FAIR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

Overview of S. 744: The Border Security, Economic Opportunity, and Immigration Modernization Act

June 10, 2013

In April 2013, Senators Chuck Schumer, Dick Durbin, Michael Bennet, Bob Menendez, John McCain, Lindsey Graham, Jeff Flake, and Marco Rubio introduced S.744—the Border Security, Economic Opportunity, and Immigration Modernization Act—otherwise known as the Gang of Eight amnesty bill. If passed, S.744 would grant amnesty to the approximately 12 million illegal aliens in the U.S. and dramatically increase legal immigration, while doing virtually nothing to improve border security or immigration enforcement.

In May, the Senate Judiciary Committee debated and marked up S.744. While the Committee accepted numerous amendments, none changed the core provisions of the bill. In fact, many amendments made the bill worse. In the end, the Judiciary Committee approved the bill, as amended, by a vote of 13-5. The Senate will take up the bill on the floor in June.

To help educate the American people and lawmakers, FAIR has created this summary of the major provisions in S.744. Please remember that this summary is not intended to cover each and every provision within the 1,000-page bill. For more details, readers may visit FAIR's Amnesty Resource Center. In addition, for readers who are new to immigration policy, please note that under the Immigration and Nationality Act (INA), an "immigrant" means a legal permanent resident (also called a green card holder) and a "nonimmigrant" refers to an alien with temporary legal status (such as a guest worker, tourist, student, etc.).

I. AMNESTY PROGRAM

S. 744 authorizes the Department of Homeland Security (DHS) to grant amnesty six months after enactment to illegal aliens who entered the United States on or before December 31, 2011. (Sec. 2101, p.942) It does so through the creation of a new status called "registered provisional immigrant" status (RPI status). The bill states that RPI status shall not be considered a nonimmigrant (temporary) status; however, aliens who receive it shall receive work authorization, travel authorization, and shall be considered "lawfully present." In other words, the RPI status is virtually the same as nonimmigrant status.

S.744 provides that the DHS may grant RPI status to an illegal alien who is eligible, submits biometric data, pays a fee (unspecified) and a $1,000 penalty. The penalty is waivable and payable in installments. RPI status lasts six years and is renewable indefinitely. An RPI alien is eligible for a green card in ten years and for naturalization in thirteen years.

To be eligible for RPI status, an alien must demonstrate he/she:

- Is physically present in the U.S. on the date of application;
- Has been physically present in the U.S. on or before December 31, 2011; and
- Has maintained continuous physical presence since Dec. 31, 2011.

S.744 also allows illegal aliens who have been deported or have illegally re-entered since deportation to apply for RPI status if they have certain family members in the U.S. or meet certain age requirements.

In addition, an alien need not demonstrate any English skills nor pay back taxes to apply for RPI status. S.744 merely requires that an applicant for RPI status satisfy any formal IRS tax assessment — if any — before applying.

In general, an alien is ineligible for RPI status if he/she:

- Has a felony conviction;
- Has a conviction for an aggravated felony defined under INA 101(a)(43) (note this is in Title 8 and not the criminal code (Title 18));
- Has a conviction for three or more misdemeanors entered on different dates (waivable);
- Has a conviction under foreign law that, if committed in the U.S. would make the alien inadmissible or deportable under the INA;
- Has a conviction for unlawful voting;
- Is reasonably believed to be engaged in, or is likely to engage in, terrorist activity;
- Is a legal alien, whether a nonimmigrant or an immigrant; or
- Is inadmissible, with a broad array of exceptions.

