

APPENDIX A

IMMACT: PROVISIONS AND EFFECTS

The Immigration Act of 1990 [IMMACT] attempted to balance a number of competing interests. First, it established annual overall limits on total legal immigration, but allowed those limits to be “pierced” in response to changing levels of nuclear family applications and humanitarian admissions. Second, it created a guaranteed minimum number of visas for close family members if there are increases in the number of immediate relatives of U.S. citizens seeking entry. Third, it increased the number of persons admitted for employment reasons, with higher priority given to professionals and highly-skilled persons. Fourth, it created a diversity class of admissions for persons from nations that have not recently sent many immigrants to the United States.

IMMACT legislated a worldwide level of 675,000 family-based, employment-based, and diversity immigration admissions per year.¹ This ceiling may be pierced if immediate relative applications exceed expectations and does not include refugee, asylum, or other humanitarian admissions. The worldwide pierceable ceiling represented an increase of about 40 percent in the permitted number of admissions compared to previously legislated levels. Prior to IMMACT, immediate relatives (who entered without regard to numerical limits) averaged about 210,000 per year, and numerically-limited categories were set at 270,000. Humanitarian-based admissions were set outside of regular immigration ceilings, as they con-

¹ A transition worldwide level of 700,000 admissions was in effect during FY 1992-1994. Many admissions during the first two years were from the pre-IMMACT backlog and do not necessarily reflect the aims of the new legislation.

tinue to be under IMMACT. Most of IMMACT's legal immigration provisions went into effect in FY 1992, with the permanent diversity program beginning in FY 1995.

More specifically, IMMACT contained the following provisions affecting immigration numbers and immigrant characteristics.

Family-based admissions. IMMACT established a worldwide limit of 480,000 family-based admissions. Immediate relatives—including spouses, minor children, and parents of U.S. citizens—continue to enter without regard to numerical limits. Their actual admission numbers are subtracted from the worldwide limit to determine how many other family members (i.e., adult unmarried children of U.S. citizens, spouses and minor children of legal permanent residents, married children of U.S. citizens, and siblings of adult U.S. citizens) will be permitted to enter the following year. IMMACT set a minimum floor of 226,000 numerically-limited family immigrants. In addition, unused employment visas are transferred to the next year's family admissions.

The actual number of admission slots available and used each year varies. During the past five years, annual family admissions have been as low as 460,653 in FY 1995 and as high as 595,540 in FY 1996.² Variation can be seen in both the immediate relative and the numerically-limited categories.

² Processing problems explain some of the below average numbers for FY 1995 and above average ones for FY 1996. Higher demand for adjustment of status within the United States followed enactment of § 245(i) that permits those not in lawful status to pay a penalty to obtain their legal immigration status in the U.S. INS was not prepared for the large increase in applications, resulting in an adjustment backlog. Some of those who normally would have received their green card in FY 1995 had to wait until FY 1996. In the meantime, the large number of unused FY 1995 employment-based admissions were transferred to the family categories for FY 1996.

One goal of IMMACT was to reduce waiting times, particularly for the spouses and minor children of legal permanent residents (FB-2A Preference). Recognizing that the 2.7 million aliens who were given LPR status by the Immigration Reform and Control Act would petition for their immediate families, IMMACT provided three years of additional visas for spouses and minor children of legalized aliens. Because per-country limits sometimes create admission backlogs for affected nationalities, it also required that 75 percent of the FB-2A numbers would be exempt from per-country limits.

The family categories have attracted far more applicants than there are admission visas and, hence, large backlogs have developed. The total backlog of family applicants stood at 3.5 million at the start of FY 1997, essentially unchanged from FY 1996. About one million individuals are awaiting legal admission under FB-2A. As projected by the Commission in its 1995 report, the numbers on the FB-2A waiting list have declined slightly from the prior year.³ However, the waiting time until admission has continued to grow since IMMACT. From an already long wait of just less than two and one-half years in FY 1992, the waiting time in the backlog has continued to increase each year until, at the time of this report, it is almost four and one-half years. The priority date for admission advances little each month, meaning longer and longer waits for new applicants. Anticipation of such trends led the Commission to recommend in its 1995 report a series of changes to the numerically-limited family categories, but no congressional action was taken. The Commission

