The Immigration System: Need To Eliminate Discrimination And Delay

I. INTRODUCTION

A citizen of Honduras immigrates to the United States. Later he sends for his spouse to join him. His wife wishes to immigrate immediately, but the American Consulate informs her that she must wait more than two years. A woman born in Canada immigrates to the United States and becomes a naturalized citizen. When her brother seeks to join her, he learns that in addition to facing a lengthy delay he will need a job offer and labor certification. If the spouse or brother were born in an Eastern Hemisphere country other than the Philippines, they would receive visas without delay. Neither would need a job offer and certification from the U.S. Labor Department.

The United States Congress has been aware of these inequities in immigration since 1968.[1] Bills to remedy the situation were introduced and hearings held in 1970[2] and 1973,[3] but none of these became law. In 1975, Representative Peter Rodino reintroduced H.R. 981, a bill from the 93rd Congress, which would amend the Immigration and Nationality Act.[4] Analysis of some of the problems with the present immigration system and consideration of proposed reforms is therefore timely.

This article focuses on the need to eliminate discrimination and delay in the immigration system. First, a brief description of the present immigration system is presented. Second is a discussion of

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[1] *Hearings on Immigration Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968).

[2] Bills in the 91st Cong., 2d Sess. (1970) include: H.R. 9112, H.R. 15092, H.R. 17370; *Hearings on H.R. 9112, H.R. 15092, H.R. 17370 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

[3] Bills in the 93d Cong., 1st Sess. (1973) include: H.R. 981 [hereinafter cited as Bill H.R. 981], H.R. 9409 and S. 2643; an amended version of H.R. 981 passed the House [hereinafter cited as Act H.R. 981]. *Hearings on H.R. 981 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Hearings on H.R. 981*].

[4] This bill introduced on January 14, 1975 has the same number: H.R. 981, 94th Cong., 1st Sess. (1975).

the history and rationale of two Congressional policies: equal treatment of all nations' immigrants and speedy immigration. Finally, these policies are used as principles to evaluate the existing immigration law and the changes proposed by bills introduced in the 93rd Congress[5] in the following areas: (1) separate ceilings for the Western and Eastern Hemispheres; (2) per country limitation for Mexico and Canada; (3) the preference system for immigration; and (4) the labor certification requirement.

II. THE PRESENT IMMIGRATION SYSTEMS

The Immigration and Nationality Act of 1952[6] as amended[7] provides the structure for immigration.[8] It classifies aliens seeking temporary entry into the United States as nonimmigrants;[9] all others are immigrants.[10] Immigrants born[11] in the independent countries[12] of the Western Hemisphere[13] are subject to a different immigration system than those born in the Eastern Hemisphere.

The Western Hemisphere system has a ceiling[14] on immigration of

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[5]*See* note 3.

[6]Act of June 27, 1952, ch. 477, 66 Stat. 163, 8 U.S.C. § 1101 *et seq.* (1970). For a history of immigration and nationality laws up through the Immigration and Nationality Act of 1952, *see* Wasserman, *The Immigration and Nationality Act of 1952 — Our New Alien and Sedition Law*, 27 TEMP. L.Q. 62 (1953).

[7]For a list of public laws amending the Immigration and Nationality Act of 1952, *see* J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 437 (2d ed. 1973).

[8]The following description of the immigration systems of the two hemispheres is limited to those aspects considered in this article. More detailed descriptions are found in Wasserman, *The Undemocratic, Illogical, and Arbitrary Immigration Laws of United States*, 3 INT'L. LAW. 254 (1969) and Abrams & Abrams, *Immigration Policy — Who Gets In and Why?*, 38 PUB. INTEREST 3 (1975).

[9]8 U.S.C. § 1101(a)(15) (1970). These aliens are not subject to numerical limitation.

[10]All aliens are considered immigrants unless they come within an exception in the immigration laws. Karnuth v. United States *ex rel.* Albro, 279 U.S. 231, 242-43 (1929).

[11]The numerical limit of the immigrant's birthplace is usually charged for his immigration. 8 U.S.C. § 1152 (1970).

[12]Colonies are limited to annual immigration of 200. 8 U.S.C. § 1152(c) (1970).

[13]The present Immigration and Nationality Act does not define the Western Hemisphere countries. Act of May 24, 1924, ch. 190, § 4(c), 43 Stat. 155, the predecessor to 8 U.S.C. § 1101(a)(27)(A) (1970), defines a nonquota immigrant as:

> (C) An immigrant who was born in the Dominion of Canada, New Foundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America. . . .

The legislative history shows the Western Hemisphere embraces all independent countries of North and South America, while the Eastern Hemisphere includes all other countries. S. REP. NO. 748, 89th Cong., 1st Sess. (1965).

[14]"Immediate relatives" are exempt from this ceiling. 8 U.S.C. § 1151(a) (1970). They are defined as the children, spouses, or parents of United States citizens, but the citizen must be over twenty-one years of age for his parents to qualify. 8 U.S.C. § 1151(b) (1970).

120,000 each year.[15] The visas allowing immigration[16] are issued on a first-come, first-served basis, subject to qualitative restrictions.[17] Of the grounds for exclusion from the United States,[18] the limitation with the broadest impact on immigration is the Labor Department certification requirement.[19] Except for parents,[20] spouses,[21] or children[22] of United States citizens and permanent resident aliens,[23] all aliens intending to work in the United States must receive Labor Department certification.[24] Even though the labor certification requirement reduces immigration, the demand for visas is much greater than the 120,000 annual limit. Currently, the large backlog of applications causes immigrants to suffer a twenty-seven month delay before receiving a visa.[25]

The Eastern Hemisphere has a 170,000 annual ceiling[26] on aliens receiving immigrant visas[27] and the additional limit of 20,000 visas per country.[28] The most significant difference from the Western Hemisphere is the use of a preference system to allocate visas. Prefer-

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[15] Act of Oct. 3, 1965, Pub. L. 89-236, § 21(e), 79 Stat. 921, provides this limitation. 8 U.S.C. § 1101(a)(27)(A) (1970) provides that Western Hemisphere immigrants are "special immigrants."

[16] Aliens without a valid visa or other entry document and a travel document identifying them are excludable. 8 U.S.C. § 1182(a)(20) (1970).

[17] 8 U.S.C. § 1152(a) (1970) provides no preferences for immigrants other than provided by statute. In the Eastern Hemisphere the order of issuing visas is specified to be in the chronological order of filing a petition for preference status. 8 U.S.C. § 1153(c) (1970).

[18] 8 U.S.C. § 1182(a) (1970).

[19] 8 U.S.C. § 1182(a)(14) (1970).

[20] 8 U.S.C. § 1101(b)(2) (1970) defines this relationship to include circumstances in 8 U.S.C. § 1101(b)(1) (1970). *See* note 22.

[21] A "spouse" is defined in 8 U.S.C. § 1101(a)(35) (1970).

[22] A "child" is defined as an unmarried person under 21 years of age who is legitimate, a stepchild, an illegitimate child (claiming status by a natural mother) or a child adopted before the age of 14. 8 U.S.C. § 1101(b)(1) (1970).

[23] 8 U.S.C. § 1182(a)(14) (1970).

[24] *Id.* states:

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

[25] When the number of qualified applicants for a certain category of immigrants exceeds the statutory and regulatory limits, the category is oversubscribed. Applicants are then issued visas in chronological order based on their priority dates. The State Department in April 1975 issued visas to Western Hemisphere applicants with priority dates earlier than January 1, 1973. BUREAU OF SECURITY AND CONSULAR AFFAIRS, UNITED STATES DEPT. OF STATE, AVAILABILITY OF IMMIGRANT VISA NUMBERS FOR APRIL 1975.

