The Simpson-Mazzoli Bill: An Analysis of Selected Economic Policies

Roy J. Watson Jr.
The Simpson-Mazzoli Bill: An Analysis of Selected Economic Policies

ROY J. WATSON, JR.*

The Simpson-Mazzoli bill, a comprehensive set of amendments to the present Immigration and Nationality Act, is currently before Congress. This article analyzes certain portions of the bill in terms of the economic policies underlying them, and concludes that any change in the immigration laws should be drafted in such a way as to more effectively implement these policies.

INTRODUCTION

"[O]ur present immigration law and enforcement procedures no longer serve the national interest . . . [and] immigration to the United States is out of control."1 With these and similar words of introduction, on March 17, 1982, Senator Alan K. Simpson (R-Wyo.) and Representative Romano L. Mazzoli (D-Ky.), chairmen of their respective immigration subcommittees, introduced the Immigration Reform and Control Act of 1982,2 commonly referred to as the Simpson-Mazzoli bill.

Once again, emotional backlash from angry and discontented

* Member of the Massachusetts Bar. B.A., Brandeis University, 1971; J.D., Boston College, 1973; LL.M. Candidate, Kennedy School of Government, Harvard University; member of various committees of the American Immigration Lawyers Association.

American voters is providing the impetus for yet another amendment to the Immigration and Nationality Act. Advocates assure us that it will cure the evils of past legislation, stem the unwanted tide of aliens (both legal and illegal) entering the United States, reaffirm and protect our social structure, and pave the way for a total restructuring of the immigration system, thereby strengthening our nation.

While few if any would argue that the present system is in dire need of change, there is little consensus as to what changes should be made. This article will analyze some of the issues that are highlighted in this most recent legislative proposal, and will specifically examine how these and other related changes would affect our national economy. A review of some of the failures of past and present systems will suggest policy goals that would more directly incorporate legitimate economic considerations and fashion a positive system of laws to replace the present system, which is generally negative in both its structure and implementation.

It is the obligation of our legislators to assess, and then fairly balance, the needs of various individuals and groups, and then to fashion laws that neither give excessive weight to one group nor dismiss the concerns of another with trite solutions that are no

3. This backlash has taken forms that have been something less than subtle. Consider the following excerpt from a recent article by Tim Miller:

Richard W. Day was startled recently when, as chief counsel to the Senate Judiciary Subcommittee on Immigration and Refugee Policy, he received a phone call from an irate citizen.

"Until we have the guts to shoot a couple illegal aliens at the border," the Maine resident said, "we'll never convince them we're serious about immigration reform."

"I kind of wrote him off as a crank," Day said. "And then I started opening my mail, and the third letter I opened was from a doctor who suggested the same thing. . . . That's how strong it gets around here."

Miller, Sharp Differences on Immigration Law Changes Could Doom a Bill This Year, NAT. J., Feb. 20, 1982, at 336.

4. The purpose of this analysis is not to provide a definitive critique of the proposal, but rather to use it as the focal point and framework for a discussion of various policy considerations. The goal is not necessarily to provide answers to the questions posed, but rather to provide a focus for determining which questions should be asked. It is not essential to this analysis what form the Simpson-Mazzoli bill ultimately takes. The real question is whether or not, in arriving at the final structure and wording of the bill, all of the issues and concerns relevant to the shaping of an immigration policy have been properly considered. The impact of immigration policy on all Americans (as well as millions of foreign nationals) cannot be overemphasized. It is the obligation of our legislators to assess, and then fairly balance, the needs of these various individuals and groups, and then to fashion laws that neither give excessive weight to one group's interests nor dismiss the concerns of another with facile solutions.
more appropriate or capable of providing a proper solution today than they were when they were first introduced.

In attempting to formulate a reasonable structure for immigration law, legislators must strive for an appropriate balancing of a number of complex policy issues. It would be an overwhelming task to attempt to address all of these issues; therefore this article will focus on certain economic policy issues and the effect immigration laws have on them. Even in an analysis so limited, however, no single issue or theme can be considered independently of all of the other factors. Immigration law is an integration of a multitude of complex factors, each affecting the other to a greater or lesser degree.

In any such examination, of course, attention must be given to how political issues frequently shape and direct economic policy. For example, the present administration seeks to implement economic programs designed to limit the role of the government, and to shift (as much as possible) economic responsibility to the private sector. It is here that one of the strongest arguments in favor of a restructuring of many of our present immigration policies can be found.

