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LEGAL CRITIQUE OF PRESIDENT CARTER'S PROPOSALS ON UNDOCUMENTED ALIENS*

REV. MSGR. ANTHONY J. BEVILACQUA †

INTRODUCTION

Significantly, Congressman Peter Rodino chose October 12, 1977, the 485th anniversary of the discovery of America, to introduce into Congress a bill on undocumented aliens. Known as H.R. 9531, this bill incorporated the major features of President Carter's proposals on this issue which he formally announced on August 4, 1977.

President Carter's program covered a larger area of proposed action on undocumented aliens than is embodied in H.R. 9531.¹ This Article will limit itself to President Carter's recommended legislation as it was presented in these bills. Accordingly, it will deal with the two main concepts of adjustment of status and employer sanctions. The adjustment of status concerns itself with two classes: lawful permanent residents and temporary resident aliens. Employer sanctions cover a number of issues which I have considered under separate headings: (1) legal critique of employer sanctions with emphasis on the enforcement dimension; (2) employer and evidence of alien's eligibility to work; (3) crime of assisting undocumented aliens in employment.

While this paper will be largely a legal critique of President Carter's proposals, I wish to state beforehand that I feel that the President has manifested a great deal of courage and sensitivity in attempting to deal intelligently with this complex and controversial issue. While it is my opinion that there are objections to some of his proposals, I think he has shown his intention to be humane and understanding in seeking to assist

* This article is based upon an address delivered at a legal conference entitled In Defense of the Alien, sponsored by the Center for Migration Studies of New York with the cooperation of Georgetown University Law Center, Washington, D.C., March 2-3, 1978.

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¹ H.R. 9531, 95th Cong., 1st Sess. (1977) (identical Senate bill, S. 2252, 95th Cong., 1st Sess. (1977)).

the undocumented aliens who are in the United States.

Though I do not think he has been generous enough with his amnesty provisions, at least he was not afraid to speak of amnesty for some of the undocumented aliens. This is an enlightened step in the right direction.

In addition, President Carter has recognized as essential an economic assistance program in source countries. He also has seen the immediate necessity for a study of immigration policy. These proposals, along with two other proposals on border enforcement and temporary workers, have not been incorporated into the bills.

The aim of this critique, therefore, is not to halt the momentum of the President's thrust toward a humane resolution of this problem involving so many human lives, but rather a humble attempt to assist in the clarification and refinement of the program.

LAWFUL PERMANENT RESIDENTS

Under the proposed legislation,² lawful permanent residence will be granted to undocumented aliens, with certain exceptions, provided that they entered the United States prior to January 1, 1970, and have resided continuously in the United States since such entry. The adjustment of status for these long-term residents would be effected by amending section 249 of the Immigration and Nationality Act³ to update the registry date to January 1, 1970.

While I welcome this adjustment of status to permit a certain number of undocumented aliens to become lawful permanent residents, it is my opinion that the proposed legislation is less than generous. The Immigration and Naturalization Service estimates it will benefit about 765,000 people. Others believe that the number will be much less, particularly since there is considerable overlap with section 244.⁴

It is my opinion that the registry date should be advanced to a date reasonably close to the effective date of the bill. Since the interval between the introduction of a bill and its final passage can be rather lengthy, a registry date close to the effective date of the bill should be designated in such a way that there will not be need of amending the proposed date. For example, the registry provision might be made available to all, with certain exceptions, who had been residing in the United States for a period of at least six months prior to the effective date of the bill. Alternatively, permanent lawful residence could be granted to those who entered prior to January 1 of the year in which the bill is passed. Excluded, however, from any amnesty provision would be criminals, procurers and other immoral persons, subversives, violators of narcotic laws, and smugglers of aliens. These persons are excluded from the present bills. By granting permanent resi-

² H.R. 9531, 95th Cong., 1st Sess. § 2(a) (1977) (to amend the Immigration and Nationality Act of 1965, 8 U.S.C. § 1259 (1976)).

³ Act of 1965, 8 U.S.C. § 1259 (1976).

⁴ Act of 1976, 8 U.S.C. § 1254 (1976).

dent status to all eligible undocumented aliens, designation of a temporary resident alien class would be unnecessary. Although granting complete amnesty, with the exceptions mentioned, may not be politically expedient at the present time, it would appear to be the more humane and logical, as well as the least costly, solution to part of the undocumented aliens problem.