S.744 grants DHS broad discretion to waive a wide array criminal activity for the purposes of determining eligibility for RPI status. First, S.744 allows DHS to waive multiple misdemeanor convictions. (Sec. 2101, p.65) S.744 also authorizes DHS to waive the following provisions, which would otherwise make an alien inadmissible to the U.S.:

- Gang-related crimes and gang membership;
- Three or more drunk driving offenses;
- Domestic violence, stalking, child abuse, and violation of protective orders;
- Crimes of moral turpitude;
- Federal or state drug offenses;
- Trafficking in passports;
- Providing fraudulent immigration services;
- Trafficking immigration documents, including document fraud
- Prostitution;
- Misrepresenting a material fact to procure visas or other immigration benefits (if done for any purpose other than submitting an amnesty application);
- Violating student visas;
- Falsely claiming citizenship; and
- Illegally re-entering the U.S. after deportation.

S.744 prohibits the government from taking virtually any enforcement action against an alien who merely “appears” to be eligible for RPI status. S.744 provides that from the time of enactment to the end of the application period, DHS may not remove — for any reason — any

illegal alien who appears to be "prima facie eligible" for amnesty. Once an illegal alien has applied for RPI status, DHS may not detain or remove the alien — for any reason — DHS has made a "final determination" on the application. Finally, if an alien is in deportation proceedings and either DHS or the Department of Justice (DOJ) finds the alien prima facie eligible for amnesty, the government shall terminate the proceedings and give the alien an opportunity to apply.

S.744 also shields any information an illegal alien submits in an RPI application. The bill does not penalize illegal aliens who submit false information in their applications, but criminalizes and penalizes any federal employee who uses application information for any other purpose than determining whether to grant amnesty to the alien. Moreover, regardless of how serious information in an RPI application may be, S.744 only requires DHS to share that information with law enforcement officials when there is an existing criminal investigation (of a felony) or an existing national security investigation. DHS is not required to share the information with law enforcement to initiate any investigation, no matter how damaging it is.

For illegal aliens whose RPI applications are denied (or revoked), S.744 provides numerous ways for illegal aliens to challenge DHS's decision. It allows illegal aliens to file for administrative review, judicial review, and even allows illegal aliens to file class action lawsuits to challenge DHS rules, policies, and procedures. While one may argue an illegal alien already has access to courts for certain reasons, allowing illegal aliens to challenge what should be a discretionary decision to forgive criminal conduct has the potential to overwhelm our court system. Class actions filed by illegal aliens after the 1986 amnesty lawsuits clogged up the court system for over two decades.

S.744 provides that RPI aliens are ineligible for federal means-tested public benefits or Obamacare until they become green card holders. This is generally consistent with current law, except that current law provides that aliens who are lawfully present (including nonimmigrants) are eligible for Obamacare. RPI aliens, however, will still be eligible for benefits generally offered to those who are "lawfully present" including Social Security, numerous tax credits, and state and local benefits. In some states, such as California and New York, these benefits are significant.

Finally, S.744 incorporates the DREAM Act and AgJOBS, which in this bill is called the Agricultural Worker Program. In general, the DREAM Act creates an expedited amnesty program for illegal aliens who entered the U.S. before the age of 16. The Agricultural Worker Program creates an expedited amnesty program for illegal agricultural workers who meet certain work requirements. Illegal aliens who receive amnesty under the DREAM Act will be eligible for a green card AND naturalization in five years. Illegal aliens who receive amnesty through the Agricultural Worker Program are eligible for a green card in five years and naturalization in ten years.

Triggers For The Amnesty Program

The Department of Homeland Security (DHS) may start approving applications for RPI status as soon as it "submits" notice to Congress that it has begun implementing the border security plan and the fencing plan (see below). (Sec. 3, p.855)

However, DHS may not give RPI aliens green cards until DHS has submitted to Congress a written certification that:

- DHS has submitted the border security plan to Congress and that the plan is "substantially deployed" and "substantially operational";
- The border security plan must include a strategy for DHS to achieve and maintain an apprehension effectiveness rate of at least 90% in all border sectors;
- DHS has submitted to Congress, "implemented" and "substantially completed" the border fencing plan;
- DHS has "implemented" the new, mandatory E-Verify system created in the bill (it is unclear whether this means adoption of regulations or that all employers are subject to mandatory use); and
- DHS "is using" an "electronic exit system" (but not biometric) at air and sea (but not land) ports of entry that operates by collecting machine-readable visa or passport information from air and vessel carriers. (p.854-856)

