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MAJOR ELEMENTS OF HOUSE EDUCATION & LABOR AMENDMENTS TO H.R. 1510

Hawkins -- employer sanctions and discrimination

- o replaces de-fanged Judiciary Committee employer sanctions with sanctions that are both effective and workable:
 - o eliminates first free-bite problem by deleting administrative citation,
 - o nullifies Kindness amendment exemption of employers from documentation requirement until found to violate sanctions,
 - o increases civil money penalties,
 - o eliminates Employment Service referral loophole by deleting exemption of employers who use ES agencies from documentation requirement; sanctions also more workable because Hawkins
 - o eliminates criminal penalties,
 - o speeds ALJ caseload and prevents harrassment of employers (and resulting chilling effect on hiring "foreign-looking" job applicants) by creating a Special Counsel, empowered to investigate charges of violations of sanctions and nondiscrimination, to determine if such charges are meritorious.

Miller -- H-2 and Transition Program for Agriculture

- o although these amendments redress the imbalance struck by growers in the Judiciary Committee mark-up of the H-2 and transition provisions, they are also designed to accommodate to the most critical grower interests:
 - o retains current AG final authority over H-2 admissions; codifies current DOL final authority over H-2 labor certification regulations; gives USDA a new statutory consultative role re H-2 labor cert regs for agricultural workers,
 - o compromise 9-month duration of H-2 admission, vs. Senate and Administration 8-month limit, and House Judiciary silence on this immigration control issue,
 - o codifies current H-2 labor certification criteria of availability and adverse effect on US workers, vs. weaker criteria for H-2 agricultural workers in both Senate and House Judiciary bills,
 - o mandates labor standards "at least as effective" as current DOL regs, vs. original Miller amendment, which would have codified virtually all current standards regarding housing, meals, transportation, record-keeping, etc. etc., and vs. silence of Senate and House bills on this issue,
 - o accommodates to western grower concerns re housing by explicitly providing (vs. current DOL regs) for possibility of employer securing housing, as opposed to, providing adequate and safe

housing, free of charge; vs. House Judiciary provision for housing allowance (which relieves employer of responsibility for assuring availability of housing for foreign workers or US workers who are neither local workers or commute), and silence of Senate bill on this issue,

- o creation of 15-month Commission, with mandatory balanced representation of growers, labor, researchers, to review and make specific recommendations regarding such divisive but technical issues as:
 - o labor certification criteria and whether labor certification should be a condition of H-2 admissions,
 - o whether number of H-2 workers should be limited,
 - o proper standards of proficiency and productivity for US and foreign workers,
 - o whether employers should pay FICA and FUTA taxes for H-2 agricultural workers (from which they are currently exempt),
 - o per Select Commission, how to end dependency of any industry on importation of foreign workers, etc.
- o substitute of Senate transition program for agriculture, which growers (as well as labor and Administration) prefer, because mandates no special labor standards for these foreign workers, vs. House Judiciary, which mandates H-2 standards

H-2 Workers

Section 211 of H. R. 1510 provides for a temporary worker program under the Immigration and Nationality Act. The Committee on Education and Labor requested a sequential referral of H. R. 1510, as it did its predecessor bill in the 97th Congress, principally because of concerns with this section. The bill as reported by the Committee on the Judiciary once again fails to provide necessary protections for domestic and foreign workers under this program. The Judiciary passed bill, although different in some respects than H. R. 6514, its predecessor, has not addressed the concerns raised by this Committee in the 97th Congress. It is for that reason that the Committee adopted a substitute section 211 described below.

The Subcommittee on Labor Standards has in the past year investigated the workings of the H-2 temporary worker program as it is administered by the U.S. Department of Labor. The Subcommittee held hearings in Belle Glade, Florida (and in Washington, D. C.) concerning the use of guest-workers in the sugar cane industry. This investigation has demonstrated to the Education and Labor Committee that the current structure of the program fails to meet the underlying reasons for the program's existence: to provide employers with temporary foreign workers in times of an actual labor shortage; and to maximize the employment of domestic workers prior to the importation of foreign labor. In response to this finding, the Committee's substitute section 211 rather than relying on the current structure as envisioned in its actions on H. R. 6514 in the 97th Congress establishes a Commission to recommend to the Congress how to develop a workable procedure.