According to a section-by-section analysis of the bill, the provisions of section 212(e) of the Immigration and Nationality Act⁵ would appear to preclude exchange visitors subject to the 2-year foreign residency requirement from obtaining adjustment under section 249.⁶ There does not seem to be sufficient justification to eliminate this group and special provision should be made to include them. Presuming that the January 1, 1970 registry date will be retained, there should also be a provision concomitantly granting lawful permanent residence status to a qualifying alien's spouse, children, and parents, even though the latter may have entered the United States after January 1, 1970.

Many undocumented aliens may have difficulty proving continuous residence. The usual documentary evidence will not be available, since many have received their salaries in cash and numerous others have scrupulously avoided having their name on any documents that would be acceptable as testimony. The only hope for some will be regulations that are satisfied with affidavits of credible witnesses. Even affidavits may not be available for many, since undocumented aliens tend to move frequently and thus remain an invisible group. It is suggested that the regulations should spell out very specifically what will constitute evidence of continuous residence. Such specific regulations will give greater certitude to the qualifying undocumented aliens that they possess the required proof of residence and lessen their fear that unacceptable evidence will subject them to deportation.

TEMPORARY RESIDENT ALIENS

The proposed Alien Bill⁷ creates a new class of aliens to be known as temporary resident aliens. Section 4 permits, with certain exceptions, undocumented aliens to receive this temporary status provided they were residing in the United States on or before January 1, 1977, and have registered within one year of the effective date of the Act. The major features of this new status can be summarized as follows: (1) the temporary status will be granted at the discretion of the Attorney General for five years from the effective date of the bill; (2) aliens granted such status would be allowed to work; (3) they could not send for their close relatives; (4) they would not be eligible for certain federal social benefits; (5) they would be

⁵ *Id.* § 1182(e).

⁶ 123 CONG. REC. S18066 (daily ed. Oct. 28, 1977) (section-by-section analysis of the Alien Adjustment and Employment Act of 1977).

⁷ H.R. 9531, 95th Cong., 1st Sess. (1977).

permitted to make temporary departures from the United States during this period without violating their status; (6) during this period, a final decision would be made regarding the future of their status.

The expressed purpose of the temporary resident alien status is to make a count of the number of undocumented aliens here and evaluate their impact on the economy. The White House section by section analysis of the Alien Adjustment and Employment Act of 1977 explained that "the granting of temporary status is necessary to preserve a decision on the final status of a large group of undocumented aliens who have resided here for shorter periods of time, until more precise information about their number, location, family size, and economic situation can be collected and reviewed."⁸ I am sure that this innovative proposal for a new class of temporary aliens was motivated by a generous and humane desire to give some relief to all those undocumented aliens who have been living in constant fear of apprehension. My own desire is that the registry date be advanced from the proposed January 1, 1970, to a date reasonably close to the effective date of the bill. Presuming that such a generous amnesty provision will not be forthcoming in this Act, I shall deal with the reality of the proposed Temporary Resident Alien Act provisions.

Due to the novelty and nature of the Act, it is only natural to expect that the Act will occasion certain objections and questions. The obvious and primary objection to the Act is the uncertainty of the status that will eventually be accorded the registrants. It would be unrealistic for the Carter Administration to expect that the majority of undocumented aliens will register in that first year, the period permitted for registration, if the bill retains its present wording. Both Attorney General Bell and Commissioner of the Immigration and Naturalization Service, Leonel Castillo, admitted upon questioning that it was possible that unregistered aliens could be deported after the 5-year temporary residence period had elapsed. The Administration has indicated that it hopes to award these persons permanent status, although such an offer is impossible at the present time.⁹ However sincere the Carter Administration may be in its desire to help all of these undocumented aliens to remain in the United States, one can only wonder about the situation five years from the date of the bill. What Administration will be in office five years after the bill? What will be the mood of the people at that time? Will there be high unemployment or a serious recession? Will there be a strong nativist and anti-alien attitude at that time? A humane resolution of this objection would be to include in the bill an assurance of permanent resident status after the expiration of the 5-year temporary residence period. This assurance would guarantee a substantial if not almost complete registration and would thus provide the Administration with the desired information.