Immigration legislation should not restrict the growth and development of private industry, but rather assist it in strengthening its position and expanding its markets. Throughout this article, it is submitted that a streamlining of the labor certification procedures and a revision of policies relating to foreign nationals who seek entry into the United States (both temporarily and permanently) for employment should be considered. In so doing, the federal government, through its immigration policy, will be assisting in the stimulation and growth of private markets. The inevitable result of this growth will be an expansion of business, jobs, and a resulting reduction in unemployment and overall positive growth of the economy.

ANALYSIS OF THE SIMPSON-MAZZOLI BILL

Overview

One unavoidable problem of the Simpson-Mazzoli bill in its present form is that it seeks to amend the existing Act rather than replace it. Thus, any suggested change that is proposed must adopt all of the flaws and failings of the existing legislation. It seems clear that the political intent was to fashion a policy di-
rective for limited and immediate changes for which a ready consensus could be gained. The inevitable consequence of such a structure is that no matter how well designed it may be, it can never be any stronger than the foundation upon which it is built.

The bill is divided into three primary sections. The first deals with control of illegal immigration and contains provisions relating to employer sanctions and the creation of an administrative law judge system for immigration adjudication. The second deals with reforms to the present system of legal immigration and sets forth proposed revisions of the preference system for immigration and certain limited changes to several of the nonimmigrant categories. The third and final division addresses the question of the legalization (amnesty) of undocumented aliens presently in the United States.

This review focuses primarily on the issues raised in the second portion of the bill as it affects the influx of legal immigrants. The core proposal of the second part is a restructuring of the preference system, which would be divided into two parts: family reunification for those individuals who seek entry into the United States based on the application of family members who are either citizens or permanent resident aliens; and independent immigrants who do not have the requisite family relationship and seek admission into the United States principally to perform some form of skilled or unskilled labor.

An important provision in this restructuring is an amendment to section 201(a) of the Act that calls for a ceiling or “cap” to be placed on legal immigration, with a maximum of 325,000 visas being allotted to family reunification and 100,000 visas being allotted to the independent category. It should be noted that this number excludes only refugees and asylees under sections 207 and 208 of the present Act and aliens who would be granted permanent residence under the amnesty provisions of the bill.

There would be no limit placed on the number of “immediate relatives” or “special immigrant” visas. However, the number of visas issued under those headings in any given year would be deducted from the 325,000 visas available under family reunification...

5. S. 2222, supra note 2 (Title I, Control of Illegal Immigration: Part A—Employment; Part B—Enforcement and Fees; Part C—Adjudication Procedures and Asylum; Part D—Adjustment of Status).
6. Id. (Title I, Reform of Legal Immigration: Part A—Immigrants; Part B—Nonimmigrants).
7. Id. (Title III, Legislation).
8. Id. § 201(a).
for the following year.\textsuperscript{10}

\textbf{Independent Immigrants}

As noted above, section 201(a) of the Act\textsuperscript{11} would be amended to provide for a limit of 100,000 immigrant visas to be distributed to persons who fall into the newly defined independent (non-family reunification) immigrant category.\textsuperscript{12} This number would be exclusive of refugees, but the number of special immigrant visas issued in the preceding fiscal year (exclusive of those applicable to returning residents) would be deducted from the total of 100,000 visas available.\textsuperscript{13}

Proposed section 203(b) defines the five categories or preferences for the distribution of the remaining independent immigrant visa numbers. The first category would be for aliens of “exceptional ability,” the second covers “skilled workers,” the third provides for “investors,” the fourth for “unskilled workers,” and the fifth is assigned to all other “nonpreference” workers. A closer analysis of the first three categories follows.

\textbf{Aliens of Exceptional Ability}

This category would appear to parallel the present definition of third preference, “members of the professions or persons of distinguished merit and ability in the arts and sciences,”\textsuperscript{14} except that it expressly eliminates members of the professions. Although the Immigration and Nationality Act does contain a specific definition for one who is a member of the “professions” there is no definition either in the Act or in the proposed bill for “persons of exceptional merit and ability.” Various interpretations of the Act have produced inconsistent standards for this category.\textsuperscript{15}
It would seem appropriate that in proposing new legislation that purports to eliminate some of the ambiguity and confusion of past legislation that a phrase as critical as this should be expressly and specifically defined. The drafters of the bill have made clear that they do not wish to permit “unearned” entry for an individual simply because that person is defined as a professional. However, they have failed to make clear who it is they do wish to admit.

