95th Cong., 2d Sess. 135 (1978) (statement of INS Commissioner Leonel J. Castillo).

109. D. NORTH & M. HOUSTON, *THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET* (1976).

110. Cornelius, *Mexican Migration to the United States, Dimensions and Characteristics* (June 28-30, 1978) (prepared for the Brookings Institution—El Colegio de Mexico symposium on Structural Factors Contributing to Current Patterns of Migration in Mexico and the Caribbean Basin, Washington, D.C.).

111. The policy that emerged and was formally announced on August 4, 1977, included both administrative directives and legislative proposals. The major features of the program were:

To make unlawful the hiring of undocumented aliens, with enforcement by the Justice Department against those employers who engage in a "pattern or practice" of such hiring. Penalties were to be civil in nature—injunctions and fines of \$1,000 per undocumented alien hired. Criminal penalties were to be imposed by the courts against employers violating injunctions. Moreover, employers and others receiving compensation for knowingly assisting an undocumented alien to obtain or retain a job were to be subject to criminal penalties.

mitted to Congress by President Carter on August 4, 1977, detailing "a set of actions to help markedly reduce the increasing flow of undocumented aliens in this country and to regulate the presence of the millions of undocumented aliens already here."¹¹² The major elements of the Carter proposal consisted of amnesty for undocumented aliens and civil penalties for the employment of undocumented aliens. President Carter proposed increased Southwest border enforcement, continued cooperation with major "sending" countries, permanent resident status for eligible aliens who have resided here continuously since January 1, 1970, and a five-year temporary resident status program for aliens who have resided here continuously from January 1, 1970, to January 1, 1977.¹¹³ The President further recommended a review both of the existing temporary alien worker program and of our entire immigration policy. He also expressed his support of pending legislation to increase the annual limitation on Mexican and Canadian

To increase significantly the enforcement of the Fair Labor Standards Act and the Federal Farm Labor Contractor Registration Act, targeted to areas where heavy undocumented alien hirings occur.

To adjust the immigration status of undocumented aliens who had resided in the United States continuously from January 1, 1970, or before, and who apply to the Immigration and Naturalization Service for permanent resident alien status; to create a new immigration category of temporary resident alien for undocumented aliens who had resided in the United States continuously prior to January 1, 1977; to make no status change and enforce the immigration law against those undocumented aliens entering the United States after January 1, 1977.

To substantially increase resources available to control the Southern border and other entry points, in order to prevent further illegal immigration and control alien smuggling rings.

To promote continued cooperation with the governments which are major sources of undocumented aliens, in an effort to improve their economies and their employment opportunities.

Hearings on S.2252, supra note 50, at 174.

112. H.R. Doc. No. 202, 95th Cong. 1st Sess. 1 (1977).

113. Legislation containing the employer sanctions and adjustment of status provisions of the President's program was introduced in both the House and Senate and was the subject of public hearings by the Senate Judiciary Committee. *Hearings on S. 2252*, note 50 *supra*. The Committee took no action on the legislation following the hearings, however, and the bills died when Congress adjourned in October.

Before adjourning, Congress did approve legislation, H.R. 12443, creating a Select Commission on Immigration and Refugee Policy with a mandate to study and evaluate "existing laws, policies and procedures governing the admission of migrants and refugees to the United States and to make such administrative and legislative recommendations to the President and the Congress as are appropriate," no later than September 30, 1980. *Id.*

immigration from 20,000 to 50,000, to be allocated on a demand basis.¹¹⁴

The presence of illegal aliens in this country constitutes a complex problem that requires a multi-faceted solution. United States policy on illegal migration should include provisions for increased labor law enforcement, economic disincentives to employers of aliens, a temporary documented worker program, and a program of cooperation with Mexico.

Moreover, the President's proposal to grant temporary resident status to persons who have been in the United States less than seven years but who were here prior to January 1, 1977, is administratively unworkable. The administration is attempting, through the creation of this new category, to provide incentive to those illegal aliens to come forward so that more precise data may be obtained as to the magnitude of the problem. However, the relief granted in accepting a temporary resident status without longer range assurances, the withholding of public social assistance, and the inherent uncertainty as to whether the government might take prejudicial action against the person once he makes his presence known further militate against voluntary registration and disclosure. It would be more feasible to devise a system whereby all who entered the United States illegally prior to the date of enactment of a proposed amnesty bill would be permitted to adjust their status to that of permanent immigrant. This program would not have the effect of creating a residual group of undocumented aliens.