³ Much of the initial rapid increase in the spouse and children of the LPR backlog was due to IRCA legalization. Now most of those family members already have made their applications and, indeed, new applicant numbers have declined steadily since 1992. Even so, there were still 82,521 new applicants entering the backlog in 1996. In most years, about 90,000 admission slots are available for FB-2A, meaning that the waiting list will experience only modest decreases in the future.

has projected that waiting times could reach as long as ten years for applicants at the end of the waiting line.⁴

Employment-based admissions. IMMACT extensively revised the employment-based categories and numbers. The legislation emphasized the admission of high-skilled persons and added a new category for investors. IMMACT allows up to 140,000 employment-based admissions each year, up from an annual limit of 54,000 under previous statute. Covered under these numbers are the principal applicants, as well as their spouses and minor children (both referred to as beneficiaries). The numbers are distributed over several categories, generally reflecting educational and skill level. IMMACT also placed a cap of 10,000 admissions on lesser-skilled admissions.

Employment-based admissions increased significantly under IMMACT, but they have not approached the annual ceiling of 140,000 (except when the Chinese Student Protection Act of 1992 [CSPA] permitted Chinese who had entered the U.S. before Tiananmen Square to become permanent residents under the employment category). Subtracting out the onetime admissions under CSPA, skilled and unskilled employment-based admissions have gone from about 100,000 in FY 1994 to 81,000 in FY 1995 and back up to 117,000 in FY 1996. The increase in FY 1996 appears to reflect a catchup from

⁴ In principle, the recent surge in the naturalization of potential sponsors could reduce the backlog and waiting time of spouses and children of LPRs. Sponsors who have naturalized can petition for the admission of their spouses and minor children under the unlimited citizen reunification category, thus effectively moving them out of the queue. However, this process will not decrease the backlog in an expeditious fashion. Even assuming rather high rates of naturalization, the Commission projections also show that it will take at least another decade before today's backlog can be reduced to acceptable numbers. Surprisingly, early indications are that the large volume of naturalizations since 1995 have not resulted in increases of relatives of U.S. citizens in the family preference total. (DOS Bureau of Consular Affairs. 1997. *Visa Bulletin* 73:7 A7.)

administrative processing delays in the previous year. The most notable increase through this period has been in the first preference, particularly in the subcategory for executives and managers of multinational corporations.⁵ The first preference had fewer than 5,500 admissions in IMMACT's first year of implementation but now has more than 25,000 admissions.

In terms of the backlog of employment-based visas, the category of unskilled workers (EB-3B preference) remains heavily oversubscribed as of FY 1997, with nearly a seven-year wait for admission for all nations. Otherwise, only India is oversubscribed with nearly a two-year wait for admission for employment professionals with advanced degrees (EB-2) and skilled workers (EB-3A). Employment-based admissions must be closely monitored to know whether or not they reach their limit in the future and whether per-country limits impede timely entry of the highly-specialized workers who are genuinely needed by U.S. business.

Diversity admissions. The diversity immigrant provisions in IMMACT seek to increase national diversity in the immigrant population by widening access for immigrants from underrepresented countries whose citizens have neither strong family nor job ties to the United States. The permanent program began in October 1994. It provides 55,000 admission slots per year to nationals of countries that have sent fewer than 50,000 legal immigrants to this country over the previous five years. Each applicant must have a high school education or its equivalent or two years of work experience in an occupation requiring at least two years of training or experience. Persons eligible to enter are chosen by lottery. In FY 1996, some eight million applications were received by the Department of State.

⁵ Multinational corporations include U.S.-based companies with overseas operations and large and small foreign businesses that establish U.S. offices, subsidiaries, or affiliates.

About 40,000 diversity immigrants entered in FY 1995 and 58,000 in FY 1996. As with other admission categories, the FY 1995 numbers are misleading because of the delays in processing adjustments of status. Unlike other categories, however, the diversity program does not permit a waiting list of unprocessed applicants who will be interviewed the following year.

Refugee and other humanitarian admissions. Various categories of people may obtain LPR status outside of the worldwide pierceable ceiling. The largest groups are refugees admitted from overseas as part of the refugee resettlement program and asylees granted asylum domestically. After one year, refugees and asylees become eligible to adjust to LPR status. They are counted when the adjustment occurs. Other humanitarian-based admissions include Amerasians, parolees permitted to adjust status under special legislation, and individuals granted suspension of deportation. The total numbers admitted under these categories vary depending largely on the annual refugee admission levels determined through Presidential-Congressional consultation. All humanitarian admissions reached a high in FY 1994 of 160,000 and dropped modestly to 123,000 and 138,000 in FYs 1995 and 1996, respectively.