Under the present standard, an individual whose profession is specifically listed under section 101(a)(32) of the Immigration and Nationality Act\textsuperscript{16} would automatically qualify under third preference.\textsuperscript{17} Additionally, those individuals who have the equivalent (in most cases) of a bachelor’s degree within a particular field may generally also qualify as professionals. However, the exceptional merit and ability standard is an imposing one that requires some form of recognition (undefined) of the petitioner both in this country and in at least one other foreign country. Once again, there is a failure to recognize the need that presently exists in this country for qualified professionals, and the resulting benefit to the labor market that is derived when private industry fills a particular job with a qualified professional.

Skilled Workers

The second category defined in the bill would provide visas to “skilled” workers. This category would appear to accept all of the individuals who would have previously qualified under the old third preference (but not under the new definition for first prefer-

and this has been implemented by the Service. Generally, persons seeking to qualify as professionals must have the equivalent of “at least a baccalaureate level of special knowledge . . . .” Matter of Shin, 11 L & N. Dec. 686, 688 (1966).

However, as noted in Shin, “the mere acquisition of a degree does not, of itself, qualify a person as a member of a ‘profession.’” Id. The more difficult question raised is who qualifies under the second part of section 203(a)(3) as having “exceptional ability in the arts and sciences.” Because of the absence of any clear definition of this phrase, each decision must be made on a case-by-case basis, often with unusual results. See Matter of Pan American World Airways, Inc., 7 L & N. Dec. 634 (1957) (held a flight stewardess qualified); Matter of Tagawa, 13 L & N. Dec. 13 (1967) (held a puppeteer qualified). The general standard that has emerged, however, calls for a qualifying individual to possess exceptional ability and accomplishment in a chosen field of endeavor, with an eminent stature and reputation recognized by qualified experts in that field. Matter of Kim, 12 L & N. Dec. 758 (1967); see also 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.27(d) (rev. ed. 1982).

\textsuperscript{16} “The term ‘profession’ shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” Immigration and Nationality Act § 101(a)(32), 8 U.S.C. § 1101(a)(32) (1970).

\textsuperscript{17} See supra note 10.
ence) as well as roughly half of the individuals who presently receive visas under the sixth preference of skilled and unskilled workers. This category should greatly benefit individuals who are business managers or executives who do not now qualify for visas under third preference and who must wait behind the present existing backlog (approximately two years) for sixth preference.18

An economic policy of regulating “exceptional” and “skilled” aliens

At first glance it would appear that these proposed amendments regarding “highly skilled” and “skilled” aliens recognize the party line of the present administration,19 that is, what is good for American business is good for America. In truth, however, this section of the Simpson-Mazzoli bill is a dangerous “band-aid” provision that would wreak havoc upon our present system.20 Instead of recognizing the pressing demand for highly skilled and trained workers in specific fields of science and technology,21 positions that could be filled by potential immigrants, the present proposal once again adopts a “negative” approach to classification.

To help in understanding the full impact of these provisions, some consideration should be given to certain policy goals that form the basis of the present Act. The 1965 amendments to the Immigration and Nationality Act22 eliminated the previous na-

18. One major benefit provided by this category would be the elimination of uncertainty for these individuals, who frequently must file two separate applications in both third and sixth preference because they may believe they qualify for third preference, but cannot afford the risk of filing only in that category. There would be no doubt that they would be classified as skilled workers under the new regulation even if they would not qualify as professionals under the old. The INS Operations Instructions allow an applicant to petition for both preferences simultaneously by filing separate visa petitions for each preference. IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEP'T OF JUSTICE, OPERATIONS INSTRUCTIONS, REGULATIONS AND INTERPRETATIONS § 204.4(b)(1) (1981).

19. The present administration has espoused a vociferous “party-line” of minimizing the role of government in areas where private industry could otherwise participate. A frequent response to the record-high unemployment has been to call upon private industry to step in (through a number of programs aimed at “stimulating growth” in the private sector) and begin to employ persons left jobless from the extensive cutbacks in a variety of federal programs.

20. See infra notes 23-26 and accompanying text.


tional quota system, and created a system whose avowed goal
was to assist in the reunification of families and family units as
well as to provide an intelligent and systematic basis for the entry
of foreign labor, both skilled and unskilled, that was deemed vital
and necessary to the growth of the United States. However,
much of the legislation enacted in the field of immigration, al-
though reasonable and acceptable in a theoretical form, has to-
tally failed to accomplish the stated goals and purposes that were
used as justification for the original enactment.

