(2) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(3) the alien is in detention at the time this Title is enacted

(d) An alien granted Cuban/Haitian temporary resident status under this section shall register with the Immigration and Naturalization Service every three years, under such regulations as the Attorney General may prescribe, for so long as the alien remains in temporary resident status.

(e)(1) An alien under Cuban/Haitian temporary resident status shall not be eligible for benefits under section 501 of the Refugee Education Assistance Act of 1980 (P.L. 96-122)

(2) The spouse and children of an alien granted temporary resident status under this section shall not receive any status or preferred treatment under the Immigration and Nationality Act by reason of the family relationship with the temporary resident alien. However, this subsection shall not prevent a spouse or child who independently meets the qualifications of subsections (a) and (b) of this section from obtaining temporary resident status.

(3) An alien granted Cuban Haitian temporary resident status shall not be eligible for any benefits under any of the following provisions of law:

(A) Aid to families with dependent children under Title IV, Part A, of the Social Security Act (42 U.S.C. 601 et seq.);

(B) supplemental security income for the aged, blind, and disabled under Title XVI of the Social Security Act (42 U.S.C. 1381 et seq.) unless such disability was incurred directly from employment after registration under the provisions of the Act;

(C) Food Stamp Act of 1964, as amended (7 U.S.C. 2011 et seq.).

(D) Financial assistance made available pursuant to the United States Housing Act of 1937, Section 235 or 236 or National Housing Act or Section 101 of the Housing and Urban Development Act of 1965; and

(E) aid or assistance under a State plan approved under title I, X, XIV, or XVI of the Social Security Act (other than on the basis of a disability described in paragraph (G) of this subsection); and".

(F) redesignating paragraph (5) as paragraph (6) and amending it to read: "(6) medical assistance under title XIX of the Social Security Act (other than in the case of an individual receiving aid under a State plan approved under title XIV or XVI of the Social Security Act, or supplemental security income benefits under title XVI of that Act, on the basis of a disability described in paragraph (G) of this subsection.)";

(G)(1) Section 402(a)(33) of the Social Security Act is amended by striking out the period at the end thereof and inserting instead "other than an alien granted Cuban/Haitian temporary resident status.

(2) Section 1614(a)(1)(B) of such Act is amended by striking out the period at the end thereof and inserting instead "other than an alien granted Cuban/Haitian temporary resident status.

(3) Section (2)(a) of such Act is amended --

(A) by striking out "and" at the end of paragraph (12),

(B) by striking out the period at the end of paragraph (13) and inserting instead "; and", and

(C) by adding at the end of such subsection the following new paragraph:

"(14) provide that, in order for any individual to be a recipient of old-age assistance, or an individual whose needs are taken into account in making the determination under paragraph (10)(A), such individual must be either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 207(c) of the Immigration and Nationality Act (or of section 203(a)(7) of such Act prior to April 1, 1980), or as a result of the application of the provisions of section 208 or 212(d)(5) of such Act), other than an alien granted Cuban/Haitian temporary resident status."

(4) Section 1002(a) of such Act is amended --

(A) by striking out "and" at the end of paragraph (13),

(B) by striking out the period at the end of paragraph (14) and inserting instead "; and", and

(C) by adding at the end of such subsection the following new paragraph:

"(14) provide that, in order for any individual to be a recipient of aid to the blind, or an individual whose needs are taken into account in making the determination under paragraph (8), such individual must be either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 207(c) of the Immigration and Nationality Act (or of section 203(a)(7) of such Act prior to April 1, 1980), or as a result of the application of the provisions of section 208 or 212(d)(5) of such Act), other than an alien granted Cuban/Haitian temporary resident status."

(5) Section 1402(a) of such Act is amended --

(A) by striking out "and" at the end of paragraph (11),

(B) by striking out the period at the end of paragraph (12) and inserting instead "; and", and

(C) by adding at the end of that subsection the following new paragraph:

(13) provide that, in order for any individual to be a recipient of aid to the permanently and totally disabled, or an individual whose needs are taken into account in making the determination under paragraph (8), such individual must be either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 207(c) of the Immigration and Nationality Act (or of section 203(a)(7) of such Act prior to April 1, 1980), or as a result of the application of the provisions of section 208 or 212(d)(5) of such Act), other than an alien granted Cuban/Haitian temporary resident status.

(6) Section 1602(a) of such Act (as in effect in Puerto Rico, Guam, and the Virgin Islands) is amended --

(A) by striking out "and" at the end of paragraph (16),

(B) by striking out the period at the end of paragraph (17) and inserting instead "; and", and

(C) by adding at the end of such subsection the following new paragraph:

"(18) provide that, in order for any individual to be a recipient of aid to the aged, blind, or disabled, or an individual whose needs are taken into account in making the determination under paragraph (14), such individual must be either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 207(c) of the Immigration and Nationality Act (or of section 203(a)(7) of such Act prior to April 1, 1980), or as a result of the application of the provisions of section 208 or 212(d)(5) of such Act), other than an alien granted Cuban/Haitian temporary resident status."

(7) Section 1902(a) of such Act is amended --

(A) by striking out the period at the end of paragraph (43) and inserting "; and", and

(B) by adding at the end thereof the following new paragraph:

(44) provide that, in order for any individual to be eligible for medical assistance, such individual must be either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 207(c) of the Immigration and Nationality Act (or of section 203(a)(7) of such Act prior to April 1, 1980) , or as a result of the application of the provisions of section 208 or 212(d)(5) of such Act), other than an alien granted Cuban/Haitian temporary resident status.

Section 302. (a) Any alien (except an alien specified in section 301(a)(3), or an alien specified in section 301(a)(5) who has entered the United States) who is denied Cuban/Haitian temporary resident status for any of the reasons set forth in section 301(c), or whose status is terminated pursuant to the provisions of section 301 shall be detained pending a final determination of admissibility, or pending release on parole, or

pending deportation if the alien is found excludable, unless an examining officer finds that the alien is clearly and beyond a doubt entitled to be admitted to the United States. Such detention shall be in any prison or other detention facility or elsewhere, whether maintained by the Federal Government or otherwise, as the Attorney General may direct. The Attorney General may at any time transfer an alien from one place of detention to another. No alien shall be released from detention pending a final determination of admissibility, or pending exclusion or deportation if the alien is found excludable, except in the discretion of the Attorney General, and under such conditions as the Attorney General may prescribe, including release on bond. No court shall review any decision of the Attorney General made pursuant to this paragraph to detain, to transfer or to release an alien, except that any person so detained may obtain review, in habeas corpus proceedings, on the question of whether that person falls within the category of aliens subject to detention. A determination of admissibility is exempt from the provisions of the Administrative Procedures Act 15 US.C. 701(a).

(b) An alien specified in section 301(a)(3), or an alien specified in section 301(a)(5) who has entered the United States, who is denied Cuban/Haitian temporary resident status for any of the reasons set forth in section 301(c), or whose status is terminated pursuant to the provisions of section 301 shall be dealt with in accordance with section 242 of the Immigration and Nationality Act.

Section 303. (a) Notwithstanding any numerical limitations in the Immigration and Nationality Act, the Attorney General, in his discretion and under such regulations as he may prescribe, may adjust the status of a Cuban/ Haitian temporary resident to that of an alien lawfully admitted for permanent residence if the alien:

(1) applies for such adjustment,

(2) is not firmly resettled in any foreign country,

(3) has been physically present in the United States for at least five years after the earliest date upon which he came within any category specified in section 2(a)(1)-(5),

(4) can demonstrate an understanding of the English language,

Provided, that this requirement shall not

apply to any person physically unable to comply therewith, if otherwise eligible for adjustment; Provided further, that the requirements of this section relating to ability to read and write shall be met if the applicant can read or write simple words and phrases and that no extraordinary or unreasonable conditions shall be imposed upon the applicant; and

(5) is admissible (except as otherwise provided in subsection (b)) as an immigrant under the Immigration and Nationality Act at the time of examination for adjustment of such alien.

(b) The provisions of paragraphs (14), (20), (21), and (32) of section 212(a) of the Immigration and Nationality Act shall not be applicable to an alien seeking adjustment of status under this section, and the Attorney General may waive any other provision of such section (other that paragraph (27), (29), or (33) and other than so much of paragraph (23), except if the alien's inclusion in paragraph (23) is the result of only one conviction for possession without intent to distribute narcotic drugs or marihuana) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

Section 304. (a) An alien granted Cuban/Haitian temporary resident status may not apply for asylum under section 208 of the Immigration and Nationality Act (8 U.S.C. 1158), and any application for asylum under setion 208 or under any other provision of law filed by the alien but not approved before the alien was granted Cuban/Haitian temporary resident status shall be denied.

(b) Subsection (c) of section 208 of the Immigration and Nationality Act (8 U.S.C. 1158) and subsection (b) of section 209 (8 U.S.C. 1159) of that Act shall not be applicable to an alien granted Cuban/Haitian temporary resident status or to the spouse or child of such alien.

Section 305. Public Law 89-732 is repealed.

Section 306. There are hereby authorized to be appropriated such sums as may be necessary for the purpose of carrying out the provisions of this Act.

Section 307. This Act may be cited as the Cuban/Haitian Temporary Resident Status Act of 1981.

CUBAN/HAITIAN TEMPORARY RESIDENT LEGISLATION

Section-by-Section Analysis

Section 301 of the bill grants "Cuban/Haitian Temporary Resident" status to Cubans who were paroled into the United States between April 20, 1980, and January 1, 1981, or who had applications for asylum pending with the Immigration and Naturalization Service on December 31, 1980, and to Haitians who were (1) subjects of exclusion or deportation proceedings on December 31, 1980, or (2) were paroled into the United States before December 31, 1980, or (3) who had applications for asylum pending on December 31, 1980. Cuban/Haitian temporary resident status would be granted beginning 60 days after enactment of this Act. The Attorney General would be authorized to deny Cuban/Haitian temporary resident status to, or terminate the status of, any alien who is excludable under section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182), with certain exceptions. It allows the Attorney General to deny temporary resident status to detainees. This section would also permit the Attorney General to authorize Cuban/Haitian temporary resident to engage in employment in the United States. Subsection (d) provides that, notwithstanding that this section gives legal status to these aliens, the penalty provisions of section 273 and section 274 of the Immigration and Nationality Act would still apply to the boat captains who brought them in.

The section provides that aliens granted Cuban/Haitian temporary resident status must register with the Attorney General every three years and makes them ineligible for any government benefits including benefits under the Refugee Assistance Act of 1980

Section 302 provides for detention of aliens denied Cuban/Haitian temporary resident status until a final determination of admissibility is made, or pending determination, so that an alien may be detained for an indeterminate period. The section limits judicial review of such detention to habeas corpus proceedings on the question of whether that person falls within the category of aliens subject to exclusion. Persons eligible for deportation proceedings would be processed under section 242, as presently. The provisions of the Administrative Procedures Act will not apply to determinations of admissibility.

Section 303 authorizes the Attorney General to adjust the status of a Cuban/Haitian temporary resident to that of an alien lawfully admitted for permanent residence after the alien has maintained temporary resident status for five years. The Cuban/Haitian temporary resident may be denied adjustment if he is firmly resettled in another country or inadmissible under the Immigration and Nationality Act (8 U.S.C. 1182). The Attorney General is authorized to waive grounds for exclusion (with the exception of the provisions regarding national security, association with the Nazi government or trafficking in narcotics) for humanitarian purposes, to assure family unity, or when it otherwise would be in the public interest. These adjustments would not count against the numerical limitations of the Immigration and Nationality Act.

Section 304 terminates asylum proceedings for all temporary residents who have not been granted asylum under section 208 of the Immigration and Nationality Act (8 U.S.C. 1158) as of the date they are granted Cuban/Haitian temporary resident status. Those aliens granted asylum prior to the enactment of this Act will retain their status and will also be granted Cuban/Haitian temporary resident status if eligible under this Act. For purposes of adjustment of status and family reunification, such aliens will be treated as Cuban/Haitian temporary residents.

Section 305 repeals the Cuban Refugee Adjustment Act, P.L. 89-732. Under P.L. 89-732, the Cubans would otherwise be eligible for adjustment once they complete a year of physical presence.

Section 306 authorizes appropriations to carry out the provisions of this Act.

Section 307. The title of the Act.

TITLE IV -- THE FAIR AND EXPEDITIOUS APPEAL, ASYLUM AND EXCLUSION ACT OF 1981

Sec. 401 Section 106(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1105a) is amended to read as follows:

"A petition for review may be filed not later than 30 days from the date of the final deportation order or from the effective date of this section, whichever is the later."

Sec. 402(a). Section 279 of the Immigration and Nationality Act (8 U.S.C. 1329) is designated as section 279(a).

(b) Section 279 of the Act is hereby amended by adding after subsection (a) the following new subsection (b) to read as follows:

"(b) An action for judicial review of any administrative action arising under this Act, or regulations issued pursuant to this Act, other than a final order of deportation as provided in section 106(a) of the Act, may not be filed later than 30 days from the date of the final administrative action or from the effective date of this section, whichever is the later."

Sec. 403. Section 208 of the Immigration and Nationality Act (8 U.S.C. 1158) is amended to read as follows:

"Sec. 208(a)(1). An application for asylum may be made by any alien physically present in the United States or at a land border or port of entry. An alien may be granted asylum by an asylum officer under paragraph (2) of this subsection, if (A) the asylum officer determines that the alien is a refugee within the

meaning of section 101(a)(42)(A); (B) the alien is not firmly resettled in any foreign country; (C) the alien is not inadmissible under the provisions of paragraphs (27), (29), or (33) of section 212(a), or so much of paragraph 23 of section 212(a) as relates to trafficking; (D) the alien has not been convicted by final judgment of a particularly serious crime and does not constitute a danger to the community; and (E) there are no serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.

(2) Eligibility for asylum shall be determined by an asylum officer, who shall serve at the direction of the Commissioner, and who shall perform such other duties as the Commissioner may prescribe, except for the investigation or prosecution of any case under sections 235 or 242 of this Act. An alien seeking asylum shall appear before the asylum officer in an informal, nonadversary interview, and may be accompanied by counsel at no expense and no delay to the government. Counsel may advise the alien during the interview but shall not otherwise participate in the interview. The asylum officer may administer oaths and call witnesses, and request information on an application from any government agency, including information classified under Executive Order No. 12065 (50 U.S.C. nt. 401). A record of the proceedings shall be made in accordance with this section, and under such regulations as the Attorney General shall prescribe. The procedures set forth in this section shall be the sole and exclusive procedures for determining asylum. The determination of the asylum officer shall be final and shall not be subject to further administrative appeal or review, except that either the Commissioner or the Attorney General may require that the decision of an asylum officer be certified to him for review.

(3) The burden of proof shall be on the alien to establish that he qualifies for asylum under this section.

