Spring 1997

Immigration Act of 1990: Friend or Foe to Business?

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Immigration Act of 1990: Friend or Foe to Business?

An Honors Thesis Submitted to

the Department of International Relations

by

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Spring 1997
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Date 4/10/97
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Introduction

The issue of immigration evokes strong feelings in most Americans. This fact is probably because immigration policies and programs have a significant effect on the nation in which we live. Mark Nowak explains, "American immigration policy has profound consequences for the labor market, the economy, and even the size of the United States population. It is the most enormous of our discretionary policies..."¹

For these reasons, most immigration policies concerning the United States are controversial. For example, Proposition 187 in California (a state measure to deny social benefits such as education and health care to illegal immigrants) divided the entire nation into two hostile camps. As recently as last spring, Senator Alan Simpson fueled the fire surrounding immigration with the introduction of another controversial measure. This measure was designed to further limit the number of available visas for different groups of immigrants.²

Immigration policy is divisive because of the diverse effects immigration policies may have on people. Immigration has become an

issue of national importance because immigration and immigrants have an impact on people throughout the nation. However, that impact is not the same for all persons. Some people may benefit from the presence of immigrants while others may find their condition worsening. The presence of immigrants as well as their absence can make a large difference in the lives of the native born. These immigration laws also have the power to shape future actions with regard to immigration. In America, as well as elsewhere, people learn the true effects of their laws only after the laws have been implemented. However, people's ensuing actions will reflect their evaluation of past laws. People may continue the action they started originally with the law or take steps in an opposite or alternative direction with new laws. At the very least, these policies have the potential to set political agendas. Therefore, it is pertinent to examine past immigration laws and their impacts.

One such law which could further our understanding of immigration and the future of immigration policy is the Immigration Act of 1990. One of the purposes of the Immigration Act of 1990 is to ease the barriers for professionals to enter the United States workforce. This paper will evaluate how well this law has met its goal. It is my contention that a close examination of the Immigration Act of 1990 and its impacts will reveal that it has benefited large businesses in the United States. There are many other important affects of immigration laws. However, this paper will focus on the effects of these laws on
businesses, because there is a lack of conclusive writing on the effect of immigration laws on business. Most writing on immigration focuses on immigration of unskilled workers and not professionals, who may have a more profound impact on American business. In order to examine the hypothesis that this policy has aided U.S. businesses, this paper will utilize a cost-benefit approach.

The first chapter will introduce the Immigration Act of 1990. This chapter will offer a thorough explanation of what the bill entails as well as the reasons for the bill.

After laying the foundation of what the Immigration Act of 1990 is, this paper will highlight the benefits businesses have reaped due to the change in the policy. Furthermore, this paper will try to answer a few questions concerning the benefits derived from this law. Has the law resulted in financial gain? Have there been other benefits? What are they? How can non-financial benefits be measured? Also, have all businesses reaped the same benefits? How have these benefits been distributed? Who benefits?

Then, in chapter 3, this paper will acknowledge the costs businesses have incurred due to the change in policy. Again, this paper will try to answer relevant questions concerning the costs. What types of costs have businesses experienced? Are there material costs attached with the implementation of this law? Are there non-financial costs? Who bears the costs?
The next chapter will analyze and weigh the costs and benefits. Can the costs and benefits be compared? How can we evaluate non-material costs and benefits?

Finally, this paper will apply the lessons derived from this policy by offering suggestions for future immigration policy with regard to professionals. It will convey suggestions made by the Commission on Immigration Reform as well as suggestions by the author. Can similar future laws result in similar effects? What lessons have we learnt from this law?
Chapter 1: The Immigration Act of 1990

The Immigration Act of 1990 significantly changed U.S. immigration policy. It overhauled the Immigration and Nationality Act of 1952, the predominant law governing legal immigration, for the past half century. U.S. immigration policy has limited the number of legal immigrants to the United States and the type of immigrants allowed to enter the United States.

In 1952, the Immigration and Nationality Act (INA) was passed by Congress, overriding President Truman's veto. It both carried forward many of the existing immigration provisions and introduced important changes, such as excluding drug addicts and those who sought to obtain a visa by fraud; it also established priorities within quotas.

Although the Immigration and Nationality Act of 1952 has been thoroughly amended in the years following its passage, the principles of the law have remained the same. The amendments have struck a balance between allowing immigrants to escape exclusionary amendments and placing restrictions on immigrants. For example, the amendment in 1954 "spared from exclusion an alien convicted of a single petty offense." However, changes made in 1956 restricted exchange visitors from becoming lawful permanent residents of the

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4 Ibid, 16.
United States unless they returned to their home country for two years. Further amendments in the following decades continued the balancing act between the exceptions from restrictions and the restrictions on immigration. For the most part, this balance has characterized U.S. immigration policy since 1952. Changes have been enacted, but the basic principles set forth in the Immigration and Nationality Act of 1952 were preserved until the major changes enacted by the Immigration Act of 1990 took affect.