Many of these laws have been enacted with the stated goal of
protecting the American labor market by preventing an influx of
foreign workers into job areas for which there is an overabun-
dance of qualified United States workers. However, little or no
attention is given to the fact that the entry of a single skilled
worker into a job market desirous and needing of that individual’s
skills creates a ripple effect of increased production and growth,
which provides ever-increasing numbers of jobs in the various
service and support positions and has both immediate and long-
term benefits on semi-skilled and unskilled labor markets.

It is necessary to recognize that immigrants and nonimmigrants
alike represent a tremendous potential resource, one which could
be a valuable asset to the growth of our presently faltering econ-
omy. The key is in identifying the present needs of the nation,
and then fashioning an immigration policy that will effectively im-
plement these goals both in the short and long term.

163 (1952), with numerous and extensive amendments, is the foundation of our im-
migration system today.

23. A striking feature of this legislation was the creation of ceilings or quota
systems for the Eastern and Western Hemispheres. Our present-day quota sys-
tem reflects almost exactly the original quotas and categories created in the Act,
but the distinctions drawn between Eastern and Western Hemispheres have been

24. See generally Fragomen & Del Rey, The Immigration Selection System: A
Proposal for Reform, 17 SAN DIEGO L. REV. 1 (1979); Bernsen, INS: An Agency
With Too Many Problems, 58 INTERPRETER RELEASES 335 (1981).

25. “The history of the labor certification requirement in the law dates back to
the Contract Labor Act of 1885. [Act of Feb. 26, 1885, ch. 164, 23 Stat. 332.] This law
was designed for the purpose of protecting American workers from the potentially
unfair competition of imported foreign laborers and remained a principal part of
our immigration law until 1952.” Wildes, The Department of Labor: Toward A

26. Profiles of the immigrants who enter the United States through the third
and sixth preference categories show that an extraordinarily high percentage (ap-
proximately three-quarters) of the individuals qualify as professionals, with craft
and service workers making up most of the remaining balance, followed by manag-
Rep.
Investors

The third category, investors,27 would be available to individuals willing to commit (1) a minimum of $250,000, (2) in a new enterprise, (3) that creates at least ten jobs, (4) in a predesignated area of high unemployment.28 This category is the only group within the independent visa framework that has a separate cap (ten percent) or limit to the total number of visas that may be issued. Here again, politicians writing the laws are probably reluctant to admit openly that which they believe will be politically unpalatable. It seems clear that it is in the interest of the United States to admit legitimate foreign investors willing to invest in an enterprise that helps the growth and development of the United States. However, politicians are probably afraid that they will be accused of allowing the rich to “buy” their way into the United States; therefore, these inordinate and unreasonable restrictions are imposed on persons seeking immigration into the United States under investor status. Legitimate investors are unlikely to risk a quarter of a million dollars in a new enterprise that employs a minimum of ten United States citizens, especially in an area previously designated as a high-risk area. There is, however, no doubt that there are individuals who are financially strong enough to buy their way into the United States for a quarter of a million dollars. But because of the unrealistic restrictions proposed, it is most unlikely that these will be legitimate investors. Thus, the statute as it is written guarantees that admission into the United States in this category can be nothing other than the same “payoff” that this status has previously been characterized as being.

The failure here is to recognize and admit that the United

27. The present investor status regulations, 8 C.F.R. § 212.8(b)(4) (1982) and 22 C.F.R. § 22.91(a)(14)(ii)(d) (1982), provides a waiver for one coming to engage in an enterprise in which “he has invested, or is actively in the process of investing, capital totaling at least $40,000 in an enterprise in the United States of which he will be a principal manager, and that the enterprise will employ a person or persons in the United States . . . [who are] United States citizens or lawfully admitted for permanent [sic] residence, exclusive of the alien, his spouse and children.” However, visas for this category come from those allotted for the “non-preference” category, § 203(a)(7), 8 U.S.C. § 1153(a)(7) (Supp. IV 1980), which is so hopelessly oversubscribed at this point that realistically it cannot be considered open unless it is amended by Congress, or otherwise receives a separate visa allocation.

28. S. 2222, supra note 2, § 202. The Senate-passed version of the bill reduces the requirement of hiring ten “eligible individuals” to four. Id. § 202(b)(3).
States can have business investment as a legitimate policy consideration. Politicians therefore prefer to impose restrictions that can be offered to the general public as palliatives in order to apologize for the reality, rather than admit it and defend it on its own merits.