[26] 8 U.S.C. § 1151(a) (1970). "Immediate relatives" are not limited. *See* note 14.

[27] Included in this limit are aliens who change status to permanent resident aliens, 8 U.S.C. § 1254 (1970), or are granted conditional entry as refugees, 8 U.S.C. § 1153(a)(7) (1970). 8 U.S.C. § 1151(a) (1970).

[28] 8 U.S.C. § 1152(a) (1970).

ences are given to seven categories of immigrants, ranked in order of preference. Certain relatives of American citizens and permanent resident aliens, applicants with needed skills, and refugees are given these preferences.[29] Preferences given to relatives[30] and refugees[31] are exempt from the Labor Department certification requirement.[32] Due to a level of demand less than the ceiling and the use of a preference system, visas are currently available for immigrants from all independent countries in the Eastern Hemisphere except the Philippines and Korea.[33]

III. THE PRINCIPLES OF EQUAL TREATMENT AND SPEEDY IMMIGRATION

Because of different standards of evaluation various commentators have reached radically different conclusions about the success of United States immigration law.[34] Since the standards used will largely determine the analysis, clear standards with solid support are needed. Congress has shown by words and actions two policies in immigration which provide a relevant standard. These policies are the equal treatment of immigrants from all nations and the avoidance of delay-causing backlogs of immigrant applications. Using these Congressional policies as the standard has two advantages: (1) the political process insures that the policies underlying legislation will command broad support;[35] (2) it is fair to judge what Congress has done in terms of the goals it has sought to accomplish. These policies provide a focus for evaluating urgent problems in the immigration system and for proposing recommendations.

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[29] 8 U.S.C. § 1153(a) (1970). *See* Appendix for the details of the existing preference system and the proposals to modify it.

[30] These are the first, second, fourth and fifth preferences. 8 U.S.C. § 1153(a)(1), (2), (4), (5) (1970).

[31] The seventh preference allows 10,200 conditional entrants from Communist-dominated or Middle Eastern countries who are unable to return home because of persecution and who are not nationals of the country in which the application is made. 8 U.S.C. § 1153(a)(7) (1970).

[32] 8 U.S.C. § 1182(a)(14) (1970).

[33] As of April 1975, in Korea all preference category immigrants had currently available visas but nonpreference visas were issued for immigrants with priority dates earlier than June 1, 1974. In the Philippines only the first and second preference categories were current, with the greatly oversubscribed third category applicants receiving visas only for those with priority dates before January 22, 1970. *See* note 25.

[34] *Compare* Alexander, *A Defense of the McCarran-Walter Act*, 21 LAW & CONTEMP. PROB. 382 (1956) *with* Wasserman, *supra* note 6.

[35] The legislative function is to evaluate basic principles for social conduct and pass laws conforming to principles with broad public support. 1 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § § 1.02-1.07 (4th ed. 1972).

A. EACH NATION SHOULD RECEIVE EQUAL TREATMENT FOR IMMIGRATION OF ITS NATIVES

1. HISTORY OF THE POLICY

Equal access for immigrants from all nations was the original principle of American immigration policy.[36] Around the turn of the twentieth century, however, the fear of an invasion of poor immigrants of foreign races led to the exclusion of Chinese laborers,[37] Japanese laborers,[38] and all Asiatics.[39] Restrictionist sentiments toward certain immigrants became so great that a temporary national origins quota system was enacted in 1921.[40] A permanent system followed in 1924 which set numerical quotas for each country in order to limit the immigration of Asiatics and Southern Europeans.[41] Immigrants from North and South American countries were exempted from quotas[42] due to Pan-American foreign policy and the need for Mexican agricultural labor in the Southwest.[43] The nonquota status of these immigrants allowed unlimited immigration. This system was codified with minor changes in the McCarran-Walter Act of 1952.[44]

Despite the pressures to restrict the immigration of aliens, Congress moved to accept refugees after World War II.[45] In addition, on

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[36] The earliest Congressional action to deport dangerous aliens, the Alien Act of June 25, 1798, ch. 58, 1 Stat. 570, was bitterly opposed, and no alien was deported under it before the law expired on June 25, 1800. Wasserman, *supra* note 6, at 65. *See generally*, J. KENNEDY, A NATION OF IMMIGRANTS (1964); Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROB. 213 (1956).

[37] Act of May 6, 1882, ch. 126, 22 Stat. 58. The Chinese Exclusion Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504, prevented the re-entry of Chinese laborers. The law was upheld in The Chinese Exclusion Case, 130 U.S. 581 (1889).

[38] *The Gentlemen's Agreement of 1907*, 2 U.S. DEPARTMENT OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1924 at 337 (1939).

[39] Act of Feb. 5, 1917, ch. 29, 39 Stat. 874. An "Asiatic barred zone" was described by latitude and longitude. *Id.*, § 3, 39 Stat. at 876, *repealed by* Act of June 27, 1952, ch. 477, Title IV, § 403(a), 66 Stat. 279, eff. Dec. 24, 1952.

[40] The Act of May 19, 1921, ch. 8, 42 Stat. 5, limited European immigration to 3 percent of those born in each foreign country who resided in the United States at the time of the 1910 census.

[41] The Act of May 26, 1924, ch. 190, 43 Stat. 153, provided quotas for immigration based on the national origins of the entire population in the 1920 census.

[42] *Id.*, § 4(c).

[43] Higham, *supra* note 36, at 230. Restrictionists sought to extend the quota system to the Western Hemisphere immediately after the 1924 Immigration Act. In 1929, when passage of a statute to accomplish this result seemed imminent, the State Department defeated it by restricting immigration administratively with the cooperation of Mexico. *Id.*, at 231-32.

[44] Immigration and Nationality Act of 1952, ch. 472, 66 Stat. 163, 8 U.S.C. § 1101 *et seq.* (1952). *See* Wasserman, *supra* note 6, for details about the changes.

[45] The Displaced Persons Act of 1948, 62 Stat. 1009; The Refugee Relief Act

five occasions from 1957 to 1964 Congress granted nonquota status to immigrants previously under the quota system.[46] As a result, only 34 percent of the 2,599,349 immigrants coming to the United States during the decade from 1953 to 1963 were quota immigrants.[47] In light of these actions, then Secretary of State Dean Rusk urged the Congress to amend the Immigration and Nationality Act in these terms:

> The national origins principle, rather than the facts of our actual immigration, is picked up by people unfriendly to the United States and made an issue in their countries. This causes political disturbances in the good relations which we would hope to establish.
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> I therefore urge the committee to reflect in the letter of the law the policy adopted by the Congress during the last decade and to eliminate, with the safeguards proposed by the administration bill, the national origins system which has created an unwholesome atmosphere in our foreign relations.[48]

In 1965 the Administration sought to end the national origins quota system without limiting immigration from the Western Hemisphere.[49] Although the Administration speakers did not find the special treatment of the Western Hemisphere discriminatory,[50] some Congressmen did not wish to perpetuate distinctive treatment which originated from racism.[51] In the end, Congress eliminated the na-

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of 1953, 67 Stat. 400; and the Fair-Share Refugee-Escapee Act, Pub. L. 86-648, 74 Stat. 504 (1960).

[46] *See* note 72.

[47] *Hearings on Immigration (H.R. 2580) Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 89 (1965). During the 1953 to 1963 decade, 119,000 immigrants were allowed from China, Japan and the Philippines despite the annual quotas of 205 for China, 185 for Japan and 100 for the Philippines. *Id.* at 111.

[48] *Id.* at 89.