The Education and Labor substitute offered by Mr. Miller of California has three major goals: to ensure that adequate labor standards are maintained for both domestic and foreign workers hired under this program; to use the time provided by the transition program to allow those directly affected by the program to assist in the development of a program which provides temporary workers in times of a real labor shortage and maximizes the employment of domestic workers; and to provide a mechanism for all parties aggrieved by violations of the program to have a fair determination of their rights.

Certification and the Commission

Under the current regulatory structure, the Department of Labor has devised a procedure that enables it to determine if there is a need for foreign labor and if the importation of the labor will adversely affect the wages and working conditions of domestic labor. The procedure provides for the filing of applications for temporary foreign agricultural workers in sufficient time to allow for the recruitment of qualified and available domestic labor. This procedure has been criticized by both employers and representatives of employees. Representatives of employers at the Subcommittee on Labor Standards' April 13, 1983 hearing referred to the program as "a dismal

failure." While an attorney representing domestic workers who believe that they have been displaced by the importation of foreign sugar cane workers stated at the Subcommittee's hearing in Belle Glade, Florida, that "this program exploits those who participate in it and denys job opportunities to domestic farmworkers."

Such criticisms, coupled with the Subcommittee's investigation of the administration of the program, have led the Committee to adopt a substitute section 211 which provides for a Commission to study and recommend to the Congress specific statutory and regulatory language to improve the workings of the agricultural portion of this program.

The Commission will be composed of 11 members -- five to be appointed by the Secretary of Labor and five by the Speaker of the House of Representatives. The remaining member will be appointed jointly by the Speaker and the Secretary. The Committee intends that by this formulation the members will adequately represent all views on the administration of the existing "H-2" program, as well as the effect of the Simpson-Mazzoli bill on employment, and will, therefore, be able to provide the Congress with the expertise necessary to solve the current problems.

Specifically, the Commission shall review and make specific recommendations with regard to:

- the standards described in section 214 (c)(2)(A) of the Immigration and Nationality Act regarding the certification of foreign temporary workers including whether or not a certification by the Department of Labor should be a prerequisite to the admission of the foreign agricultural worker(s);
- whether there should be a limit on the number of foreign workers imported in a particular time period;
- whether payments should be made by the employers of foreign workers equivalent to those otherwise imposed under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act;
- what is the proper length of any recruitment period for domestic workers;
- what is the proper length of time that an employer should be required to accept for employment domestic workers after the petitions for foreign workers have been approved;
- what are the proper standards for proficiency and productivity with regard to the qualifications of domestic and foreign labor.

With regard to the issue of productivity and proficiency, the Committee is concerned that some employers in the past have established piece rates which were artificially high and served to discriminate against domestic workers

who may not produce at the same rate as a temporary worker whose stay in the United States is based substantially on his or her productivity level. The Committee is well aware that this issue has arisen with regard to American citizens who reside in Puerto Rico and intends that the Commission specifically address this issue. The Committee notes that the thrust of the program is that domestic workers who are qualified and available should be hired prior to the admission of temporary workers and that any devices which discriminate against such domestic workers do not conform to the intent of the program.

The Committee substitute requires the Commission to report to Congress not later than 15 months after the effective date of this Act with specific legislative recommendations:

- assuring the maximum recruitment of available domestic labor and in times of a labor shortage assure employers timely access to nonimmigrant workers;
- improving the timeliness of decisions regarding the admission of foreign workers;
- removing the current economic disincentives to hiring domestic workers where temporary foreign workers have been requested, especially with regard to the payment of unemployment and social security taxes;
- improving the cooperation between all parties to end the dependence of any industry on the constant supply of temporary foreign workers.

The Commission is provided sufficient authority to operate and to carry out its review and recommendation role.

The Committee is well aware of the seemingly endless numbers of Commissions and studies which this Congress has established. It can be said that many such studies have proven of little or no value and have served merely to postpone the consideration of difficult or controversial issues. The Committee believes, notwithstanding that awareness, that the complex nature of this issue creates the need for such a response. The Committee is also aware that the Select Commission on Immigration and Refugee Policy considered the existing H-2 program. The Chairman of that Commission, The Reverend Theodore M. Hesburgh, testified before the Subcommittee on Labor Standards that the Commission had recommended that changes be made in the program to streamline the application and certification procedure but that any such changes would not result in any more than a slight expansion of the numbers of temporary workers. While that Commission considered many of the issues this Committee is now placing before the members of the new Commission, it failed to provide specific legislative language to accomplish these goals. It is this language that the Committee believes needs to be developed by the new Commission. Further, the Committee believes that it is only in light of the effect of employer sanctions and legalization as proposed by H.R. 1510 that a workable program can be established.