(4) No alien who meets the refugee definition set forth in section 101(a)(42)(A), and who meets the requirements of subsections (1)(C), (D), and (E) of this section shall be returned to the country or place where he would face persecution, as determined by the asylum officer.

(5) An alien against whom proceedings are instituted under section 236 or 242 of this Act, who has not previously made a claim for asylum, must make any application for asylum to the asylum officer under this section within 14 days of the service of the notice instituting such proceedings. An alien who does not make such a timely claim shall not be allowed to initiate an asylum claim absent a clear showing of changed circumstances in the country of the alien's nationality, or in the case of an alien having no nationality, the country of the alien's last habitual residence.

(6) An asylum officer may not reopen a proceeding under this section except upon a clear showing of changed circumstances in the country of the alien's nationality, or in the case of an alien having no nationality, the country of the alien's last habitual residence.

(b) Asylum granted under subsection (a) may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is (A) no longer a refugee within the meaning of section 101(a)(42)(A) owing to a change in circumstances in the alien's country of nationality or in the case of an alien having no nationality, in the country in which the alien last habitually resided; or (B) the alien was not a refugee within the meaning of section 101(a)(42)(A) at the time he was granted asylum; or (C) the alien is no longer eligible for asylum on any of the grounds set forth in (a)(1) above.

(c) A spouse or child (as defined in section 101(b)(1)(A), (B), (C), (D), or (E)) of an alien who is granted asylum under subsection (a) may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.

(d) Notwithstanding any other provision of law, a denial of an application for asylum and the procedures established to adjudicate asylum claims under this section shall be subject to judicial review only in a proceeding challenging the validity of an exclusion or deportation order as provided for in section 106(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1105a, and shall not be subject to review under 5 U.S.C. 702. The denial of an application for asylum may be set aside, or the cause remanded for further proceedings, only upon a showing that such denial was arbitrary and capricious, or was otherwise not in accordance with law.

Sec. 404. Section 235(b) of the Immigration and Nationality Act (8 U.S.C. 1225(b)) is amended to read as follows:

"Sec. 235(b) Provided that an "Immigration Emergency" has not been declared an immigration officer shall inspect each alien who is requried to have documentation seeking entry to the United States and shall make a determination on each alien's admissibility. (1) The decision of the immigration officer on admissibility of an alien shall be final, and not subject to further agency review or to judicial review, if the immigration officer determines an alien to be an alien crewman, a stowaway under section 273(d) of this Act, or an alien who does not present documentary evidence of U.S. citizenship, or lawful admission for permanent residence, or a visa or other entry document, or a certificate of identity issued under section 360(b) to support a claim of admissibility. (2) Any alien not excluded under paragraph one of this subsection who does not appear to the examining immigration officer to be clearly and beyond a doubt entitled to admission shall be detained for further inquiry by a special inquiry officer under section 236."

Sec. 405. Section 237 of the Immigration and Nationality Act (8 U.S.C. 1227(a)) is amended to read as follows:

"Sec. 237(a)(1) Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported, in accommodations of the same class in which he arrived, unless the Attorney General, in an individual case in his discretion, concludes that immediate deportation is not practicable or proper. Deportation shall be to the country in which the alien boarded the vessel or aircraft in foreign territory. If such boarding occurred in territory contiguous to the United States, or in any island adjacent thereto or adjacent to the United States and the alien is not a native, citizen, or subject or national of, or does not have residence in, such foreign contiguous territory or adjacent island, the deportation shall instead be to the country in which is located the port at which the alien embarked for such foreign contiguous territory or adjacent island. The cost of the maintenance, including detention expenses incident to detention of any such alien while he is being detained, shall be borne by the owner or owners of the vessel or aircraft on which he arrived, except that the cost of maintenance (including detention expenses and expenses incident to detention while the alien is being detained prior to the time he is offered for deportation to the transportation

line which brought him to the United States) shall not be assessed against the owner or owners of such vessel or aircraft if (A) the alien was in possession of a valid, unexpired immigrant visa, or (B) the alien (other than an alien crewman) was in possession of a valid, unexpired nonimmigrant visa or other document authorizing such alien to apply for temporary admission to the United States, or an unexpired reentry permit issued to him, and (i) such application was made within one hundred and twenty days of the date of issuance of the visa or other document, or in the case of an alien in possession of a reentry permit, examined and admitted by the Service, or (ii) in the event the application was made later than one hundred and twenty days of the date of issuance of the visa or other document or such examination and admission, if the owner or owners of such vessels or aircraft establishes to the satisfaction of the Attorney General that the ground of exclusion could not have been ascertained by the exercise of due diligence prior to the alien's embarkation, or (C) the person claimed United States nationality or citizenship and was in possession of an unexpired United States passport issued to him by competent authority.

(2) If the government of the country designated in subsection (a)(1) will not accept the alien into its territory, the alien's deportation shall be directed by the Attorney General, in his discretion and without necessarily giving any priority or preference because of their order as herein set forth, to —

(A) the country of which the alien is a subject, citizen, or national;

(B) the country in which he was born;

(C) the country in which he has a residence; or

(D) any country which is willing to accept the alien into its territory, if deportation to any of the foregoing countries is impracticable, inadvisable or impossible.

(b) It shall be unlawful for any master, commanding officer, purser, person in charge, agent, owner, or consignee of any vessel or aircraft (1) to refuse to receive any alien (other than an alien crewman) ordered deported under this section back on board such vessel or aircraft or another vessel or

aircraft owned or operated by the same interests; (2) to fail to detain any alien (other than an alien crewman) on board any such vessel or at the airport of arrival of the aircraft when required by this Act or if so ordered by an immigration officer, or to fail or refuse to deliver him for medical or other inspection, or for further medical or other inspection, as and when so ordered by such officer; (3) to refuse or fail to remove him from the United States to the country to which his exclusion and deportation has been directed; (4) to fail to pay the cost of his maintenance while being detained as required by this section or section 233 of this title; (5) to take any fee, deposit, or consideration on a contingent basis to be kept or returned in case the alien is landed or excluded; or (6) knowingly to bring to the United States any alien (other than an alien crewman) excluded or arrested and deported under any provision of law until such alien may be lawfully entitled to reapply for admission to the United States. If it shall appear to the satisfaction of the Attorney General that any such master, commanding officer, purser, person in charge, agent, owner, or consignee of any vessel or aircraft has violated any of the provisions of this section or of section 233 of this title, such master, commanding officer, purser, person in charge, agent, owner, or consignee shall pay to the district director of customs of the district in which the port of arrival is situated or in which any vessel or aircraft of the line may be found, the sum of $500 for each violation. No such vessel or aircraft shall have clearance from any port of the United States while any such fine is unpaid or while the question of liability to pay any such fine is being determined, nor shall any such fine be remitted or refunded; except that clearance may be granted prior to the determination of such question upon the deposit with the district director of customs of a bond or undertaking approved by the Attorney General or a sum sufficient to cover such fine.

(c) An alien shall be deported on a vessel or an aircraft owned by the same person who owns the vessel or aircraft on which such alien arrived in the United States, unless it is impracticable to so deport the alien within a reasonable time. The transportation expenses of the alien's deportation shall be borne by the owner or owners of the vessel or aircraft on which the alien arrived. If the deportation is effected on a vessel or aircraft not owned by such owner or owners, the transportation expenses of the alien's deportation may be paid from the appropriation for the enforcement of this Act and recovered by civil suit from any owner, agent, or consignee of the vessel or aircraft on which the alien arrived.

(d) The Attorney General, under such conditions as are by regulations prescribed, may stay the deportation of any alien deportable under this section, if in his judgment the testimony of such alien is necessary on behalf of the United States in the prosecution of offenders against any provision of this Act or other laws of the United States. The cost of maintenance of any person so detained resulting from a stay of deportation under this subsection and a witness fee in the sum of $1 per day for each day such person is so detained may be paid from the appropriation for the enforcement of this title. Such alien may be released under bond in the penalty of not less than $500 with security approved by the Attorney General on condition that such alien shall be produced when required as a witness and for deportation, and on such other conditions as the Attorney General may prescribe.

(e) Upon the certificate of an examining medical officer to the effect that an alien ordered to be excluded and deported under this section is helpless from sickness or mental and physical disability, or infancy, if such alien is accompanied by another alien whose protection or guardianship is required by the alien ordered excluded and deported, such accompanying alien may also be excluded and deported, and the master, commanding officer, agent owner, or consignee of the vessel or aircraft in which such alien and accompanying alien arrived in the United States shall be required to return the accompanying alien in the same manner as other aliens denied admission and ordered deported under this section."

Sec. 406. Section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h)) is hereby repealed.

Section-by-Section Analysis and Background

THE FAIR AND EXPEDITIOUS
APPEAL, ASYLUM, AND EXCLUSION ACT OF 1981

General purpose. This bill addresses three major aspects of the immigration law: exclusion, appeals, and asylum. The changes made in existing laws, plus additional provisions should provide for a speedier and more efficient resolution of admissibility, appeals, and asylum claims. The appeal provisions shorten the time period allowed for appeal from orders of deportation, and for the first time establish a 30-day appeal period for other administrative decisions. The exclusion provisions limit the categories of aliens who may request an exclusion hearing before an immigration judge. For example, persons who attempt to enter the United States without any valid documentation, or alien crewmen or stowaways will have their admissibility determined by an immigration inspector. An excluded alien may be returned to the country where he boarded the aircraft or vessel or to any other country or place designated in the amended section 237. Under the present provisions, the government is often unable to exclude and deport an alien, as deportation may only be to the country "whence the alien came". The asylum provisions establish an "asylum officer" who will adjudicate all such claims in a nonadversarial setting. Limits are imposed on the time during which an application may be made, and the conditions for reopening the application. The asylum provisions are made consistent with the refugee provisions of section 207 in regard to eligibility. Finally, review of asylum applications is limited: there is no administrative review except through certification, and judicial review is provided for only in the context of the review of a final order of deportation or exclusion.

Section 106a of the Immigration and Nationality Act, 8 U.S.C. 1105a is amended to shorten the time period within which a deportation order may be appealed from six months, to 30 days. Under the current provision, many deportable aliens postpone their appeal fo five months or more, and then submit a frivolous appeal. The filing of the appeal serves as an automatic stay. With the present backlog in the courts of appeal, the net result is to award a deportable alien extra time in the United States. Shortening the appeal period to 30 days will speed up the deportation process, and will not adversely affect an alien's legitimate defense of a deportation order.

Section 279 of the Act, 8 U.S.C. 1329, is amended to provide for a 30 day appeal period to contest an administrative action arising under the immigration statutes or regulations. Under the present provision, which specifies no appeal limit, deportable aliens have been able to frustrate the deportation process by filing suit contesting administrative actions, such as denial of student reinstatement, after the deportation process has been completed, and after they have received final orders of deportation. The proposed 30 day appeal period will be consistent with the proposed section 106a.

Section 208(a)(1) incorporates the present provision that any alien physically present in the United States may apply for asylum, regardless of his means of entry, or the legality of his status. This subsection additionally specifies that an asylum officer will determine eligibility for asylum, and bars certain categories of aliens from receiving a grant of asylum. Persons firmly resettled in a foreign country will not be eligible for asylum. Aliens inadmissible under paragraphs (27), (29), or (33), and so much of paragraph (23) as relates to trafficking in narcotics, of section 212(a) will not be eligible for asylum. The addition of these two bars to eligibility will result in an asylum provision which is consistent with the refugee provisions of section 207 of the Act, 8 U.S.C. 1157. It should also do away with the present somewhat anomolous situation where aliens may be granted asylum, without regard to these provisions, but then are rendered ineligible for adjustment of status to permanent residence under section 209(b) of the Act. This subsection also bars a grant of asylum to an alien who has been convicted of a particularly serious crime and constitutes a danger to the community, as well as an alien for whom there is serious reason to believe that he has committed a serious nonpolitical crime outside the United States prior to arrival. These bars are consistent with the UN Convention Relating to the Status of Refugees, and are presently incorporated in section 243(h) of the Act, which is repealed. The United States is not obligated to grant refugee status to persons committing acts of this type.

Subsection 208(a)(2) provides for an "asylum officer" to adjudicate asylum claims. This officer would serve at the direction of the Commissioner of the Service, and would be specifically trained to adjudicate asylum claims in a nonadversarial setting. The present system allows an alien to make successive applications to the district director and to an immigration judge, leading to a time-consuming process. The asylum officer would preside as a hearing officer,

and would interview witnesses and consider evidence submitted by the applicant, as well as information provided at the asylum officer's request by other agencies, such as the Department of State. Counsel's participation would be limited to advising the applicant, and not otherwise presenting evidence, or acting as an advocate. The asylum officer's determination would be administratively final, except in instances where the Attorney General or Commissioner determined that certification of the application was appropriate. In such cases, the asylum officer's determination to either grant or deny asylum could be reversed.

Subsection 208(a)(3) places the burden of proof on the applicant. No such provision exists in the present asylum statute. This provision codifies the administrative interpretations of the Board of Immigration Appeals, and is consistent with the UN Convention Relating to the Status of Refugees.

Subsection 208(a)(4) bars the deportation of an alien to a country or place where he will suffer persecution, thus incorporating the major provision of the present section 243(h) of the Act. This section satisfies the standards of Article 33 of the UN Covention Relating to the Status of Refugees, by preventing the "refoulement" of refugees to a country or place of persecution.

Subsection 208(a)(5) provides that an alien brought into asylum or deportation proceedings, who has not previously made a claim to asylum, must apply for asylum within 14 days of the notice instituting the proceedings. If a timely claim is not made, the applicant must a clear showing of changed circumstances in the country of alleged persecution.

Subsection 208(a)(6) prohibits reopening of asylum or deportation proceedings before the asylum officer except upon a clear showing of changed circumstances in the country of alleged persecution. This provision enables flexibility in cases where the alien originally lacked sufficient evidence of persecution, but where conditions in the country may have since changed.

Subsection 208(b) provides for termination of asylum status if circumstances change in the country of persecution to such an extent that the applicant need no longer fear persecution upon return. This subsection also adds a provision allowing termination of asylum status if the alien was not a refugee at the time he was granted asylum. This is a parallel provision to

section 207 of the Act. Additionally, it allows for termination if it is determined that the alien is no longer eligible for asylum for any of the reasons which initially bar a grant of asylum. These provisions are presently incorporated in the asylum regulations, but have no statutory basis, except by analogy to section 243(h).

Subsection 208(c) incorporates the present provisions of section 108(c) of the Act, which accord derivative asylum status to the spouses or child of the person granted asylum.