The Immigration Act of 1990 entailed a comprehensive overhaul of U.S. immigration policies. This legislation expanded and changed existing visa categories and the necessary requirements to fit into these categories. The Immigration Act of 1990 affects all types of immigrants. "It also features a new classification and quota system for allocating immigrant visas, which will affect all individuals seeking permanent residency status in this country." Undoubtedly, the ramifications of this act were and will continue to be far reaching. Perhaps its largest impact thus far has been on business people and professional workers. David Stanton, an immigration lawyer with fourteen years experience, explains:

The Immigration Act of 1990 (IMMAct 90), signed into law by President George Bush in November of that year, contained many provisions designed to facilitate, rather

5 Ibid, 16.
than hinder, the entry of international business executives and foreign workers of "exceptional ability," including scientists and engineers, into the United States.7

The bill attempts to connect large business in the United States with talented employees from abroad. By expanding and changing existing visa categories, the act eases the process for obtaining work authorization for professionals.8

In an attempt to make more workers available to needy businesses, the Immigration Act of 1990 increased the number of total legal immigrants to be granted visas. The Immigration Act of 1990 raised the legal immigration ceiling from about 500,000 to about 700,000.9 After the implementation of the law, there were 200,000 more available visas for legal immigrants. The law also increased the number of slots available for employment-based visas and visas for professionals. Prior to the change, a mere 54,000 professionals were allowed entry each year. After the change, 140,000 slots were available each year.10 The act also increased the number of visas available within different visa categories.

The Immigration Act of 1990 created the H-1B visa category for aliens of distinguished merit to obtain non-immigrant visas. This new category allows U.S. companies to hire foreign professionals for up to six years. The H-1B visa category only allows for temporary stays in the United States, as it does not include permanent residency.

Besides changing the categories for temporary visas, the Immigration Act of 1990 created four employment-based categories for immigrant visas. The first category applies to priority workers. There are three subcategories for priority workers. The new category of priority workers applies to "aliens with extraordinary ability, outstanding professors and researchers, and certain exceptional executives and managers."12

"Extraordinary ability for immigrant-visa eligibility is determined by extensively documented, sustained national or international acclaim in the field of endeavor."13 The Immigration Act of 1990 explains an alien fits in this category if:

the alien has extraordinary ability in sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation.14

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The law also stipulates that immigrant must continue to work in the area of extraordinary ability once in the United States.\textsuperscript{15} Furthermore, the alien falls into this category only if “the alien’s entry into the United States will substantially benefit prospectively the United States.”\textsuperscript{16}

The second subcategory under priority workers applies to outstanding professors and researchers. Again, the immigrant must have had international recognition as outstanding in an academic area.\textsuperscript{17} The immigrant must also have had three years experience in that academic field.\textsuperscript{18} Finally, the immigrant must be coming to America for a tenured position or comparable position to teach or conduct research.\textsuperscript{19} Essentially, these criteria are very similar to the criteria for workers with extraordinary ability.

The final subcategory for priority workers applies to select multinational executives and managers. This subdivision requires that in the past three years, the alien has spent at least one year employed with a multinational corporation.\textsuperscript{20} Furthermore, the alien must be

\textsuperscript{15} Ibid, 4988
\textsuperscript{16} Ibid, 4988.
\textsuperscript{17} Ibid, 4988.
\textsuperscript{18} Ibid, 4988.
\textsuperscript{19} Ibid, 4988.
\textsuperscript{20} Ibid, 4988.
seeking entry to the United States in order to continue to render services to that same employer. 21

All three subcategories for priority workers attempt to insure that the immigrant has documented skills useful to the United States. Also, the bill tries to insure that the immigrants will be gainfully employed once they enter the United States. To a somewhat lesser degree, the next category for professionals with exceptional ability strives for the same outcome.

This next category applies to advanced professionals and those of exceptional ability. In an attempt to facilitate the entry of workers of "exceptional ability" like scientists, engineers, and researchers, the Immigration Act of 1990 increased the limit for such applicants. This category reserves spaces for those immigrants who have received advanced degrees or their equivalent. However, the degree or license is not enough to qualify a person to apply under this category. 22

Generally, an employer in the United States must sponsor the individual's visa application. Furthermore, the applicants must demonstrate that their occupations are traditionally based on self-employment or that their occupation is on the Labor Department's list of fields in which there is a shortage of U.S. workers. 23 In order to be granted a visa because of a shortage of qualified native workers, the

21 Ibid, 4988
applicants must prove "that there are no able, willing, and qualified
workers in the U.S. for the positions the applicants seek to fill." This
labor certification process also requires employers to prove that they
will pay the immigrant the "prevailing wage" and offer the immigrant
the same working conditions and treatment as are available for native
workers. This requirement applies to workers that are paid a salary as
well as workers who work for a wage. Furthermore, employers must
prove that at the time of filing, there is no workers' strike or lockout in
the course of a labor dispute. The promises made by the employers
must be documented to the Labor Department and the Immigration and
Naturalization Service. This labor certification process applies to
other categories of immigrants in the Immigration Act of 1990 as well.
Therefore, the process is described generally and then applied to these
different categories of employment-based visas.

The next visa category applies to professionals, skilled workers,
and other workers. There are 40,000 slots available for persons
applying under this category. Under this section of the law,
professionals are those workers holding bachelor's degrees. "Skilled
workers means those capable of performing labor requiring at least two

23 Ibid, 35.
24 Ibid, 35.
years' training or experience." Finally, "other workers" is a category for those applicants who work in a field with no minimum requirements. The law limits this subcategory to only 10,000 visas per year. Workers in this category are also subject to the labor certification process as described for the "exceptional ability" category.