In addition, DHS may adjust RPIs to LPR status **without satisfying the triggers**, if

- Litigation has prevented one of the triggers from being implemented, OR implementation of the triggers has been held unconstitutional by the Supreme Court of the United States; AND
- Ten years have elapsed since the date of enactment. (p.857-858)

II. BORDER SECURITY

S.744 requires that DHS submit a plan to secure the U.S.-Mexico border within 180 days of enactment (p.864). This plan must include a strategy for achieving "**effective control**" between ports of entry, which is defined as persistent surveillance of the border and an apprehension rate of 90 percent or more, even though DHS will not know the full number of illegal border crossers who successfully evade the Border Patrol. DHS must start implementing the plan "immediately" upon submission and give Congress status reports every six months. (p.867)

S.744 also requires DHS to submit, within 180 days of enactment, a fencing plan to identify where fencing, if any, should be deployed along the U.S.-Mexico border. (p.870) An amendment offered by Senator Leahy and adopted in the Judiciary Committee clarified that DHS has no obligation under this bill to construct any fencing. (p.871)

If DHS does not achieve effective control of the U.S.-Mexico border within five years, S.744 requires the creation, within 60 days, of a "Southern Border Security Commission." (p.860) The

Commission shall submit its recommendations to the President and Congress on policies to achieve and maintain effective control within 180 days. However, the Commission has no real authority, terminating a mere 30 days after it submits recommendations—less than a year from the time it was created. (p.864)

In addition to the border security and fencing plans, S.744 requires DHS to add 3,500 Customs and Border Protection (CBP) officers by the end of fiscal year 2017. (Sec. 1102, p.897) Note, however, that CBP officers are not the same as Border Patrol agents. CBP officers work at official ports of entry while Border Patrol agents have jurisdiction between ports of entry. S.744 does not require DHS to add any Border Patrol agents, but does authorize DHS to add additional Border Patrol stations "as needed" and forward operating bases "as needed," with no specific funding authorized. (Sec. 1104, p.904)

S.744 authorizes a governor, with approval from the Secretary of Defense, to call up that state's National Guard to assist Customs and Border Protection in securing the U.S.-Mexico border. (Sec. 1103, p.899) The statutory authority for using the National Guard in this capacity already exists under Title 32 and has been invoked on at least two occasions for similar border security purposes, for Operation Jump Start (2006-2008) and for Operation Phalanx (2010-2011).

S.744 authorizes appropriations of "such sums as may be necessary" from the CIR trust fund to increase prosecutions under Operation Streamline. Operation Streamline, a program that began in 2005, provides for the prosecution of all aliens who illegally cross the U.S.-Mexico border. The additional funding in S.744 is specifically designated to increase the number of prosecutions for illegal border crossings in the Tucson border sector, where prosecutions have not been able to match the extraordinarily high volume of illegal border crossers. (Sec. 1104, p.901) In addition, S.744 requires DHS to reimburse state and local governments for the prosecution of "federally initiated" criminal cases declined by the Department of Justice. (Sec. 1108, p.916) However, the Attorney General has discretion not to reimburse if "there is reason to believe" that the jurisdiction seeking reimbursement "has engaged in unlawful conduct in connection with immigration apprehensions," not for the immigration apprehensions for which reimbursement is sought.

S.744 authorizes additional funding for Operation Stonegarden. Established in 2004, Operation Stonegarden is a FEMA grant program that gives money to local jurisdictions to coordinate border security efforts with DHS. (Sec. 1104, p.903) The bill requires that at least 90 percent of the additional funding be allocated to local jurisdictions for personnel, overtime, travel, and other costs related to combating illegal immigration and drug smuggling along the U.S.-Mexico border. These are activities already covered under Operation Stonegarden.