[49] At the *Hearings on H.R. 2580, supra* note 47, the Attorney General and Secretary of State argued that the immigration from the Western Hemisphere was not large enough to pose a practical problem while the imposition of a ceiling could adversely affect U.S. foreign relations. Other arguments for not changing the special status include the history of free movement across borders, the effectiveness of qualitative restrictions, and the fact that immigration from the Western Hemisphere in 1960-1964 averaged less than immigration in 1924 when the special status was enacted. *Id.* at 27, 41-49, 94-99.

[50] Administration speakers considered different treatment of the Western Hemisphere a distinction, not a discrimination. They objected to the discrimination label based on the lack of discriminatory intent when enacted, the lack of protests from other countries, and the absence of individual quotas favoring particular countries.

[51] Representative Feighan expressed the view that historically nonquota status was a racially motivated favor and that regardless of the original intent, the special treatment provided discriminatory benefit based on the accident of birth in a certain country. *Id.* at 44-46. Other Congressmen seized on the principle of nondiscrimination to restrict immigration. Senator Ervin, in his separate views in S. REP. NO. 748, 89th Cong., 1st Sess. (1965), justified the national origins quota system as not discriminatory, yet called for the fair restriction of the Western Hemisphere to end discrimination.

tional origins system,[52] and prohibited preferences based on race, nationality, place of birth and place of residence,[53] but demanded the Western Hemisphere have a ceiling on immigration.[54] The creation of a Western Hemisphere ceiling is a triumph of the nondiscrimination principle in the immigration field,[55] but its passage without due consideration caused problems.

Thus, since World War II the immigration practices of the United States have not followed the rigid confines of the national origins quota system. In 1965 Congress attempted to end all discrimination in immigration based on national origin.[56]

2. RATIONALE FOR EQUAL TREATMENT

Three major reasons support the principle of equal treatment for all nations whose natives seek to immigrate to the United States.[57] First, the democratic and moral ideals of the United States require an end to racial and ethnic discrimination. Second, the interest in gain-

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[52] Act of Oct. 3, 1965, Pub. L. 89-236, 79 Stat. 911. *See* Scully, *Is the Door Open Again? — A Survey of Our New Immigration Law*, 13 U.C.L.A. L. REV. 227 (1966).

[53] 8 U.S.C. § 1152(a) (1970). Preferences specifically provided by statute are exempt. *Id.*

[54] The ceiling became effective June 30, 1968. A Select Commission on Western Hemisphere Immigration was established in 1965 to study all aspects of immigration from the hemisphere, including the wisdom of a numerical restriction on immigration. Despite the recommendation of the Commission that the ceiling be delayed at least one year, Congress took no action and the ceiling became effective. U.S. SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, REPORT 9-11 (1968); *but cf.* minority report. *Id.* at 15-18.

[55] The following reasons for imposing a ceiling were given in S. REP. NO. 748, 89th Cong., 1st Sess. 17-18 (1965) accompanying the Act:

> . . . Last year the nonquota admissions from Western Hemisphere countries totaled 139,284 and the evidence is present that the increase will continue. Not only is the committee concerned with the volume of the immigration, but it has difficulty with reconciling its decision to eliminate the concept of an alien's place of birth determining the quota to which he is charged with the exception from the numerical limitation extended to persons born in the Western Hemisphere. To continue unrestricted immigration for persons born in Western Hemisphere countries is to place such aliens in a preferred status compared to aliens born in other parts of the world which the committee feels requires further study.

Senators Kennedy, Hart and Javits filed a dissenting minority report on this change.

[56] The remaining inequities between immigrants from different nations are the unintended result of technical deficiencies in the immigration laws. The last-minute imposition of a ceiling on the Western Hemisphere is blamed for many of these problems. H.R. REP. NO. 461, 93d Cong., 1st Sess. 7 (1973) [hereinafter cited as H.R. REP. NO. 461].

[57] In 1965, then Attorney General Katzenbach in testimony at Congressional hearings in support of H.R. 2580 to abolish the national origins quota system raised the three reasons of elemental humanity, domestic self-interest, and self-interest abroad. *Hearings on H.R. 2580, supra* note 47, at 8.

ing immigrants with needed skills does not allow irrelevant restrictions. Third, unequal treatment endangers the foreign policy goals of the United States.

American representative democracy is rooted in a strict regard for human rights.[58] Statutes and court decisions have made governmental racial discrimination against American citizens illegal.[59] Similarly, discrimination against American citizens on the basis of their ancestry or national origin is illegal.[60] The United States Supreme Court has not extended the constitutional rights of due process and equal protection to the immigration of aliens.[61] Yet, unless Congress is pursuing a special foreign policy objective, distinctions based on race or national origin should not govern which applicants for immigration will come to America.[62] Senator Fong effectively summarized this argument in testimony before a Senate subcommittee considering abolition of the national origins quota system:

> [A]s we move to erase racial discrimination against our own citizens, we should also move to erase racial barriers against citizens of other lands in our immigration laws.
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> . . .
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> [O]ur present immigration laws disparage our democratic heritage. They directly contradict the spirit and principles of the Declaration of Independence, the Constitution of the United States, and our traditional standards of justice, decency, and the dignity and equality of all men.[63]

A second reason for equal treatment of all nations is that discrimination interferes with the immigration of those aliens with needed skills.[64] The United States relies on immigrants to satisfy the de-

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[58] *See* D. SANDIFER & L. SCHEMAN, THE FOUNDATION OF FREEDOM (1966); Z. CHAFEE, DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS (1963); R. PERRY, ed., SOURCES OF OUR LIBERTIES (1959).

[59] *See* B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS (1970); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Carter, *An Evaluation of Past and Current Legal Approaches to Vindication of the Fourteenth Amendment's Guarantee of Equal Educational Opportunity*, 1972 WASH. U. L.Q. 479 (1972).

[60] Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973).

[61] The Japanese Immigrant Case, 189 U.S. 86, 97-100 (1903) and cases cited therein; Harisiades v. Shaugnessy, 342 U.S. 580, 587 (1952).

[62] The United States is a signatory to the United Nations *Universal Declaration of Human Rights*, U.N. Doc. A/810, Dec. 10, 1948; § 2 forbids discrimination based on race, color, or national origin. *See* Chafee, *Federal and State Powers Under the U.N. Covenant on Human Rights*, 1951 WISC. L. REV. 389, 623 (1951).

[63] *Hearings on S. 500 Before the Subcomm. on Immigration and Nationality of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 45 (1965).

[64] Promoting the immigration of aliens with needed skills is accomplished by excluding aliens (who are not relatives or refugees) unless they have labor certification. 8 U.S.C. § 1182(a)(14) (1970).

mand for labor in many occupations.[65] For example, the immigration of alien doctors and other medical personnel supplies critically needed manpower.[66] Since immigrants with valuable skills are not limited to certain nations, the past restrictions based on national origins worked against this interest.[67]

Finally, in the past racially discriminatory provisions in United States immigration laws caused great bitterness in the affected countries.[68] After World War II, Asian and African countries changing from colonies of European powers to independent countries were particularly suspicious of racism.[69] The discriminatory aspects of United States immigration law caused foreign relations difficulties with these countries.[70] Since 1968, U.S. relations with Canada and other Western Hemisphere countries have suffered because of discriminatory treatment of their immigrants.[71]

B. IMMIGRATION SHOULD NOT BE DELAYED BY BACKLOGS

1. HISTORY OF THE POLICY

Congressional actions have demonstrated a policy of avoiding large backlogs of visa applicants on waiting lists. There have been two recent examples of this policy. First, from 1957 to 1962, Congress enacted five laws which granted nonquota status to quota immigrants awaiting visas.[72] Second, in 1965 Congress created a preference

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[65]The largest occupational group is the live-in maid. There is a nationwide shortage of workers interested in such positions. *Hearings on H.R. 981*, *supra* note 3, at 178, 206.