Subsection 208(d) provides that judicial review of an asylum claim is reviewable in the context of judicial review of an order of exclusion or deportation as provided in section 106(a) of the Act, 8 U.S.C. 1105a, and that a claim is not reviewable under the Administrative Procedure Act. The standard for review is that the denial of the asylum application was arbitrary or capricious, or otherwise not in accordance with law. This provision will allow review of the great majority of asylum claims made by aliens who are placed in deportation or exclusion proceedings, but will not provide for judicial review of asylum claims by persons who maintain a lawful status in the United States. This provision does not address the use of petitions for writs of habeas corpus which will probably continue to provide an additional means of review for all aliens taken into custody following a finding of excludability or deportability.

Sec. 404 amends section 235(b) to provide that any alien who presents himself for inspection by an immigration officer may be summarily excluded from admission by that immigration officer if the alien does not present any documentation to support a claim that he is addmissible to the United States.

An alien seeking entry has only those rights which Congress determines should be extended to him. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Currently, exclusion proceedings are prescribed by section 236 of the Act. That section provides for a hearing before an immigration judge and requires that a complete record of the testimony and evidence be kept. Section 292 of the Act provides right of counsel (at no expense to the Government) for any alien in an exclusion proceeding. Under 8 C.F.R. 236.2, the immigration judge must advise the alien of his right to counsel of his choice and of the availability of free legal services. A decision by the immigration judge that the alien is excludable is appealable to the Attorney General under section 236(b). The Board of

Immigration Appeals was created by the Attorney General administratively to hear such appeals (8 C.F.R. Part 3). Under 8 C.F.R. 236.7, the alien has 13 days after a written decision of exclusion is mailed to file an appeal with the BIA. An appeal from an oral decision of exclusion must be taken immediately after the decision is rendered. On request, the BIA must schedule oral hearings on the appeal. BIA decisions must be issued in writing. Under section 106(b) of the Act, an alien under a final order of exclusion by the BIA may obtain judicial review only by habeas corpus proceedings.

These procedures are available to any alien, regardless of his claim. This proposal will streamline those proceedings when an alien cannot present any documentation to support a claim of admissibility. Under currently available procedures, those aliens denied entry under this provision who have a claim to admission but who have lost their documents may go to the U.S. consular officer and apply for a special immigrant visa.

Section 405 amends section 237 to eliminate the problems caused by the current law which specifies that an alien ordered excluded from the United States may be returned only to the "country whence he came." Decisional law has defined "the country whence he came" as the country where the alien last had a place of abode. When, however, that country does not recognize the alien's right to return, the United States Government has no discretion under the Immigration and Nationality Act to apply to a second country which may be willing to accept the alien as a deportee. In contrast, when an alien illegally in the United States is ordered arrested and deported following an expulsion hearing, section 243(a) of the Act (8 U.S.C. 1253(a)) provides that if the country first designated will not accept the alien, application may be made to other countries. This amendment would provide similar options with respect to aliens who have been ordered excluded and deported. It will also eliminate the confusing term "whence he came" and make it clear to which country deportation initially would be sought.

Section 406 repeals section 243(h) in its entirety. As long as this withholding provision exists, each alien will have two means of applying for asylum in the United States. With the incorporation of the new subsection 208(a)(4), which bars deportation to a country or place of persecution, there is no need for withholding of deportation. In pratice, the existence of both applications has led to confusion, as immigration judges apparently have the option of granting either asylum or withholding. The reality of the situation is that few if any aliens granted withholding ever leave the United States. It is also incongruous to have a mandatory withholding provision and a discretionary asylum provision.

TITLE V

THE IMMIGRANT VISAS FOR CANADA AND MEXICO

Section 501

(a). Section 201(a) of the Immigration and Nationality Act (8 U.S.C. 1151(a)) is amended to read as follows:

"(a)(1) Exclusive of special immigrants defined in section 101(a)(27), immediate relatives specified in subsection (b) of this section, aliens who are admitted or granted asylum under section 207 or 208, and aliens described in paragraph (2) of this subsection, the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, shall not in any of the first three quarters of any fiscal year exceed a total of sixty-one thousand and shall not in any fiscal year exceed two hundred thirty thousand.

"(2) Exclusive of special immigrants defined in section 101(a)(27), immediate relatives specified in section 201(b), and aliens who are admitted or granted asylum under section 207 or 208, the number of aliens chargeable (as

provided in section 202(b)) to any single foreign state contiguous to the United States who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence shall not in any of the first three quarters of any fiscal year exceed a total of eleven thousand and shall not in any fiscal year exceed a total of forty thousand: Provided, however, that, if in any fiscal year, the number of aliens chargeable to either contiguous foreign state who are issued immigrant visas and otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence is less than forty thousand, in the next following fiscal year the number of aliens from the other contiguous foreign state who may be issued immigrant visas or otherwise acquire the status of an alien lawfully admitted to the United States shall be increased by an amount equal to the difference between forty thousand and such number. In such a case, the limitation prescribed for such foreign state for each of the first three quarters of such fiscal year shall be increased by an appropriate proportional amount."

(b). Section 202(a) (8 U.S.C. 1152(a)) is amended to read as follows:

"(a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant

visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in section 101(a)(27), 201(b), and section 203: Provided, that the total number of immigrant visas made available to natives of any single foreign state (other than a foreign state contiguous to the United States) under paragraphs (1) through (7) of section 203(a) shall not exceed 20,000 in any fiscal year."

SECTION BY SECTION ANALYSIS

Section 501(a) would amend section 201(a) of the Act to create separate numerical limitations of 40,000 each on immigration from Canada and Mexico, our two contiguous neighbors. The overall limitation on immigration from the rest of the world would be reduced from 270,000 to 230,000.

Under this proposal qualified immigrants from each of the two countries would compete for immigration only among themselves. The substantive rules for qualification to immigrate would remain unchanged, as would the apportionment of the respective limitations among the various classes of qualified immigrants (preference and nonpreference) set forth in section 203(a) of the Act.

This proposal also contains provisions for increasing the limitation for either Canada or Mexico by an amount equal to the amount, if any, unused by the other country. If, in a given fiscal year, immigration under the 40,000 limitation from either country fell below the 40,000 maximum, in the next fiscal year the limitation for the other country could be increased by an amount equal to the previous year's shortfall. In no case, however, would the basic 40,000 limitation for either country be reduced.

As an example, in the first year of operation of this proposed system the limitation for each country would be 40,000. If, at the end of the year, immigration from Canada had reached only 25,000, then in the second year the limitation for Canada would again be 40,000, but the limitation for Mexico would be 55,000 - the basic 40,000 plus 15,000 (the difference between 40,000 and Canada's previous year usage of 25,000).

This calculation of the limitation would be made each year on the basis of the previous year's level of immigration. In theory, if immigration from both countries fell below 40,000 in any fiscal year, both countries would be entitled to an increase in the next year. It is unlikely, however, that such a situation would occur.

Section 501(b) would make a conforming technical amendment in section 202(a).

TITLE VI - THE TEMPORARY MEXICAN WORKERS ACT

Section 601(a) During each of two consecutive twelve month periods beginning on the first day of the seventh month following enactment of this section, there are authorized to be admitted to the United States as nonimmigrants not more than fifty thousand aliens who --

(1) are nationals of Mexico;

(2) have a residence in Mexico which they have no intention of abandoning;

(3) are seeking to enter the United States temporarily to perform services or labor as specified in subsection (b) of this section;

(4) are in possession of a nonimmigrant visa issued by a consular officer as provided in subsection (c) of this section; and

(5) are otherwise admissible under the Immigration and Nationality Act, as amended, to the United States as nonimmigrants.

(b)(1) Prior to the beginning of each twelve-month period specified in subsection (a) of this section, the Governor of each of the states of the United States wishing to participate in the program established in this section, shall, (A) using a format which may be prescribed by the Secretary of Labor, establish a list of industries, following the Standard Industrial Classification Code, and/or a list of occupations, following the Dictionary of Occupational Titles, containing the industries and/or occupations having an adequate supply of qualified workers within such State; and (B) estimate how many aliens described in subsection (a) of this section might be admitted to the United States for employment in other occupations in such state without adversely affecting labor conditions therein.

(2) Upon receipt of the determinations made by states pursuant to subsection (b)(1)(B) of this section, the Secretary of Labor shall consider any request above 50,000 to be equal to 50,000, and shall allocate to each state the amount of its request, up to 925 (1/54 of 50,000). If there is an unallocated remainder of the 50,000, and if there are states with requests in excess of 925, the remainder will be allocated among those states as follows: Each such state will be allocated a share of the remainder in the same proportion that its unfilled request bears to the total of such unfilled requests. The

Secretary shall thereupon promptly inform the Secretary of State and the Commissioner of Immigration and Naturalization of such estimates or of the total assigned to each state.

(3) Any person in the United States intending to employ an alien described in subsection (a) of this section may apply to the Governor of the state, or his designee, in which the alien will be employed, in such form as the Secretary of Labor may prescribe, and submit a statement identifying the occupation in which employment is to be offered to the alien, using the Dictionary of Occupational Titles, and certifying that the employer will comply with all Federal, State and local laws regarding such employment. Upon receipt of such application, the Governor, or his designee, shall approve such application and endorse it appropriately, if (1) the occupation in which the alien is to be employed is not included on the list prepared pursuant to subsection (b)(1)(A) for such state; and (2) if the number of such applications approved for such state in the same twelve-month period has not reached the number established for such state pursuant to subsection (b)(2).

(4) Upon approval and endorsement of an application, the Governor, or his designee, shall transmit the endorsed application to the consular office, designated by the employer as the office at which the alien will apply for a visa.

(5) Nothing in this section shall be construed to authorize or require the Secretary of Labor or the Governor of any state to participate in the recruitment of workers.

(c) After receipt of the application as provided in subsection (b)(4) of this section, the consular officer may, upon application therefor by an alien designated by the employer, issue a nonimmigrant visa to the alien, provided the alien is otherwise eligible therefor as provided in subsection (a) of this section.

Such visa shall be in the form prescribed by the Secretary of State for nonimmigrant visas generally, shall bear the visa symbol "M" and shall be valid for no more than one year from the date of issuance of such visa, and for multiple applications for admission.

(d) When an alien in possession of a visa issued pursuant to subsection (c) applies for admission to the United States, the Attorney General shall, if he finds that the alien is admissible to the United States, admit the alien for a period of no more than 365 days.

(e) An alien admitted pursuant to subsection (d) of this section may be granted permission to change employment, upon application by the employer for whom the alien desires to work, provided that (1) such employment is in a state participating in the program established by this section; and (2) such employment is not in an occupation listed pursuant to subsection (b)(1)(A) for such state. An employer desiring and intending to employ such an alien may apply to the Governor of the State, or his designee on the form prescribed pursuant to subsection (b)(1) of this section. If the Governor, or his designee determines that such employment is not in an occupation listed pursuant to subsection (b)(1)(A) of this section for the State, he may approve such application and return it to the employer. Actual employment of the alien by the new employer prior to such approval shall constitute employment in violation of the provisions of 5(f). The employer shall thereupon furnish the approved application to the alien who shall apply to the District Office of the Immigration and Naturalization Service having jurisdiction over the place of proposed employment, for annotation of the alien's entry record to reflect the change of employment and for extension of his authorized period of admission, if necessary.

(f) An alien admitted pursuant to the provisions of this section who thereafter is employed in violation of the provisions of this section, who remains longer than authorized under this section, or otherwise violates the terms and conditions of his admission shall not thereafter be eligible for admission pursuant to this section.

(g) an alien who is the spouse or child of an alien admitted pursuant to this section shall not be admissible to the United States on the basis of such relationship.

(h) No alien admitted pursuant to this section shall be eligible to receive any of the following benefits --

(1) food stamps under the Food Stamp Act of 1964, as amended (7 U.S.C. 2011, et seq.); or

(2) benefits under any State or Federal unemployment compensation program based on any services performed or any wages earned while present in the United States after such admission; Provided, That no employer of such an alien shall be exempt from taxation on the wages paid to such alien under any state unemployment compensation law or under chapter 23 of the Internal Revenue Code of 1954 because of such alien's status as an alien, the admission of such alien pursuant to this section, or the temporary nature of such admission.

(3)Financial assistnace made available pursuant to the United States Housing Act of 1937, Section 235 or 236 or National Housing Act or Section 101 of the Housing and Urban Development Act of 1965; and

(4) aid or assistance under a state plan approved under title I, X, XIV, or XVI of the Social Security Act (other than on the basis of a disability described in paragraph (6) of this subsection); and

(5) medical assistance under title XIX of the Social Security Act (other than in the case of an individual receiving aid under a state plan approved under title XIV or XVI of the Social Security Act, or supplemental security income benefits under title XVI of that Act, on the basis of a disability described in paragraph (6) of this subsection;

(6)(1) Section 402(a)(33) of the Social Secuity Act is amended by striking out the period at the end thereof and inserting instead "other than a nonimmigrant admitted for a period of no more than 365 days in order to participate in an experimental work program.

(2) Section 1614 (a)(1)(B) of such Act is amended by striking out the period at the end thereof and inserting instead "other than a nonimmigrant admitted for a period of no more than 365 days in order to participate in an experimental work program.

(3) Section (2)(a) of such Act is amended --

(A) by striking out "and" at the end of paragraph (12),

(B) by striking out the period at the end of paragraph (13) and inserting instead "; and", and

(C) by adding at the end of such subsection the following new paragraph:

"(14) provide that, in order for any individual to be a recipient of old-age assistance, or an individual whose needs are taken into account in making the determination under paragraph (10)(A), such individual must be either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 207(c) of the Immigration and Nationality Act (or of section 203(a)(7) of such Act prior to April 1, 1980), or as a result of the application of the provisions of section 208 or 212(d)(5) of such Act), other than a nonimmigrant admitted for a period of no more than 365 days in order to participate in an experimental work program."

(4) Section 1002(a) of such Act is amended --

(A) by striking out "and" at the end of paragraph (13);

(B) by striking out the period at the end of paragraph (14) and inserting instead "; and", and

(C) by adding at the end of such subsection the following new paragraph:

"(14) provide that, in order for any individual to be a recipient of aid to the blind, or an individual whose needs are taken into account in making the determination under paragraph (8), such individual must be either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 207(c) of the Immigration and Nationality Act (or of section 203(a)(7) of such Act prior to April 1, 1980), or as a result of the application of the provisions of section 208 or 212(d)(5) of such Act), other than a nonimmigrant admitted for a period of no more than 365 days in order to participate in an experimental work program."

(5) Section 1402(a) of such Act is amended --

(A) by striking out "and" at the end of paragraph (11),

(B) by striking out the period at the end of paragraph (12) and inserting instead "; and", and

(C) by adding at the end of that subsection the following new paragraph:

(13) provide that, in order for any individual to be a recipient of aid to the permanently and totally disabled, or an individual whose needs are taken into account in making the determination under paragraph (8), such individual must be either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 207(c) of the Immigration and Nationality Act (or of section 203(a)(7) of such Act prior to April 1, 1980), or as a result of the application of the provisions of section 208 or 212(d)(5) of such Act), other than a nonimmigrant admitted for a period of no more than 365 days in order to participate in an experimental work program.