The Commission established by this substitute would be in existence for no more than 18 months after the effective date -- this timetable is established in order to allow the Congress sufficient time to act on its recommendations prior to the end of the agricultural transition program established by section 214 of this bill. The Commission is empowered to recommend legislation for the certification of agricultural workers only. While the Commission and the Congress are acting, the substitute provides that the existing framework for certification be maintained. During this time period, the Committee believes that the certification process should be strictly adhered to in order to protect the job opportunities of domestic workers. Should the Commission fail to recommend a procedure that the Congress can enact, the substitute provides that the existing framework for certification be preserved. This, the Committee feels, will provide added incentive for the Commission to produce a workable procedure.

Other Provisions

The Committee substitute makes the following changes in section 211 of H. R. 1510 as reported by the Committee on the Judiciary. These changes are not intended to fall within the scope of the Commission.

1. While retaining the distinction between agricultural and non-agricultural labor passed by the Committee on the Judiciary, the Education and Labor Committee substitute re-inserts in section 101(a)(15)(H)(ii) of the INA the existing statutory basis for the H-2 worker program - that temporary workers may be brought into the United States if "unemployed persons capable of performing such service of labor cannot be found in this country." The Committee believes that in order to ensure that the H-2 program remains a program that is utilized only when an actual need for alien workers can be established and to assure that the influx of temporary workers does not displace domestic workers, the Department of Labor and the Attorney General should consider the effect of the importation of temporary workers in light of the overall unemployment rate.

In addition, the Judiciary Committee granted the Department of Labor the authority to freely define the boundaries of the definition of agricultural labor or services. The Education and Labor Committee substitute restricts the definition to agricultural labor and services as defined in the Internal Revenue Code and the Fair Labor Standards Act. The definitions have proved workable and the Committee sees no justification for the expansion of that definition by regulation.

2. The Committee's substitute makes two changes with regard to the length of stay of H-2 workers. The Committee adopted a provision which is consistent with H. R. 2427 introduced by Mr. Erlenborn, the ranking minority member of the Committee. The provision restricts the stay of agricultural temporary workers to 9 months except if the Secretary of Labor has recognized in the past a situation requiring a longer period. The Secretary of Labor may grant an

extension if he or she determines that such an extension is in the public interest. The Committee is concerned that a stay of a longer period of time, except in extraordinary circumstances which are in the public interest, takes on the appearance of permanent rather than temporary employment, something the program was not designed to permit. ~~The Committee believes that~~ stays of 11 months, as allowed under the current regulations, should form the outside boundary of the time period in virtually all cases. The Committee also believes that the current practice with regard to non-agricultural workers should be maintained.

3. The Committee's substitute provides that in the case of agricultural labor an alien may under no circumstances be admitted to the United States as a nonimmigrant unless the minimum conditions described in paragraph Number 7 below have been met.

4. Under the section as reported by the Judiciary Committee the Department of Agriculture was given, for the first time, a statutory role in the certification and regulatory writing provisions of the program with respect to H-2 agricultural workers. The Department of Agriculture has traditionally had no such role in either the existing statute or regulations and the Committee believes that the addition of another Department will merely serve to slow down the certification and regulatory process unnecessarily. Therefore, the Education and Labor Committee's substitute does not provide for such a role for the Department of Agriculture other than consultation as described under point 14 of this report.

5. The Committee substitute has reinstated [in proposed section 214 (c)(2)(A)(i)(I) of the INA] the test of "qualified and available" for the certification of both agricultural and non-agricultural workers. With regard to agricultural workers the question of the appropriateness of this standard is put before the Commission as discussed above. With regard to nonagricultural workers the Education and Labor Committee provision is identical to that of the Judiciary Committee.

The Committee substitute provides that the issuance of the labor certification by the Department of Labor is a prerequisite for the admission of non-agricultural H-2 workers. The Committee amendment places such a provision with regard to agricultural workers as an issue for the Commission.