Future trends. As indicated, the year-to-year admissions under IMMACT have followed an up-and-down course. Future trends are difficult to project. A number of factors may increase future admission levels. Given the pace with which immigrants are naturalizing, growth in the number of immediate relatives may occur as newly naturalized citizens petition for their families. While LPRs may petition for spouses and minor children, until naturalization, they may not petition for the admission of a parent. It is also unlikely that the numerically-limited family preferences will be undersubscribed in the foreseeable future. Continuing backlogs ensure that available family quotas, as well as any unused employment numbers transferred to the family categories, will be filled.

At the same time, new provisions adopted in the recent welfare reform (The Personal Responsibility and Work Opportunity Reconciliation Act of 1996) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 may dampen future admissions despite the lengthy waiting lists. In particular, IIRIRA requires all family members to be sponsored by a U.S. petitioner whose income meets at least 125 percent of the poverty level. Sponsors must sign legally-binding affidavits under which they pledge to provide any financial support needed by the new immigrants. In addition, the welfare reform legislation bars noncitizens from most income transfer programs. Some U.S. family members may be unwilling or unable to take on these new financial responsibilities for new immigrants.

APPENDIX B

STATEMENT OF COMMISSIONER WARREN R. LEIDEN

While I agree with most of the findings and recommendations of the Commission majority, there are two subjects of major recommendations on which I am moved to make separate statements—one in dissent (Legal Permanent Admissions) and one in concurrence (Structural Reform).

Legal Permanent Admissions

Legal immigration needs reform of priorities and allocations, but current levels of legal immigration are in the national interest.

Virtually all the research and analysis received by the Commission indicated that the current levels of legal immigration continue to provide a net positive benefit to America in a multitude of ways. Whatever interest is examined—economic, social, political, scientific, or cultural—the current levels of legal immigration are found to benefit each of these aspects of American life. The current levels of legal immigration that were established by the Immigration Act of 1990 have served this country well. And, after the current one-time increase that is the result of the 1986 legalization program, the overall number of legal immigrant admissions can be expected to moderate and decrease.

The current overall levels of legal immigration should be maintained until there is another opportunity for review in three to five years.

The majority recommends a one-quarter reduction in legal immigration from current levels, but not now, rather in five to eight years.

This reduction comes at the expense of thousands of American families who have been patiently waiting for legal reunification with their close relatives overseas. It is accomplished by eliminating three of four family preference categories and simply shutting the door on thousands of sons, daughters, and siblings of U.S. citizens.

There is no convincing argument for this drastic reduction in legal immigration now or years from now. Current levels of legal immigration clearly serve the national interest and can better do so if priorities and allocations are reformed.

Prioritize family-based admissions without eliminating family **reunification**. Spouses and minor children of U.S. citizens and lawful permanent residents [LPRs] and parents of U.S. citizens should receive the highest priority for immigration, but this can be accomplished without eliminating the immigrant categories for adult sons and daughters or siblings of U.S. citizens.

The family preference categories should be reordered, placing the spouses and minor children of LPRs at the top, with a “spillover” of unused visas going to the remaining family categories. This approach would ensure the quickest reduction in the shameful backlog of spouses and minor children of LPRs, without sacrificing the family unification of those sons and daughters who simply turned 21 years old. The majority, by its determination to reduce legal immigration, is forced to call for the elimination of sons and daughters preference categories. It is wholly unnecessary to impose this hardship when simple priority setting can accomplish the same end.

The backlog of spouses and children of LPRs has already begun to decrease, and there are fewer new applicants than there are individuals being accorded immigrant status under the “second preference category.” This indicates, as predicted, that the current backlogs can be reduced and that a new stable level of family immigration can be achieved once the one-time “echo” of the legalization

program has been processed. The small increases in the family preference categories for sons and daughters can be quickly made up once the top preference category is current.

Preserve employment-based immigration levels and reform labor market tests without penalizing employers.