[66]*Hearings on Brain Drain Before the Research and Technical Programs Subcomm. of the House Comm. on Governmental Operations*, 90th Cong., 2d Sess. 39, 51 (1968).

[67]Senator Robert Kennedy noted the irrationality of an immigration law which delays for many years the immigration of Turkish scientists while an unskilled laborer from a Northern European country can immigrate within weeks. *Hearings on S. 500*, *supra* note 63, at 216. After the repeal of the national origins quota system, 11,000 to 12,000 Filipino professionals, many of them doctors, immigrated to the United States in fiscal 1972. *Hearings on H.R. 981*, *supra* note 3, at 31.

[68]The exclusion of Chinese caused an economic boycott which destroyed American trade with China from 1904 to 1906. The exclusion of Japanese in 1924 has been credited with leading to the Japanese attack on Pearl Harbor. Kingsley, *Immigration and Our Foreign Policy Objectives*, 21 LAW & CONTEMP. PROB. 299, 304-05 (1956); Wasserman, *supra* note 6, at 67 n. 49.

[69]Kingley, *supra* note 68, at 309.

[70]*Id.* at 307-10.

[71]*Hearings on H.R. 981*, *supra* note 3, at 23-24, 40-42. Individual members of Parliament have written to the American government on behalf of constituents and diplomatic notes have been exchanged on the subject. *Id.*

[72]Act of Sept. 11, 1957, Pub. L. 85-316, § 12, 71 Stat. 642; Act of Aug. 21, 1958, Pub. L. 85-700, § 2, 72 Stat. 699; Act of Sept. 22, 1959, Pub. L. 86-363, § 4, 73 Stat. 644; Act of Sept. 26, 1961, Pub. L. 87-301, § 25, 75 Stat. 657; Act of Oct. 24, 1962, Pub. L. 87-885, § § 1, 2, 76 Stat. 1247.

system for the Eastern Hemisphere to avoid long waiting lists.[73] In addition, the statements made in the hearings and reports accompanying these actions show a great concern with this problem.

Only five years after the McCarran-Walter Act, Congress began to pass special legislation allowing aliens waiting for visas to immigrate despite over-subscribed quotas. In the following years aliens eligible for preference visas[74] were granted nonquota status: (1) in 1957, quotas were waived for aliens with urgently needed skills, parents of adult American citizens, and the spouses and children of permanent resident aliens;[75] (2) in 1958, quotas were waived for aliens with urgently needed skills;[76] (3) in 1959, quotas were waived for parents of adult American citizens, spouses and children of permanent resident aliens, and brothers, sisters, sons and daughters of American citizens;[77] (4) in 1961, quotas were waived for spouses and children of permanent resident aliens, and brothers, sisters, sons and daughters of American citizens;[78] and (5) in 1962, quotas were waived for aliens with urgently needed skills and brothers, sisters, sons and daughters of American citizens.[79] These Acts gave nonquota status only to those aliens who were backlogged on consular waiting lists or previously approved for immigration.

This special legislation was repeatedly needed to avoid the long backlogs which developed under the confines of the quota system. The experience caused Congress[80] in 1965 to increase the annual limit for the Eastern Hemisphere to 170,000[81] and institute a seven level preference system.[82] The use of a preference system made large backlogs less likely to occur. Instead of having all applicants wait in a

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[73] 8 U.S.C. § 1153(a) (1970).

[74] *See* Act of June 27, 1952, ch. 477, § 203(a)(1), (2), (3) and (4), 66 Stat. 163, 178 *amended by* Act of Oct. 3, 1965, Pub. L. 89-236, 79 Stat. 911.

[75] Aliens eligible for visas under § 203(a)(1), (2), or (3) of the McCarran-Walter Act, with petitions approved before July 1, 1957, were granted nonquota status. Act of Sept. 11, 1957, Pub. L. 85-316, § 12, 71 Stat. 642.

[76] The quota restrictions on immigrants eligible under § 203(a)(1) of the Immigration and Nationality Act who were approved before July 1, 1958 were similarly waived. Act of Aug. 2, 1958, Pub. L. 85-700, § 2, 72 Stat. 699.

[77] Aliens on consular waiting lists with priority dates before December 31, 1953 and who were approved for a § 203(a)(2), (3), or (4) preference before January 1, 1959 were granted nonquota status. Act of Sept. 22, 1959, Pub. L. 86-363, § 4, 78 Stat. 644.

[78] Aliens eligible for quota immigrant visas under § 203(a)(2) or (3) who filed petitions prior to July 1, 1961 were granted nonquota status. Act of Sept. 26, 1961, Pub. L. 87-301, § 25, 75 Stat. 657.

[79] Aliens registered on consular waiting lists before March 31, 1954 and eligible for quota status under § 203(a)(4) based on a petition filed before January 1, 1962 were given nonquota status. Act of Oct. 24, 1962, Pub. L. 87-885, § 1, 76 Stat. 1247. Certain aliens eligible for § 203(a)(1) quota status who filed before April 1, 1962 were also granted nonquota status. *Id.*, § 2.

[80] *See* S. REP. NO. 748, 89th Cong., 1st Sess., to accompany H.R. 2580 (1965).

[81] Act of Oct. 3, 1965, Pub. L. 89-236, § 1, 79 Stat. 911.

[82] *Id.*, § 3.

single long line, Congress chose to provide immediate immigration for close relatives and needed workers.[83]

Congress made two further minor changes to speed the immigration of serious applicants:[84] (1) nonpreference visas would be issued in order of qualification for visas rather than order of registration;[85] and (2) the Secretary of State could terminate the registration of an applicant who did not continue to show a desire to immigrate.[86]

These statutory changes were very successful in removing backlogs and preventing their recurrence. Presently, all countries in the Eastern Hemisphere except the Philippines and Korea have current availability for visas.[87]

Congress has often expressed a desire to eliminate long delays which large backlogs cause. Legislative history shows that Congress recognized the special hardships such delays place on close relatives when it passed the five special acts from 1957 to 1962.[88] This concern was recently expressed during the *Hearings on H.R. 981* about Western Hemisphere immigration.[89] At the hearings the State Department,[90] Congressmen,[91] organized labor,[92] and the volunteer agencies[93] agreed that changes in the immigration laws were necessary to eliminate the backlog in the Western Hemisphere.

2. RATIONALE FOR ELIMINATING BACKLOGS

The long delays caused by backlogs are a source of concern for many reasons. At the hearings on the Western Hemisphere system held in 1973, several of the following reasons were discussed.[94]

Perhaps the strongest motive for eliminating backlogs is the personal hardship they create for families divided in separate countries. Presently, the immigration of a resident alien's spouse and child from the Western Hemisphere is delayed twenty-seven months after registration.[95] Since family reunification is one of the major goals of American immigration policy,[96] long delays for the immigration of

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[83] Congress was aware that this choice would preclude the immigration of many people without preferences. *See* S. REP. NO. 748, *supra* note 80.
[84] *Id.*
[85] 8 U.S.C. § 1153(a)(8) (1970).
[86] 8 U.S.C. § 1153(e) (1970).
[87] *See* note 33.
[88] *See* the House and Senate Reports accompanying the bills in note 72.
[89] *Hearings on H.R. 981*, *supra* note 3.
[90] *Id.* at 22-26.
[91] *Id.* at 20, 352-53.
[92] *Id.* at 296-97.
[93] *Id.* at 300.
[94] *Id.* at 23-26, 56-57.
[95] *See* note 25.
[96] H.R. REP. NO. 461, *supra* note 56, at 7.

close relatives are particularly disturbing.