⁸ The White House, Sept., 1977, at 1.

⁹ Cf. Remarks of Attorney General Bell, Aug. 4, 1977 (press briefing on occasion of presentation of President Carter's proposals).

If the offer of permanent status is not explicitly stated, substantial registration of the undocumented alien might depend on the success of volunteer groups working with the undocumented workers and leaders of the alien communities. Since the undocumented aliens will look to these groups and leaders for guidance as to whether or not they should register, the Administration would do well to consult with them before passage of the bill.¹⁰

Additionally, there seems to be insufficient reason why temporary resident status is denied to out-of-state alien students and exchange visitors with a 2-year foreign residency requirement. It is therefore urged that this status be extended to student aliens and exchange visitors with a two year foreign residency requirement by eliminating sections 4(b)(2) and 4(b)(3) of the proposed Alien Bill.

Section 4(f) provides for a rescission of the temporary resident alien status if it is later discovered that the alien was not eligible. The proposal, however, does not contain any provisions meeting minimal due process standards before granting rescission; rescission should be allowed only after proper notice and an opportunity for a hearing have been afforded the alien.¹¹

The exclusion of temporary resident aliens from certain social benefits is considered an injustice and should be eliminated from the proposal. During this period these aliens will be paying taxes and, in justice, should have a right to the benefits for which their taxes pay. Moreover, excluding them from welfare benefits exposes them once again to exploitation by their employer. Since alien employees cannot receive any benefits and are totally dependent on employment, the employer can easily exploit these aliens by the threat of dismissal. The insecure status itself of the temporary resident alien exposes him to exploitation by the employer. The alien and his employer know that the grant of permanent residence at the end of five years depends upon whether the temporary alien is able to demonstrate his good character and his economic self-sufficiency. Essential to certification of both of these requisites will be employment.

Furthermore, while the temporary resident alien will have the right to

¹⁰ A few spokesmen for the undocumented aliens have told me that, while not satisfied with this temporary resident status, they will urge their people to register. Their feeling is that the new status will give at least a five year respite and sense of legitimacy to the people who have been living in constant fear of apprehension. If, at the end of the 5-year period, it appears that permanent status will be not granted and that deportation is contemplated, they are certain that the people will have sufficient time to go underground again — a procedure at which they are expert. There is also the possibility that by that time they may be able to qualify for permanent residence. Moreover, it is suspected that those aliens who do not register will become an institutionalized sub-class with all the disadvantages and ills that are entailed.

¹¹ In addition, because of this possibility of a rescission without any hearing, those undocumented aliens who would want to register will very likely want to determine beforehand whether they fulfill all the conditions of eligibility. This could prove to be a great burden on the various social agencies which will be approached for assistance and guidance.

work, there is no assurance that this right will not be disregarded with impunity in view of the Supreme Court decision in *Espinoza v. Farah Manufacturing Co.*¹² In *Espinoza*, the Supreme Court held that private employers could discriminate against aliens because of alienage and, as long as such discrimination was based solely on alienage, no action would lie under Title VII of the Civil Rights Act of 1964.¹³ While the Court's holding would also apply to lawful permanent residents, its impact is more burdensome for temporary resident aliens. Since temporary resident aliens cannot receive certain federal social benefits, unemployment presents for them a more ominous specter of hardship than it would for lawful permanent residents.

Prohibiting the temporary resident alien from sending for his family will create serious moral problems for many men here and their wives at home. It will have a deleterious effect on the children and will disrupt family life, causing many of the wives and children to come here illegally. While theoretically the men would be permitted to visit their families and return, the cost of traveling and job commitments would make such visits prohibitive, especially for those from distant countries.

As of January 1, 1977, adjustment of status under section 245 will be denied to an alien, other than an immediate relative, who continues in or accepts unauthorized employment prior to the application for adjustment of status. Most of those who would be applying for the temporary resident alien status adjustment have been working since January 1, 1977, and therefore would be disqualified under the amended section.¹⁴ In order to avoid this impediment to adjustment, the authorization of employment granted in 4(c) of the proposed bill should be made retroactive to January 1, 1977.