6. The Judiciary Committee provisions provide that the Secretary of Labor may require an application fee to cover the costs of processing the applications for certification. The Education and Labor Committee substitute provides [in section 214(c)(2)(A)(i) of the INA] that such costs should be recovered in the form of an application fee, and further provides that all such fees and all penalties collected pursuant to the H-2 program shall be applied to the reimbursement of the costs of processing the applications and for making determinations of violations of the program.

7. The Education and Labor Committee substitute includes [in section 214 (c)(2)(B) of the INA] a direction to the Secretary of Labor that he or she establish employment standards with regard to the employment of agricultural guestworkers and domestic workers hired under this program which are at least as effective as those currently found in regulations (20 CFR section 655.200 et seq). These standards shall guarantee the provision by employers of such items as transportation, meals, health insurance, workers' compensation or like insurance and accurate payroll records and pay stubs. With regard to housing, the Committee substitute provides that the employer secure adequate and safe housing in the proximate area of employment and offer that housing without charge to the workers. The Committee intends that by "adequate and safe" that the housing meet Federal and state health and safety standards. Further, the Committee intends by the terms "provide and secure" that the employer either have adequate and safe housing available or that he or she rent, lease, furnish or procure housing for each domestic or foreign worker hired under the certification.

8. The Committee substitute also provides [in subparagraph (C)(i) of section 214(c)(2) of the INA] that the Secretary of Labor may not issue a certification if a strike or other labor dispute is in progress at the place that the alien would be employed. The current program operates under two sets of regulations in this regard. The Committee substitute mandates that the Secretary of Labor develop new regulations. The Committee intends that the Secretary develop regulations which protect the employment of workers at the place of intended employment.

9. The Committee substitute provides [in subparagraph (C)(ii) of that same section] that the Secretary of Labor may not issue a certification if the Secretary of Labor has determined that the employer has not complied other than for technical reasons with the terms of the labor certification. This provision differs from the Judiciary Committee section by removing the two-year limitation placed on the Department for its determinations of non-compliance. The Committee believes that since such a limitation does not exist in current regulations it would only serve to hamstring enforcement efforts. The substitute also has no reference to "substantially violate a material term or condition" found in the Judiciary provision. Instead, the substitute reflects current regulations. The Committee believes that the terms used by the Judiciary Committee will likely cause the slowing down of enforcement efforts. The substitute provides that if an employer, who has failed to comply with the terms of the certification, fails to pay a penalty assessed by the Department of Labor for that violation, the employer becomes ineligible to apply for H-2 workers. Lastly, the Committee intends by the use of the terms "other than for technical reasons" that non-substantive violations which do not prejudice the rights of either domestic or foreign workers or which in no way endangers the health or safety of domestic or foreign workers should not form the basis for denial of a certification.

10. The Committee substitute provides in proposed [section 214 (c)(3)(A)(iv) of the INA] that the employer of H-2 agricultural workers must accept for employment qualified domestic workers for a period to be determined by the Secretary of Labor. Under the current regulations, the employer must accept domestic workers until 50% of the contract has lapsed. The substitute places a review of this requirement into the purview of

the Commission. In the interim, and if the Commission and the Congress fail to act, the Secretary of Labor shall have the responsibility to determine a fair period of time. The Committee believes that it would be unreasonable to turn domestic workers away from employment prior to the peak of the harvest.

11. The Committee substitute provides [in subparagraph (B) of section 214(c)(3) of the INA] that an association can act as the employer if the association is the sole employer of all of similarly employed domestic workers and aliens of all its members or users and the association demonstrates sufficient financial resources to absorb any and all liability that may occur for violations of any conditions required by the certification. If the association fails to meet the above two criteria, the filing of an application by the non-complying association does not relieve the member or user of any liability under this section. This provision is contained in H. R. 2427 offered by Mr. Erlenborn.

12. The Committee is aware of the historical lack of safeguards to protect domestic and foreign agricultural workers. Despite previous temporary worker programs which provided for worker rights, there has not been sufficient enforcement to insure compliance with labor standards and protections. The Committee heard various witnesses which testified to the lack of enforcement of existing laws for both H-2 and domestic workers. It is for these reasons that the Committee has increased the authorization for the enforcement of the provisions of section 211 and section 214, the transitional agricultural worker program, from \$10,000,000 to \$15,000,000. The additional authorization for fiscal year 1984 is provided in order that the Department of Labor will have the resources necessary to adequately enforce the labor standards provisions especially with regard to transitional workers. The Committee is concerned that without a strong regulatory presence the transition program because of its finite existence creates a potential for exploitation.