S.744 creates additional federal judgeships for Arizona (2), the Eastern District of California (3), the Western District of Texas (2), and the Southern District of Texas (1). (Sec. 1104, p.906)

S.744 requires the Departments of Agriculture and the Interior to give CBP "immediate access" to lands owned by the federal government along the Arizona-Mexico border, up to 100 miles inward. Access to these federal lands is for the purpose of undertaking border security activities in a manner that will best protect the natural and cultural resources on federal lands." (Sec. 1105, p.908) However, as circumscribed by the bill, this access provides only limited relief to Border Patrol agents, whose ability to patrol and monitor 40 percent of land along the U.S.-Mexico border is limited because such land is owned by the federal government and is subject to land use laws, policies and restrictions (see GAO-11-38). In 2011, the 59 members of the House sponsored legislation that would have given Border Patrol agents access to federal lands long the entire U.S.-Mexico border without the restrictions found in S.744 (see H.R. 1505).

S.744 requires CBP to deploy additional surveillance systems and drones (UAVs) along the Southern border for 24 hours per day, seven days per week. (Sec.1106, p.911) In the Judiciary Committee, however, members adopted an amendment specifying that drones may not operate in the San Diego and El Centro border sectors, except within 3 miles of the border. CBP has had a drone program since 2005. The program first deployed drones along the U.S.-Mexico border but has since expanded to the Caribbean, Gulf area, and Northern border. Currently CBP operates approximately 10 drones, but the Office of Inspector General (OIG) has reported that due to poor planning, CBP has only run the drones for less than a third of the agency's time goal. (OIG-12-85, May 2012)

S.744 authorizes appropriations for federal agencies and local governments to purchase interoperable P-25 radios—radios that meet current public safety standards for interoperability. According to the OIG, DHS already has a goal of radio interoperability among its agencies, but has yet to reach this goal. (OIG-13-06, November 2012) In addition, GAO reports that the federal government since 2003 has created 40 different grant programs operated by nine different agencies that allow for the purchase of such radio equipment. (GAO-12-343, February 2012)

S.744 creates a "comprehensive immigration reform trust fund" that will collect many of the fees charged pursuant to the bill and be used as a source of funding for various provisions. (Sec. 6, p.872) However, the bill provides that no fee may be collected except to the extent that its expenditure is provided for in advance through "an appropriations act."

S.744 reauthorizes appropriations for the State Criminal Alien Assistance Program (SCAAP) through FY 2016. This program, found under Section 241(i) of the INA, provides for the partial reimbursement of state and local governments for the incarceration of certain criminal aliens. (Sec. 1110, p.917) Pursuant to amendments adopted in the Judiciary Committee, S,744 expands the definition of a criminal alien to include one "charged with" a felony or two or more misdemeanors. It also requires reimbursement for individuals whose immigration status DHS is unable to confirm, which reverses an Obama Administration policy not to reimburse for "unknowns."

S.744 requires DHS to issue policies requiring that **"all"** Homeland Security personnel report **"each"** "use of force," no matter how minor (note also that the term is undefined). It also requires DHS to establish procedures for accepting and investigating complaints regarding the use of force; disciplining personnel who violate policies; and reviewing **"all"** uses of force to determine whether the use of force complied with policy. (Sec. 1111, p.918)

S.744 creates a "Homeland Security Border Oversight Task Force," to recommend immigration and border enforcement strategies; to recommend ways in which Border Communities Liaison Offices can strengthen relationships between border communities and the federal government; to evaluate how the policies of agencies acting along the border protect the "due process, civil, and human rights" of border residents, visitors, and migrants; and to recommend types of training for border enforcement personnel. The DHS Task Force shall issue a report to Congress and the President within 2 years of its first meeting, and sunsets 60 days thereafter. (Sec.1113, p.922)

S.744 eliminates the USCIS ombudsman and replaces it with an ombudsman that covers USCIS and enforcement agencies, such as CBP and ICE. (Sec. 1114, p. 927)