Though temporary resident aliens may be permitted, in the discretion of the Attorney General, readmission after temporary absences abroad, the proposal does not seem to allow the application of the *Fleuti* doctrine for brief visits.¹⁵ As recently as July 1977, a federal district court decision concluded that the *Fleuti* doctrine applied to brief visits abroad and entry was limited to lawful permanent residents.¹⁶ Since temporary resident aliens are not lawful permanent residents, a brief unauthorized visit to Mexico or Canada, for example, could result in their exclusion.

Since undocumented aliens residing here on or before January 1, 1977, would have one year to register, one could argue from the present wording of the law that every undocumented alien, whether he intends to register or not, would be free from deportation during the first year. In fact, during the first year allowed for registration, it would seem useless to attempt any

¹² 414 U.S. 86 (1973).

¹³ *Id.* at 95.

¹⁴ Immigration and Nationality Act of 1976 § 245(c), 8 U.S.C. § 1255(c) (1976).

¹⁵ See *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

¹⁶ *Mischel v. District Director, INS*, 470 F. Supp. 788 (S.D.N.Y. 1977).

arrests of undocumented aliens who would otherwise qualify for temporary resident alien status, since the moment the undocumented alien is apprehended, he or she can register. The present wording of the law also raises the question whether an undocumented worker in that first year can continue to work while deciding if he wishes to register. The problem here arises because two provisions seem to conflict. Section 4(a) gives an undocumented alien residing here on or before January 1, 1977, a full year after the enactment of the legislation in which to register. Section 4(c) states that such a temporary resident alien will be given documentation of his status and section 4(d) states that the Attorney General will grant such an alien authorization to work. Section 274(c)(5), however, equivalently requires an employer to have seen documentary evidence of an alien's right to work and, in the case of one hired before the bill, that he do so within 90 days of the effective date of the bill. The problem, therefore, is how the undocumented alien can show any documentation within 90 days of the Act or even reasonably thereafter, if he has a year to register and therefore has not received any documentation.

EMPLOYER SANCTIONS

Section 5 of the proposed bill¹⁷ imposes sanctions on employers of undocumented aliens. It does this by amending section 274 of the Immigration and Nationality Act¹⁸ and prescribing the following: (1) that it shall be unlawful for an employer to employ aliens who are not lawful permanent residents or not authorized to work; (2) that an employer who violates this law "shall be subject to a civil penalty of not more than \$1,000 for each such alien" in his employ on the effective date of the bill or employed thereafter; and (3) that upon determination that cause exists to believe that the employer has engaged in a "pattern or practice" of employing undocumented aliens, the Attorney General "shall bring actions for both civil penalty and injunctive relief." Accordingly, in this instance an employer could not only be fined but also be enjoined and jailed for contempt if he violates this injunction. After several readings of the employer sanction provisions, the one thing that is clear is that the section needs clarification. On the one hand, the provisions make it unlawful for any employer to employ aliens not permitted to work and each violation of this prohibition subjects the employer to a civil penalty of \$1,000. On the other hand, a following subsection prescribes that in a "pattern or practice" of violations, the Attorney General shall bring action for both civil penalty and injunctive relief. The White House Fact Sheet went on to explain that enforcement would be limited to employers engaging in a pattern or practice of violations.

¹⁷ H.R. 9531, 95th Cong., 1st Sess. § 5(a) (1977) (to amend section 274 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1324 (1976)).

¹⁸ Act of 1952, 8 U.S.C. § 1324 (1976).

It is presumed that these two provisions are not contradictory, yet they raise several questions of interpretation. Firstly, do they mean that in a single violation, that is, where there is not yet a "pattern or practice," the employer will not have any action taken against him, but that in case of a "pattern or practice" the Attorney General *shall*, meaning *must*, take action? The Fact Sheet from the White House released on the occasion of President Carter's announcement of his proposals gives support to this interpretation. It states: "Enforcement would be limited to employers who engage in a 'pattern or practice.'"¹⁹ At first glance, the section by section analysis of this provision seems to confirm the Fact Sheet interpretation that enforcement will be restricted only to a "pattern or practice." But in fact it does not. The analysis makes the comment that "those employers who may *inadvertently* hire an undocumented worker will not have to fear the imposition of sanctions under this bill"²⁰ The issue here, however, does not concern an isolated *inadvertent* hiring, but whether an isolated *knowing* hiring of an undocumented alien could lead to the imposition of a civil penalty. It would seem to be rash for anyone to seek protection in the Fact Sheet assurance that enforcement would be limited to "pattern or practice" violations. The law should clearly spell out its meaning.