(6) Section 1602(a) of such Act (as in effect in Puerto Rico, Guam, and the Virgin Islands) is amended --

(A) by striking out "and" at the end of paragraph (16),

(B) by striking out the period at the end of paragraph (17) and inserting instead "; and", and

(C) by adding at the end of such subsection the following new paragraph:

"(18) provide that, in order for any individual to be a recipient of aid to the aged, blind, or disabled, or an individual whose needs are taken into account in making the determination under paragraph (14), such individual must be either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 207(c) of the Immigration and Nationality Act (or of section 203(a)(7) of such Act prior to April 1, 1980), or as a result of the application of the provisions of section 208 or 212(d)(5) of such Act), other than a nonimmigrant admitted for a period of no more than 365 days in order to participate in an experimental work program."

(7) Section 1902(a) of such Act is amended --

(A) by striking out the period at the end of paragraph (43) and inserting "; and", and

(B) by adding at the end thereof the following new paragraph:

(44) provide that, in order for any individual to be eligible for medical assistance, such individual must be either (A) a citizen, or (B) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 207(c) of the Immigration and Nationality Act (or of section 203(a)(7) of such Act prior to April 1, 1980) , or as a result of the application of the provisions of section 208 or 212(d)(5) of such Act), other than a nonimmigrant admitted for a period of no more than 365 days in order to participate in an experimental work program.

(i)(1) Notwithstanding the provisions of the Immigration and Nationality Act, as amended, no alien admitted as a nonimmigrant pursuant to the provisions of this section shall be granted adjustment of status pursuant to section 245 thereof to that of an alien lawfully admitted for permanent residence, change of nonimmigrant classification pursuant to section 248 thereof, or suspension of deportation pursuant to section 244 thereof.

(2) Except as otherwise provided in this section, the provisions of the Immigration and Nationality Act, as amended, shall apply in the administration and enforcement of the provisions of this section.

(j) Not later than ninety days following the end of each twelve-month period specified in subsection (a) of this section, the Governor of each state, or his designee, which has participated in the program established by this section during such twelve-month period shall submit to the Secretary of Labor a detailed report of the operation of the program in such State. The report shall contain such information as the Secretary of Labor may prescribe, including, but not limited to, the number of workers employed

under this program in the state, the occupations and industries in which such workers were employed, the locations within the state at which such workers were employed, and the wages and working conditions of such employment.

THE TEMPORARY MEXICAN WORKER ACT

ANALYSIS

Section 601 would establish a two-year program for the admission of nationals of Mexico for employment in jobs for which there is a shortage of domestic workers. The jobs could be in any field, skilled or unskilled, provided that there was a lack of available labor. Because the program is a pilot project and is intended as a test, it would not only be limited in time to a two-year period, but also be limited in size to 50,000 workers per year.

Under the proposal, the participating states of the United States would determine for each fiscal year the occupations in each state for which there is an adequate supply of workers. Also, each participating state would estimate the number of alien workers for whom employment might be available in other occupations within the state without adverse effect on the labor market in the state. These estimates would be submitted to the Secretary of Labor who would total them. If they amounted to a grand total of 50,000 or less, the Secretary would simply assign as each state's share the number estimated by the state. If the grand total exceeded 50,000, the Secretary would assign as each state's share a proportionate share of the 50,000 total, taking into account the size of the state's total request.

An employer desiring to hire a Mexican worker under this program would apply to the Governor of the state. The Governor would verify that the proposed job is not in an occupation included on the "adequate supply of labor list" for the state in which the job is located and that the number of approvals for that year for that state had not reached the number assigned for that state. After verifying these two items, he would then send the application to the consulate in Mexico at which a worker designated by the employer will apply for an entry visa.

The consul will verify that the worker is generally admissible under the immigration law and, if so, issue a visa. When the worker applies to enter this country he will be admitted for a period of up to twelve months. During the period of employment, the worker would be allowed to travel back to Mexico for short visits and return to his job.

If the worker desired to change jobs after admission, his new employer would apply to the Governor of the state in which the new job is located for permission to do so. The Governor would grant the permission if the new job was not included on the "adequate supply of labor list" for the state in which the job was located (either the same state or another and either the same type of job or a different type). The numerical limit on the number per state would not apply to requests to change employment.

Mexican workers admitted under this program would not be allowed to bring their families with them and would be ineligible to receive a number of social benefits which citizen and permanent resident workers can receive. On the other hand, these Mexican workers would find themselves significantly better off than they now are as workers here without lawful status or a legal right to be employed. First, they would have the legal right to be employed in the jobs they have and would have obtained those jobs through a formal, open procedure. Also, and perhaps even more important, they would be allowed to change jobs legally under a simple procedure. This second feature will do much to eliminate the exploitation which now often takes place.

At the same time, however, the interests of citizen and permanent resident workers are protected by the requirement that the Mexican worker not be employed in jobs for which there is an adequate supply of American workers.

Mexican workers admitted under this program who violate the terms of their admission (for example, by taking a job in a listed occupation or by staying longer than permitted) would not only be subject to the general provisions of the immigration law regarding deportation, but would also be prohibited from future participation in this program. Also, participants in this program would be barred from certain general benefits under the

immigration law such as adjustment of status to permanent resident, suspension of deportation and change to another nonimmigrant classification.

TITLE VII - THE IMMIGRATION EMERGENCY ACT

Section 701. Chapter 4 of Title II of the Immigration and Nationality Act is amended by inserting at the end thereof the following new sections (8 U.S.C. 1230A through 1230E):

Section 240A. Declaration of Immigration Emergency

(a) The President may declare an immigration emergency with respect to any specifically designated foreign country or countries or geographical area or areas, if the President, in his judgment, determines that:

a substantial number of aliens who lack documents authorizing entry to the United States appear to be ready to embark or have already embarked for the United States, and the aliens will travel from, or are likely to travel in transit through, the foreign country or countries or the foreign geographical area or areas; and

the normal procedures of the Immigration and Nationality Act or the current resources of the Immigration and Naturalization Service would be inadequate to respond effectively to the influx of these aliens.

(b) Within 48 hours of the declaration of any immigration emergency, the President shall inform the Speaker of the House and the President pro-tempore of the Senate of the reasons prompting

the declaration. The President shall cause the declaration to be published in the Federal Register as soon as practicable. The declaration shall expire automatically 120 days after its proclamation, unless ended sooner by the President. The President may extend the declaration for additional periods of 120 days by following the procedures set forth in this subsection, if, in his judgment, the conditions listed in subsection (a) continue to exist.

Section 240B. Emergency Powers and Procedures

(a) Upon the declaration of an immigration emergency under Section 240A, the President may invoke the following emergency powers and procedures:

(1) Any or all United States vessels, vehicles and aircraft, and any other vessel, vehicle or aircraft which is owned or operated by, chartered to, or otherwise controlled by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any political subdivision thereof, bound directly or indirectly for a designated foreign country or foreign geographical area may be precluded from departing from the United States or may be intercepted while en route and required to return to the United States if feasible, or to any other reasonable location until such time as it is feasible to return to the United States, or, if appropriate, allowed to proceed to any other reasonable location.

The arrival in the United States of any aliens or class of aliens who lack documents authorizing entry

to the United States or who are otherwise inadmissible and who are traveling directly or indirectly from or in transit through a designated foreign country or foreign geographical area may be prevented by returning or requiring the return of such alien or any vessel, vehicle, or aircraft carrying any such alien to the designated country or area, or to some other reasonable location.

The exclusion or admission to the United States of any alien, regardless of nationality, who is traveling or has traveled to the United States directly or indirectly from or through the designated foreign country or foreign geographical area and who is not in possession of a visa or other entry document required for admission to the United States by statute or regulation may be determined under procedures established by the Attorney General (whether by regulation or otherwise), and no such alien shall be presented for inquiry before a special inquiry officer unless such presentation is authorized by the Attorney General pursuant to regulation.

(ii) Notwithstanding section 208, or any other provision of law, the Attorney General may establish by regulation or otherwise a separate procedure to consider an asylum claim advanced by an alien whose admissibility is to be determined in accordance with this paragraph.

(iii) Any alien found inadmissible to the United States pursuant to the procedures established by the Attorney General under this paragraph shall be deported to the country from whence he came. If the Attorney General determines that the alien should not or cannot practicably be removed to the country from whence the alien came, the Attorney General may deport the alien to any country described in section 243(a), without regard to the designation of the alien or the order of countries set forth in section 243(a).

(iv) Any alien admitted to the United States under this paragraph shall be admitted for such time and under such conditions as may be prescribed by the Attorney General, including the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe to insure compliance with the terms and conditions of the alien's admission.

(v) No court shall have jurisdiction to review the determination of admissibility or nonadmissibility, or the determination of any asylum claim with respect to any alien who is subject to this paragraph.

(4) Every alien who is subject to the provisions of this section shall be detained pending a final determination of admissibility, or pending release on parole,

or pending deportation if the alien is found excludable, unless an examining officer finds that the alien is clearly and beyond a doubt entitled to be admitted to the United States. Such detention shall be in any prison or other detention facility or elsewhere, whether maintained by the Federal Government or otherwise, as the Attorney General may direct. The Attorney General may at any time transfer an alien from one place of detention to another. No alien shall be released from detention pending a final determination of admissibility, or pending deportation if the alien is found excludable, except in the discretion of the Attorney General, and under such conditions as the Attorney General may prescribe, including release on bond. Any alien applying for admission from foreign contiguous territory may, in the discretion of the Attorney General, be required to remain outside of the United States pending a final determination of admissibility. No court shall review any decision of the Attorney General made pursuant to this paragraph to detain, to transfer or to release an alien, except that any person so detained may obtain review, in habeas corpus proceedings, on the question of whether that person falls within the category of aliens subject to detention. Nothing in this paragraph shall relieve a carrier

or any other person of any liability, duty or consequence pertaining to the detention of aliens which may arise under any other provision of the Act or other law.

(5) (i) The President may exempt any source of any department, agency, or instrumentality in the executive branch from applicable environmental requirements pursuant to section 1323(a) of title 33 and sections 300j-6(b), 4903, 6961, and 7418(b) of title 42 of the United States Code.

(ii) Upon a Presidential finding, transmitted to Congress, that an exemption is necessary to respond to an immigration emergency, the President may exempt any source or action of any department, agency, or instrumentality in the executive branch which is directly and substantially related to an immigration emergency from applicable requirements of the National Environmental Policy Act, 42 U.S.C. 4331 et seq., the Coastal Zone Management Act, 46 U.S.C. 1451 et seq., the Endangered Species Act, 16 U.S.C. 1531 et seq., The Fish and Wildlife Coordination Act, 16 U.S.C. 661 et seq., the Historic Preservation Act, 16 U.S.C. 470 et seq., and from the applicable requirements of any other Federal, state or local law which is intended principally to protect or preserve the environment, wildlife, or aspects of the history or heritage of the United States.

(iii) Except with respect to matters concerning the detention of aliens, an exemption under this paragraph shall lapse upon termination of an immigration emergency. In no event shall any exemption under this paragraph last more than one year. An exemption with respect to matters concerning the detention of aliens shall last until terminated by the President, or the expiration of one year, whichever occurs first. During the time period in which an exemption applies the President may, in his discretion, require that a source nonetheless meet certain environmental standards without thereby creating a private right of action to enforce that requirement.

(b)(1) During the existence of the immigration emergency, the President may order the closing or sealing of any harbor, port, airport, road or any other place, structure or location which may be used as a point of departure from the United States to a designated foreign country or foreign geographical area, if, in the President's judgment, such action is necessary to prevent the arrival in the United States of aliens who are inadmissible and who are traveling from or in transit through a designated country or area.

(2) No person shall cause any vessel, or aircraft to depart from or beyond or enter into a closed or sealed harbor, port, airport, road, place, structure or location during an immigration emergency, unless written permission has been obtained for

such departure prior to the actual departure of the vessel, or aircraft.

(3) Permission for departure from or beyond or entry into a closed or sealed harbor, port, airport, road, or any other place, structure or location shall be given only for those vessels, vehicles, aircraft which are clearly shown not to be destined for a designated foreign country or foreign geographical area. The agency designated by the President under subsection (c) of this section shall prescribe the procedures to be followed in requesting departure permission. In the absence of such procedures, permission may be sought from any agency directly involved in the closing or sealing of the harbor, port, airport, road, or other place, structure or location. A final decision shall be made on any request for departure permission within 72 hours of the request, unless the person seeking such permission consents to a longer period. If no action is taken on the request within the requisite period, the request for departure permission shall be deemed denied.

(4) The district courts of the United States shall have jurisdiction to review any final decision denying permission to depart under paragraph (3) of this subsection, except that review may be obtained prior to a final administrative decision with respect to any vessel, vehicle or aircraft if

irreparable injury would occur before a final administrative decision could be obtained.

(c) Although the President may not delegate the authority to initiate those emergency powers of this section which expressly require Presidential invocation, the President may designate one or more agencies of the Federal Government to administer the provisions of sections 240B through 240D. In the course of enforcement of these provisions, the designated agency may promulgate regulations and may request assistance from any state or local agency or from any civilian Federal agency. The President may direct that any component of the Department of Defense, including the Army, Navy, and Air Force, provide assistance, any statute, rule or regulation to the contrary notwithstanding. Any such agency or military component may assist in the actual detention, removal and transportation of an alien to the country to which he is being deported.

(d) Notwithstanding any other provision of law, any agency or military component requested or directed to render assistance or services during an immigration emergency is authorized to stop, board, make arrest of persons, inspect and seize any vessel, vehicle or aircraft which is subject to the provisions of sections240B through 240D.

(e) In providing assistance under sections 240B through 240D, agencies shall have the same authority as for disaster relief under 42 U.S.C. 5149.

(f) The provisions of paragraphs (3) and (4) of subsection (a) of this section shall continue to govern any aliens subject to those provisions, regardless of the termination of the immigration emergency.

(g) The President may direct the enforcement of subsection (a) of this section beyond the territorial limits of the United States including on the high seas.

(h) Nothing in this section shall relieve any carrier or any other person of any civil or criminal liability, duty, or consequence that may arise from the transportation or the bringing of any alien to the United States.

Section : 240C. Travel Restrictions and Licensing

(a) Upon the declaration of an immigration emergency under section 240A, it shall be unlawful for any person to cause any United States vessel, vehicle or aircraft, or any other vessel, vehicle or aircraft which is owned by, chartered to or otherwise controlled by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any political subdivision thereof, to travel or be transported to a designated foreign country or foreign geographical area or to within such distance therefrom as the President may specify, unless prior approval has been obtained from an agency designated by the President.