Furthermore, the Immigration Act of 1990 created a new classification for business investors. "Congress has set aside 10,000 visas per year for foreigners and their families who invest at least $1 million in a U.S. business that creates 10 new jobs." In addition, "Congress mandated that 3,000 of the 10,000 visas be reserved for either rural areas or communities burdened with 1 1/2 times the national unemployment rate."

This section of the law was intended to spur much needed growth in the U.S. economy, at the time of the law's conception. An optimistic Senate subcommittee predicted the new arrangement could attract $4 billion worth of foreign investment annually and create 40,000 new jobs each year. Congress modeled the investor category after Canadian and Australian provisions which have attracted capital.

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27 Ibid, 35.
28 Ibid, 35.
29 Ibid, 35.
31 Ibid, 54.
32 Ibid, 54.
and skilled immigrants. The incentives offered by the Canadian and Australian governments culminated in economic growth. Affluent immigrants gave the Canadian economy a $2.7 billion boost annually and the Australian economy a $1.2 billion boost annually.

These elements of the Immigration Act of 1990 garnered support from influential groups while the act was before Congress. The most outstanding and outspoken of these groups were large businesses and law firms. Businesses found an ally in the U.S. Chamber of Commerce. While Congress was considering this measure, the U.S. Chamber of Commerce pleaded for this new measure because it would allow the U.S. businesses to be competitive in the global marketplace. This organization argued that the existing immigration law was outdated and served as an impediment to U.S. businesses. The U.S. Chamber of Congress explained:

Legal-immigration reform is long overdue. The world has changed dramatically in the 25 years since Congress last enacted a major legal-immigration reform law. Impediments to immigration among the United States' major competitors, especially in Europe in Asia, are disappearing rapidly and dramatically, yet American companies continue to operate under outmoded law.

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36 Ibid, 37.
37 Ibid, 37.
Individual businesses, armed with the same arguments, also lobbied Congress. The most common businesses to make impassioned pleas were technical businesses, such as manufacturers of computer software and science research firms. Businesses such as Intel, Microsoft, and Packard Bell claim that "the hiring of aliens in high tech positions is necessary because not enough qualified Americans can be found to fill many of the high tech positions." These businesses also argue that if they are denied the ability to hire aliens, their competitive edge would be eroded. Furthermore, the businesses' future growth and prospects would be threatened.

Legal organizations joined business organizations in the fight for the Immigration Act of 1990. The American Bar Association and its Coordinating Committee on Immigration Law lobbied for the Immigration Act of 1990. The American Bar Association President applauded the law for its improvement over the old law, and for fostering economic growth and cultural diversity. As with business, individuals in the field of law also lobbied Congress for the new law. Roy Delbyck, a Hong Kong-based attorney with Baker & McKenzie

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39 Ibid, 1.
40 Ibid, 1.
42 Ibid, 111.
visited Washington twice to lobby for this act. Delbyck stated, "I think it's a shame and a tragedy that the U.S. dropped the ball for so long. The U.S. now recognizes that there is an international competition, and we're finally in the race." The United States will be able to be more competitive because its businesses can enjoy access to bright people across the globe in the same way businesses in other countries do.

However, not everyone who testified before Congress spoke in favor of the measure. The two largest opponents were universities and trade unions. Universities like Harvard objected to the H-1B temporary visa category because it would complicate the issue of arranging for visiting professors and allowing graduated foreign students to remain on campus for research or teaching purposes. Harvard employs about 300 people each year under this visa category and argued that it would be adversely affected by the new law.

Trade unions such as the AFL-CIO objected to the law because they viewed it as a loophole for businesses to hire foreign workers at lower wages, thus displacing American workers.

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44 One could speculate that Mr. Delbyck lobbied Congress out of self-interest. The Immigration Act of 1990 provides work for immigration lawyers, perhaps even more so for immigration lawyers in Hong Kong. Hong Kong is especially susceptible to capital and personnel flight as it prepares to be handed over to China in 1997. See Karp, 56.
48 Ibid, 15.
organizations claimed that the new law would be damaging to native workers. They argued that not only would native workers face the possibility of losing their jobs, but also decreased wages and less favorable working conditions. The opponents of the bill were unable to block the bill's passage. However, it was these trade unions which convinced Congress to amend the law and include the labor certification process.49

Essentially, the opponents, including the trade unions, won a significant battle, but nevertheless lost the war. The Immigration Act of 1990 was approved by Congress and hence caused a drastic shift in United States Immigration policy. Whether that shift was a benefit or a detriment to businesses is yet to be determined. The judgments about the effects of this law are still disputed, however, one can attempt to dissect the arguments and come to some conclusions.

49 Ibid, 15.
Chapter 2: Benefits for Businesses

The Immigration Act of 1990 has produced benefits for businesses in the United States. The new visa categories and their requirements have made it possible for businesses to compensate for shortages in the U.S. labor market. The lack of supply of qualified workers is something which must be demonstrated for the labor certification process which applies to two of the immigrant visa categories. Businesses that lack employees with specific knowledge of advanced issues and problems can utilize the new visa categories to obtain qualified employees. Stanton claims, "The H-1B category of the Immigration Act of 1990 has been useful to U.S. businesses that need foreign workers for specific business problems or research positions." The new immigration laws have supplied highly trained employees, thus benefiting businesses in the United States.