A second question is whether the two provisions mean that in isolated instances the employer is merely *subject* to a civil penalty. In other words, in a case where the employer knowingly hires a single undocumented alien, the Attorney General would have the discretion to bring or not to bring action against the employer, while in a "pattern or practice" situation the Attorney General would have no such discretion, but would be *obliged* to bring action. In the first provision it is stated that an employer who violates the law shall be *subject* to a civil penalty, while in the subsequent "pattern or practice" provision it is stated that the Attorney General *shall* bring action. The comment in the section by section analysis of the bill does not tend to support this literal interpretation. Its observation on the first provision reads: "[s]ection 274(c)(2) provides that in the event of a violation of the foregoing prohibition, a civil penalty not to exceed \$1,000 *shall* be imposed upon the employer. . . ."²¹ Note the omission of the phrase, *subject to*, and the use of the obligatory term, *shall*.

Additionally, it is uncertain whether the provisions mean that in the case of an isolated violation, only a civil penalty action can be brought against the employer, while in a "pattern or practice" situation, the Attorney General shall bring action for both a civil penalty and injunctive relief. The first provision provides that the violating employer "shall be subject to a civil penalty of not more than \$1,000," while the "pattern or practice"

¹⁹ Office of the White House Press Secretary, "Undocumented Aliens Fact Sheet" 1 (Aug. 4, 1977) [hereinafter cited as Fact Sheet].

²⁰ 123 CONG. REC. S18,066 (daily ed. Oct. 28, 1977) (emphasis added).

²¹ *Id.* (emphasis added).

provision states that "the Attorney General shall bring actions for *both* civil penalty *and* injunctive relief . . ." ²² The section by section analysis seems to confirm that in the "pattern or practice" violations, the Attorney General is obliged to bring action for both a civil penalty and an injunction. It explains that in a "pattern or practice" violation, the "Attorney General shall bring an action for civil penalty *along with* an action for [injunctive relief] . . ." ²³

Lastly, does the first provision mean that no action will or even can be taken against the employer if he has employed only a single undocumented alien, but that he becomes subject to a civil penalty if he employs more than one, although it is not yet a "pattern or practice?" It is an old axiom of the law: "*Ubi lex non distinguit, nec nos distinguere debemus.*" Where the law does not distinguish, we should not distinguish. It is another way of saying that we should primarily interpret the law the way it is written. Section 274(c)(2) makes the employer subject to a civil penalty of \$1,000 when he violates section 274(c)(1), that is, when he employs *aliens* not permitted to work. Section 274(c)(1) reads: "It shall be unlawful for any employer to employ *aliens* . . ." ²⁴ Note the word, *aliens*, is in the plural, not in the singular.

The problems and confusion basically arise because of the concept of "pattern or practice" used in section 274(c)(4). If this provision had not been inserted, it would be fairly clear than an employer could be fined up to \$1,000 for any hiring of an undocumented alien. As a result of this "pattern or practice" insertion, the Fact Sheet comment on it, and observations by several writers, it is not at all clear whether enforcement will be completely restricted only to "pattern or practice" violations and thus no enforcement at all where no "pattern or practice" exists. Another way of highlighting the problem about enforcement is to ask this question: in the event of an action brought against the employer, would the employer be entitled to the defense that he has not engaged in a "pattern or practice" of employing aliens in violation of the prohibition? If the enforcement is absolutely limited to "pattern or practice" violations, there exists a unique situation with the violations that are not a "pattern or practice"; in such a situation, there is a prohibition without a *de facto* penalty. Under the philosophy of law, it is generally considered that a law that is not enforceable is not really a law.

Clarification is also needed of the concept "pattern or practice." The section by section analysis attempts an elucidation by pointing out that the term has been used in other federal statutes, such as the Civil Rights Act of 1964 ²⁵ and the Fair Housing Act of 1968. ²⁶ Furthermore, the analysis

²² H.R. 9531, 95th Cong., 1st Sess. § 274(c)(4) (1977) (emphasis added).