S.744 requires DHS, and any state and local law agencies that apprehend aliens near the border, to inquire "as soon as practicable" after an apprehension whether the alien is a parent or is traveling with a spouse or child. The bill also requires apprehending agencies to ascertain whether removing the alien "presents any humanitarian concern related to such individual's physical safety." DHS and state and local agencies shall ensure that with respect to a decision to remove, "due consideration" is given to: "the best interests" of the child; to "family unity"; and to "other public interest factors, including humanitarian concerns and concerns related to the apprehended individual's physical safety." (Sec. 1115, p.930)

S.744 attempts to eliminate the Alien Transfer Exit Program by requiring that DHS annually certify that it is only deporting illegal aliens through an entry or exit point on the Southern border "during daylight hours." Such certification shall not apply to the deportation if the manner of deportation is: "justified by a compelling governmental interest" or "in accordance with a repatriation agreement signed by the Mexican consulate. The certification is also not required if the migrant is removed at the same point where he entered and agrees to being so removed. (Sec. 1121, p.940)

S.744 requires the creation of an electronic, automated exit program. (Sec. 3303, p.1454) The bill provides that by Dec. 31, 2015, DHS shall establish "a mandatory exit data system" that is not biometric, but collects data from machine-readable visas and other travel documents for all aliens leaving at air and sea (but not land) ports. This system rolls back current law, which has for years required the government to implement a **biometric** exit system at all air, sea, **and land** ports. (See, e.g. 8 U.S.C. 1365b). Pursuant to an amendment offered by Senator Hatch adopted in Committee, Sec. 3303 now requires DHS to establish a biometric exit system at the 10 busiest international airports within 2 years of enactment. In addition, no later than 6 years

after enactment, DHS must establish a biometric exit system at the "Core 30" international airports. The bill requires DHS to submit a plan after 6 years for the expansion of the biometric exit program to "major" air, sea, and land ports of entry. But even with the Hatch amendment, the bill still falls far short of the requirements in current law.

S.744 provides that illegal aliens under the age 18 (who do not have a criminal record) have an affirmative defense to the felony of illegally re-entering the United States. (Sec. 3705, p.1553) This will encourage more minors to cross the border illegally; it will also encourage drug cartels to use children as means of trafficking illegal goods across the border.

III. INTERIOR ENFORCEMENT

S.744 prohibits immigration enforcement actions, including arrests, surveillance, searches, or even interviews by ICE agents and CBP officers in "sensitive locations." Sensitive locations include hospitals and health clinics; public and private schools of all educational levels including vocational and trade schools; organizations assisting children, pregnant women, victims of crime or abuse, or individuals with mental or physical disabilities; churches, synagogues, mosques, and other places of worship; **and such other locations as the DHS Secretary determines**.

S.744 authorizes immigration judges to ignore U.S. immigration law, by providing that judges may "exercise discretion" to decline to order the alien deported AND terminate proceedings if the judge determines deporting the alien "is against the public interest or would result in hardship to the alien's U.S. citizen or LPR parent spouse or child…." (Sec. 2314, p. 1231)

S.744 authorizes DHS to ignore U.S. immigration law, by providing that the Secretary may "exercise discretion to waive a ground of inadmissibility or deportability if she determines that such removal or refusal of admission is against the public interest" or would result in "hardship" to the alien's U.S. citizen or LPR parent spouse or child. (Sec. 2314, p. 1233)

S.744 essentially renders the 3 and 10-year bars to admission inapplicable to DREAMers. The 3 and 10-year bars — adopted to deter illegal immigration — provide that illegal aliens who leave the U.S. are inadmissible for 3 or 10 years, depending on the length of time such aliens were in the country illegally. However, Section 2315 provides that the 3 and 10 year bars do not apply to nonimmigrants who have earned a B.A. or higher degree and who were younger than 16 at the time of initial entry to the U.S. (Sec. 2315, p.1234) S.744 also expands DHS's authority to waive the 3 and 10 year bars for illegal aliens who are parents of citizens or LPRs. (p.1235)