As indicated below, transitional workers will be afforded the benefits of the new Migrant and Seasonal Agricultural Workers Protection Act and the H-2 program. This Committee's recent investigations into the enforcement of the labor standards under those two programs raises serious concerns about the Department of Labor's ability to enforce such standards. This added appropriation is intended to assist in increasing the Department's ability to protect these workers. As indicated in the past, this Committee intends to continue its active oversight of the operations of the Department in this area.

13. The Committee substitute provides in a new paragraph (7) to section 214(c) of the INA, for a private right of action in district court having jurisdiction (without regard to the amount in controversy, the citizenship of the parties, or the exhaustion of alternative administrative remedies) for any person aggrieved by a violation of the H-2 provisions. The Committee intends that this provision be a backstop for the enforcement efforts of the Department of Labor. The Committee considers such a right to be especially important in light of the unknown effects of the legalization program and the unknown size of the H-2 program in the coming years. Domestic workers displaced by the importation of nonimmigrant aliens, as well as the nonimmigrant workers themselves, must have a mechanism for a fair determination of their rights.

The private right of action established by this substitute is patterned after a similar right afforded under the Fair Labor Standards Act (section 16).

That is, that the right for an aggrieved individual to bring an action shall be terminated upon the Secretary of Labor's filing of an action respecting the same violation and such appropriate relief on behalf of the workers affected by such violation under this section. The Committee substitute also includes an anti-discrimination provision patterned after a similar provision in the recently-enacted Migrant and Seasonal Agricultural Worker Protection Act.

14. Lastly, the Committee substitute [in section 211(d) of the bill] provides that the Secretary of Labor shall issue regulations implementing this section. The Committee believes that the Department of Labor, which has had de facto authority for the promulgation of regulations under the current framework, is the appropriate agency for the regulatory responsibility. The Committee notes that the provision requires the Secretary of Labor to consult with the Attorney General and the Secretary of Agriculture in the development of the regulations.

Agricultural and Transition Program

Section 214. The Committee adopted the transition program currently in the Senate version of the Immigration Reform and Control Act of 1983 (S. 529). The Senate adopted this identical provision during its favorable consideration of S. 529 on May 18, 1983.

The Committee has adopted such a program in order to allow the Commission, established under section 211, time to deliberate and to make its recommendations. Because of its short duration, the Committee has left many aspects of the administration of the program up to the Attorney General after consultation with the Secretary of Labor and the Secretary of Agriculture. However, the committee would like to note the following aspects of the program:

- transitional workers shall not be permitted to replace available domestic workers or H-2 workers. The Committee believes that any attempt by an employer to replace workers in this manner should be a basis for denial or removal from the program.

- all workers hired under this program shall be afforded the rights and benefits of all laws and regulations governing the employment of agricultural workers in the United States, including but not limited to the Migrant and Seasonal Agricultural Worker Protection Act. The Education and Labor Committee, unlike the Committee on the Judiciary, does not exempt transitional workers from coverage of that important Federal law.

- the program is designed so that only workers who have been employed in agriculture in the United States for at least 90 days since January 1, 1980, and who are employed in agriculture during the first year of the program will be eligible for employment during the second and third years.

- to be eligible to participate in the program an employer must notify the Attorney General of his or her intent to participate in the program, and provide a numerical count of the numbers of seasonal agricultural

workers employed in the preceding 12 months. The Attorney General may request of any employer who is participating in the program to provide a numerical count of the transitional workers employed and the total number of agricultural workers employed. The Committee believes that any attempt to overstate the number of workers in order to obtain a larger authorization for transition workers or the hiring by a participating employer of more transitional workers than he or she is authorized should form the basis for removal from the program.

- if a participating employer hires a temporary nonimmigrant alien under the H-2 program all similarly employed workers (domestic, transitional or non-immigrant) shall be provided all of the benefits of the H-2 program.

- agreement by an alien to be a transitional worker shall not preclude that alien from eligibility under the legalization provisions of Title III of this Act.