(b) The designated agency may, for authorized purposes, grant prior approval for travel to or around a designated foreign country or geographical area by regulation for certain classes or categories of vessels, vehicles and aircraft. The owner or operator of any vessel, vehicle, or aircraft not authorized by regulation to travel to or around a designated country or area may apply to the designated agency for a license granting permission for one or more trips to that country or area. The designated agency shall establish by regulation the procedures governing the application for and the approval and revocation of such licenses.

The designated agency may authorize officials of any other United States agency to accept and transmit applications for licenses to the designated agency or to grant or deny such licenses under standards established by the designated ageny.

(c) No travel to or within such distance as the President may specify from a designated foreign country or area shall be approved if it appears that such travel may result in or contribute to a violation of any statute or regulation relating to the immigration of aliens to the United States.

(d) Nothing in this section shall be construed to require the agency designated by the President to approve the travel of any vessel, vehicle or aircraft to a designated country or area or within the specified distance therefrom.

Section 240D Penalties

(a)(1) Any vessel, vehicle or aircraft involved in a violation of section 240B(b)(2) or section 240C(a) shall be forfeited and the owner, operator, and any person causing such vessel, vehicle or aircraft to be involved in the violation shall be subject to a civil fine of $10,000 for each separate act in violation of those sections. This subsection shall become effective on the day following the day of publication of the declaration of the immigration emergency in the Federal Register, except that this subsection shall be immediately effective as to any person who has learned or been informed of the existence of the declaration.

(2) All provisions of the customs laws relating to the seizure, summary and judicial forfeiture, and condemnation of property; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeiture;

and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred, under the provisions of this section insofar as applicable and not inconsistent with the provisions hereof, except that duties imposed on customs officers or other persons regarding the seizure and forfeiture of property under the customs laws may be performed with respect to seizure and forfeitures carried out under the provisions of this section by such officers or persons authorized for that purpose by the Attorney General.

(3) Whenever a conveyance is forfeited under this section the Attorney General may:

(i) retain the conveyance for official use;

(ii) sell the conveyance, in which case proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs, with the remaining proceeds, if any, turned over to the United States Treasury;

(iii) require that the General Services Administration, or the Federal Maritime Commission if appropriate under 40 U.S.C. 484(i), take custody of the conveyance and remove it for disposition in accordance with law; or

(iv) dispose of the conveyance in accordance with the terms and conditions of any petition of remission or mitigation of forfeiture granted by the Attorney General.

(4) In all suits or actions brought for the forfeiture of any conveyance seized under this section, where the conveyance is

claimed by any person, the burden of proof shall lie upon such claimant: Provided, that probable cause shall be first shown for the institution of such suit or action, to be judged of by the court.

(b) Any person who knowingly engages or attempts to engage in any conduct prohibited by the terms of section 240B(b)(2) or section 240C(a) shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $50,000 or by imprisonment for a term not exceeding five years, or both, for each separate prohibited act. This subsection shall become effective on the day following the day of publication of the declaration of the immigration emergency in the Federal Register, except that this subsection shall be immediately effective as to any person who has learned or been informed of the existence of the declaration.

(c) Any alien who willfully violates a condition of his admission under section 240B shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(d) The requirements and sanctions imposed by this section shall be in addition to those set forth by other provisions of law.

(e) Violations of any provisions of the Immigration and Nationality Act committed during the immigration emergency may be investigated by the Federal Bureau of Investigation, the Immigration and Naturalization Service, the Coast Guard, or any component of the Department of Treasury. Assistance in investigating or enforcing this section may be provided by any Federal, with the approval of the Attorney General, state or local agency including the Army,

Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.

Section 240E. Definitions

As used in chapters 240A through 240D:

(1) The term "vessel" means any ship, boat, barge submarine, raft, or other craft or structure capable of being used as a means of transportation on, under or immediately above the water.

(2) The term "vehicle" means any automobile, motorcycle, bus, truck, cart, train, or other device or structure capable of being used as a means of transportation on land.

(3) The term "aircraft" means any airplane, helicopter, glider, balloon, blimp, or other craft or structure capable of being used as a means of transportation in the air.

(4) The terms "United States vessel, vehicle or aircraft" include any vessel, vehicle, or aircraft documented, registered, licensed, or numbered under the laws of the United States or any political subdivision thereof.

(5) The term "agency" includes any executive department and components thereof, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

Sec. 702.

Subsection (b) of Section 273 of the Immigration and Nationality Act (8 USC 1323(b)) is amended by substituting the

figure "$3,000" for the figure of $1,000 in the first sentence thereof, by deleting the last sentence of that subsection, and by adding the following at the end thereof:

"Such sums shall be a lien upon the vessel or aircraft involved in a violation of the provisions of subsection (a) of this section, and such vessel or aircraft may be libeled therefore in the appropriate United States Court. In addition, pending the determination of liability to the payment of such sums or while such sums remain unpaid, said vessel or aircraft may be denied clearance, or summarily seized, or both, unless a deposit is made of an amount sufficient to cover such sums or of a bond with sufficient surety to secure the payment thereof satisfactory to the Attorney General."

Sec. 703. 235(b) of the Immigration and Nationality Act (8 U.S.C. 1225(b)) is amended to read as follows:

"Sec. 235(b) Provided that an "Immigration Emergency" has not been declared, an immigration officer shall inspect each alien, who is required to have documentation seeking entry to the United States and shall make a determination on each alien's admissibility. (1) The decision of the immigration officer on admissibility of an alien shall be final, and not subject to further agency review or to judicial review, if the immigration officer determines an alien to be an alien crewman, a stowaway under section 273(d) of this Act, or an alien who does not present documentary evidence of U.S. citizenship, or lawful admission for permanent residence, or a visa or other entry document, or a certificate of identity issued under section 360(b) to support a claim of admissibility. (2) Any alien not excluded under paragraph one of this subsection who does not appear to the examining immigration officer to be clearly and beyond a doubt entitled to admission shall be detained for further inquiry by a special inquiry officer under section 236."

Sec. 704.

There are authorized to be appropriated to the President specifically to fund expenses incurred in carrying out the purposes of Sections 240A through 240E of the Immigration and Nationality Act an amount not to exceed 35 million. Amounts appropriated under this section are authorized to remain available until expended.

SECTION-BY-SECTION ANALYSIS OF LEGISLATION AUTHORIZING THE PRESIDENT TO DECLARE AN "IMMIGRATION EMERGENCY" TO RESPOND TO THE MASS MIGRATION OF VISALESS ALIENS

Declaration of the Emergency

Section 240A(a) allows the President to declare an immigration emergency if, in his judgment, a substantial number of undocumented aliens are about to embark or have embarked for the United States, and the procedures of the Immigration and Nationality Act or the resources of the Immigration and Naturalization Service would be inadequate to respond to the expected influx. The triggering criteria have been broadly worded to allow the President reasonable flexibility. Clearly, the Secretary of State and the Attorney General would play key roles in advising the President concerning the need for and the consequences of declaring an emergency.

The language pertaining to a "substantial number" of aliens is necessarily inexact. The President could not have expected to have precise estimates of the number of undocumented aliens who may be about to travel to the United States. The phrase "substantial number" would clearly permit the declaration of an immigration emergency in response to a situation such as existed before the 1980 Cuban flotilla, in which well over 100,000 aliens came to the United States. It is not, however, intended that declarations of emergencies be limited to situations involving the exceptionally large numbers associated with the 1980 Cuban flotilla. Rather, it is anticipated that an immigration emergency could be declared even if only a few thousand aliens were expected to arrive over the course of several weeks. Consequently, a key factor in assessing the need for invoking these emergency powers is the adequacy of the response that would be made using the normal exclusion and asylum procedures of the Immigration and Nationality Act and the available resources of the Immigration and Naturalization Service. On the other hand, while serious problems exist with respect to daily illegal border crossings, it is not expected that such activity would lead to the declaration of an emergency absent other exceptional circumstances.

Subsection (b) of section 240A provides that within forty-eight hours of the declaration of an immigration emergency the President must inform the President pro-tempore of the Senate and the Speaker of the House of his reasons for invoking the emergency provisions. The emergency would end automatically after 120 days, or earlier if ordered by the President, unless extended for an additional 120-day period or periods by the President.

Emergency Powers

Section 240B of the bill sets forth the emergency powers and procedures which could be invoked pursuant to a declaration of an emergency. Under subsection (a)(1), the President could restrict

or ban the travel of vessels, vehicles, and aircraft to a designated country or area. This would deter such vessels, vehicles, and aircraft from picking up undocumented aliens seeking to enter the United States. This subsection would also authorize the interception of vessels, vehicles, and aircraft travelling to the prohibited country or area and force them to return to the United States, or to other reasonable locations. Intercepted conveyances not likely to violate the travel restrictions could be allowed to proceed freely to other places.

Subsection (a)(1) would have a clear impact on the constitutionally protected right to international travel. In the recent decision of Haig v. Agee, ____ U.S. ____ (June 29, 1981), the Supreme Court noted, however, that "the freedom to travel outside the United States must be distinguished from the right to travel within the United States." Slip op. p. 25. Quoting from Califano v. Aznovorian, 439 U.S. 170, 176 (1978), the Court stated:

> Aznovorian urges that the freedom of international travel is basically equivalent to the constitutional right to interstate travel, recognized by this Court for over 100 years. But this Court has often pointed out the crucial difference between the freedom to travel internationally and the right of interstate travel.
>
> The constitutional right of interstate travel is virtually unqualified. By contrast the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. As such this "right" the Court has held, can be regulated within the bounds of due process. [Citations omitted.] Slip op. pp. 25-26.

It is clear from the Agee decision, that the right to travel outside the United States can be restricted subject to due process limitations.

This emergency legislation provides the requisite due process by establishing a licensing process in section 240C which would allow the Governemnt to approve such travel where adequate safeguards exist to insure that the Government's interests are protected. The provision is tailored to address the perceived harm, namely, the influx into the United States of a large number of visaless aliens. Furthermore, the restriction does not unnecessarily infringe on the right of travel, because individuals are free to travel to a designated foreign country or geographical area, by foreign common carriers for example, as long as no United States owned or controlled conveyances are transported to the designated country or area. Compare Zemel v. Rusk, 381 U.S. 1 (1969), with Kent v. Dulles, 357 U.S. 116 (1958).

Subsection (a)(2) of section 240B is intended to permit the interception of vessels on the high seas and to permit the return of any aliens or vessels, vehicles, or aircraft carrying such aliens to the designated country or to any other suitable country or area. The power to return aliens to the designated country or to any other suitable country or area should be administered with due regard for this nation's international obligations related to refugees and the granting of asylum.

Subsection (a)(3)(i) and (ii) would permit the utilization of procedures designed to expedite the adjudication of exclusion and asylum proceedings. It would not, however, absolve the Government from the responsibility to make admission and asylum determinations, and thus should not amount to an abrogation of our treaty obligations in this area. One of the primary means of expediting exclusion procedures is the elimination of the requirement that an immigration judge conduct hearings.

Since the Attorney General is authorized to set up procedures for making exclusion and asylum determinations, he can set up different procedures for different types of cases. Thus, those undocumented aliens who claim to be United States citizens or to be lawfully admitted aliens may receive different review than that afforded aliens who have no colorable claims for admission into the United States.

Subsection (a)(3)(iii) would authorize returning an alien to a country, other than the country from whence he came, if the Attorney General determines that it would not be practicable or appropriate to return the alien to the country from which he came. Under section 237 of the Act (8 U.S.C. 1227), an excluded alien must be returned to the country from "whence he came." This limitation of the current law does not provide the flexibility needed in times of crisis. Subsection (a)(3)(iii) will provide flexibility by permitting the Attorney General to deport the alien to his native land, even if that is not the country "from whence he came," or to any country which is willing to accept the excluded alien. As stated above, in the discussion of section 240B(a)(2), the deportation of aliens should be administered with due regard for this nation's international obligations related to refugees and the granting of asylum.

Subsection (a)(3)(iv) authorizes the Attorney General to prescribe the terms and conditions under which an alien would be admitted to the United States. The posting of a bond with sufficient surety to ensure compliance with the conditions of admission is specifically authorized.

Subsection (a)(3)(v) would eliminate judicial review of exclusion and asylum determinations. For years, aliens who are clearly not entitled to enter the United States have come here and been able to remain indefinitely while their cases proceed through the labyrinth of administrative and judicial proceedings.

The aliens have been able to take advantage of court ordered or automatic stays of deportation. It is obviously in the interest of such aliens to take advantage of every procedural and judicial avenue available to them regardless of the merits of their cases. By expediting the administrative procedure and eliminating judicial review of the administrative decision, it will be possible to dispose of these cases much more quickly than is possible under current law.

The elimination of judicial review is a significant step and has been taken only after serious consideration. The law is clear, however, that those aliens seeking admission to the United States have only the due process rights which Congress decides to give them. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Moreover, our treaty obligations with respect to refugee claimants do not mandate any particular procedures which must be followed in resolving claims of persecution.

Subsection (a)(4) of section 240B provides for the detention of every alien, except those who are beyond a doubt entitled to be admitted to the United States, pending a final determination of admissibility, or pending release on parole, or pending deportation if the alien is found excludable. This paragraph makes clear that the Attorney General has complete discretion as to where such aliens will be detained, including in federal prisons where appropriate. This paragraph is not intended to grant the Attorney General power to direct other governmental agencies to house detained aliens. The power of the Attorney General to request assistance from such agencies is addressed in subsection (c) of section 240B.

If an alien is found excludable he can be detained until such time as he can be deported. The language of this paragraph is also intended to permit the indefinite detention of the alien if no country is willing to accept him, such as occurred in the Cuban flotilla situation. The Attorney General's decision as to where an alien should be detained is not subject to judicial review; however, an alien can obtain habeas corpus review on the issue of whether he falls within the category of aliens subject to detention.

Subsection (a)(5) of section 240B would exempt actions taken during an immigration emergency from the restraints of the nation's environmental laws. The first paragraph merely references existing Presidential exemption authority under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act and the Noise Control Act. The second paragraph provides the President with additional exemption authority with respect to other major Federal environmental requirements, as well as state and local requirements, but limits that authority in that it must be closely tied to the demands of an immigration emergency. The third paragraph places limits on the time the exemptions can remain in effect but in no event can they last longer than one year.

The Federal Government should be able to comply after a year with environmental requirements such as sewage discharge from a detention facility. If this will not be possible, legislation granting further exemptions can be obtained from Congress.

These environmental exemptions will allow the Government to deal quickly with an emergency without litigants impeding those efforts though court stays and injunctions such as occurred during the 1980 Cuban flotilla when efforts to transfer aliens to Fort Allen, Puerto Rico were blocked by a court injunction. See Commonwealth of Puerto Rico v. Muskie, 507 F. Supp. 1035 (D.P.R. 1981).