Essentially, these new visa categories have facilitated a "brain gain" by shifting the focus to an individual's value as a prospective employee. The Immigration Act of 1990 nearly triples the number of visas available based on the basis of job skills. Carl Shusterman, an immigration attorney who has served as general attorney and trial attorney for the U.S. Immigration and Nationalization Service,

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comments, "The Immigration Act of 1990 also takes a strategically important step by making talent a more important criterion for immigration benefits than it has been in the past." By increasing the weight of job training and talent as criteria for immigration, this new law has created a situation for potential brain gain. The new law opens the gates to individuals who have demonstrated talent in their respective fields. The U.S. and its businesses gain the brain power of talented individuals, who can nicely complement the U.S. workforce. At least three of these visa categories (H-1B workers, priority workers, and workers with "exceptional ability") attract brilliant and well-trained individuals to the United States, thus creating a brain gain.

Many legal immigrants generate jobs, growth, and new industries. Immigrants own a significant share of small businesses which provide numerous jobs. Allen Kay, spokesman for Representative Lamar Smith, recently admitted, "It's unquestioned that immigrants coming to the high-tech industry have really driven job growth. Immigrants have come in and started successful companies, been star performers and generated thousands of jobs for other Americans."

Legal immigrants are responsible for a large portion of growth in key industries. For example, foreigners have advanced the fields of

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53 Ibid, 33.
science and engineering when skilled native workers were unwilling to
enter these fields. For whatever reason, there exists a shortage of
American workers in the fields of science and technology. Input from
foreign brains is necessary if the United States wants to continue to be
a leader in science and technology. Robert Birgeneau, dean of the
school of science and technology at the Massachusetts Institute of
Technology, explains, "We simply don't have enough outstanding
American citizens who want to pursue careers in science and
technology." Essentially, foreign workers fill a vacuum in the fields
of science and technology. There are other ways in which the U.S.
could compensate for this shortage such as exporting the technical jobs
to other nations or reforming our education system. However, these
alternatives also have drawbacks. For example, changing the education
process would be time consuming. For the time being, the best choice
is to continue allowing immigrants to fill these jobs.

Nevertheless, legal immigrants can take credit for many
important discoveries. A recent study authored by Stephen Moore and
reported by Andres Viglucci examined 250 recently awarded patents
and found that one in five went to immigrants. Some of the
innovations include an air purification system for use inside combat

57 Ibid, 75.
vehicles, sensors used on space shuttles and components for General Electric generators.\textsuperscript{59} For example, "one foreign-born scientist obtained a patent for his employer for a process to produce a drug that has enhanced the lives of tens of thousands of dialysis patients (and has, incidentally, created employment for more than 1,000 Americans).\textsuperscript{60}

The inventors include researchers, executives, entrepreneurs, and professors.\textsuperscript{61} The findings of this study suggest that "immigrants are twice as likely as the general population to generate technological innovations."\textsuperscript{62} The end result is that immigrants obtain patents for products and processes that can often stimulate jobs and economic growth.\textsuperscript{63}

Many scholars argue that legal immigrants generally generate an economic gain for the United States government through the taxes they pay. Although, when it comes to immigrants and their effect on the economy, there are no clear and generally accepted conclusions.\textsuperscript{64}

Scholars in the field make very different estimates as to the amount immigrants cost governments and the amount immigrants pay

\textsuperscript{59} Ibid, p. 4B
\textsuperscript{61} Ibid, p. 4B
\textsuperscript{62} Ibid, p. 4B
governments. The net costs of legal immigration are nearly impossible to discern.

For example, Donald Huddle, professor of economics at Rice University, argues "that these costs are very high and are not balanced by a much smaller amount of taxes paid by immigrants." Dr. Huddle's study was the first to study the net cost of legal immigration to the United States. First released in 1993 but since updated, the study estimates that post-1969 immigrants have created a net deficit of $44.2 billion annually. The Huddle Study has hence concluded that legal immigrants are an economic detriment to the United States government. The Center for Immigration Studies has agreed with Dr. Huddle in so far as immigrants create a net deficit. However, the study supported by the Center for Immigration Studies disagrees on the exact extent of that deficit. Their study determined that immigrants create a deficit of $29.1 billion annually.

To the contrary, George Borjas, professor of economics at the University of California, San Diego, believes "these costs are smaller and that the immigrants' taxes cover a higher proportion of them." A recent study conducted by the Urban Institute offers research to

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65 Ibid, 49.
66 Ibid, 49.
68 Ibid, 1.
69 Ibid, 2.
coincide with Borjas's argument. The study, entitled "Immigrations and Immigrants: Setting the Record Straight," was designed to counteract the Huddle Study. The Urban Institute study concluded that post-1969 immigrants have created a net benefit of $28.7 billion annually.

The Alexis de Tocqueville Institution released a statement concluding that, "Immigrants generally pay more to the U.S. government in taxes than they use in services, as a number of studies have shown. In fact, a sudden drop in immigration levels would sharply reduce Social Security revenues." Immigrants which legally enter the United States are faced with paying into these different tax funds. Generally, illegal immigrants are not forced to pay taxes to the United States government. Secondly, legal immigrants are less likely to need help in the form of social services. "A recent Urban Institute study shows, for example, that working-age, non-refugee immigrants are less likely than natives to be on welfare."