²³ 123 CONG. REC. S18,066 (daily ed. Oct. 28, 1977) (emphasis added).

²⁴ H.R. 9531, 95th Cong., 1st Sess. § 274(c)(1) (1977) (emphasis added).

²⁵ 42 U.S.C. § 2000e-6(a) (1970).

²⁶ 42 U.S.C. § 3613 (1970).

continues, the government will be required to show more than just accidental, isolated, or sporadic hirings of undocumented workers in order to establish a "pattern or practice."²⁷ Some have utilized this comment as evidence that there will be no enforcement in "accidental, isolated or sporadic hirings." This would not seem to be a legitimate conclusion. The sentence only tries to describe what would not be a "pattern or practice," but of itself does not exclude the possibility of enforcement in "accidental, isolated or sporadic hirings." The comment fails to define "pattern or practice." Thus, it can be asked whether the following hypothetical situations would be a "pattern or practice": (a) a housewife who always hires an undocumented alien as a domestic although she has to do this only every 2 to 3 years; (b) an employer who, after the law becomes effective, only once hires a large number of undocumented workers. After reading the comment in the section by section analysis, an employer or a housewife might feel assured that even several isolated or sporadic hirings would not trigger action on the part of the Attorney General. This security, however, is immediately chilled by the sentence that immediately follows in the section by section analysis: "Therefore, those employers who may *inadvertently* hire an undocumented worker, will not have to fear the imposition of sanctions under this bill"²⁸ The question, however, is whether there is a lot to fear where the employer inadvertently hires more than one undocumented worker or, as previously indicated, where the hiring of *an* undocumented worker was not inadvertent.²⁹

Though not stated in the bill, the section by section analysis explains that retention of undocumented aliens hired prior to the effective date of the Act will be considered in establishing whether a "pattern or practice" exists afterwards.³⁰ It would seem, therefore, that the hiring practices of an employer prior to the bill can serve as a basis for reaching a conclusion of "pattern or practice," even though the incident after the date of the bill would not of itself be considered a "pattern or practice." I have difficulties with this. Since a "pattern or practice" action can lead to criminal penalties, is this not approaching a situation analogous to an "ex post facto" law? It is true that the employer is not being penalized criminally for an act committed prior to the law. He is being punished, however, with a criminal penalty for a "pattern or practice" violation whose essential ingredients are acts committed prior to the law when they were not unlawful.

Practically all employer sanction bills proposed in Congress and in state legislatures require that the employer *knowingly* employ undocumented aliens before penalties can be inflicted. Section 274(c)(1) of the present proposed Act fails to include this qualification: "It shall be unlaw-

²⁷ 123 CONG. REC. S18,066 (daily ed. Oct. 28, 1977); see, e.g., *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

²⁸ 123 CONG. REC. S18,066 (daily ed. Oct. 28, 1977) (emphasis added).

²⁹ *Id.*

³⁰ *Id.*

ful for any employer to employ aliens”³¹ Under the present wording of the bill, it seems that an employer would be subject to the civil penalty even though he had no knowledge that the person employed was an undocumented alien. The section by section analysis tries to assure employers that they have nothing to fear if they “*inadvertently* hire an undocumented worker.”³² This phrase, however, is in the analysis, not in the law. Furthermore, the phrase is a comment on the notion of “pattern or practice” rather than on the employer’s knowledge of the employee’s status. Section 274(c)(5) attempts to alleviate the anxieties of employers by declaring that proof that he saw documentary evidence of the applicant’s eligibility to work would give rise to a rebuttable presumption that the employer had not committed any violation. Such language, however, will not remove an employer’s fear that his hiring practices may be found to be violative of the law. Unless it is clearly spelled out by including the word “knowingly” as a qualification of employment, many employers will take no chances. Thus, the possibilities of discrimination against persons classified as “foreign” in looks, language, and behavior are increased. It must also be remembered that even when the employer proves that he saw documentary evidence of the alien’s lawful right to work, such proof is not an absolute defense but only a rebuttable presumption.