The backlog also decreases the immigration of skilled workers. Skilled workers need job offers and labor certifications before they can obtain a position on the waiting list.[97] But employers of skilled workers, unlike the employer of a live-in maid, are not able to wait several years when a vacancy occurs for a particular job.[98] Employers aware of the delay will not make job offers and file the necessary forms for labor certification.[99] Thus fewer workers with needed skills can immigrate. Since workers with special skills have needed talents, backlogs which deter their immigration are against the interest of the United States.

In addition, waiting periods which cause hardship and limit immigration of skilled workers also adversely affect United States foreign relations.[100] Developing nations desire easy immigration to the United States as a safety valve for overpopulation and unemployment pressures.[101] Canada, whose immigrants are mainly skilled workers especially vulnerable to delays, has repeatedly protested the long delay for visas.[102] The delays are particularly resented in the Western Hemisphere, which had unlimited immigration to the United States before 1968.[103]

The backlog, making legal immigration more difficult, has encouraged illegal immigration.[104] The evasion of United States immigration laws has taken many forms. Although nonimmigrant visas are issued only for temporary visits,[105] many aliens have applied for these visas with the intention of remaining indefinitely in the United States if the visa is granted.[106] This increase in bad faith applications has caused the visa refusal rate to climb dramatically for certain countries.[107] In addition, "businesses" have developed to produce counterfeit nonimmigrant visas and to smuggle aliens into the United States.[108] The illegal alien problem has caused strains in foreign relations with a number of Latin American countries.[109]

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[97] 29 C.F.R. § 60.3 (1974).
[98] *Hearings on H.R. 981, supra* note 3, at 23, 45.
[99] A Statement of Qualifications of Alien form and a Job Offer for Alien Employment form. 29 C.F.R. § 60.3(c) (1974).
[100] *See* note 98.
[101] *Hearings on H.R. 981, supra* note 3, at 23-24, 40-42. At a recent Caribbean Chief of Mission Conference, ambassadors commented that visa matters were the most important activity of the mission which affected relations with host countries. *Id.* at 24.
[102] *Id.* at 42; *see* note 71.
[103] Act of Oct. 3, 1965, Pub. L. 89-236, § 21, 79 Stat. 920.
[104] *Hearings on H.R. 981, supra* note 3, at 24-26, 50-51.
[105] *See* note 9.
[106] *Hearings on H.R. 981, supra* note 3, at 26.
[107] *Id.*
[108] *Id.* at 26, 50-51.
[109] *Id.* at 26.

Finally, large backlogs make the administration of the immigration process more time-consuming, expensive and inefficient. For example, an application will become inactive when delay causes a labor certification to lapse.[110] In January 1973, of 297,833 applications for immigrant visas, 192,761 were active and 105,072 were inactive.[111] Efforts wasted on applications which become inactive create greater delay.[112]

IV. EVALUATING THE IMMIGRATION SYSTEMS

The two policies of eliminating discrimination in immigration and ending backlogs of applications have been explored at length. These reasonable policies provide a firm basis to measure the current immigration systems in the following four areas: separate ceilings for each hemisphere, per country limits for Mexico and Canada, the preference system, and labor certification.

A. SEPARATE CEILINGS FOR EACH HEMISPHERE

The present law provides for an annual ceiling on immigration of 120,000 from the Western Hemisphere[113] and 170,000 from the Eastern Hemisphere.[114] An alternative is to have one ceiling for the entire world.[115] Separate ceilings violate the principle of nondiscrimination in three ways: (1) by retaining a distinction originally based on racial prejudices, (2) by giving the Western Hemisphere more than its fair share of visas, and (3) by delaying a single worldwide immigration system.

The origin of different treatment for the two hemispheres is directly traceable to discrimination based on race and national origin.[116] Historically, Eastern Hemisphere immigration has suffered from discrimination, while Western Hemisphere immigration has benefited. Giving the Western Hemisphere benefits is as discriminatory as putting restrictions on the Eastern Hemisphere. Discrimina-

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[110] *Id.* at 27. The bulk of the inactive applications are due to lapsed labor certifications. *Id.*

[111] *Id.*

[112] The Immigration and Nationalization Service suffers chronic understaffing. At the end of fiscal 1973 the backlog of applications and petitions for immigration benefits was 124,176 and climbing. *Hearings on Review of the Administration of the Immigration and Nationality Act Before the Subcomm. on Immigration, Citizenship and International Law (formerly No. 1) of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 276-79 (1973).

[113] Act of Oct. 3, 1965, Pub. L. 89-236, § 21, 79 Stat. 920.

[114] 8 U.S.C. § 1151(a) (1970).

[115] This is proposed by Bill H.R. 981, *supra* note 3, and S. 2643, 93d Cong., 1st Sess. (1973).

[116] The 1924 Act which established the nonquota status of the Western Hemisphere was adopted to restrict Oriental and Southern European immigration, yet continue Northern European and Latin American immigration. Higham, *supra* note 36.

tion is not less invidious because it results in restrictions or advantages for large areas of the world rather than individual countries or races.[117] To retain separate treatment of the two hemispheres perpetuates a distinction which was a direct outgrowth of racial prejudice.

The second reason for ending the separate ceilings for the two hemispheres is that the Western Hemisphere presently receives more than its fair share of visas under this system. Although the Western Hemisphere has a smaller ceiling than the Eastern Hemisphere, the Western Hemisphere is allocated 41 percent of the total visas, but it contains only 18 percent of the countries and 9 percent of the population of the world.[118]

Finally, a single worldwide ceiling would encourage fair and equal treatment of all nations. The administration of the immigration laws would be more uniform with a worldwide system.

The principle of avoiding backlogs also requires a single worldwide ceiling. Backlogs would lessen when countries with a high demand for emigration to the United States could utilize part of the ceiling not needed by countries with little demand.

One of the major faults of the quota system, which set rigid limits for each country, was that countries with large backlogs could not use the leftover quotas of other countries. Greater benefits from balancing different levels of demand are possible when all immigrants are in a single system than when the two hemispheres have separate ceilings.[119]

While both principles of nondiscrimination and avoiding backlogs favor the adoption of one worldwide system, the realities of the present situation suggest both hemispheres should not be merged immediately. Since the Eastern Hemisphere has current availability for visas in virtually every country and the Western Hemisphere has a large backlog, combining the hemispheres would discriminate against the Eastern Hemisphere. A worldwide backlog would result from the inability of the Eastern Hemisphere to absorb the great backlog in the Western Hemisphere. The application of both principles to this problem suggests the need to move to a single worldwide system, but only when visas are equally available without delay in both hemispheres.

Two bills introduced in the 93rd Congress would have created a

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[117] Consider the "Asiatic Barred Zone", *supra* note 39, and the "Asian-Pacific Triangle" which charged persons of Asian ancestry to the small quotas of Asian countries regardless of the land of their birth. Immigration and Nationality Act of 1952, ch. 477, § 202(b), 66 Stat. 177.

[118] 119 CONG. REC. H8329 (daily ed., Sept. 26, 1973).