Another perspective is offered by Julian Simon, a professor of business administration at the University of Maryland, who thinks that "whatever the short-term costs (and he thinks even these are covered by
the taxes immigrants pay), the long-term benefits to the nation
definitely outweigh any costs."75

Clearly, there exists no consensus on the question of the net
economic impact of legal immigration, not to mention the net economic
impact of legal immigration under the Immigration Act of 1990.
However, the affluent, professional immigrants will not usually place a
heavy burden on government social services.

Legal immigrants bring extensive economic benefits to the United
States. However, one can reason that the immigrants also result in
other benefits which are more difficult to document, such as
multiculturalism. In theory, persons who represent other cultures can
help to increase cultural awareness and understanding. This view of
multiculturalism is represented in the melting pot metaphor. According
to this metaphor, the U.S. is a melting pot, a place where various
cultures meet and blend together. It is uncertain that the cultures
actually blend together. The melting pot may not be accurate, but
cultural diversity definitely accompanies increased rates of
immigration. At any rate, the Immigration Act of 1990 and immigrants
who enter under this provision benefit the businesses in the United
States. However, they also incur costs.

Chapter 3: Costs to Businesses

Despite its benefits, the Immigration Act of 1990 has also imposed costs on the business and non-business sectors. However, there has not been a consensus on the exact costs or the extent of these costs.

Foreign workers provide a benefit by compensating for a shortage of eager American scientists, however, there exists a related cost. By satisfying the need for scientists and engineers, immigrants have the effect of "soothing the institution." David North explains, "Their presence reduces pressures on institutions to bring more Americans--including more women, blacks, and Hispanics--into science and engineering." Therefore, using foreign scientists to compensate for an insufficiently small field of American scientists only artificially and temporarily attempts to solve the problem. The U.S. never has to produce people capable of doing these jobs because it can rely on imported workers. In the long run, the hiring of foreign scientists exacerbates the problem with the shortage of native scientists.

Another alleged cost is that foreign workers displace native workers as a result of the new immigrant visa categories. According to the law, such a negative impact would not be possible. The labor

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certification process required by the Immigration Act of 1990 makes it illegal for a business to hire a foreign worker when there are equally qualified native workers available. However, the wording of the law seldom reflects what actually happens. Despite its illegality, there are businesses which still hire foreign workers in lieu of native workers.78

Critics of the law also allege that the H-1B category for non-immigrants has led businesses to fire native workers and hire temporary foreign workers. "They charged that the program is driving down wages in certain sectors, displacing American workers, and bringing in foreigners who often are effectively "indentured" to their employers."79 The opponents of this visa category claim it is being abused by businesses who use the category to obtain cheap labor.80

Those who favor this non-immigrant visa category are ready to answer the critics. Austin T. Fragomen, an immigration lawyer who represents major U.S. corporations, says, "There is abuse of the current non-immigrant system, but it is by no means overwhelming. To the extent that there is abuse, it occurs among small, relatively unknown companies."81 Charles A. Billingsley, of the Information Technology Association of America, echoes that idea: "It is minimally widespread.

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77 Ibid, 23.
80 Ibid, 1.
Are U.S. workers being put out of work by foreign workers? Probably. But the occurrence is minuscule."\textsuperscript{82} Fragomen promotes the idea that there is a small amount of abuse in this system, as there is in nearly all systems. Therefore, the abuse is not a reason to immediately invalidate the system, but is instead a call for better enforcement.\textsuperscript{83}

Furthermore, "studies commissioned by the INS have demonstrated that employing H-1B professionals has no negative effect on the wages and working conditions of U.S. workers similarly employed."\textsuperscript{84}

Regardless of the impact of foreign professionals on native workers' job opportunities, the law brings about other negative effects. The Immigration Act of 1990 traps visa applicants in "a bureaucratic quagmire."\textsuperscript{85} Sam Myers, president of the American Association of Immigration Lawyers, claims that the documentation needed to prove to the Labor Department and the immigration officials that the foreign worker will be paid the prevailing wage and will receive the same treatment and conditions as similarly employed workers promises to cause bureaucratic delay.\textsuperscript{86} Both the employer and the prospective employee will have to bare the costs of these delays caused by increased paperwork. Furthermore, this new requirement for added

\textsuperscript{81} Ibid, 1.
\textsuperscript{82} Ibid, 1.
\textsuperscript{83} Ibid, 1.
\textsuperscript{84} Shusterman, C. (1991 Fall). Opening the door for immigrant officials. Issues in Science and Technology, 8, 34.
documentation will be both burdensome and costly for the businesses.\textsuperscript{87}

Businesses, as a result of this law, have the responsibility to provide the necessary documentation to meet the demands of the Labor Department and the Immigration and Nationalization Service.

Another cost is the penalties to businesses for violating the Immigration Act of 1990 are drastic and as a result hurt businesses. Since Robert Reich's appointment, the Department of Labor has been rigorously investigating businesses that employ professional workers in the H-1B category. If a business is found guilty of any wrong doing, stiff penalties are imposed. The penalties include a ban on the hiring of foreign workers.