I dissent from the majority's recommendation to reduce employment-based immigration by almost 30 percent to only 100,000 admissions per year (including spouses and children). This level was already exceeded in FY 1996, when employment based legal immigration reached 117,000. Moreover, the continued growth of the international economy promises to increase employment-based legal immigration up to at least the current level of 140,000 admissions per year. The majority's recommendation to cut annual employment based admissions down to 100,000 per year would result in immediate backlogs, which would recreate precisely the situation that the Immigration Act of 1990 was enacted to cure.

Proposals that would result in the immediate creation of new backlogs are clearly wrong. The employment-based immigration ceiling should be kept at the current level, with review in three to five years.

New requirements and procedures need to be developed to replace the labor certification process to test the *bona fides* of the petitioning employer's need and to avoid adverse effect on similar U.S. workers. I dissent from the majority's recommendation that the solution is that such employers be required to pay a "substantial fee" or tax for the privilege of sponsoring international personnel.

The "substantial fee" approach simply does not address the real issues. It substitutes a penalty on certain employers for an honest assessment of what is beneficial to the national interest and what is practical in an environment of heightened international competition. The majority wants to label the imposition of fees to be a use of

“market forces,” but it is obvious that government-imposed tariffs and fees are the complete opposite of market forces. For the government to charge a substantial, arbitrarily-set fee that will be used for purposes other than expense of adjudication and processing the application would be more like a tax, the antithesis of market forces. The majority would not only impose a penalty fee but would also require such employers to meet subjective tests of eligibility, such as whether it took “appropriate steps to recruit U.S. workers.” It is hard to imagine that this proposal would not result in a new bureaucracy sitting in judgment on employers’ compliance with new regulations and requirements.

The majority’s proposal will serve more to penalize U.S. employers who petition for international personnel than to prevent adverse effect. Unfortunately, a proper analysis of these issues and more thoughtful recommendations remain to be done.

Structural Reform

Restructure the federal immigration responsibilities to separate the adjudications function from the enforcement function but keep them in the Department of Justice along with the appeals function. The federal responsibilities to conduct immigration enforcement, both at the border and inside the U.S., and to adjudicate immigration and naturalization applications and petitions have not been managed adequately.

Although it has received substantial increases in appropriations for staff, equipment, and other resources, the enforcement function continues to suffer from a lack of strategic coordination. While important improvements have been made in enforcement at the border, coordination with interior enforcement is tactical at best and often exists in form only. Interior enforcement is led and managed by officials who have been charged with too many other responsibilities.

At most levels of the INS, inadequate attention is given to the glaring imbalances in staff and resource allocations to the sequential steps of the enforcement process so that the consequences of apprehension are neither swift nor certain. Distracted and overloaded management also increases the risk of error and misconduct by its subordinate staff. Simply put, there is not a single, focused, national chain of command to pursue an integrated national enforcement strategy, and the immigration function and the nation suffer as a result.

Similarly on the adjudications side, huge increases in fee account receipts have not resulted in proportional improvements in accuracy or efficiency. Managers at the local, regional, and national levels have not been adequately concentrated on their adjudications responsibilities in immigration and naturalization. The economies of scale and additional resources provided by the substantial caseload (and therefore revenue) increases have not been converted into improvements, rather there is the appearance that there is just too much to do.

The lack of success in enforcement and adjudications is not simply for want of trying. The immigration agencies are served by many talented and determined staff and managers. The current administration of the Immigration and Naturalization Service has made impressive strides forward on a number of fronts and its accomplishments are historic.

If, despite huge increases in funding and dedicated staff and leadership, the federal government still has not achieved adequate management of its immigration responsibilities, it is inescapable that something else must be done in order to arrive at a successful equation. Based on the information, interviews, and analyses the commission has reviewed over the past several years, it becomes an inescapable conclusion that the primary immigration functions need to be separated and restructured.

Separation of the enforcement and adjudications functions is the only solution to the current overload of responsibilities competing for attention that is obvious at every level of the INS. Separation of the functions would permit the establishment of unified, focused chains of command and operations at every level. Separation of enforcement from adjudications would allow each function to have a clear mission and to set clear goals on by which performance could be judged and accountability enforced. Separate functions would benefit greatly from the ability to gear hiring, training, promotions, and discipline to a clear mission.