[119] For this reason Richard Scammon, former chairman of the Select Commission on Western Hemisphere Immigration, favored a single worldwide ceiling. *Hearings on H.R. 981*, *supra* note 3, at 73-74.

worldwide immigration system. H.R. 981, as first introduced, provided for a worldwide ceiling of 250,000, but Mexico and Canada would have been allowed unlimited immigration because they would not have a ceiling.[120] S. 2643 would have provided a worldwide ceiling of 300,000 to take effect on June 30, 1976.[121] No hearings were held on S. 2643, but H.R. 981 was extensively considered. Representative Rodino, who introduced H.R. 981, stated that although he preferred a worldwide ceiling, the first priority was the imposition of a per country limit and preference system in the Western Hemisphere.[122]

The State Department opposed the adoption of a worldwide system until it could analyze the Western Hemisphere response to a preference system and per country limitation.[123] Until Western Hemisphere immigration functions for a period of time under the same preference system as the Eastern Hemisphere no basis exists to predict the patterns of demand when they are merged.[124] Merging both hemispheres into one system without making adjustments based on knowledge gained from the transition period could result in immigrants from one hemisphere using most of the worldwide ceiling.[125]

The House Subcommittee on Immigration, Citizenship, and International Law followed the reasoning of the State Department and the suggestion by Representative Rodino. They decided the move to a worldwide ceiling should be made after gaining sufficient experience with the preference system in the Western Hemisphere.[126] Since many unexpected problems resulted from the earlier imposition of a ceiling on the Western Hemisphere, Congress is wise to exercise caution about this change.

B. PER COUNTRY LIMITATION FOR MEXICO AND CANADA

Presently immigration from Mexico and Canada, like that from other Western Hemisphere countries, is only limited by the 120,000 annual ceiling on the entire hemisphere. By contrast, in the Eastern

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[120] Bill H.R. 981, 93d Cong., 1st Sess., § § 1, 2. The treatment of Mexico and Canada is considered *infra.*

[121] From the enactment until June 30, 1976, the Eastern Hemisphere would receive 170,000 and the Western Hemisphere 130,000. S. 2643, 93d Cong., 1st Sess., § 3 (1973).

[122] *Hearings on H.R. 981, supra* note 3, at 20-21.

[123] *Id.* at 43, 47-49.

[124] *Id.*

[125] *Id.*

[126] H.R. REP. NO. 461, *supra* note 56, at 8-9. Rep. Eilberg, Chairman of the House Subcommittee on Immigration, Citizenship and International Law, suggested that the move from separate ceilings to a worldwide system could follow in the next Congress after adoption of a preference system in the Western Hemisphere. 119 CONG. REC. H8329 (daily ed., Sept. 29, 1973).

Hemisphere each country is limited to 20,000 immigrants annually.[127]

The per country limit promotes equal treatment of nations and decreases backlogs. It insures that large demand countries do not monopolize the immigration ceilings, and that backlogs in one country do not adversely affect other countries. Several proposals would adopt per country limits in the Western Hemisphere. The first approach limits all countries to 20,000 visas annually,[128] thus significantly cutting immigration from Mexico.[129] Another proposal would allow Mexico and Canada ceilings of 35,000 each while limiting all other countries to 20,000.[130] A third proposal would impose 20,000 visa limits on other Western Hemisphere countries but not impose a per country limit on Mexico and Canada.[131]

An advantage given to Mexico and Canada is consistent with the principle of equal treatment of all nations only if required by exceptional circumstances. To avoid cloaking racial prejudice in respectable sounding reasons an exception should have an objective basis. The major justification for special treatment is the economic and cultural ties between the United States and its neighbors. For instance, the growth of binational companies operating on both sides of the border calls for migration of personnel.[132] Although much trade and tourism flows across the borders with Mexico and Canada, the United States has large amounts of trade and tourism with many countries. The distinguishing characteristic, however, is that Mexico and Canada share long common borders with the United States. When two nations are close and friendly neighbors, natural movements of people will lead to a larger amount of immigration between them than between more distant countries. This reasoning provides a nondiscriminatory basis for a higher limit on immigration from contiguous countries.[133] In contrast, a discriminatory purpose would be

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[127] 8 U.S.C. § 1152(a) (1970).

[128] H.R. REP. NO. 461, *supra* note 56, at 16.

[129] Canadian immigration peaked at 40,000 in 1965 and has since declined because of the ceiling to less than 10,000 in 1972. Mexican immigration has remained at a high level despite the ceilings. *Hearings on H.R. 981*, *supra* note 3, at 28, 36.

Visas issued each fiscal year:

	Canada	*Mexico*
1968	29,536	43,510
1969	15,722	42,071
1970	12,266	43,013
1971	11,316	48,076
1972	9,179	61,720

[130] H.R. 9409, 93d Cong., 1st Sess., § 3 (1973); S. 2643, 93d Cong., 1st Sess., § 4 (1973).

[131] Bill H.R. 981, 93d Cong., 1st Sess., § 1.

[132] *Hearings on H.R. 981*, *supra* note 3, at 40-45.

[133] Joint undertakings show the advantages of good relations. The united efforts of the United States, Canada and Mexico are used to meet the narcotics traffic.

clear if one of these neighbors received an advantage denied the other. Since Mexico and Canada do not share the same racial or ethnic backgrounds, it is unlikely they are favored for these reasons. On the other hand, the fact that a country is a neighbor does not justify abandoning the concept of numerically limited immigration which applies to all other countries. To deviate so far from a basic policy would be discriminatory.

This exception for contiguous countries has the benefit of being limited to Canada and Mexico. Unless exceptions to the uniform per country ceilings are strictly limited the proliferation of special ceilings could recreate a national origins quota system with its accompanying evils. Raising ceilings for countries simply on the basis of demand for immigration is bad policy, because it encourages further demand for immigration and defeats the purpose of spreading immigration among many countries. The proposed exception, based more on our close relationship with Canada and Mexico rather than simply the demand in those two countries for visas, is not subject to this criticism.

The principle of avoiding backlogs does not clearly favor or oppose higher ceilings for Mexico and Canada. Lowering the ceilings for these two countries means a greater backlog for them but a lesser backlog for the other countries in the hemisphere. Having Mexico and Canada limited by the hemispheric ceiling but exempting them from a per country limit entirely could create long backlogs for the other nations of the hemisphere. The best solution is to balance the demand by creating moderate backlogs in these two countries and in the other countries of the hemisphere. A per country limit somewhat below the historic demand for visas from Mexico and Canada could achieve this solution.

Various bills would provide Mexico and Canada with an exemption from the strict 20,000 limit per country. The two major approaches are the 35,000 annual limit[134] and the no per country limit within the Western Hemisphere ceiling.[135] The State Department supported the 35,000 limit on Mexico and Canada because of the historic open borders with these countries and the large amount of people and goods which flow across them.[136] Several Congressmen, however, considered such special treatment to be discrimination

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Joint work in the area of environmental protection is also significant. *Hearings on H.R. 981*, *supra* note 3, at 36-37.

[134] H.R. 9409, 93d Cong., 1st Sess., § 1; Additional Views of the Honorable Peter W. Rodino, Jr., H.R. REP. NO. 461, *supra* note 56, at 47-49; 119 CONG. REC. H8325 (daily ed., Sept. 26, 1973); S. 2643, 93d Cong., 1st Sess., § 4.

[135] Bill H.R. 981, 93d Cong., 1st Sess.; Representative Gonzalez' amendment, 119 CONG. REC. H8329 (daily ed., Sept. 26, 1973).