Subsection 240B (b) creates special emergency powers which would allow the President to order the sealing or closing of roads or harbors if necessary to prevent the arrival of the aliens in the United States. The purpose of this provision is to permit authorities to close a harbor or airport before ships or planes can depart for the purpose of picking up aliens and bringing them to the United States. In addition, roads leading to harbors, for example, may be closed in order to prevent people from launching their boats. It is obviously easier for authorities to quarantine harbors and airports and to prevent boats and planes or other conveyances from leaving, than it is to try and intercept such conveyances once they have dispersed or have entered foreign territory.

During the time a harbor, port or road is sealed, it will be left to the designated agency or the agency which is closing the harbor, port or road to determine whether a vessel, vehicle or aircraft will be allowed to depart or to travel on such road. If the facts indicate that the vessel, or aircraft is not bound for the designated foreign country, then permission will be given to proceed. The burden, however, will be on the party seeking permission to depart to show that he in fact is not intending to go to the designated foreign country. A party who is denied permission to depart may seek judicial review of the agency's decision in a United States District Court. Judicial review prior to the exhaustion of administrative remedies can be obtained if a party can show he would suffer irreparable injury should his departure be delayed. Thus, a captain of a ship with perishable cargo will be able to seek immediate judicial review if it appears that awaiting a final administrative decision would be itself result in loss or spoilage of the cargo.

Subsection (b)(3) provides that the agency designated by the President shall set up procedures to be followed in requesting departure permission. The provision recognizes, however, that there may be no procedures established for granting permission to depart. In this situation, the agency which is responsible for the closing of the harbor, airport, or road will make such determinations. However, once the designated agency establishes procedures for obtaining departure permission, these procedures will have to be followed.

The sealing of harbors, ports or roads, will interfere with the right to travel. As discussed previously, however, the right to travel outside the United States is not absolute and can be restricted where the limitation is tailored to a perceived harm and does not unnecessarily infringe on the right to travel, and where the necessary due process safeguards are provided. Haig v. Agee, ____ U.S. ____ (June 29, 1981), Slip op. pp. 25-26.

Some constraints on domestic travel may also result from the sealing of harbors or airports or the closing of roads. Individuals would, of course, remain free to travel within the United States. However, it is recognized that restricting the movement of conveyances may also at least temporarily restrict the movement of the persons owning or using those conveyances.

The requirement that an administrative decision on departure permission be made within 72 hours recognizes the need not to unduly restrain domestic travel, as well as legitimate international travel. Compelling justifications for some limitations on domestic travel, moreover, exist because of the practical enforcement problems associated with the interdiction of widely dispersed vessels, aircraft in flight, and vehicles that have entered foreign territory, and because of the injury to the United States which would occur if a mass migration of undocumented aliens were to take place.

Subsection (c) of section 240B authorizes the President to designate an agency or agencies which are to be responsible for carrying out the emergency provisions once they have been invoked by the President. In addition, state or local agencies or any civilian Federal agency may be called on for assistance. The President may direct that any component of the Department of Defense provide assistance. By specifically permitting the Army, Navy, and Air Force to enforce these provisions, any problems with the Posse Comitatus Act are eliminated. State and local agencies would be called upon to render aid within the limits of their general competence and would not be asked to make asylum and admissibility determinations.

Subsection (d) grants search and seizure powers to agencies enforcing the provisons of this emergency legislation. The body of law governing the search and seizure powers of the INS and Coast Guard has seen some changes in recent years, and no attempt has been made to define the permissible limits of law enforcement in this respect. The actual exercise of these search and seizure powers would, however, be consistent with prevailing interpretations of the Fourth Amendment.

Under current law, the Coast Guard has broad authority to stop and inspect ships for possible violations of various laws. See 19 U.S.C. 1581(a); 14 U.S.C. 89(a). The courts have upheld against Fourth Amendment challenges the right of the Coast Guard under

14 U.S.C. 89(a) to stop and board United States vessels for administrative documentation and safety checks without a warrant and in the absence of suspicion of criminal activity. United States v. Arra, 630 F.2d 836 (1st Cir. 1980); United States v. Demanett, 629 F.2d 862 (3d Cir. 1980) (approving documentation checks); United States v. Hilton, 619 F.2d 127 (1st Cir. 1980); United States v. Harper, 617 F.2d 35 (4th Cir. 1980); United States v. Warren, 578 F.2d 1058, 1064-1065 (5th Cir. 1978)(en banc).

The intrusion justified by such an administrative inspection is limited. The scope of permissible Coast Guard inspection is restricted to those matters reasonably relating to checking documentation and safety. United States v. Arra, supra, at 841 n. 6; United States v. Demanett, supra; United States v. Robbins, 623 F.2d 418, 420 (5th Cir. 1980). However, where probable cause or reasonable suspicion of criminal activity arises during such an inspection, the inquiry and search may be appropriately expanded. See United States v. Demanett, supra; United States v. Ricardo, 619 F.2d 1124, 1129 (5th Cir. 1980); United States v. Hilton, supra, 619 F.2d at 131; United States v. Warren, supra, 578 F.2d at 1065. Aside from administrative inspections, brief investigatory interceptions of vessels may be permissible if there is a reasonable suspicion of a criminal violation. See United States v. Williams, 617 F.2d 1063 at 1078 (5th Cir. 1980).

In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court upheld the INS procedure of setting up fixed checkpoints away from the border at which cars could be stopped and the occupants questioned as to their citizenship and immigration status. The court held that such stops could occur even if there was no reason to believe the particular automobile contained illegal aliens. While Martinez-Fuerte concerned a different type of problem, it indicates that interior vehicle checkpoints could lawfully be established to aid in identifying persons who intend to transport a conveyance from the United States to a designated foreign country or geographical area.

Subsection (e) of 240B provides that agencies will have the same authority as they now have for disaster relief under 42 U.S.C. 5149. Under 42 U.S.C. 5149, a Federal agency in a disaster type situation can, with the consent of a state or local government, utilize the services or facilities of such government. In addition, 42 U.S.C. 5149 authorizes a Federal agency to hire temporary personnel and to purchase, rent, or hire equipment, materials and supplies for such things as shipping, travel and communications and for the administration and supervision of such activities.

Subsection (f) of 240B provides that paragraphs 3 and 4 of subsection (a), which authorize expedited exclusion and asylum proceedings and the detention of aliens, will remain in effect for those aliens who were subject to those provisions, even after the immigration emergency has ended. It is important to note that during an immigration emergency, not every alien attempting to enter the United States will be subjected to expedited proceedings and detention, only those undocumented aliens who are travelling directly or indirectly from the

designated foreign country or area will be subject to such proceedings.

Subsection (g) would permit the President to direct enforcement of subsection (a) beyond the territorial limits of the United States. As in the initial decision to declare an immigration emergency, the Attorney General and Secretary of State would have major roles in advising the President concerning the need for and appropriate procedures for handling such enforcement.

There are customary international law limitations which restrict the ability of the United States to interdict foreign flag vessels absent the consent of the foreign flag state. Despite these limitations, the Fifth Circuit has held that 14 U.S.C. 89(a) authorizes the Coast Guard to board foreign flag vessels in international waters when there is reasonable suspicion that the vessel's occupants are engaged in conduct which violates a United States statute having extraterritorial application. United States v. Williams, 617 F.2d 1063 (5th Cir. 1980). As a matter of our domestic law, this emergency legislation would thus permit the halting of a foreign flag vessel, in the absence of foreign state approval, if there was reasonable suspicion that the vessel was transporting visaless aliens to the United States in violation of our civil or criminal immigration laws. Such action would, however, be inconsistent with international law, and it is not anticipated that the United States would violate those customary rules of international law which restrict the boarding of foreign flag vessels, except in the most compelling of circumstances. The statute, though, is broadly worded to permit the necessary lawful actions to be taken in response to a situation such as the 1980 Cuban flotilla.

Subsection (g) also authorizes, inter alia, the making of admissibility and asylum determinations outside the territorial limits of the United States, including on the high seas. Aliens intercepted at sea could receive these determinations on ships and if they are found excludable, they would not be allowed to proceed to the United States.

Subsection (h) makes clear that the fact that an immigration emergency has been declared does not relieve any carrier or other person from any of the other civil or criminal liabilities, duties or consequences which arise elsewhere from the transportation or the bringing of any alien to the United States.

Travel Restrictions and Licensing

Section 240C provides for travel restrictions on vessels, vehicles, and aircraft and for licensing procedures. The travel restrictions would apply to all United States vessels, vehicles and aircraft and such other vessels, vehicles, and aircraft which are owned by, leased by or controlled by United States citizens or residents or by United States corporations. This latter phrase prevents a United States citizen from hiring a foreign registered vessel and using that vessel to bring undocumented aliens to the United States. As a result,

if an emergency were declared with respect to Cuba, the statute would also require prior approval for a Mexican tour ship to go to Cuba if that ship was owned by a United States corporation, even if the ship could never reasonably be expected to travel to the United States. It is expected, however, that regulations promulgated by the designated agency would provide almost blanket approval for foreign registered vessels and aircraft to travel to designated countries or areas as long as they are not also involved in any travel to the United States. Such blanket approval could help eliminate some of the problems associated with the purported regulation of foreign flag vessels, a problem which occurs repeatedly in the statute. Broad language, however, has been consistently employed in order to reach conduct that must be regulated in order to deal effectively with a flotilla-like situation.

Penalties

Section 240D provides for both civil and criminal penalties for violations of either section 240B(b)(2) or section 240C, and a misdemeanor penalty for aliens violating the terms of admission under section 240B. Subsection (a) provides for a civil fine of up to $10,000 and the forfeiture of any vessel, vehicle or aircraft which is used to violate the travel restrictions imposed in section 240C, or the limitations on departing from a sealed harbor or closed road under section 240B (b). The same forfeiture procedures that are used under the customs laws are adopted for purposes of this provision. A person who knowingly engages in conduct prohibited with respect to travel restrictions or the sealing and closing of harbors and roads is guilty of a criminal offense and is subject to a fine of up to $50,000 and imprisonment for up to five years.

Subsection (e) of section 240D provides that violations of the immigration laws committed during an immigration emergency may be investigated by various Federal agencies. Once one of these agencies commences an investigation of a violation, it may conclude the investigation even though the immigration emergency has ended. This provision also specifies that assistance in investigating or enforcing section 240D may be provided by other Federal agencies including the Army, Navy and Air Force and also from state and local agencies. By specifically including the Army, Navy and Air Force, any problems with the Posse Comitatus Act are eliminated.

Definitions

Section 240E contains definitions which apply to the terms used in sections 240A through 240D.

The Section 273(b) Amendment

While not an emergency provision, an amendment to section 273(b) of the Act, 8 U.S.C. 1323(b), has been included. It is intended to increase the deterrent effect of that statute by increasing the monetary penalty for unlawfully bringing to the United States aliens without visas, and to provide greater authority for imposing sanctions

directly on the vessel. With regard to sanctions on the vessel, the statute at present provides only for denial of clearance. Although denial of clearance is in some circumstances a valuable coercive tool inobtaining collection of the monetary penalty, it is fundamentally inadequate for that purpose in dealing with vessels not requiring clearance, such as non-commercial vessels and commercial vessels not bound for foreign ports. The Cuban flotilla in 1980 was comprised primarily of such vessels. In order to provide adequate flexibility to ensure fine collection, the proposed amendment thus also makes the penalty a lien on the vessel, in the manner presently provided for similar violations of the immigration laws under 8 U.S.C. 1287 and 1321(a).

The power to seize a vessel involved in a violation of 8 U.S.C. 1323 may already exist under 19 U.S.C. 1581(e). However, the proposed amendment eliminates any doubt on that issue by explicitly authorizing seizure. The existence of clear authority to summarily seize vessels is important for three reasons. First, seizure secures the vessel as an aid to fine collection. Second, seizure may be necessary to prevent multiple trips bringing undocumented aliens by vessel owners or masters who, because of a lack of assets reachable in judicial collection actions, or for other reasons, are undeterred by the monetary penalties provided by the statute. Third, this seizure power will exist regardless of the declaration of an immigration emergency.

It is intended that seizures made under this provision be based on probable cause to believe the vessel or aircraft has been, or is being, used in violation of the section, but such seizures are to be without a warrant unless a warrant is constitutionally required. See 8 U.S.C. 1324(c). This amendment does not, however, affect the government's due process obligation to provide prompt post-seizure hearings to the aggrieved owners. See Pollgreen v. Morris, 496 F. Supp. 1042 (S.D. Fla. 1980).

The sanctions against the vessel are not available under this amendment if a sufficient deposit or bond is provided to otherwise secure payment of any penalty. The current law is identical in this respect.

Miscellaneous

Finally, the legislation contains a conforming amendment to section 235(b) of the Immigration and Nationality Act (8 U.S.C. 1225(b)), and an appropriations provision.

TITLE VIII - THE UNAUTHORIZED ENTRY AND TRANSPORTATION ACT

Section 801. Section 274 of the Immigration and Nationality Act is amended to read as follows:

BRINGING IN AND HARBORING CERTAIN ALIENS

(a) Any person who—

knowing or in reckless disregard of the fact that the alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, any alien, regardless of any official action which may later be taken with respect to such alien,

(1) shall, for each transaction constituting a violation of this subsection, regardless of the number of aliens involved, be guilty of a misdemeanor and upon conviction shall be punished by a mandatory fine of $2500, the imposition of which shall not be suspended by the court, and, in the court's discretion, may be punished by an additional fine of not more than an amount equal to $2500 for each such alien in respect to whom any violation of this paragraph occurs, or by imprisonment for a term not exceeding one year, or both; or

(2)(A) for a second offense under this section;

(B) for an offense done for the purpose of commercial advantage or private financial gain;

(C) for an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration official; or

(D) for an offense during which either the offender or the alien with the knowledge of the offender, makes any false or misleading statement, or engages in any act or conduct intended to mislead any officer, agent, or employee of the United States, shall be guilty of a felony and upon conviction shall be punished by a fine not exceeding $10,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this paragraph occurs.

(b) Any person who—

(1) knowing or having reason to know that the person is an alien, brings to or attempts to bring to the United States in any manner whatsoever, any such person at a place other than a designated port of entry or place other than as designated by the Commissioner of the Immigration and Naturalization Service regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(2) knowing or in reckless disregard of the fact that the alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move any such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) knowing or in reckless disregard of the fact that the alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, any such alien in any place, including any building or any means of transportation; or

(4) knowing or having reason to know that a person is an alien, willfully encourages or induces or attempts to encourage or induce, either directly or indirectly, the entry without prior official authorization, into the United States of any such alien—

shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $10,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(c)(1) any conveyance, including any vessel, vehicle, or aircraft, which has been, is being, or is intended to be used, in the commission of a violation of subsections (a) or (b) shall be seized and subject to forfeiture except that—

(A) no conveyance used by any person as a common carrier shall be forfeited under the provisions of this section if the offense occurs when the conveyance is being used in the business as a common carrier unless the owner, operator, or other person in charge of the conveyance at the time of the offense was a consenting party or privy to the illegal act; and

(B) no conveyance shall be forfeited under the provisions of this section if the offense occurred while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States or of any State.