In order to prevent the future backlog of undocumented aliens, United States policy must change. United States policy on illegal migration should establish a workable program to authorize the admission of temporary documented workers for temporary jobs, as identified by the Labor Department and in collaboration with government and employers and according to need, if able and willing United States workers cannot be found in agriculture or the particular industry at the particular time and place. To improve upon previous temporary worker programs, such recruited

114. The administration bill, entitled the "Alien and Employment Act of 1977," was introduced in the House in the 95th Congress as H.R. 9531 by Judiciary Committee Chairman Peter Rodino on October 12, 1977, and in the Senate as S. 2252 by Judiciary Committee Chairman James O. Eastland. The bill contained provisions implementing the President's proposals relating to employer sanctions and permanent and temporary adjustment of status for certain aliens. INS estimated that 765,000 aliens might be eligible for permanent adjustment on the basis of continuous residence since entry prior to January 1, 1970, and that as many as five million might be eligible for temporary adjustment for a five-year period on the basis of continuous residency since January 1, 1977. *Hearings on S.2252, supra* note 50, at 147.

workers and the migrant family should have a degree of social and economic security, as well as tax obligations. Immigrant status might be accorded to temporary workers and their families after approximately three years of work in the United States.

Concerning labor law enforcement, major emphasis should be focused on improving the wages, hours, and working conditions of illegal migrants and on affirming their right to organize. The focus on employer sanctions that might lead to the discrimination against Americans who seem "foreign" should be replaced by labor law enforcement, full employment strategy, and a temporary worker program. Finally, as part of the long-range solution to this problem, cooperation between the United States and Mexico should be increased. Joint United States-Mexican programs should be formulated to finance the long-range economic development of Mexico, providing incentives for capital investment in agriculture and labor intensive industries in Mexico. Similar programs should be explored with other "sending" nations.

Admission of Refugees

Closely linked to its foreign policy considerations, the United States has traditionally aspired to a leadership role in the treatment of refugees.¹¹⁵ Since World War II, the United States has admitted more than 2,000,000 refugees from around the world,¹¹⁶ including 800,000 since 1965. Most refugees have been paroled into the country outside of any numerical limitation.¹¹⁷ Foreign policy considerations tempered by domestic concerns dictate refugee policy. Since the end of our participation in the Vietnam conflict in 1975, the United States has been viewed internationally as having primary responsibility for Indochinese resettlement programs. Consistent with our immigration policy and international obligations, preference for entry is given to those Vietnamese refugees who 1) have immediate relatives residing in the United States, 2) had worked for the United States government during the war, or 3) would incur high personal risk if they remained in Vietnam because of their previous involvement with the Vietnamese or United States governments. Refugees who do

115. SENATE COMM. ON FOREIGN RELATIONS, UNITED STATES COMM. FOR REFUGEES, WORLD REPORT NO. 2 (1970).

116. [1976] INS ANN. REP. 52.

117. INTERAGENCY TASK FORCE ON IMMIGRATION POLICY, U.S. DEPT'S OF JUSTICE, LABOR, AND STATE, STAFF REPORT 10 (1979).

not qualify under these categories are less likely to be admitted to the United States. Humanitarian concern for Vietnamese refugees escaping in boats has led to the increased admission of Indochinese refugees, and the above criteria continue to be weighed in the process.¹¹⁸

During the past four decades, the admission of large groups of refugees to the United States has been characterized by the absence of any permanent legislation providing for the selection, transportation, and resettlement of refugees in the United States.

United States law has three separate provisions setting forth refugee standards.¹¹⁹ According to the restrictive definition provided by the amendments of October, 1965 and the Immigration and Nationality Act of 1952,¹²⁰ two major types of refugees eligible for entry under the seventh preference are recognized: those who have fled from communist or communist-dominated countries and those who have been uprooted as a result of conflicts in the general area of the Middle East. Upon a specific finding by the Executive, persons displaced by a natural calamity may also qualify.¹²¹ The second definition of a refugee states that persons may not be deported to a country where "the alien would be subject to persecution on account of race, religion or political opinion" for that pe-

118. *Id.*

119. See generally Fragomen, *The Refugee: A Problem of Definition*, 3 CASE W. RES. J. INT'L L. 45 (1970).

120. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, as amended by Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 912.

121. Immigration and Nationality Act § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976). This section of the Act provides that a certain number of immigrant visas shall be allocated for

aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode.

Subparagraph (7) further defines "general area of the Middle East" as the "area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south . . ."