[136] *Hearings on H.R. 981*, *supra* note 3, at 34-39.

based on national origin.[137] The House Subcommittee considering H.R. 981 rejected any exemption from the 20,000 limit for Mexico and Canada to avoid such discrimination.[138] Representative Rodino in the *House Report on H.R. 981* filed a dissenting view on the 20,000 limit for Mexico and Canada.[139] On the floor of the House, he offered an amendment to allow a 35,000 limit for Mexico and Canada, arguing that decreasing legal immigration would increase illegal immigration, the dramatic cut in visas for Mexico would be an affront to that nation, and the 35,000 ceiling would phase out the higher level of visas from Mexico.[140] The House, however, rejected the amendment.[141]

The reluctance to make any deviation from the principle of nondiscrimination is strong evidence that the United States firmly rejects discrimination based on national origins. The primary motivations for special treatment of these neighbors, however, are foreign policy and economic considerations, not racial or ethnic prejudice. An annual limit per country on immigration for Mexico and Canada of 35,000 rather than 20,000 seems the most promising course of action.[141a]

C. A WESTERN HEMISPHERE PREFERENCE SYSTEM

The Eastern Hemisphere presently employs a seven level preference system in addition to labor certification and qualitative exclusions to decide which applicants for immigration will receive visas.[142] The Western Hemisphere relies on the labor certification requirement and qualitative exclusions, such as the exclusion of drug addicts and mentally defective individuals,[143] to choose among visa appliants but does not make other preferences among these applicants. Many policy decisions are involved in structuring a preference system,[144] but the extension of the present preference system to the Western Hemi-

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[137] *Id.* at 37-40.

[138] H.R. REP. NO. 461, *supra* note 56, at 9-10. The Subcommittee reasoned that immigration for economic opportunity included workers seeking temporary employment in the United States. Amendment of the nonimmigrant H-2 visa to allow workers to fill permanent jobs for a period up to two years could satisfy this demand. *Id.*

[139] *See* note 134.

[140] *Id.*

[141] 119 CONG. REC. H8332-33 (daily ed., Sept. 26, 1973).

[141a] *Accord* Bonaparte, *The Rodino Bill: An Example of Prejudice Towards Mexican Immigration to the United States*, 2 CHICANO L. REV. 40 (1975).

[142] 8 U.S.C. §1153(a) (1970). *See* Appendix for a chart comparing the present system and three proposed alternatives.

[143] 8 U.S.C. §1182(a) (1970).

[144] For instance, the present system reserves 70% of the visas for relatives and 10% for refugees. Only 20% are marked for workers. The original version of H.R. 981 proposed reserving 25% of the preference visas for relatives, with the remainder largely for workers. *See* Abrams & Abrams, *supra* note 8, at 10-15.

sphere is of the highest priority.

Western Hemisphere immigrants who would receive preference were they born in the Eastern Hemisphere suffer from the lack of a preference system. Causing the spouse of a permanent resident alien to wait twenty-seven months for a visa in the Western Hemisphere, when a visa would be immediately available in the Eastern Hemisphere, is irrational. The preference system aids the unification of families, helps refugees and provides needed workers. These policies apply to both hemispheres. Limiting the preference system to only the Eastern Hemisphere effects an unintended discrimination based on national origin. Extending the same preference system to both hemispheres would be a step toward a single worldwide system which would promote equal treatment for all nations.

The major reason for extending the preference system to the Western Hemisphere, however, is the need to reduce the present backlog. When the ceiling was imposed in 1965, Congress did not anticipate the circumstances which have created the backlog.[145] Instead of placing all visa applicants in one long line, the preference system creates several lines with the shortest one for the most desired applicants and the longest one for those without any preference. When the total number of applicants is less than the ceiling, everyone not excluded on qualitative grounds receives a visa. In this situation, the existence of a preference system does not affect immigration. When demand exceeds the numerical limit, the preference system allows undelayed immigration of the best applicants rather than delaying everyone. Thus the preference system does no harm when the demand for immigration is low, but is essential to avoid delays for the best applicants when demand is great.

Congress has considered several proposals to extend the preference system to the Western Hemisphere. Representative Rodino introduced H.R. 981 which would provide a worldwide preference system with higher preference limits for workers than the present system.[146] The Administration proposed H.R. 9409 which would extend the present system to the Western Hemisphere with only minor modifications.[147] The Subcommittee considering these bills agreed with the

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[145] The reason for greatly increased demand from the Western Hemisphere is not understood. It has been suggested that South American urbanization and trips to the United States by South Americans have led to a desire for the greater opportunities in the United States. Abrams & Abrams, *supra* note 8, at 13. In addition, the Cuban refugees "paroled" into the United States have had their adjustment of status counted against the hemisphere ceiling. As of 1973, these refugees had taken 175,000 spaces, yet 154,000 remained to adjust status. *Hearings on H.R. 981*, *supra* note 3, at 71.

[146] *See* Appendix.

[147] *Id.* The Administration witnesses testified that the preference system in the Eastern Hemisphere works effectively. *Hearings on H.R. 981*, *supra* note 3, at 48.

Administration that extending the preference system to the Western Hemisphere was a high priority while changing the existing system was not.[148]

The preference system and the per country limits are necessary to end the backlog in the Western Hemisphere. The delays which backlogs cause have the unintended effect of discriminating against countries in this hemisphere. Amendment of the Immigration and Nationality Act to end this delay is of the highest priority.

D. LABOR CERTIFICATION

Before visas may be issued to immigrants intending to work in the United States, the Labor Department must certify that no American worker is qualified or available to fill the job offered the alien and that the alien's employment will not depress American wages and working conditions.[149] Aliens from the Eastern Hemisphere with relative or refugee preferences are exempt from this requirement, while in the Western Hemisphere parents, spouses and children of both U.S. citizens and resident aliens are exempt.[150] The labor certification procedure has led to criticism of the Labor Department for causing delays, violating the law, hiding behind secrecy, operating inconsistently throughout the country, and wasting money on an ineffectual program.[151] The analysis here will be limited to the discrimination that results from different sets of relatives being exempt in each hemisphere, and the problems of delay from the procedure.

Since most immigrants coming to the United States are exempt from the labor certification requirements because they are relatives of citizens or permanent resident aliens, only about 12 to 15 percent of the 300,000 to 400,000 immigrants admitted annually receive labor certifications.[152] While many of the same relationships are a basis for exemption in both hemispheres,[153] certain relatives of American citizens or residents are exempt only in the Eastern Hemisphere or only in the Western Hemisphere.[154] The different treatment

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[148] H.R. REP. NO. 461, *supra* note 56, at 9.
[149] 8 U.S.C. § 1182(a)(14) (1970).
[150] *Id.*
[151] *See* Rodino, *The Impact of Immigration on the American Labor Market*, 27 RUTGERS L.R. 245 (1974); *Hearings on H.R. 981*, *supra* note 3, at 171-235.
[152] *Hearings on H.R. 981*, *supra* note 3, at 199.
[153] Aliens exempt in both hemispheres: parent of adult U.S. citizen, spouse of U.S. citizen, unmarried minor child of U.S. citizen, spouse of permanent resident alient, unmarried minor child of permanent resident alien. 8 U.S.C. § 1182(a)(14) (1970).
[154] Aliens exempt only in the Eastern Hemisphere: married or unmarried adult son or daughter of U.S. citizen, brother or sister of U.S. citizen, unmarried adult son or daughter of permanent resident alien. Aliens exempt only in the Western Hemisphere: parent of minor U.S. citizen, parent of permanent resident alien. *Id.*

of immigrant relatives based on the birthplace of the citizen or resident alien makes an irrational discrimination based on national origin. Providing a preference system for the Western Hemisphere and making the same preference exempt from the labor certification requirement in each hemisphere will remove this arbitrary effect.