Of particular concern to employers is [sic] penalty of a one-year ban on any kind of employment-based immigration petition, either temporary or permanent. The Labor Department's Wage and Hour Administration has, in virtually every instance, interpreted the regulations in a way that maximizes the employer's obligations and liabilities.\textsuperscript{88}

Enforcement of the law with the implementation of this penalty will hurt businesses by denying them the ability to hire badly needed personnel.\textsuperscript{89} Businesses cannot import a worker to fill that position for at least one year. They cannot hire a native worker for the position

\textsuperscript{86} Ibid, 15.
because there are no qualified workers in the U.S. as the employer has already verified during the labor certification process. In most cases, the businesses can not train somebody in that short of a time span. Even if training does occur, it will take time and meanwhile the position is still unfilled. Furthermore, the training process is slow and necessarily produces someone without much practical experience.

In addition to the ban on hiring immigrants, businesses are also subject to monetary fines. For example, Digital Equipment Corp. was recently fined more than $50,000 and was temporarily prohibited from employing foreign workers. Furthermore, Complete Business Solutions, Inc. is spending thousands to fight a proposed fine of $180,000 and a one year prohibition of hiring foreign workers. The fines are definitely a cost to businesses. Certainly, one could argue that the businesses deserve this cost. However, as with all new laws there are still concerns that the monetary fines are not only given for intentional violations but also things such as clerical errors. Nevertheless, the monetary fine is a cost businesses must deal with.

The penalties for violation of the Immigration Act of 1990 are well intended. Restrictions and stiff penalties were designed to prevent businesses from using immigrants as strike-breakers or as low-wage

89 Ibid, 20.
90 Ibid, 18.
91 Ibid, 18.
alternatives to native workers. However, the current penalties undermine a business's ready access to the services of the foreign born, and thus undermine one of the goals of the law. The one year ban on hiring employees from abroad closes the door to the very people the United States is trying to welcome. Furthermore, the concern exists that some businesses will refuse to hire professional workers whom they need because of a fear of these harsh penalties. The penalties could actually operate as a deterrent for businesses to hire foreign professionals. This has the potential to be a large problem because the penalties apply to all businesses that violate the law—even if the violations are unintentional. These penalties would undermine not only one goal of the law, but also the progress and development of the businesses and potentially the industry.

Another cost is that the Immigration Act of 1990 is a fertile breeding ground for incompetence and fraud. For example, advertisements appeared in Hong Kong newspapers for "fast" visas—some within four months. These misleading advertisements appeared before the specific requirements for visas had even been determined. These advertisements represent the possible fraud in relation to this

93 Ibid, 34.
94 Ibid, 34.
96 Ibid, 55.
new law. There is also the issue of incompetence. The new visa
categories and their requirements are relatively complicated and people
will need trained, competent lawyers to interpret the laws and help
their clients work with these guidelines. In the first few months after
the law passed, some of the people advising foreigners about the new
law did not even speak English.\textsuperscript{98} Certainly, proficiency in English is a
necessary prerequisite for manipulating U.S. laws written in English.\textsuperscript{99}
At this time, we can only speculate as to how much fraud and
incompetence has actually materialized.

Undeniably, the Immigration Act of 1990 has incurred material
costs for business as well as individuals. As with the benefits, there
are also intangible costs. Lawrence Auster notes that an influx of
immigrants feeds cultural ills such as the loss of a common language,
common literature, and common national identity, as well as increased
racial tensions.\textsuperscript{100} These negative impacts of immigration have led to
the metaphor of the United States as a tossed salad, as opposed to a
melting pot. In the tossed salad, the components do not blend together.
It is difficult to determine which metaphor is more accurate because
both ideas have validity. In many cases, the extent of the costs have
been disputed, but the fact remains that these costs exist to some

\textsuperscript{97} Ibid, 55.
\textsuperscript{98} Ibid, 55.
\textsuperscript{99} Ibid, 55.
degree. With this in mind, it is necessary to attempt to weigh the costs and benefits of this law.
Chapter 4: Analysis of Costs and Benefits

Although the benefits and costs are difficult to compare, the benefits of the Immigration Act of 1990 are greater than the costs. In order to perform a meaningful comparison, one must first answer the following questions: Who pays the costs? Who receives the benefits?

First, who pays the costs of the Immigration Act of 1990? More than just one group of people bare the costs of this act. Businesses must bare the cost of financial and non-financial penalties imposed for mishandling visa applications. The bureaucratic procedures and delays impose costs on both businesses and individuals making application for visas. Businesses carry the bulk of the cost of complying with the bureaucratic procedures. However, the individuals are also responsible for portions of the visa application. The bureaucratic delays and backlogs will harm both the business and the individual. The business is at least temporarily denied the qualified workers it needs. The individuals are in a constant state of waiting, marked by uncertainty. Finally, in some cases, native workers may bare the cost as their jobs are given to overseas workers.

36.
Businesses, foreign workers, and native workers all bear some portion of the costs of this act.

Next, who receives the benefits of the Immigration Act of 1990? Foreign workers, in increasing numbers, enjoy the benefits of the Immigration Act of 1990. The law has made it possible for more foreigners to enter the United States on either temporary or permanent status. Businesses often reap the benefits of "brain gain." Those benefits also spill into the non-business sector as the brains produce developments which help others. Similarly, legal immigrants enhance growth in businesses, which indirectly benefits the general public. 104 The government and the public benefit from the money immigrants pay to the government through taxes. Therefore, foreigners, businesses, the American government and the American people all reap some benefit from the Immigration Act of 1990. Despite these benefits, the net benefit is still in dispute.