The Committee notes that as provided in section 211, the Secretary of Labor is authorized to take such actions as may be necessary to assure employer compliance with the terms and conditions of employment under section 211 and 214 of this Act.

The Committee also notes that this program is a temporary program. The Committee intends that at the end of the 3 year period no transitional workers shall be employed in this country.

UNLAWFUL EMPLOYMENT OF ALIENS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES

Amendment No. 1

H. R. 1510, as reported by the Judiciary Committee on May 13, 1983, establishes a system of civil and criminal penalties which are imposed on any employer who knowingly hires an illegal alien. That bill also prohibits the employment of an individual without ascertaining the eligibility of prospective employees to work in the United States by checking and verifying, as a condition for hiring:

- (1) a U. S. passport; or
- (2) a Social Security card, U. S. birth certificate, or some other proof of U. S. nationality at birth; and a federally-issued valid ID, a State-issued driver's license, a similar State-issued ID, or any other ID that the Attorney General deems reliable.

Section 274A as amended by the first amendment reported by the Education and Labor Committee, deletes a provision of H. R. 1510 which requires state employment services to review and ascertain the validity of identification documents of job referral applicants and to attest to the eligibility of such individuals to work in the United States. The amendment also makes it unlawful for an employer to discriminate against any individual with respect to hiring, recruitment or referral because of such individual's national origin or alienage, and creates an expeditious administrative adjudication process similar to that of the National Labor Relations Board through which to enforce both the employer sanctions provision of H. R. 1510 and the non-discrimination provisions of this amendment.

Employment Services

As noted, the amendment deletes the provisions in H. R. 1510 which require, or appear to require, state employment services to verify the employment eligibility of all individuals who it intends to refer for employment. It is the intent of the Committee that the employment service shall have no responsibility to either ascertain that employment applicants have the requisite verification documents or to verify that such documents are valid and the individual is eligible to work in the United States.

Administrative Enforcement System

The amendment vests the new United States Immigration Board, created under H. R. 1510, as an independent agency in the Department of Justice, with authority to adjudicate through a panel of administrative law judges, also created by H. R. 1510, charges arising under both the employer sanctions provisions and the non-discrimination provisions of this amendment. The amendment creates a Special Counsel who is appointed by the President, by and with the advice and consent of the Senate and requires the Special Counsel to investigate charges alleging violations of either the employer sanctions provisions or the non-discrimination provisions, to determine whether there is a "reasonable cause to believe the charge is true," to determine whether or not

to prosecute the charge before the Board and to prosecute such charges as it elects to pursue.

It is assumed that the Special Counsel will prosecute diligently all charges which fall within the jurisdiction of the USIB and which are filed for the purpose of seeking redress under the provisions of the Act. The Committee is particularly concerned that the Special Counsel commit, as a priority, resources adequate to ensure that vigorous and timely enforcement of all unfair immigration-related employment practice charges.

The Committee was especially concerned with the employment discrimination consequences Hispanic-Americans may suffer because of the employer sanctions provisions. Specifically, the Committee was concerned with the potential for excessive charges under subsections (a)(1) and (a)(2) which could result in the harassment of employers. This harassment could make employers hesitant to hire persons because of their linguistic and physical characteristics. In order to minimize this form of discrimination and protect employers from unfounded charges, it is the Committee's intent that any person claiming to have been "adversely affected directly" by a violation of subsection (a)(1) and (a)(2) should clearly demonstrate direct harm. In this regard, the Committee believes that the Board should consider such factors as whether the charging party: (1) has applied for employment with the employer who is the subject of such charge, (2) is qualified for such employment, (3) was denied employment, and (4) the position was subsequently filled by an unauthorized alien. Special Counsel shall have the discretion to refuse to prosecute any and all charges filed for the purpose of harassment or for any purpose not consistent with the objectives of the Act.

The above standards are not to be applied nor considered appropriate in determining standing to bring charges for an unfair immigration related employment practice. It is the Committee's intent that standing to bring unfair immigration related employment practices be liberally construed consistent with existing Title VII law.