(2) Any conveyance subject to seizure under this section may be seized without a warrant if there is probable cause to believe the conveyance has been, is being, or is intended to be used in a violation of subsection (a) or (b) and circumstances exist where a warrant is not constitutionally required.

(3) All provisions of the customs laws relating to the seizure, summary and judicial forfeiture, and condemnation of property; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeiture; and the compromise of claims and the award of compensation to informers in respect of

such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred, under the provisions of this section insofar as applicable and not inconsistent with the provisions hereof, except that duties imposed on customs officers or other persons regarding the seizure and forfeiture of property under the customs laws may be performed with respect to seizure and forfeitures carried out under the provisions of this section by such officers or persons authorized for that purpose by the Attorney General.

(4) Whenever a conveyance is forfeited under this section the Attorney General may—

(A) retain the conveyance for official use;

(B) sell the conveyance, in which case the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs;

(C) require that the General Services Administration, or the Federal Maritime Commission if appropriate under 40 U.S.C. 484(i), take custody of the conveyance and remove it for disposition in accordance with law; or

(D) dispose of the conveyance in accordance with the terms and conditions of any petition of remission or mitigation of forfeiture granted by the Attorney General.

(5) In all suits or actions brought for the forfeiture of any conveyance seized under this section, where the conveyance is claimed by any person, the burden of proof shall lie upon such

claimant: Provided, that probable cause shall be first shown for the institution of such suit or action, to be judged of by the court. In determining whether probable cause exists, any of the following shall be prima facie evidence of the presumption that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law;

(B) Official records of the Immigration and Naturalization Service or State Department showing that the alien had not received prior authorization to come to, enter, or reside in the United States or had come to, entered, or remained in the United States in violation of law; and

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior authorization to come to, enter, or reside in the United States or had come to, entered, or remained in the United States in violation of law.

(6) Any officer or employee of the Service designated by the Attorney General, either individually or as a member of a class, and all other Federal officers and officers of a state or political subdivision thereof whose duty it is to enforce criminal laws shall have authority to make any arrest for a violation of any provision of this section.

THE UNAUTHORIZED ENTRY AND TRANSPORTATION ACT

SECTION BY SECTION ANALYSIS

Subsections (a) and (b) are designed to fill the gap in Section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) caused by the December 19, 1980, opinion of the United States District Court for the Southern District of Florida in United States v. Anaya, et al., No. 80-231-CR-EPS. In Anaya the court held that section 1324 (a)(1) does not prohibit the mere bringing of undocumented aliens to this country's borders. In the court's view, this statute is aimed only at preventing surreptitious entries. An alien does not make an entry by arriving at a port so long as he is detained or paroled. The court held that "[t]o accomplish an entry an alien must be present in the United States and be free of official restraint." Slip op. p. 8. Since there were neither actual nor attempted surreptitious entries in the Cuban Flotilla cases, the court dismissed the indictments. Consequently, 1324(a) is redrafted in two new subsections, one a misdemeanor and the other a felony, to make it clear that it is the bringing to the United States of an alien who does not have prior authorization to come, as well as the transporting or harboring of an alien who has come here without prior authorization, that is proscribed.

Paragraph (a)(1) makes it a misdemeanor punishable by a mandatory fine of $2500 and imprisonment for up to one year, or both, for a person to bring to the United States an alien who does not have prior official authorization to come to this country, regardless of whether the alien does or does not make an entry, and regardless of any future action that might be taken with respect to the alien such as the granting of parole. The fine may, in the court's discretion, be increased by any amount up to $2500 per alien involved in the offense. It is of no consequence under this paragraph that the alien later presents himself to an Immigration and Naturalization Service officer or other authority. Persons who bring to the United States aliens who do not have visas or have not otherwise been previously given official permission to come to, enter, or reside in the United States would be in violation. Attempts to bring such aliens to the United States are also proscribed.

Paragraph (a)(2) provides that bringing an alien who does not have prior authorization to come to, enter, or reside in this country for purposes of financial gain or commercial advantage is a felony. It also provides that bringing such an alien without taking him directly to an INS official, bringing of such an alien by means of fraud, and any second offense under section 1324 are felonies. The punishment is imprisonment for up to five years and a fine of up to $10,000 for each alien involved in the offense.

Paragraph (b)(1) has no counterpart in present section 1324. It prohibits the bringing of an alien to the United States at a place other than a designated port of entry or other place designated by the INS. The provision is meant to preclude such a bringing of an alien

to the United States in any manner whatsoever. The intent requirement is that at the time of the bringing or attempted bringing to the United States, the subject know or have reason to believe the person is an alien. The alien's possession of a visa or other entitlement to come to or reside in the United States is irrelevant under this paragraph.

Paragraph (b)(2) proscribes the transporting within the United States of an alien who has come to, entered, or remains illegally in the United States. It closely follows the existing subsection 1324 (a)(2), except there is no requirement that the subject know that the alien first came to the United States less than three years prior to the illegal transportation. The transportation must be in furtherance of the violation of law. Thus it would not be a violation of the paragraph to transport an alien who first came to the United States illegally but was subsequently granted asylum or parole. If, however, the subject knows or is in reckless disregard of the fact that the alien has come to or remains in the United States in violation of law and the transportation is for the purpose of furthering the violation, the subject's knowledge of the date of entry should be irrelevant.

Paragraph (b)(3) is simply a restatement of existing section 1324 (a)(3). It is rephrased to make clear that the harboring or concealing of an alien who has come to, entered, or remains in the United States in violation of law is prohibited.

Paragraph (b)(4) is simply a restatement of existing section 1324 (a)(4) with no substantive change intended.

All violations of subsection (b) are felonies and the punishment extends to a fine of up to $10,000 and imprisonement for up to five years, or both, for each alien in respect to whom any violation of the subsection occurs. The provision that it is a separate felony as to each alien involved, which also applies to violations of paragraph (a) (2), is carried forward from the present section 1324. The courts have specifically upheld indictments charging multiple counts of transportation of aliens and consecutive sentences even though all were transported at the same time and place. See Vega-Murrillo v. United States, 264 F.2d 240 (9th Cir. 1959); Jones v. United States 260 F.2d 89 (9th Cir. 1958).

Subsection (c) narrows the exceptions that exist in present section 1324(b), providing for forfeiture of vehicles, vessels, and aircraft used in the transportation of illegal aliens. The subsection closely follows the provisions of H.R. 8115 (96th Cong.) which was reported favorably by the Judiciary Committee. See Report No. 96-1395.

Present INS forfeiture authority, enacted in 1978, and codified in 8 U.S.C. 1324(b)(1)(A) is too restrictive. For example, this section precludes the forfeiture of any vessel unless the Government can show

that the owner, master or person in charge consented to or knew of the illegal use of the vessel. In many situations such knowledge or consent is impossible to demonstrate and is a burden of proof not borne by other Federal law enforcement agencies such as the Customs Service and the Drug Enforcement Administration where proving such knowledge or consent is limited to seizures involving common carriers. 21 U.S.C. 881(a)(4)(A). Additionally, section 1324(b) presently requires INS to bear administrative and incidental expenses when it turns out that an innocent owner is involved even though the seizure was made in a good faith belief that it was warranted based on facts known to the INS at the time. No other enforcement agency with vehicle seizure authority is subjected to this type of liability. Compare Department of Justice Regulations for the Remission or Mitigation of Civil Forfeitures, 28 C.F.R. 9.7. Finally, present law provides that INS is required to satisfy any valid lien or third party interest in the conveyance "without expense to the interest holder." This creates little incentive for mortgage lenders to exercise caution in making loans for the purchase of conveyances that could be used to transport illegal aliens. Compare 28 C.F.R. 9.7, providing that a lienholder's interest in the vehicle should be satisfied only after the Government's costs associated with the seizure and forfeiture have been deducted. The new subsection (c) has the effect of leaving on the lienholder the normal burden of showing good faith, innocence, and lack of knowledge in order to obtain a remission or mitigation of the forfeiture. This is the procedure currently followed pursuant to the customs and drug laws. Compare 28 C.F.R. 9.5 (b) and (c).

Section 1324(c)(1) provides that any convenyance used in or intended to be used in a violation of subsection (a) or (b) shall be seized and subject to forfeiture. This is a slight expansion on the authority provided in present section 1324(b)(1) in that it allows for seizure of a conveyance clearly intended to be used in the substantive offense as well as where it is used in committing a substantive violation. Paragraph (c)(1)(A) exempts common carriers from forfeiture if the offense occurs while the conveyance is being used as a common carrier unless the owner, operator or other person in charge was a consenting party or privy to the illegal act. It is similar to a provision in the law providing for forfeiture of conveyances used to transport controlled substances, 21 U.S.C. 881(a)(4)(A), and to a provision in 49 U.S.C. 782 providing for seizure and forfeiture of conveyances used in transporting certain articles of contraband. Paragraph (c)(1)(B) carries forward existing 8 U.S.C. 1324(b)(1)(B) providing that it is a defense to a forfeiture if the offense occurred while the conveyance was unlawfully in the possession of a person other than the owner in violation of law.

Section 1324(c)(2) carries forward 8 U.S.C. 1324(b)(3) providing that a conveyance subject to seizure may be seized without a warrant in circumstances where a warrant is not constitutionally required. Together with section 1324(c)(3), which makes provisions of the customs laws applicable by reference to seizures and forfeitures under

this section, section (c)(2) will allow the INS to seize vessels or other conveyances if an INS officer has probable cause to believe the vessel is being used in violation of section 1324. There is no need to determine whether the owner was involved before making the seizure. Once a vessel is seized, it is normally held by the government pending the actual judicial proceeding to perfect the forfeiture.

Section 1324(c)(5) deals with the burden of proof in the forfeiture action and is similar to 19 U.S.C. 1615 relating to customs forfeitures. It provides that initially the government must show the probable cause that justified the seizure and the institution of the forfeiture action. In showing probable cause the government must produce evidence that the aliens involved with the conveyance did not have prior authorization to come to or remain in the United States. In order to forestall any possible claim that the government must detain all undocumented aliens involved in a particular incident, the proposed bill lists three types of evidence that are prima facie evidence that the aliens involved did not have such authorization. They are records of any administrative or judicial proceeding concerning the alien's status in which it was determined he had not received authorization to come to or enter this country, official records of the INS or State Department showing that the alien had not received such authorization, and testimony by an immigration officer having knowledge of the alien's status that the alien had not received such authorization. (An example of the last type of evidence might come from an INS officer who, by referring to notes or INS records, can testify that a certain boat landed on a particular day with a particular illegal alien on it). Once the government shows probable cause for the seizure and the initiation of the forfeiture action, the burden of proof shifts to the claimant to show either that the conveyance was not used in a violation of the section or that the common carrier exception or the exception for conveyances unlawfully in the hands of someone other than the owner applies.

Section 1324(c)(4) provides for disposition of the conveyance and the payment of costs and expenses. It is similar to provisions contained in the Controlled Substances Act, 21 U.S.C. 881(e).

Section 1324(d) concerns arrest authority for violations of sections 1324(a) and (b). It expands on the present provisions to allow not only INS officers but also other Federal and state law enforcement officers to make arrests. Occasionally, alien smugglers are first spotted in the act by state law enforcement officers and this provision allows them to make an arrest.

TITLE IX - THE LABOR CERTIFICATION ACT

Section 901. Nowithstanding the provisions of section 212(a)(14) of the Immigration and Nationality Act (8 U.S.C. 1182(a) is hereby amended to read as follows:

(a)(34) "Aliens seeking to enter the United States purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that at the time of application (A) there are not sufficient workers available in the United States in the occupations in which the aliens will be employed and (B) the employment of aliens in such occupations will not adversely affect the wages and working conditions of workers in the United States who are similarly employed. In making such determinations, the Secretary of Labor may use labor market information without reference to the specific job opportunity for which certification is

requested. An alien on behalf of whom a certification is southt must have an offer of employment from an employer in the United States, except that the Secretary of Labor may waive this requirement in the case of an alien of exceptional ability. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(7). Notwithstanding any other provision of law, decisions of the Secretary of Labor made pursuant to this paragraph, including the issuance and content of regulations and the use of labor market information under this paragraph, shall be reviewable by the appropriate United States district court, but the court shall not set aside such a decision unless there is compelling evidence that the Secretary made such decision in an arbitrary and capricious manner;".

Section-by-Section Analysis

The bill amends section 212(a)(14) of the Immigration and Nationality Act, the labor certification provision. The bill provides for the exclusion of aliens under the third (exceptional) and sixth (skilled or unskilled labor) preference categories or the nonpreference category unless the Department of Labor certifies that there are not sufficient workers available in the alien's occupation and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of workers in the United States similarly employed. In making such determinations, the Secretary of Labor may use labor market information without reference to the specific job opportunity for which the certification is sought. Decisions of the Secretary of Labor made pursuant to this section would be subject to only limited review by the courts. The Secretary may waive the requirement of an offer of employment for an alien of exceptional ability.

TITLE X - THE EMERGENCY INTERDICTION ACT

Section 1001. Subsection (f) of section 212 of the Immigration and Nationality Act 8 U.S.C. 1182(f) is amended to read as follows:

(f)(1) In order to prevent the illegal migration of aliens to the United States, the President is authorized to conclude arrangements with other countries for the purpose of preventing such illegal migration. Notwithstanding any other provision of law, the President is authorized to furnish assistance to any country, on such terms and conditions as he may determine, for the control of the immigration of persons from such country to the United States.

(f)(2) Notwithstanding any provision of law, the President may direct the Coast Guard or any other federal agency including the Army, Navy and Air Force, to stop and examine, on the high seas, vessels of the United States, vessels subject to United States jurisdiction, or foreign flag vessels for which the United States Government has an arrangement authorizing such action. Upon boarding, the Coast Guard or other federal agency may make inquiries of those on board, examine documents, and take such actions as are necessary to establish the registry, condition, and destination of the vessel and the status of those on board the vessel. When these measures indicate that an offense against United States immigration laws, or an offense under the laws of a foreign country with which the United States has an agreement to assist is being committed, the Coast Guard or other federal agency may return the vessel and passengers to the country from whence they came or to some other location. An alien who qualifies as a refugee under the terms of the United Nations Convention and Protocol Relating to the Status of Refugees may not be returned to a country where such person's life or freedom would be threatened

on account of his race, religion, nationality, membership in a particular social group, or political opinion.

(f)(3) Notwithstanding any other provision of law, the Attorney General is authorized to establish by regulation, procedures to determine the admissibility of those aliens who have not landed in the United States.

(f)(4) Nothing contained in this section shall be construed as limiting the President in any way from exercising his Constitutional powers.