Conditional entry status is accorded to the refugee. Under the proviso to § 1153(a)(7), after a period of two years in the United States, a conditional entrant may apply to have his status adjusted to that of an alien lawfully admitted for permanent residence. For the permanent resident alien who does not qualify under any accelerated naturalization provision, five years of permanent resident status is necessary preceding an application for citizenship. 8 U.S.C. § 1427(a) (1976). See generally 8 U.S.C. §§ 1401-1489 (1976).

riod during which persecution would result.¹²² This second provision stays deportation of refugees, whereas the first provision permits the alien to enter the United States. A third provision grants the Attorney General discretionary power to "parole into the United States temporarily under such conditions as he may prescribe in emergencies or for reasons deemed strictly in the public interest any alien applying for admission to the United States. . . ." ¹²³ The present law allocates 17,400 visas for the admission of refugees worldwide.¹²⁴ A worldwide ceiling of 290,000 annual admissions has replaced the two hemispheric ceiling system established by the 1965 Act.¹²⁵ However, the restrictive refugee definition stated above remains unchanged. Those accepted under our refugee laws are granted conditional entry.

The authority of the Attorney General to parole in certain aliens in response to international emergency or public interest has been invoked to permit the entry of hundreds of thousands of refugees into the United States.¹²⁶ The inadequacy of the present law has been evidenced in the use of the parole provision for the mass admission of refugees, although Congress originally intended that such authority be invoked to authorize individual admissions in extraordinary circumstances. As a result of the numerical and definitional limitations on the seventh preference category, Attorneys General have in the past twenty years paroled approximately 975,000 persons into the United States: 30,000 Hungarians, 730,000 Cubans, 1,000 Chileans and Argentinians, 8,000 Ugandan Asians, and 11,500 Soviet Jews.¹²⁷ Moreover, since

122. Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1976). Pursuant to § 1253(h), the alien is eligible after two years of status in the United States to apply for a visa under the proviso to § 1153(a)(7). See note 94 *supra*.

Section 1253(h) authorizes the Attorney General of the United States to withhold the deportation of an alien "to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." 8 U.S.C. § 1253(h) (1976).

123. Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976). Although parole does not constitute admission for permanent residence, under certain circumstances aliens paroled into the United States pursuant to this provision may be eligible after a two-year period to apply for permanent resident status under the proviso to § 1153(a)(7).

124. *Id.* § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976).

125. *Id.* § 201(a), 8 U.S.C. § 1151(a) (1976), as amended by Act of Oct. 5, 1978, Pub. L. No. 95-412 92 Stat. 907.

126. *Id.* § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976).

127. INTERAGENCY TASK FORCE ON IMMIGRATION POLICY, U.S. DEPT'S OF JUSTICE, LABOR, AND STATE, STAFF REPORT 74 (1979).

In order to allow refugees to remain in the country permanently, Congress has

the downfall of Vietnam and Cambodia in 1975, 200,000 Indochinese refugees have been brought into the United States, and additional legislation has enabled such refugees to adjust to permanent resident status.¹²⁸ Thus, by implementing the historically humanitarian refugee policy of the United States, the Attorney General occupies the tenuous position of exercising parole authority in admitting thousands of refugees while at the same time questioning his legal right to take such action. New refugee legislation constitutes the sole vehicle by which to adjust selection criteria to reflect the present world political realities.

United States involvement in the political and military affairs of other countries motivates our acceptance of some refugees. However, existing refugee legislation is highly restrictive and fragmentary and is formulated in reaction to events rather than encompassing a systematic response to the needs of people who must seek asylum in the United States; it is totally inadequate to deal with the patterns of migration of this decade and the projected future.¹²⁹ For example, the current definition of refugees discriminates against those victims of right-wing repression in the

had to follow each use of parole authority with special legislation allowing the refugees to become permanent resident aliens. The 1978 amendments to the Act provide for retroactive adjustment of status of refugees who were or will be paroled into the U.S. before Sept. 30, 1980. Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907.

128. Act of Oct. 28, 1977, Pub. L. No. 95-145, 91 Stat. 1223; Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907.

129. To demonstrate the scope and changing nature of the current refugee crisis, Senator Dick Clark, the President's Coordinator for Refugee Affairs in the Department of State, noted that

there are more than two million refugees in Africa, some fleeing racism, some civil war, some unspeakable human rights violations, and some religious persecution. These refugees generally do not face hostility in their countries of asylum, and they hope to return home eventually.