Many of the same people (foreigners, native workers, and businesses) experience both the costs and the benefits of the Immigration Act of 1990. Thus it would seem at first glance that the costs and benefits are fairly distributed, because the same people pay the costs and reap the benefits. However, we can analyze the costs and

benefits in three additional ways to find that the benefits of the law actually outweigh the costs of the law.

First, the benefits of the law are more widespread than the costs of the law. Roughly the same groups pay the costs and enjoy the benefits, however, within these groups, the costs and benefits are not equally distributed. The benefits tend to be nearly universal. Almost everyone benefits from the new knowledge which is discovered by scientists. The products and processes which immigrants discover are soon available to everyone, albeit at a price. Furthermore, these discoveries often lead to more advancements in the future. Hence, it is difficult to isolate exactly which developments should be credited to foreign workers. Foreign workers are an integral part of a continuing process. Nearly everyone benefits from economic growth and increased employment. When immigrants stimulate the economy and create jobs, all people will find themselves functioning in a stronger economy.

On the other hand, the costs of the new law are somewhat sporadic. The only cost which people can count on with certainty is bureaucratic delays. These delays are distributed without discrimination. All businesses and immigrant workers involved in the visa process are subject to costly delays. However, the other costs do not apply to everyone or even a significant number of people. For example, the number of native workers displaced by foreign workers is uncertain, yet it is unlikely that it is very high. The number of people
who enter the United States workforce on employment visas is a mere fraction of the labor force.\textsuperscript{105} Therefore, even if each worker who came to America displaced a native worker (as unlikely as that is), the number of those displaced would still be relatively small.

Likewise, the penalties for violating the Immigration Act of 1990, another cost of the law, do not apply to all businesses. These penalties apply only to those businesses found guilty of violating the law, or mishandling visa applications. There is no doubt that some businesses do actually violate the law before being penalized. For that matter, businesses are aware when they hire foreign workers that there are penalties for mishandling visa applications. Still, the costs of the law only affect a portion of the people in these groups.

Second, the benefits of the law are direct, whereas many of the costs are indirect. The benefits will result because of the law. The costs will result because of the law and other uncertain factors. For example, the new law directly allows for an increased number of immigrants to enter the United States on employment-based visas. This benefit is derived directly from the Immigration Act of 1990 itself. Furthermore, the benefit of "brain gain" is another direct result of the law. By placing high qualification standards on the immigrants, the law insures that talented and well trained individuals will fill the

\textsuperscript{105} Branigin, W. (1995 October 21). White-collar visas: importing needed skills or cheap labor?
available visas. Even with these two examples there is some question as to whether these benefits will materialize. The result depends on the foreigners' willingness to use the new visa categories to enter the United States. If the foreign workers do choose to utilize these visa categories, then the benefits will come to fruition.

Conversely, the costs are not direct results of the law, but instead indirect results. For example, the law itself does not necessitate the displacement of native workers. In fact the law forbids the hiring of foreign workers when there is an abundance of qualified American workers. Therefore, displacement from jobs is an indirect outcome which is derived not from the law, but from how people manipulate the law for their own selfish use. By hiring foreign workers under this law, the native workforce does not necessarily lose job opportunities. In fact, due to the safeguards written into the law, native workers can only lose job opportunities when other external events are at play.

Finally, because the benefits are more direct and affect more people overall, they are easier to document and calculate than the costs of the law. Studies can document the number of businesses owned by immigrants, the patents awarded to immigrants, and the like. However, studies have difficulty determining how many immigrants take jobs from native workers. This problem arises largely because the

illegality and immorality of the practice of replacing native workers with foreign workers makes employers unwilling to admit to this practice. The net costs of government services stemming from increased immigration is also difficult to assess. Arguably, both the benefits and costs can not be pinned down with one hundred percent accuracy.

With regard to immigration in general and the Immigration Act of 1990 in particular, it is difficult to discern the costs and benefits. This makes it nearly impossible to weigh the costs and the benefits. However, based on the previous criteria, the benefits businesses have received due to the Immigration Act of 1990 do outweigh the costs.
Chapter 5: Recommendations for the Future

Future immigration policies should apply lessons derived from experiences with the Immigration Act of 1990. Overall, the Immigration Act of 1990 is a good measure which has produced benefits for many businesses. However, the costs are still considerable. Therefore, the Immigration Act of 1990 should be revised so that the same benefits may be enjoyed at less of a cost.

The Commission on Immigration Reform (CIR), which is also known as the Jordan Commission is a nine member commission which is responsible for making recommendations regarding the reform of the United States immigration system.106 The nine members are appointed by the President and the leadership of the Senate and the House of Representatives.107 The commission is a continuing study of the effects of the Immigration Act of 1990. In June of 1995, the Commission on Immigration Reform met specifically to report on the consequences of the Immigration Act of 1990.108 The CIR proposed serious changes to the Immigration Act of 1990 which received the endorsement of President Bill Clinton, but were defeated by the legislature.109

107 Ibid, 1.
109 Ibid, 18.
Among the most far reaching suggestions was the proposal that current immigration levels be drastically cut. The Jordan Commission on Immigration Reform has recently suggested a reduction in the number of immigrants admitted because of employment skills. The CIR suggested that immigration levels be reduced from nearly 1 million to 550,000 annually. Under the CIR's suggestions, the overall number of employment-based visas would fall from 147,000 to 100,000.