(f)(5) For purposes of this section the terms "vessel of the United States" and "vessel subject to the jurisdiciton of the United States" shall have the same meaning as set forth in 21 U.S.C. 955b.

SECTION ANALYSIS

The proposed amendment to subsection (f) of section 212 of the Immigration and Nationality Act (8 U.S.C. 1182(f)), would add five new paragraphs. The first new paragraph (f)(2) would authorize the President to enter into arrangements with foreign countries for the purpose of preventing illegal migration to the United States. Such arrangements could, for example, authorize the Coast Guard to stop foreign flag vessels on the high seas to determine whether such vessels are destined for the United States and are carrying undocumented aliens who are not entitled to enter the United States. Under existing international law, the regulation of a vessel in international waters is normally the sole responsibility of the nation whose flag the vessel flies. See United States v. Postal, 589 F.2d 862, 869 (5th Cir. 1979). A corollary is that foreign flag vessels are generally accorded the right to undisturbed navigation on international waters. This rule of non-interference is given formal recognition by the Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force September 30, 1962). Thus, except in a few limited situations, before a foreign flag vessel can be stopped on the high seas, the authorization of the foreign government must be obtained. This paragraph would authorize the President to enter into arrangements with foreign countries whereby they will agree to consent to the stopping of their flag vessels in order to detrmine whether such vessel is destined for the United States and is carrying undocumented aliens or aliens who are otherwise not entitled to enter the United States.

In addition, this paragraph would authorize the President to furnish assistance to a foreign country for the purpose of controlling the immigration of persons from such country to the United States.

The second new paragraph (f)(3), would authorize the President to direct the Coast Guard or any other appropriate federal agency, including components of the Department of Defense to stop on the high seas vessels of the United States, vessels subject to United States jurisdiction, or foreign flag vessels if the United States Government has an arrangement with such country authorizing such action. Of course, once a foreign flag vessel enters the territorial waters of the United States it can be stopped without obtaining the consent of the foreign country. The statute does not require the President to direct the stopping of each vessel but he may direct the stopping of a particular class of vessels.

Presently, the courts have upheld against Fourth Amendment challenges, the right of the Coast Guard under 14 U.S.C. 89(a) to stop and board American flag vessels for administrative documentation and safety checks without a warrant and in the absence of suspicion of criminal activity. United States v. Arra, 630 F.2d 836 (1st Cir. 1980); United States v. Demanett, 629 F.2d 862 (3d Cir. 1980) (approving documentation checks); United States v. Hilton, 619 F.2d 127 (1st Cir. 1980); United

States v. Harper, 617 F.2d 35 (4th Cir. 1980); United States v. Warren, 578 F.2d 1058, 1064-1065 (5th Cir. 1978) (en banc). Likewise, the courts have upheld the authority of the Coast Guard under 14 U.S.C. 89(a) to board stateless vessels. United States v. Rubies, 612 F.2d 397, 403 (9th Cir. 1979) (boarding allowed at least for the limited purpose of determining the identity of the vessel); United States v. Dominguez, 604 F.2d 304 (4th Cir. 1979) (boarding allowed because a stateless vessel is subject to the jurisdiction of the United States for the purpose of enforcing its laws); United States v. Postal, supra.

This paragraph also authorizes the President to direct the Coast Guard or other federal agency to stop foreign flag vessels where the foreign country has entered into an arrangement with the United States Government authorizing such action. The word "arrangement" was used instead of "agreement" to indicate that a formal agreement with a foreign country is not necessary but that it could be done on an ad hoc basis.

This paragraph also provides that after stopping a vessel, the Coast Guard or other federal agency may make inquiries of those on board, examine documents, and take other actions to establish the registry, condition and destination of the vessel and the status of those on board the vessel. If the circumstances indicate that an offense against United States immigration laws, or an offense against the laws of a foreign country with which the United States has an agreement to assist is being committed, the vessel and the passengers may be returned to the country from whence they came or to some other reasonable location. However, if a person qualifies as a refugee under the United Nations Convention and Protocol Relating to Refugees, 19 U.S.T. 6223, T.I.A.S. 6577, he cannot be returned to a country where his life or freedom is threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

The third new paragraph (f)(4), authorizes the Attorney General to establish procedures for determining the admissibility of those aliens who have not landed in the United States. This will permit the Attorney General to set up expedited procedures in determining the admissibility of such aliens. It is expected that such determinations will take place on the detained vessels or on the Coast Guard vessels.

It is well established that aliens not at our borders who seek to come here have no enforceable procedural protections. The courts can neither review the denial of a visa nor compel a consular officer to adjudicate such an application. Wan Shih Hsieh v. Kiley, 569 F.2d 1179 (2d Cir. 19178); Gomez v. Kissinger, 534 F.2d 518 (2d Cir. 1976), cert. denied, 429 U.S. 897 (1976); Burrafato v. United States Department of State, 523 F. 2d 554 (2d Cir. 1976), cert. denied, 424 U.S. 910 (1976); Loza-Bedoya v. INS, 410 F.2d 343 (9th Cir. 1969); U.S. ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929), cert. denied, 279 U.S. 868 (1929); U.S. ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928); Licea-Gomez v. Pilliod, 193 F. Supp. 577 (N.D. Ill. 1960); see Kleindienst v. Mandell 408 U.S. 753, 762 (1972). Thus by making the admissibility determination before the aliens have landed in the United States, the aliens will not be entitled to such protections as judicial review of the admissibility determination or a hearing before an immigration judge.

While paragraph (f)(4) would permit the utilization of procedures designed to expedite the adjudication of exclusion and refugee claims, it would not absolve the

Government from the responsibility to make admission and refugee determinations and thus will not amount to an abrogation of our treaty obligations in this area. Also, since the Attorney General is authorized to set up procedures for making exclusion and refugee determinations, he can set up different procedures for different types of cases. Thus those undocumented aliens who claim to be United States citizens or to be lawfully admitted aliens may receive different review than that afforded aliens who have no colorable claims for admission into the United States.

The fourth new paragraph (f)(5), makes clear that nothing contained in this section shall be interpreted as limiting in any way the President from exercising his Constitutonal powers.

Finally, new paragraph (f)(6) sets forth the definitions for the terms "vessel of the United States" and "vessel subject to the jurisdiction of the United States" by cross referencing to title 21, United States Code, section 955b which defines these terms.

AMENDMENTS TO THE*

IMMIGRATION AND NATIONALITY ACT
As Amended September 1, 1980

(Act of June 27,1952; 66 Stat. 163; 8 U.S.C.1101 et.seq)

*Material to be deleted is enclosed with brackets; new language is underscored.

JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION

SEC. 106. [8 U.S.C. 1105a] (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended [16] (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—

[(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later][;]

(1) "A petition for review may be filed not later than 30 days from the date of the final deportation order or from the effective date of this section, whichever is the later."

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is pre-

sented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise; (6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28, United States Code. Any such alien shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

(7) nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 242 of this Act. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 242 of this Act at any time after the issuance of a deportation order;

(8) it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

TITLE II—IMMIGRATION

CHAPTER 1—SELECTION SYSTEM

NUMERICAL LIMITATIONS

SEC. 201. [8 U.S.C. 1151] [(a) Exclusive of special immigrants defined in section 101(a)(27), immediate relatives specified in subsection (b) of this section, and aliens who are admitted or granted asylum under section 207 or 208, the number of aliens born in any foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, shall not in any of the first three quarters of any fiscal year exceed a total of seventy-two thousand and shall not in any fiscal year exceed two hundred and seventy thousand.[17]

"(a)(1) Exclusive of special immigrants defined in section 101(a)(27), immediate relatives specified in subsection (b) of this section, aliens who are admitted or granted asylum under section 207 or 208, and aliens described in paragraph (2) of this subsection, the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, shall not in any of the first three quarters of any fiscal year exceed a total of sixty-one thousand and shall not in any fiscal year exceed two hundred thirty thousand.

"(2) Exclusive of special immigrants defined in section 101(a)(27), immediate relatives specified in section 201(b), and aliens who are admitted or granted asylum under section 207 or 208, the number of aliens chargeable (as

provided in section 202(b)) to any single foreign state contiguous to the United States who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence shall not in any of the first three quarters of any fiscal year exceed a total of eleven thousand and shall not in any fiscal year exceed a total of forty thousand: Provided, however, that, if in any fiscal year, the number of aliens chargeable to either contiguous foreign state who are issued immigrant visas and otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence is less than forty thousand, in the next following fiscal year the number of aliens from the other contiguous foreign state who may be issued immigrant visas or otherwise acquire the status of an alien lawfully admitted to the United States shall be increased by an amount equal to the difference between forty thousand and such number. In such a case, the limitation prescribed for such foreign state for each of the first three quarters of such fiscal year shall be increased by an appropriate proportional amount."

(b) The "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: *Provided*, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this Act.

NUMERICAL LIMITATION TO ANY SINGLE FOREIGN STATE

SEC. 202. [8 U.S.C. 1152] [(a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in section 101(a)(27), section 201(b), and section 203: *Provided*, That the total number of immigrant visas made available to natives of any single foreign state under paragraphs (1) through (7) of section 203(a) shall not exceed 20,000 in any fiscal year.]

"(a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in section 101(a)(27), 201(b), and section 203: Provided, that the total number of immigrant visas made available to natives of any single foreign state (other than a foreign state contiguous to the United States) under paragraphs (1) through (7) of section 203(a) shall not exceed 20,000 in any fiscal year."

(b) Each independent country, self-governing dominion, mandated territory, and territory under the international trusteeship system of the United Nations, other than the United States and its outlying possessions shall be treated as a separate foreign state for the purposes of the numerical limitation set forth in the proviso to subsection (a) of this section when approved by the Secretary of State. All other inhabited lands shall be attributed to a foreign state specified by the Secretary of State. For the purposes of this Act the foreign state to which an immigrant is chargeable shall be determined by birth within such foreign state except that (1) an alien child, when accompanied by his alien parent or parents, may be charged to the same foreign state as the accompanying parent or of either accompanying parent if such parent has received or would be qualified for an immigrant visa, if necessary to prevent the separation of the child from the accompanying parent or parents, and if the foreign state to which such parent has been or would be chargeable has not exceeded the numerical limitation set forth in the proviso to subsection (a) of this section for that fiscal year; (2) if an alien is chargeable to a different foreign state from that of his accompanying spouse, the foreign state to which such alien is chargeable may, if necessary to prevent the separation of husband and wife, be determined by the foreign state of the accompanying spouse, if such spouse has received or would be qualified for an immigrant visa and if the foreign state to which such spouse has been or would be chargeable has not exceeded the numerical limitation set forth in the proviso to subsection (a) of this section for that fiscal year; (3) an alien born in the United States shall be considered as having been born in the country of which he is a citizen or subject, or if he is not a citizen or subject of any country then in the last foreign country in which he had his residence as determined by the consular officer; [and] (4) an alien born within any foreign state in which neither of his parents was born and in which neither of his parents had a residence at the time of such alien's birth may be charged to the foreign state of either parent.

(c) Any immigrant born in a colony or other component or dependent area of a foreign state overseas from the foreign state, other than a special immigrant, as defined in section 101(a)(27), or an immediate relative of a United States citizen, as defined in section 201(b), shall be chargeable for the purpose of the limitation set forth in section 202(a), to the foreign state, and the number of immigrant visas available to each such colony or other component or dependent area shall not exceed six hundred in any one fiscal year.

(d) In the case of any change in the territorial limits of foreign states, the Secretary of State shall, upon recognition of such change, issue appropriate instructions to all diplomatic and consular offices.

(e) Whenever the maximum number of visas have been made available under section 202 to natives of any single foreign state as defined in subsection (b) of this section or any dependent area as defined in subsection (c) of this section in any fiscal year, in the next following fiscal year a number of visas, not to exceed 20,000, in the case of a foreign state or 600 in the case of a dependent area, shall be made available and allocated as follows:

(1) Visas shall first be made available, in a number not to exceed 20 per centum of the number specified in this subsection, to qualified immigrants who are the unmarried sons or daughters of citizens of the United States.

(2) Visas shall next be made available, in a number not to exceed 26 per centum of the number specified in this subsection, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are the spouses, unmarried sons, or unmarried daughters of an alien lawfully admitted for permanent residence.

(3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in this subsection, to qualified immigrants who are members of the professions,[18] or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States, and whose services in the professions, sciences, or arts are sought by an employer in the United States.

(4) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in this subsection, plus any visas not required for the classes specified in paragraphs (1) through (3), to qualified immigrants who are the married sons or the married daughters of citizens of the United States.

(5) Visas shall next be made available, in a number not to exceed 24 per centum of the number specified in this subsection, plus any visas not required for the classes specified in paragraphs (1) through (4), to qualified immigrants who are the brothers or sisters of citizens of the United States, provided such citizens are at least twenty-one years of age.

(6) [18] Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in this subsection, to qualified immigrants capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States.

(7) Visas so allocated but not required for the classes specified in paragraphs (1) through (6) shall be made available to other qualified immigrants strictly in the chronological order in which they qualify.

ASYLUM PROCEDURE

SEC. 208.* [8 U.S.C. 1158] [(a) The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

(b) Asylum granted under subsection (a) may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 101(a)(42)(A) owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided.

(c) A spouse or child (as defined in section 101(b)(1) (A), (B), (C), (D), or (E)) of an alien who is granted asylum under subsection (a) may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.]

(a)(1). An application for asylum may be made by any alien physically present in the United States or at a land border or port of entry. An alien may be granted asylum by an asylum officer under paragraph (2) of this subsection, if (A) the asylum officer determines that the alien is a refugee within the meaning of section 101(a)(42)(A); (B) the alien is not firmly resettled in any foreign country; (C) the alien is not inadmissible under the provisions of paragraphs (27), (29), or (33) of section 212(a), or so much of paragraph 23 of section 212(a) as relates to trafficking; (D) the alien has not been convicted by final judgment of a particularly serious crime and does not constitute a danger to the community; and (E) there are no serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.

(2) Eligibility for asylum shall be determined by an asylum officer, who shall serve at the direction of the Commissioner, and who shall perform such other duties as the Commissioner may prescribe, except for the investigation or prosecution of any case under sections 235 or 242 of this Act. An alien seeking asylum shall appear before the asylum officer in an informal, nonadversary interview, and may be accompanied by counsel at no expense and no delay to the government. Counsel may advise the alien during the interview but shall not otherwise participate in the interview. The asylum officer may administer oaths and call witnesses, and request information on an application from any government agency, including information classified under Executive Order No. 12065 (50 U.S.C. nt. 401). A record of the proceedings shall be made in accordance with this section, and under such regulations as the Attorney General shall prescribe. The procedures set forth in this section shall be the sole and exclusive procedures for determining asylum. The determination of the asylum officer shall be final and shall not be subject to further administrative appeal or review, except that either the Commissioner or the Attorney General may require that the decision of an asylum officer be certified to him for review.