**Labor Certification**

The process of labor certification in its present form is certainly the most baffling, convoluted and complex system of regulations in existence today. This distinction is achieved by the Department of Labor as it attempts to carry out the single mandate of determining the availability of United States workers as a precondition for entry into the United States by applicants petitioning solely on employment. It has been estimated, however, that since 1965, the percentage of aliens who actually enter the labor market by way of the labor certification process accounts for no more than approximately twelve percent of all aliens who enter the work force. The balance comes from refugees, special immigrants, and persons entering the United States based on family relationships. All of these categories are totally exempt from any labor restriction, and contain no prohibition or limitation on entry into the labor market.

The United States now finds itself locked in desperate competition with other nations whose industrial growth threatens to overshadow and even surpass that of our own. Now, more than at any other time in our history, private enterprise seeks the cooperation of government in assisting positive growth rather than needlessly restricting individuals who could provide us with a potential benefit.

The changes proposed under the Simpson-Mazzoli bill are frightening, not only for the effect of the changes themselves, but also for the insight they provide into how little knowledge the architects of new immigration regulations appear to have. The proponents of this bill, in a brief (two-page) section of the proposal,

---

29. See Wildes, supra note 25.
32. Wildes, supra note 25, at 358.
36. S. 2222, supra note 2, § 203.
advance radical changes to a complex system without providing any guidance as to how the changes are to be implemented. This can also be seen as an indication of the disdain the drafters have for fashioning positive policy changes to aid rather than restrict private business.

Section 203 of the bill proposes an amendment to section 212(a)(14) of the Act that would require a finding that a sufficient number of United States workers could not be trained within a "reasonable period of time." In arriving at this finding, "[t]he Secretary of Labor may use labor market information without reference to the specific job opportunity for which the certification is requested." This appears to allow (although not require) determinations to be made on the basis of nationwide job market data rather than on the individual case-by-case basis presently in effect.

This language appears to urge the Secretary of Labor to totally dispense with individual labor certifications in favor of blanket certification for various job categories. This authority presently exists, but is very limited in its application. Many have urged the use of such blanket certification in order to streamline the processing of applications where an unquestioned labor shortage exists. However, these requests have not been acted upon, requiring each legitimate applicant to go through the expense and delay of substantiating the obvious as well as suffering through needless processing delays inherent in all applications.

The very real fear is that this mandate will encourage the Secretary of Labor to abolish case-by-case petitions entirely, and establish only limited job categories that have been blanket certified. The danger in this method would be in a rigid and restrictive application of the established standards to deny otherwise qualified individuals from filling a demonstrated need in the labor market. It is precisely this overzealous adherence to minutiae that has made the labor certification process the travesty that it has become today.

Additionally, the use of national job market information in ruling on availability, rather than limiting the scope to local availa-

37. Id.
38. Id.
39. Id.
40. 20 C.F.R. § 656.10 (1982).
41. See Wildes, supra note 25.
bility, requires no detailed analysis to illustrate its patent absurdity. Rather than approaching the certification process positively with a preconceived intent of helping petitioners to fill legitimate labor needs, the Department of Labor will be authorized to deny a qualified applicant in Boston, because there appears to be a qualified worker in the Houston district. Under the proposed law, it would be irrelevant to the finding that the applicant in Houston is unwilling or unable to relocate! It would be sufficient that he or she exists in order to provide the basis for a denial.

Evidence of the arbitrary and capricious application of inappropriate standards to otherwise qualified applicants by the Department of Labor is extensive. When one is reminded that the labor certification process accounts for only twelve percent of the total number of foreign nationals who ultimately enter the American work force, serious and legitimate questions are raised as to the efficacy of this process.

Another change called for in the proposal would require a finding that “sufficient U.S. workers could not be trained within a reasonable time.” This vague and ambiguous requirement is typical of the poor construction (to say nothing of unworkable concepts) that plague immigration law. No effort is made to provide guidance as to what a “reasonable time” is or what it should be measured by, and this amendment appears to require one more review to be made following a determination that there are not sufficient workers for a given job.

Training times for jobs vary widely, and it is impossible to determine how this standard should be applied; one occupation may require only a matter of days or weeks, while another may need years. In the case of the latter, would it be appropriate to deny certification because qualified applicants are entering college to begin training for a professional position? The key here is not to criticize the standard, but rather those drafters of immigration law.