Actions brought by the Special Counsel shall be tried before an administrative law judge who has been specially designated by the USIB as having special training in employment discrimination matters. The requirement addresses the Committee's special concern that alleged unfair immigration-related employment practices be heard and decided by judges who possess a special expertise in the area of employment discrimination law. Decisions of the administrative law judges shall be recommended orders to the Board and shall become final upon approval by the Board. The Board shall have the discretion to reject, modify or otherwise dispose of such recommended orders. The Board shall have the authority to order a party to cease and desist from unlawful activity and may seek court enforcement of its orders. In this regard, the Committee intends that the incorporation by reference of the provisions of the National Labor Relations Act relating to judicial review shall include all relevant judicial opinions interpreting the operation of those provisions.

Employer Sanctions Charges

The Committee is concerned that charges alleging violations of the provisions prohibiting the employment of illegal aliens be expeditiously prosecuted so as to avoid the accumulation of large amounts of back pay. The

Committee is also aware that many of the jobs affected by such adjudications will be of relatively short duration and prompt prosecution and determination of rights will aid the objectives of the Act.

The Committee believes that in order to avoid the possible abuses which the prohibition against hiring illegal aliens may cause, it is important that the Special Counsel have discretion to bring or not bring a charge before the Board. Any person who files a charge alleging a violation of the provisions prohibiting the hiring of illegal aliens which the Special Counsel elects not to prosecute or where he or she takes no action within 30 days may appeal such refusal or denial to the USIB. This appeal is limited and the USIB shall review the Special Prosecutor's decision solely for the purpose of determining whether or not that decision constitutes an "abuse of discretion." The Committee anticipates that only flagrant and wholly groundless decisions of the Special Counsel will result in reversal by the Board. The Committee is, of course, aware that the process provided in Section (e)(2)(B)(ii) for appeal of a decision by the Special Counsel is sui generis. Since the administrative mechanism here is different in some respects from those embodied in, e.g., the National Labor Relations Act, the Committee tailored the provisions here to the unique problem with which in this respect the bill deals, and it therefore did not treat as precedent the discretion of the General Counsel of the National Labor Relations Board as to the issuance of complaints. Board orders affirming or denying the Special Counsel's decision with respect to "abuse of discretion" appeals are not reviewable by any court.

In the event, the Special Counsel pursues the charge on its merits, a cease and desist order will issue in conjunction with a finding that a violation has occurred and the Board shall have discretion to fashion remedial relief to address the nature and the gravity of the violation. The Board decisions are appealable to the appropriate United States Court of Appeals.

Unfair Immigration-Related Employment Practice Charges

As noted above, the enforcement of provisions relating to unfair immigration-related employment practices is of paramount importance to the Committee. It is expected that the investigation and prosecution of such charges, to the extent possible, will be expedited. While the amendment provides that the Special Counsel shall investigate discrimination charges and file his complaint before the Board within 30 days from the day the charge is received, it is anticipated that the Special Counsel will make every effort to bring discrimination charges more quickly whenever possible.

Because of the importance which the Committee attaches to the possibility that widespread discrimination may occur as a result of enforcement of the employer sanction provisions of the Act, and because the Committee recognizes that the Special Prosecutor may not always have adequate resources to pursue all meritorious charges, the Committee, in the amendment, has provided individuals whose cases the Special Counsel elects not to litigate, a private right to pursue their charges before the Board for decision on the merits.

Appellate Review

The amendment permits judicial review of Board orders except a Board order relating to appeals of the Special Counsel's decision not to prosecute an alleged violation of the provisions prohibiting the employment of illegal aliens. The Committee intends that all such appeals shall be brought in accordance with the provisions of the National Labor Relations Act (29 U.S.C. 160, et seq.) as well as the case law interpreting those provisions.

Remedial Relief

The amendment prescribes no mandatory relief. Rather, it provides for a variety of discretionary relief and leaves to the Board the fashioning of remedies which address the nature and gravity of the offense found to have occurred. Where the violation is found not to have been intentional, the amendment provides that the Board may order the employer to keep and retain, hiring data, if the unlawful conduct involved the employment of illegal aliens, and applicant flow data if the violation involved an unfair immigration-related employment practice. The Board may also order an employer to hire an individual or individuals who are "adversely affected directly" by the unlawful conduct of an employer and to offer such individual or individuals back pay. ~~Back pay may not accrue from a date more than two years prior to the filing of~~ the charge and will be set off against amounts earned or "earnable with reasonable diligence."