S.744 requires DHS to create a "secure alternatives program" through which DHS "shall contract" with non-profits and community-based organizations to undertake the screening, supervision and custody of illegal aliens. (Sec. 3715. p. 1583)

S.744 authorizes the Department of Homeland Security to appoint counsel to illegal aliens fighting deportation **at taxpayer expense**. (Sec. 3502, p.1491)

S.744 creates a new bureaucracy, the Office of Legal Access Programs, to provide illegal aliens with "legal orientation programs" that help fight deportation. The bill requires DHS to make these programs available to the aliens within 5 days of being taken into custody. Section 3503 also authorizes the Office of Legal Access Programs to provide services, including legal services, to aliens in deportation hearings. (Sec. 3503, p.1494)

S.744 eliminates the requirement, designed to combat fraud, that asylum-seekers file a claim for asylum within one year of entering the U.S. (Sec. 3401, p.1469) It then allows all aliens who have been denied asylum because they failed to follow the one-year rule — regardless of how long ago their asylum claims were denied — to file a motion to re-open their case and re-litigate it. S.744 also removes the authority to grant asylum from immigration judges and leaves it entirely within the discretion of DHS. (Sec. 3404, p.1474) In addition, S.744 eliminates DHS discretion to grant asylum applicants work authorization and instead **requires** the DHS grant asylum applicants work authorization 180 days after filing. (Sec. 3412, p.1489) This will encourage fraudulent and frivolous asylum applications.

S.744 places severe burdens on law enforcement officers who have taken an illegal alien into custody. Even though deportation is a civil proceeding, the bill requires that DHS must within **72 hours** serve all aliens taken into custody with a “custody decision” specifying the reasons for continued custody. Then DOJ must ensure that the alien has an opportunity to appear before a judge to review the custody decision. Unless the judge determines at that hearing that the alien is deportable, the judge may detain the alien only if DHS demonstrates that **no conditions** will reasonably ensure the appearance of the alien in court and the public safety. (Sec. 3717 p.1589)

IV. MANDATORY EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM

S.744 mandates that all employers use an electronic eligibility verification system to ensure their newly hired employees are work authorized. (Sec. 3101, p.1300, 1324) Although members of the Gang of Eight have indicated that E-Verify is the system they intend to mandate, the bill does not specify that the system must be E-Verify. Thus, it is entirely possible that this or a future administration could require employers to use a different program to verify work authorization. Indeed, the bill repeals the provisions of the 1996 law that created and currently governs E-Verify. The bill also requires that DHS “continue to operate the E-Verify Program until the transition to the system described in” the bill. (p.1411-1412)

The bill implements the mandatory verification requirement in phases. It requires the federal agencies to use the system no later than 90 days after enactment if they are not already using it. Federal contractors must continue to use “the system” as required by federal rule (73 Fed. Reg. 67,651). One year after DHS publishes regulations to implement the system, the bill

authorizes DHS to permit or require "critical infrastructure" employers to participate in the system. Two years after DHS publishes regulations, employers with more than 5,000 employees must use the system. Three years after regulations are published employers with more than 500 employers must use the system. Four years after regulations are published all employers must use the system. S.744 only requires that employers use the system with respect to new hires and employees with expiring temporary employment authorization. (p.1326-1330)

S.744 weakens our current employer sanctions law by creating a new, narrow definition of "employers" who are required to use the verification system and subject to sanctions for hiring illegal aliens. (Sec. 3101, p.1306-1307) In particular, the bill excludes those who hire individuals for "casual, sporadic, irregular, or intermittent" labor — as defined by DHS — from the definition of employer. This will encourage employers to regularly hire temporary workers, such as day laborers, because employers who do so will not be subject to the requirements to verify work authorization and will not be subject to sanctions if the alien turns out to be an illegal worker.