43. Fragomen & Del Rey, supra note 24, at 19-25.
44. See supra note 36.
45. Many of the problems discussed by Bernsen, supra note 24, and others who deal with the Immigration Service have long been recognized by the Service. Then INS Acting Commissioner Doris M. Meissner had agreed that the Service must make changes in past practices to cope with the workload. The Great Immigration Nightmare, U.S. News & World Rep., June 22, 1981, at 27-32. The present Commissioner, Allan C. Nelson, has repeatedly affirmed his commitment to streamlining the cumbersome and impractical methods employed by the INS in the past. A major step has been the implementation of the “up front adjudication” program in INS offices across the country. This procedure calls for an on-the-spot review and processing of certain “simple” petitions which in the past required months of delay for a decision.
legislation who would propose something that would have such a staggering impact upon an already overburdened process without thinking through the consequence of the proposal. Until such time as this limitation could have been adequately defined, it should not have been included.46

Nonimmigrant Students

Section 212(a)47 of the new bill would amend section 212(e)48 of

46. This type of drafting is stereotypical of the problems that plague this area of law. Legislators seek to accomplish what they in good faith believe to be a reasonable goal: hire a United States worker over an intending immigrant of the United States unless that immigrant can be trained for the position within a "reasonable" time. The difficulty arises in trying to transfer this vague and imprecise concept into the sharp clear language a statute requires. This is especially true when one is amending existing legislation that carries with it the weight of prior cases and prior interpretations. Without debating the efficacy of the addition, this is akin to adding to a building, while making only cursory efforts to determine how the addition will fit onto the existing structure, and whether or not the foundation can support the addition.

47. S. 2222, supra note 2, § 212(a).
48. Section 212(e), 8 U.S.C. § 1182(e) (1976), of the Immigration and Nationality Act provides:

No person admitted under section 101(a)(15)(J) or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Secretary of State pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: And provided further, That, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Secre-
the present Act to include nonimmigrant (F-1 and M-1)\textsuperscript{49} students in the same category as exchange (J-1)\textsuperscript{50} visitors for purposes of prohibiting their adjustment of status unless and until the individual has resided two years in his or her country prior to being granted permanent residence status.

In the first instance, a major impact of this change will be to deprive United States businesses of technical and scientific personnel. A requirement that would send a skilled, talented, hardworking and creative individual out of this country (often to a less scientifically advanced environment) for a period of two years would in all likelihood cripple that person's professional growth and development. Even if the individual desired to return to the United States following the two-year residency, they would likely have fallen so far behind in terms of their degree of knowledge and professionalism within their field that they would be irreparably harmed and prevented from reentering the labor field in any efficient or useful manner.

The requirement that this bill attempts to impose is essentially that which is imposed on the exchange student or “J” category.\textsuperscript{51} However, the policy considerations between the two categories are radically dissimilar and the “logic” has no rational justification. In many cases, exchange students come here at the request of and/or at the expense of their own governments.\textsuperscript{52} The expectation of the home country is that the individual will derive educational benefits by attending schools in the United States and return to their native countries to share the knowledge and skills that they have learned. This requirement was inserted in the regulations after foreign governments accused the United States of engaging in a “brain drain” of their top students by enticing them to remain in the United States after the completion of their studies.\textsuperscript{53} No such rationale of governmental contribution exists for the F-1 or M-1 students.

It should also be pointed out that the two-year residency requirement applied to exchange visitors is much milder than the
proposed ban on students. As written, the two-year residency requirement is not applied unilaterally against all categories of exchange visitors. In simple terms, not all categories of the "J" program carry the two-year residency requirement. In addition, the "J" program establishes a "jobs list" whereby the various countries list specific occupations for which they require the return of their nationals. Thus, if a particular area of expertise is not listed on the jobs list, there will be no obligation for a student to return to his country of origin.

Further, if a student is in a "J" program which subjects him to the two-year residency requirement, and the student's country of national origin does require his return, then the student has the option of applying to his own government for a waiver of the residency requirement. Although the accessibility of a waiver varies greatly with the particular field of study and the country in question, at least this option is available to an individual subject to the residency requirement. Finally, in the event that the student is unable to secure a waiver upon petition to his own government, the statute provides that the individual may apply for a special hardship waiver, notwithstanding any other requirements or obligations that may exist. Although such waivers are difficult to obtain, at least the procedure does exist.

The two-year residency requirement proposed in the bill makes no such distinction between categories of students. It has no provision for waiver based on area of expertise. It has no provision for application to country of national origin to determine whether or not the country is concerned with whether or not the individual returns. And finally, there is no vehicle within the present regulations for hardship cases to be addressed.