A further problem with the enforcement dimension of the employer sanctions concerns the length of time during which an employer is vulnerable to civil and injunctive actions for violations. Section 274(c)(2), coupled with section 274(c)(4), makes the employer liable for penalties for each such alien in his employ on the effective date of the Act or who thereafter has been employed by him. The law seems to be enforceable once the employer has hired or continued to employ undocumented workers even though at the time of the action against him he no longer has any undocumented aliens working for him and has terminated the practice of such employment. A variation of this problem would occur, for example, where an action is brought against an employer for undocumented workers actually in his employ. In that action, is the employer also subject to fines for undocumented workers previously employed unlawfully but no longer in his employ at the time of the arrest of the undocumented aliens in the current action?

Additionally, neither Section 274(c)(4) on the “pattern or practice” concept nor the section by section analysis indicates any time limit. On the contrary, both support the view that once an employer has violated the law he remains liable to action by the Attorney General. Section 274(c)(4) reads: “Upon determination that cause exists to believe that an employer *has engaged* in a pattern or practice of employing aliens in violation of this subsection, the Attorney General shall bring actions”³³ The section

³¹ H.R. 9531, 95th Cong., 1st Sess. § 274(c)(1) (1977).

³² 123 CONG. REC. S18,066 (daily ed. Oct. 28, 1977) (emphasis added).

³³ H.R. 9531, 95th Cong., 1st Sess. (1977) (emphasis added).

by section analysis uses nearly identical language. In other words, there is no statute of limitations in the proposal. Perhaps there is a general statute of limitations elsewhere. If the government, however, is to make every effort to eliminate causes or even possibilities of discrimination in hiring practices, it would be advisable to remove all doubts and fears on the part of the employer by incorporating in the Act a reasonable statute of limitations.

Section 274(c)(1) does not include the provision of previous legislative proposals which permitted employment of nonimmigrants lawfully admitted for the express purpose of engaging in specific employment, e.g., H (temporary workers), I (media employees), L (intracompany transferees). Section 274(c)(1) should include a phrase permitting employment of nonimmigrants authorized to work by their very status. Without such wording, employers of nonimmigrants otherwise authorized to work would be subject to sanctions unless they obtained specific authorizations of the Attorney General.

PROOF OF ELIGIBILITY TO WORK

Under the proposed legislation,³⁴ a rebuttable presumption of innocence will arise for an employer if he can prove that he saw documentary evidence of a person's eligibility to work; the employer must examine this evidence prior to employment; and, in the case of those hired before the effective date of the bill, the employer must examine the evidence within ninety days of the effective date of the bill.

The White House Fact Sheet on the Alien Bill pointed out that "the employer would not be required . . . to keep records of the documents seen."³⁵ This seems a strange comment in light of Section 274(c)(5) which requires the employer to prove that he saw documentary evidence of eligibility. The Attorney General plans to issue a list of identification documents that will be evidence of legal status, but there is still lacking direction as to what constitutes proof that the employer *saw* the identification document. If the employer is not required to retain records of the documents seen, will his statement that he saw the documents be sufficient? It would seem that what is invited here is widespread prevarication. In simple language, what will prevent exploitive employers from not requiring documents and lying that they had seen them if there is no requirement to retain records of the documents seen? If an employer wants to have certain proof, he will probably keep records of the identification documents. This, however, will entail a considerable increase in expenses for the employers. It is this objectionable feature of increased costs for the employers that the Administration apparently wishes to counteract by not requiring retention of records.

³⁴ H.R. 9531, 95th Cong., 1st Sess § 5(a) (1977) (to amend section 274 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1324 (1976)).

³⁵ Fact Sheet, *supra* note 19, at 1.

The White House Fact Sheet also assures the employer that he "would not be required to verify the authenticity of the identification document."³⁶ Very likely, this also appears to be an assurance to employers that the legislation will not demand significant expenditures of time and money to comply with the law. At the same time, the Fact Sheet does not give the assurance that the employer will not be subject to penalties if it is determined that the documents were not authentic. The employer is granted only a rebuttable presumption. Furthermore, the release from both the necessity of keeping the records and the necessity of verifying their authenticity would seem to encourage the forgery of documents.