Where a violation is found to have been intentional, the Board may, in addition, order an employer to pay civil penalties of \$2000 for each individual discriminated against or for each unauthorized alien hired in conjunction with a first offense, \$3000 per such individual if in conjunction with a second offense and \$4000 per such individual if pursuant to a determination that the employer is engaged in a pattern and practice of such violations or discrimination.

Where it is ordered that an employer keep and retain either hiring or applicant flow data, it is the Committee's intent that such data only be released and made available to the Special Counsel and only for the purpose of enforcing the provisions of this amendment relating to the hiring of illegal aliens or the provisions relating to unfair immigration-related practices or comparable employment discrimination laws such as Title VII of the Civil Rights Act of 1964, and for no other purpose.

The Committee expects and intends that the Board will make liberal and aggressive use of its power to order employers who violate the prohibition against the hiring of illegal aliens or commit unfair immigration-related employment practices to keep and retain either hiring or applicant flow data as appropriate. The Committee believes that imposition of this penalty except where clearly unwarranted, is necessary to ensure that widespread, undetected violations do not occur and to ensure that the Special Counsel is not unduly hampered in restraining continuing violations.

The amendment provides that an employer may voluntarily compile and retain hiring data in accordance with subsection (b)(274A(b)). However, if the employer employs 4 or more employees, elects not to compile and retain such data, and hires an illegal alien, that employer will be treated as having known

that the individual hired was an illegal alien. If the employer employs fewer than 4 employees, elects not to compile and retain hiring data in accordance with subsection (b), hires an illegal alien and, within two years prior to the hiring of the illegal alien, has been cited for having hired an illegal alien, then that employer will be treated as having known that the individual hired was an illegal alien. The Committee intends that this provision shall be an incentive for employers to voluntarily compile and retain the paperwork necessary for the government to effectively monitor compliance with the provisions prohibiting the employment of illegal aliens. Thus, while the presumption that the hiring of an illegal alien was a knowing hire is a rebuttable presumption, the Committee intends that the burden of rebutting that presumption shall be heavy.

Jurisdiction

Under the amendment, employers of four or more employees shall be subject to the provisions prohibiting the employment of illegal aliens. Employers of four or more and fifteen or fewer employees shall be subject to the provisions relating to unfair immigration related employment practices. The Committee stresses that it has not and does not intend to duplicate in any respect the jurisdiction of Title VII of the Civil Rights Act of 1964. In addition, the Committee does not believe that by prohibiting discrimination because of national origin and "alienage" it has either expanded the jurisdiction of Title VII or overruled the Supreme Court's ruling in Espinoza v. Farah Mfg. Co., 410 U. S. 86 (1975). In that case, the Court held that the employers refusal to hire individuals who are not citizens of the United States --i.e., aliens -- was not a violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e et seq.).

The amendment applies only to employers of fifteen or fewer employees and, as a consequence, its provisions, including the provision which prohibits discrimination based on a person's "alienage" has no impact whatsoever on Title VII's jurisdiction. Espinoza continues, in other words, to be the law with respect to discrimination involving employer within the jurisdiction of Title VII -- that is, employers who employ more than fifteen employees and meet the other jurisdictional criteria of that Act. Employers of fewer than fifteen employees fall within the jurisdiction of and, therefore, are under the provisions of this amendment which specifically permits the Board to decide cases of discrimination based on an individual's alienage. No individual working for an employer who is within the jurisdiction of Title VII gains rights under this amendment. Similarly, no employee working for an employer which is within the coverage of the non-discrimination provisions of this amendment has rights under Title VII.

The Committee notes that Espinoza articulated no Constitutional prohibition which constrains extending such protections to aliens. In the Committee's view, the prohibitions and objectives of H. R. 1510 justify the extension of the non-discrimination provisions of this amendment to aliens, since without these minimal protections, such individuals would be subject to the exacerbated discrimination which we anticipate will occur under H. R. 1510.

THE WHITE HOUSE
WASHINGTON

August 19, 1983

MEMORANDUM FOR WILLIAM P. BARR

FROM: ROGER B. PORTER *RBP*
SUBJECT: Immigration Legislation

Your memorandum on the status of the immigration legislation was excellent. I would appreciate if you would send me a copy of the Attorney General's July 27th letter to Chairman Rodino as well as any thoughts on how you expect this will play out during the fall and what the Administration should be doing beyond the July 27th letter.