At present, with its combined missions, the INS is often in internal contradiction, and its personnel, trained primarily in one mission or the other, are asked to crisscross from positions calling for one type of expertise and then the other. The most telling evidence of the value of separating the enforcement and adjudications functions comes the recent history of INS itself. The two most successful examples of INS adjudications programs, the 1986 Legalization program and the creation of an independent corps of asylum officers in 1990, are both instances where adjudications programs were consciously and deliberately kept separate and insulated from the enforcement mission of the INS. These practical, real world examples conclusively make the case for separation of enforcement from adjudications.

Of course, separation and restructuring of the immigration functions is not a panacea in and of itself. The combined missions are far from the only problem confronting the agencies, and the separation of the functions should be seen only as providing a necessary foundation from which real, lasting solutions can be hammered out to the many substantive challenges confronting the government. The substantive problems of operations and policy remain the fundamental issues of concern; structural changes provide means to better accomplishing these ends.

The benefits of restructuring can be gained with far less disruption, at less cost, and with greater chance of success if it is accomplished within the Department of Justice. The two main functions of the INS—enforcement and adjudications—should be separated into two different agencies within the Department of Justice, with separate leadership. This would also permit the insertion of a senior level office in the Department of Justice to coordinate and lead the separate functional agencies.

The creation of the Executive Office for Immigration Review [EOIR], which separated the immigration hearings and appeals function from the rest of INS in 1983, is a good model for this restructuring. Like the EOIR, each agency should have its separate mission, career paths, training, and management, while still benefiting from policy and strategic coordination at senior department level.

The Department of Justice is the proper place for the immigration enforcement function and it is the proper place for the adjudications function. The Department of Justice has long experience with and is the preeminent repository of expertise in both the immigration enforcement and adjudications functions. The Department of Justice epitomizes the values of due process and the rule of law, which are especially important in achieving effective enforcement and fair, accurate adjudications for a well-regulated, highly-selective legal immigration system. The division of these two immigration functions, within the Department of Justice, would be far less disruptive to either responsibility at a time when both adjudications workloads and the need for enforcement activities are at record levels.

In contrast, transferring the adjudications function to the Department of State would require it to integrate into its organization large operations programs with which it has little familiarity. Any department other than Justice would have to undertake the absorption of new missions, expertise, and institutional values with which it has little experience.

Keeping both functions within the Department of Justice would be far less costly than the transfer of all adjudications activities to the Department of State or another department. The personnel, training, facilities, and management are already fully part of and integrated into Department of Justice. Separation of enforcement and adjudications within the Department of Justice raises mostly issues of management and structure, rather the basic re-creation of a substantial institution in an entirely new setting.

Moreover, keeping adjudications within Justice would not require the proposed creation of an entirely new independent agency for immigration review in place of EOIR. There are substantive arguments on both sides of this issue, and it is one that should be decided on the basis of merit, not mandated simply due to interdepartmental restructuring.

As in all cases of organizational change, some predictable disruption and added expense are justifiable if the outcome is most likely to be an improvement. However, the consequences of the proposed transfer of all adjudications functions to the Department of State are far from certain. Unlike the Department of Justice, the Department of State would be undertaking a entirely different mission with which it has had little experience or interest. Historically, immigration and consular matters have received tertiary attention and status at the Department of State. It is a gamble to think that these long-standing attitudes will change for the better. While some argue that the Department of State could and should adopt an entirely new mission in the post-Cold War era, beginning this debate by making the massive implantation of the entire federal immigration adjudications function puts the horse before the cart and is a great risk to take.

The Department of State has not had experience with the large volume of substantive adjudications that heretofore have been done by the Department of Justice. Moreover, elementary concepts of

legal process, including administrative and judicial review, precedent decisions, and the right to counsel, have been vigorously resisted by the Department of State throughout its history of consular affairs. The Department of State has energetically fought all attempts in litigation and in legislation to make individual consular decisions subject to any review within the Department of State itself or by the federal courts. It is difficult for anyone familiar with this history to conceive that these Department of State traditions would soon give way to modern legal concepts and the consistency and accuracy that is their goal.

In contrast, the Department of Justice has the experience and the expertise. It needs only the restructuring and separation of enforcement from adjudications, with dedicated leadership and management for each, to have the best chance of success, at less cost and with less disruption of the fundamental immigration responsibilities.