Additionally, the bill does not require the employer to seek documentary evidence from all applicants for a job or from all employees working for him before the enactment of the law. It leaves the employer complete discretion as to which persons must produce documentary proof of eligibility to work. Since the employer will be more likely to request evidence only from those with "foreign" appearance or characteristics, there is present another form of discrimination. It would seem that, in order to avoid this form of discrimination, the bill should require the employer to examine a document of legal status from all applicants or employees. If such be the case, however, how would this differ from utilization of the Social Security card alone as proof of eligibility to work? Is there any difference between requiring proof from a variety of documents and requiring proof from one sole document if the law demands proof from some acceptable document? In either case, the conclusion seems inevitable that all workers must have an identification document. It can be argued that if an employer must prove he has seen a document of worker eligibility, and if to avoid discrimination every worker should be required to present documentary evidence, what need is there for legislation imposing employer sanctions for employing undocumented aliens? In fact, Congressmen Sisk of California and Murphy of Illinois have proposed such alternative legislation requiring all employees to present a Social Security card before obtaining employment and penalizing the employer for not having required this presentation of the Social Security card.³⁷ The Social Security number today is used for income tax identification, for registration in schools, and for numerous other identification purposes. Its requirement for employment, therefore, would not be considered a radical change of policy or employment procedure.

If an employer provides proof of seeing an identification document of legal status, it affords him a rebuttable presumption that he has not violated the law. This provision in H.R. 9351 and S. 2252 is a significant change from the original legislation incorporating President Carter's proposal and known as the "Alien Employment Act of 1977." In the latter proposal, proof that the employer had seen documentary evidence of em-

³⁶ *Id.*

³⁷ H.R. 9531, 95th Cong., 1st Sess. (1977).

ployment eligibility was to be "conclusive evidence" of innocence. Since the proof of having seen the documents gives rise only to a rebuttable presumption, this equivalently exposes the employer to sanctions no matter how much good faith he had. It therefore compels the employer to make every attempt to verify the authenticity of the documents, although the White House Fact Sheet assured him that this was not necessary. This requirement seems to make the employer the enforcement agent of the government, with a "sword of Damocles" hanging over his head threatening sanctions. In such a situation, employers anxious to comply with the law but fearful of the additional burdens and possible sanctions will have another reason to discriminate by not hiring anyone with "foreign" characteristics. This unfortunate provision places the burden of proving nonviolation of the statute on the employer. The proof, however, provides only a rebuttable presumption of nonviolation. It would seem that this provision may be challenged constitutionally as a denial of both due process and equal protection of the law. It is suggested that discrimination and constitutional questions can be avoided by making proof of having seen identification documents conclusive evidence of innocence and, hence, an absolute defense. While this proposal has its disadvantages, it is the lesser of two evils.

AID TO EMPLOYMENT OF UNDOCUMENTED ALIENS

Under the proposed legislation,³⁸ it will be a felony knowingly to assist for gain an undocumented alien in obtaining or retaining employment, or to enter an arrangement to facilitate his employment. The penalty is a maximum of a \$2,000 fine and/or up to five years of imprisonment for each alien involved. The section by section analysis of the bill³⁹ and the White House Fact Sheet of August 4, 1977,⁴⁰ emphasized that the proposed legislation was aimed at: (1) persons who knowingly "broker" jobs for undocumented aliens; (2) agents for alien smugglers; and (3) persons in supervisory positions who sometimes threaten to report undocumented aliens unless given a fee from every paycheck.

There would be few who would oppose this proposed legislation, provided there were greater certitude that it would be aimed solely at the individuals indicated above. There is legitimate concern that the ambiguity, vagueness, and excessive broadness of the wording of the legislation could encompass persons and agencies not intended. For example, a lawyer who either assists undocumented aliens in qualifying for labor certification, or aids paid employees of the many voluntary agencies that might help undocumented aliens obtain employment while assisting them with

³⁸ *Id.* § 5(a)(2) (to amend Immigration and Nationality Act of 1952 § 274, 8 U.S.C. § 1324 (1976)).

³⁹ 123 CONG. REC. S18,067 (daily ed. Oct. 28, 1977).

⁴⁰ Fact Sheet, *supra* note 19, at 2.

their particular immigration problem, would seemingly come within the purview of this provision. According to the present wording of the legislation, these bona fide persons could be indicted under this section and be subject to severe criminal penalties. It is suggested that the wording of the proposal be changed so that there is no doubt that the legislation will be restricted solely to job "brokers," agents of smugglers, etc., and not include lawyers and employees of volunteer agencies who might assist on an individual basis an undocumented alien to obtain employment.