It is naive to assume that the imposition of such an overly broad restriction will not generate an abundance of claims for hardship that will only further clog an already overburdened court system, and no legitimate or rational goal will be accomplished. It is entirely within the provisions of the United States Immigration and Nationality Act for a foreign student to enter the United States, complete a course of education, and thereafter legitimately seek and obtain authorized employment here in the

---

54. 2 C. GORDON & H. ROSENFIELD, supra note 15, § 6.8(g).
55. Id. §§ 10.9(g)(3), 6.8(g).
56. Id. § 6.8(g).
57. Id. § 6.8(h).
United States. The result will be confusion and delay rather than efficiency and an unforgivable loss to the American economy of skilled and qualified individuals who have been trained and educated in United States schools.

Yet another sanction that seems unlikely to achieve any positive goal while guaranteeing unnecessary work and delay is that found in section 131(a) of the bill. It would amend section 245(c)(2) of the Act to preclude adjustment to anyone who “has failed to maintain continuously a legal status since entry into the United States.” At first, this change seems consistent with a “get tough” policy and stricter enforcement, but closer examination illustrates that this is again an immigration policy advanced by people unfamiliar with the practical application of the Act.

This particular sanction is similar in concept to the present prohibition to adjustment of status found in section 245(c)(2) of the Act that applies to any individual who accepts unauthorized employment. (An important distinction is that under section 245(c)(2), the prohibition does not apply to someone who is married to a United States citizen.) Note, however, that under section 245(c)(2) the penalty arises only after the individual has engaged in an affirmative action, which, realistically speaking, every individual entering the United States knows to be a prohibited act.

In the present bill, this (in some cases) exceedingly harsh sanction would be imposed without any affirmative action on the part of the alien. In fact, the sanction may be imposed in spite of the alien’s best efforts to maintain his or her status. Many individuals routinely find themselves transitorily “out” of status because of the failure on the part of the Service to handle in a reasonably timely manner a routine approvable application. Once again, we see a provision with no guidelines or cures that appears logical on its face, but reflects no understanding of how the system works. The real problem is poor enforcement of existing regulations. Better methods of implementing existing regulations, rather than irrational and excessively harsh penalties, provide the proper solution.

This proposed sanction would be imposed against all students,
except immediate relatives of United States citizens, regardless of their date of entry. Upon passage, it would result in denying adjustment of status (receiving permanent resident status while physically remaining in the United States) to otherwise eligible nonimmigrants who may already have immigrant visas immediately available. There is no question that this would ease the present workload of the Immigration Service, but it would dramatically shift this burden over to the State Department's foreign consuls, who would then be obligated to process these applications.

In addition to the added cost of transportation back to their foreign country, immigrant petitioners will surely face lengthy delays because of a major increase in consular workload. Implementation of a concept that wreaks such havoc upon the system as this should have some compelling purpose or goal that justifies the hardship it will create. It is difficult to see any logic or reason behind this rule that can justify the hardship to the petitioner, the beneficiary, and the government.

**H-2 Analysis**

The Simpson-Mazzoli bill contains no provisions for temporary guest workers, as had been proposed in title VI of an amendment package previously prepared by the Reagan administration. The only section relating to temporary workers is contained in section 211 of the bill, which would amend sections 101(a)(15)(H)(ii) and 214 of the Act to facilitate entry of qualified laborers. The critical change to be noted in the program, for economic policy purposes, is a shortening of the application time with a provision that provides for an automatic approval of an application in those circumstances where the Service fails to make a decision within the specified time limit. This concept of automatic approval has been urged by many as a means of compelling the Department of Labor (and the Service) to make a decision, in order to prevent the interminable and unforgivable delays that legitimate applicants must now accept under the threat of severe penalties and

---

62. S. 2222, supra note 2, § 211.
possible deportation should the applicant do anything other than wait.

These delays are defended on the basis of their need to prevent fraud. However, once again, we observe the application of negative restrictions rather than an emphasis on positive considerations. Legitimate applicants whose qualified services are in short supply (and high demand) should not be expected to wait the many months presently required for each stage of the application process.

An example of how delays in processing an application would impose severe hardship can be found in the situation of a typical H-2 laborer who is coming in for the very limited purpose of harvesting a particular crop. If the Department of Labor and/or the Service delays in adjudicating this petition, literally hundreds of thousands of dollars worth of farm produce may rot in the fields. The issue here is not one of fraud nor that of unqualified workers. The crop is verifiable and the qualifications are minimal. The job offer is legitimate and the timing is critical. Recognition of the need for speedy adjudication of legitimate petitions should become a prime directive of immigration policy.