The more than 200,000 Indochinese now in camps in Southeast Asia are in a desperate situation. Most of them have limited possibilities for local resettlement because of traditional animosities, and already grave economic and population problems in their countries of first asylum. Others still in Laos, Cambodia and Vietnam will risk their lives in attempting to escape by land or sea

The Soviet Union is permitting greater numbers of Jews to emigrate, and a large portion of these is seeking entry into the United States.

Two hundred thousand Arakanese Muslims have fled from Burma to Bangladesh, and the arrangements are being made for the repatriation of those who wish to return.

There are chronic problems among Palestinian refugees.

The recently increased flow of political refugees from Cuba to the United States will add to the refugee population here and elsewhere in the hemisphere. (Under U.S. urging, the Cuban government has adopted a more liberal emigration policy permitting families to be reunified and former political prisoners to leave Cuba. In light of such recent changes, it is estimated that approximately 10,000 Cubans might seek asylum in the U.S.)

125 CONG. REC. S3,038 (daily ed. March 21, 1979) (remarks of Sen. Clark).

growing number of countries now under totalitarian rule. As a result, the United States record of aiding victims of the military government of Chile has been tragically deficient.

New legislation has been proposed in an attempt to establish a new refugee policy that will end discriminatory laws, obviate the necessity of ad hoc administrative measures, and establish a comprehensive refugee resettlement and assistance program. The Chairmen of the House and Senate Committees on the Judiciary, Congressman Rodino and Senator Kennedy, and the Chairwoman of the House Subcommittee on Immigration, Refugees and International Law, Congresswoman Holtzman, introduced legislation developed in consultation with the Secretary of State, the Attorney General, and the Secretary of the Department of Health, Education, and Welfare.¹³⁰ The legislation accomplishes four fundamental objectives. First, the proposed new definition of refugee, conforming to that of the United Nations Convention and Protocol Relating to the Status of Refugees, abolishes the current law's discriminatory treatment of refugees.¹³¹ The new definition recognizes the plight of displaced persons worldwide and accords admitted refugees the same immigration status as other immigrants.¹³² Second, the annual ceiling on regular refugee admissions is increased to 50,000, without increasing overall annual immigration levels. Third, the bill establishes a flexible procedure to meet emergency refugee situations and authorizes the President, only upon consultation with Congress, to meet refugee resettlement needs of special concern to the United States in excess of the 50,000 ceiling. Those refugees, however, are given conditional entry and may be granted permanent residence only after having physically resided in the United States for at least two years. Fourth, the proposed legislation presents a comprehensive

130. S. 643 and H.R. 2816, 96th Cong., 1st Sess. (1979). The Refugee Act of 1979 passed the Senate on September 6, 1979, by a vote of 85 to 0, as amended and it passed the House on Dec. 20, 1979.

131. The following definition is from the United Nations Convention and Protocol Relating to the Status of Refugees:

A "Convention refugee" is "any person who by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or (b) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country."

132. Hohl, *Toward a New United States Refugee Policy*, *MIGRATION TODAY*, June, 1979, at 23-24.

plan for the funding authorization of various cash assistance and social service programs to complement the resettlement activities of voluntary agencies.

In the course of public debates on this legislation, common opposition was raised concerning the termination of federally funded social service programs (English language and employment training) at the end of a two-year period. Although the proposal to end the welfare program within two years was acceptable, we recommend that the social service program be extended to three to five years. Moreover, it is our opinion that the new refugee quota of 50,000 may be of questionable effectiveness in light of past experience. However, beyond the issue of the adequacy of the proposed 50,000 maximum, it is imperative in our view that the President have the authority to admit additional unlimited numbers of refugees even after consultation with Congress. Any lesser grant of presidential power would obstruct the ability of the United States government to react expeditiously in emergency situations.

CONCLUSION

At present there is an imperative need to reform the existing immigration law of the United States. Major problems concerning illegal aliens, population growth, labor force requirements, family reunion, and refugee resettlement illustrate the current deficiencies in the immigration law. Past amendments to the Immigration and Nationality Act have largely emanated from restrictionist and reactionary perspectives that may have produced a desired short term result, but they have failed to effect long-term goals consistent with the needs of the primary interest groups affected by the United States immigration policy. So as to avoid being caught short-sighted again, there must be policy reform to balance humanitarian goals with domestic, political, socioeconomic, demographic, and foreign policy impacts. Although the issues influencing immigration policy are complex, they can be resolved only through a compromised consensus of the previously discussed interest groups who must acknowledge and act upon their interdependence.