At first glance, it seems that these cuts are too drastic and have gone too far. Our legislature believed that the cuts were too extreme when it considered the issue last year and voted against the cuts. U.S. politicians followed the suggestion and introduced unsuccessful bills to the end of cutting legal immigration. Many people criticized these bills, as the fire surrounding immigration issues flared. "The most common flaw in anti-immigration arguments is the idea that one worker's fortune is another worker's misfortune. To hear some immigration reformers talk, you'd think our economy has a fixed number of jobs or a fixed payroll." The fact is we do not have a fixed economy and we have seen in the past how skilled and talented

immigrants can enlarge our economy. "If anything, the U.S. should welcome more newcomers from especially desirable groups-namely, the gifted, the ambitious, and the rich. (italics in the original)"\textsuperscript{114}

These arguments against cutting the number of visas are convincing in theory. However, most of the currently allotted visas are not being utilized.\textsuperscript{115} In 1994, “employment-based immigration declined 16 percent, and was substantially below the limit of 140,000.”\textsuperscript{116} Therefore, cutting the number of available visas may not have a significant impact on the number of immigrants actually entering the United States to work. Given this information, the commission’s suggestions gain credence.

The cuts are also made possible because the category for unskilled workers would under these proposals be completely abolished.\textsuperscript{117} Workers could no longer apply for unskilled worker visas. This suggestion reflects the fact that businesses in the United States are not suffering from a shortage of unskilled laborers. By accurately reflecting the current needs of businesses, this recommendation to eliminate the unskilled worker category strengthens the Immigration Act of 1990.

\textsuperscript{116} Ibid, 1.
Furthermore, under the commission’s suggestions, the remaining employment-based visas would be separated into two categories: those subject to a labor market test and those exempt from such a test.\textsuperscript{118} A labor market test would be required to show that qualified American workers are not being displaced or otherwise disadvantaged by the employment of immigrants.\textsuperscript{119} "Those subject to the labor market test would include individuals with bachelors degrees or higher or those needed to fill jobs requiring a high level of specific skills above the entry level."\textsuperscript{120} Who would be exempt from such a test? Those immigrants who apply for an extraordinary ability visas would be exempt from labor market test.\textsuperscript{121} Also, those individuals who apply for investor visas would not be subject to the test.\textsuperscript{122}

Those individuals who receive residency based on a labor market test would receive permanent residency that would be conditional for the first two years.\textsuperscript{123} Residency would become unconditional after a two year period in which the immigrant was still employed by the same employer at the same or a higher wage.\textsuperscript{124}

The CIR made further suggestions to improve the Immigration Act of 1990. The CIR recognizes and legitimizes the argument that

\textsuperscript{118} Ibid, p.2.  
\textsuperscript{119} Ibid, p.3.  
\textsuperscript{120} Ibid, p.3.  
\textsuperscript{121} Ibid, p.2.  
\textsuperscript{122} Ibid, p.2.  
\textsuperscript{123} Ibid, p.2.  
\textsuperscript{124} Ibid, p.3.
immigrants under the Immigration Act of 1990 rob native professionals of job opportunities. Therefore, the CIR made the following two recommendations to safeguard against such a travesty. First, the commission recommended that employers of immigrants be required to pay a "substantial" fee into a private sector initiative dedicated to increasing the competitiveness of native workers. Those employers who did not pay the fee would be faced with penalties. Such a requirement was designed to demonstrate that the need for the foreign worker is indeed genuine. Second, employers would be required to show that they have engaged in "appropriate attempts to find a qualified worker using normal company recruitment procedures that meet minimum industry-wide standards."

Having already addressed the potential problem of hiring foreign professionals in place of U.S. workers, the commission next made a recommendation to prevent the hiring of foreign professionals at a cheaper wage. The commission made the recommendation that employers be required to pay wages that are at least 5% over the prevailing wage.

124 Ibid, p.3.
125 Ibid, p.3.
126 Ibid, p.3.
127 Ibid, p.3.
128 Ibid, p.3.
129 Ibid, p.3.
Future changes in immigration law should exercise caution when implementing penalties to businesses. Under the Immigration Act of 1990, employers may be banned from hiring foreign born professionals for 12 months. This penalty is too severe, especially in the case of accidental or immaterial errors. Future laws should impose penalties only on those businesses which intend to subvert the law. Once the business is found guilty of intentionally breaking the law, the government should levy stiff penalties. However, innocent businesses that make accidental errors should not be heavily penalized.

Future immigration policy should continue the goal of the Immigration Act of 1990, allowing more talented foreigners to enter the United States. They should do this while attempting to minimize the costs. This lofty goal could be realized with the implementation of some of the suggestions made here. Legislators and policy makers should reconsider the facts and the suggestions made by the Commission on Immigration Reform as well as those of the author.

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131 Ibid, 35.
References