Other proposed changes to the nonimmigrant "labor" sections presently under active consideration are modifications to section 101(a)(15)(L) of the Act. There have been extensive discussions on a restructuring of the "L" category to facilitate the transfer of international personnel. This recognizes the legitimate business interest of established multinational corporations in having their own skilled, trained, and trusted foreign personnel enter the United States for extended periods of time in order to accomplish legitimate business goals.

The major provisional change that has been discussed and proposed would call for a "profiling" of specific companies to provide for the equivalent of a blanket certification for individuals who are sponsored by the preexamined companies. This procedure would call for an individual petitioner to undergo a thorough examination by the Service to obtain precertification. This would then obviate the need for these particular corporations to prove their existence or the existence of their business activities for each and every petition that is filed. Included as a part of these

---

65. Both the present and proposed sections require that the Department of Labor make a decision of need prior to action by the INS. The intent of this proposed legislation is to "streamline" what is recognized as an unnecessarily and damagingly slow procedure.


67. This proposal is currently an amendment to S. 2222, supra note 2.
provisions would be an opportunity for the particular corporations to demonstrate an ongoing need for workers in particular job categories. Thereafter, they would be required simply to demonstrate that the individual beneficiary qualifies as someone who would fulfill this previously demonstrated need. In effect, what the Service would accomplish with this program would be a streamlining of a process that now seems unnecessarily burdensome. This would benefit the Service in cutting down their already staggering backlog, as well as meet the legitimate business needs of the corporations in not imposing the inordinate delays occasioned by the Service’s backlog.

CONCLUSION

The process of regulating immigrant and nonimmigrant travel is a prodigious undertaking, and requires detailed consideration of many complex variables. In seeking to carry out a given directive, it is necessary to determine what impact any regulation will have on the system as a whole. The “closed” structure of the system dictates an interrelationship that requires a familiarity with all aspects of the system in order to adequately assess the impact any one change may have. Past history would suggest that inexperienced policymakers frequently fail to consider all of the implications of a given policy change.

It is imperative that a comprehensive framework for policy goals be studied, and thereafter implemented to create a system of immigration laws that will contribute positively to shaping the growth and development of the United States. The existing structure of immigration laws has been badly crippled through years of fragmentary “special interest” legislation. It is disconcerting to professionals within the field (both public and private sector alike) that the Simpson-Mazzoli bill, heralded as an effort to correct prior inconsistencies by formulating a comprehensive framework of law, falls directly into the same pattern of reactionary response to special interest groups.

The reallocation of visas, with the overwhelming majority going to family reunification, unquestionably merely follows prior law. Although family reunification has a long-established history in our immigration laws, few if any other industrialized countries admit residents in this category as freely as does the United States. Arguments restricting the entry of foreign nationals com-
ing to the United States for employment *entirely* overlook how many people enter the labor force by this route.

The unnecessarily rigid restrictions affect only a small number of aliens entering the work force. Politicians assuage their constituents' complaints of the threat to the American labor market by imposing further restrictions on the labor certification process, while allowing relatively easy entry to hundreds of thousands of immigrants who may then enter the work force with no restrictions.

As previously discussed, the restrictions the Simpson-Mazzoli bill seeks to impose on adjustment of status are a thoughtless and overly simplistic non-response to other issues raised. The logic that supports the imposition of a two-year residency requirement for exchange visitors is reflected in the statutory framework that regulates exchange visitors. This irrational penalty imposed against students will result in hardship to the alien, and loss of a resource to the United States. The Service either has no confidence in the finding of the Department of Labor (that a *bona fide* job offer exists for which there is a shortage of qualified United States workers) or the Service feels that there is some overriding public policy that justifies taking away the services of an otherwise qualified individual whose services are in demand in the American labor market.

It is impossible to effectively fashion a truly new policy that simply amends existing law. A total review is required that will question *all* of the assumptions that make up the foundation of the system and then build from there.

Conditions and circumstances of today have sharply altered many of the settled principles of the past. Today, legislators must recognize that an intelligent immigration policy could provide the country with a valuable asset; they should not allow past fears to control their decision-making.

Senator Simpson and Representative Mazzoli should be applauded for having the courage to take on the herculean task of amending the immigration laws. Neither individual is motivated by a special interest, but each has the foresight to realize and understand how great an impact these laws have on the country. No proposal can ever hope to satisfy all groups, and any undertaking such as this requires the resolve to take "hard" positions. As previously stated, the purpose of this article was not to criticize either the proposal or the ultimate form of the bill. Rather, it was to see the impact and interaction of the various laws, and to highlight some of the economic factors that this author feels have not always received full consideration in the past.