The labor certification procedure creates unnecessary delay. The present law requires the Labor Department to certify that every individual job offer to a nonexempt alien is not detrimental to American labor. Prior to 1965 the procedure for labor certification was much less time-consuming,[155] yet the increased scrutiny has not altered the distribution of occupations among immigrating alien workers.[156] Thus, a costly, delay-causing certification procedure was created which has not produced added benefits.[157]

The Administration has proposed amending the labor certification requirement.[158] This proposal would have the Labor Department publish a public list of open and closed occupations for each standard metropolitan area which the American Consulate would use to determine whether an alien could immigrate to a particular area.[159] Although some have objected to this proposal,[160] it provides a simple, efficient procedure. The Subcommittee reported H.R. 981 to the 93rd Congress with the requirement that the Labor Department make reports of undersupplied and oversupplied occupations,[161] but

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[155] The Department advised American Consulates abroad when 25 or more applications arrived from a single employer. The Department then had the burden to certify that the alien's employment would have an adverse effect. During the period from 1957 to 1965, only 56 negative certifications were issued. Rodino, *supra* note 151, at 252-53.

[156] *See* Table of Alien Occupations, *Id.* at 269, 273.

[157] The Labor Department believes that the present procedure is much worse than the previous one. *Hearings on H.R. 981*, *supra* note 3, at 202.

[158] H.R. 9409, 93d Cong., 1st Sess., § 8(a) would amend 8 U.S.C. § 1182(a)(14) (1970) to read:

> Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor in occupations for which the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there is not a shortage of qualified workers in the United States at the time of application for a visa or (B) the employment of such aliens would be inconsistent with United States manpower policies and programs. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3), (6), and (8).

[159] The details of this proposal can be found in *Hearings on H.R. 981*, *supra* note 3, at 202-33. For a similar proposal, *see Id.* at 274.

[160] Representative Rodino finds the proposal unacceptable because the local labor market is not the statutorily required basis for certification and the "manpower policies and programs" exception is too vague. Rodino, *supra* note 151, at 273-74. Another objection is that the list would not be extremely specific so workers who are needed in a specialty could be barred because there is a general oversupply in their category of employment. Abrams & Abrams, *supra* note 8, at 20-21.

[161] Bill H.R. 981, 93d Cong., 1st Sess., § 6.

the Subcommittee delayed taking other actions to amend the labor certification requirement pending further study.[162]

V. CONCLUSION

The principles of equal treatment and speedy immigration suggest several needed changes in the immigration laws. The most immediate concern is to relieve the backlog in the Western Hemisphere by extending the preference system and per country limits to this hemisphere. The backlog may also be reduced by giving Mexico and Canada a somewhat larger ceiling than other countries. Some movements toward a single worldwide system can be taken without delay, such as the uniform preference system and uniform exemptions from labor certification. Other changes, such as the world ceiling and new labor certification procedure, require further study. The continued urgency of these problems call for remedial amendments of the Immigration and Nationality Act in the 94th Congress.

Michael E. Friedman

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[162] H.R. REP. NO. 461, *supra* note 56, at 13-14.

APPENDIX

COMPARISON OF PREFERENCE SYSTEMS

	Present System[a]	H.R. 9409[b]	Original H.R. 981 Bill[c]	Alternative V[d]
UNLIMITED NUMERICALLY	"Immediate relatives" — unmarried child under 21 or spouses of U.S. citizens and parents of U.S. citizens over 21 years old	"Special immigrant" — unmarried child under 21 or spouses of U.S. citizens and parents of U.S. citizens over 21 years old	"Special immigrant" — unmarried sons and daughters or spouses of U.S. citizens and parents of U.S. citizens over 21 years old, plus Canadians and Mexicans	Spouses, unmarried sons and daughters (of any age) of U.S. citizens and resident aliens; parents of U.S. citizens and resident aliens over 21 years of age, and the parent's spouse and unmarried sons and daughters
CEILING	170,000 Eastern Hemisphere; 120,000 Western Hemisphere; 20,000 per country limit in Eastern Hemisphere	155,000 Eastern Hemisphere; 70,000 Canada and Mexico; 70,000 Western Hemisphere; 20,000 per country limit	250,000 worldwide; 25,000 per country limit	175,000 worldwide
APPLICATION	Eastern Hemisphere only	Worldwide	Worldwide	Worldwide
FIRST PREFERENCE	Unmarried sons and daughters of U.S. citizens (over 21 years old); 20% or 34,000	Unmarried sons and daughters of U.S. citizens (over 21 years old); 10% of above ceilings	Spouses, unmarried sons or daughters, parents of permanent resident aliens (for parents, alien over 21), married sons or daughters of citizens, unmarried brothers or sisters of citizen; 25% or 62,500 worldwide.	Professionals with labor certification; 40% of 70,000

	Present System[a]	H.R. 9409[b]	Original H.R. 981 Bill[c]	Alternative V[d]
SECOND PREFERENCE	Spouses, unmarried sons and daughters of resident aliens; 20% or 23,000 (1)	Spouses, unmarried sons and daughters of permanent resident aliens or parents of alien over 21 years old, child or spouse of parent; 24% of above ceilings (1)	Professional or exceptional ability, only other preference through relative, or nonpreference; 25% or 62,500 worldwide; only 10% of this preference or 6,250 to any nation.	Skilled workers with labor certification; 40% or 70,000
THIRD PREFERENCE	Professional or special benefit; 10% or 17,000	Professional; 12% of above ceilings (1) (2)	Skilled labor; 25% or 62,500 worldwide (1) (2)	Unskilled workers labor certification, those without labor certification and refugees; 20% or 35,000
FOURTH PREFERENCE	Married sons or daughters of U.S. citizens; 10% or 17,000 (1) (2) (3)	Married sons or daughters of U.S. citizens; 12% of above ceilings (1) (2) (3)	Members of religious denominations, aliens not seeking or needing employment, aliens with substantial capital to invest in enterprise; 15% (1) (2) (3)	
FIFTH PREFERENCE	Brothers and sisters of U.S. citizens; 24% or 40,000 (1) (2) (3) (4)	Unmarried brothers and sisters of U.S. citizens; 20% of above ceilings (1) (2) (3) (4)	All others, but 25% of these to be in under-25 age group. No limit on refugees. Remainder of ceiling.	
SIXTH PREFERENCE	Skilled and unskilled labor; 10% or 17,000	Skilled labor; 12% of above ceilings (1)-(5)		
SEVENTH PREFERENCE	Refugees; 6% or 10,200	Aliens not seeking or needing employment, in the arts, capable of self-employment in the U.S. or having $10,000 to invest in enterprise; 6% of above ceilings (1)-(6).		

	Present System[a]	H.R. 9409[b]	Original H.R. 981 Bill[c]	Alternative V[d]
EIGHTH PREFERENCE	Non-preference; remainder of ceiling (1)-(7)	Any labor in demand; 4% of above ceilings (1)-(7) Note: Refugees removed from preference system		

[a]8 U.S.C. § 1153(a) (1970).
[b]H.R. 9409, 93d Cong., 1st Sess. (1973).
[c]First form of H.R. 981, 93d Cong., 1st Sess. (1973).
[d]Hearings on Immigration Before Subcomm. No. 1 of the House Comm. on the Judiciary, 90th Cong., 2d Sess., 6-7 (1968).
(1) Falldown in unused visa numbers from First Preference category available for use in this category.
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(1)(2)(3) Falldown in unused visa numbers from First, Second and Third Preference categories available for use in this category.
(1)(2)(3)(4) Falldown in unused visa numbers from First, Second, Third and Fourth Preference categories available for use in this category.
(1)(2)(3)(4)(5) Falldown in unused visa numbers from First, Second, Third, Fourth, and Fifth Preference categories available for use in this category.
(1)(2)(3)(4)(5)(6) Falldown in unused visa numbers from First, Second, Third, Fourth, Fifth and Sixth Preference categories available for use in this category.
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