S.744 also contains sweeping preemption provisions that invalidate state and local E-Verify laws. Approximately 19 states require some combination of employers to use E-Verify. However, S.744 expressly provides that it will invalidate (preempt) "any state or local law, ordinance, policy, or rule, including any criminal or civil fine or penalty structure, relating to the hiring … or status verification for employment eligibility purposes, of unauthorized aliens." (p.1404)

V. LEGAL IMMIGRATION (LEGAL PERMANENT RESIDENTS)

Under our current system of immigration, there are two major ways for aliens to apply for a green card: through family relationships or through employer sponsorship.

Current law provides four categories through which aliens can apply for **family-based** green cards. (See INA 203(a)) These categories are:

(1) Unmarried sons and unmarried daughters of citizens (adults);
(2) Spouses and unmarried sons and unmarried daughters of LPRs, which are divided into two categories:
    a. Spouses and (minor) children of LPRs
    b. Unmarried sons and unmarried daughters of LPRs (adults)
(3) Married sons and married daughters of citizens; and
(4) Brothers and sisters of citizens.

The annual number of family-based green cards issued is based on a formula that starts with a floor of 226,000 and is capped at 480,000. In addition, **spouses, children and parents of U.S. citizens are currently classified as "immediate relatives," which means they are not subject to the family-based cap**. This accounts for a large number of green cards issued

each year. When this exemption is incorporated into the formula, the family-based cap for any given year is usually around 226,000.

Current law provides five categories through which an alien can obtain an **employment-based** green card. (See INA 203(b)) These categories are:

(1) Priority workers, which include:
    A. Aliens with extraordinary ability;
    B. Outstanding professors and researchers; and
    C. Certain multinational executives and managers;
(2) Members of the professions holding advanced degrees or aliens of exceptional ability;
(3) Skilled workers, unskilled workers, and professionals;
(4) Special immigrants, as defined by INA 101(a)(27); and
(5) Employment creation (commonly referred to as EB-5).

The existing cap for employment-based green cards is 140,000. Spouses and children of immigrants count towards the cap.

S.744 makes significant changes to both family and employment-based immigration that will accelerate current immigration and dramatically increase future immigration. FAIR estimates that S.744 will double legal immigration over the next decade, and triple it if one includes the amnestied aliens who receive green cards. By definition, all of these legal permanent residents will have work authorization, meaning these new arrivals will compete with Americans and previous generations of immigrants for scarce jobs.

Family-Based Immigration. S.744 restructures the current family-based system in two phases: upon enactment and 18 months after enactment (at the start of the nearest fiscal year).

Upon enactment, S.744 provides that spouses and children of legal permanent residents AND their derivatives shall be included in the definition of "immediate relatives," This classification exempts such aliens from the family-based caps. (Sec. 2305, p.1170) Then, the bill "recaptures" the number of family-based green cards that were not issued between 1992 through 2013 and adds these hundreds of thousands of green cards to the total of family-based immigrants that may be admitted within the first year of enactment. The bill then increases the percentages allotted to the existing family-based categories. Finally, the bill increases the per country cap for family-based immigrants from 7 to 15 percent. (Sec. 2306, p.1195) Together, these changes allow for an influx of family-based immigration right before the new family, employment, and merit based systems take effect (see below).

Eighteen months after enactment, S.744 restructures the family-based immigration categories. The bill eliminates the fourth category of family-based immigration: brothers and sisters of citizens. It then lowers the floor for family-based from 226,000 to 161,000. While these changes appears to reduce chain migration, note that: (1) the spouses and children of LPRs and their derivatives remain in the definition of "immediate relatives, which means their numbers are uncapped; (3) the new merit based immigration system allocates points based on family

relationship, giving certain relatives a preference; and (4) through the resurrection of the V nonimmigrant visa, the bill allows certain aliens who are waiting on family-based green cards to live and work in the U.S. instead of waiting outside of the country. (*See* Sec. 2309, p.1217)

The remaining family system allocates the annual number of family-based green cards (now 161,000 after immediate relatives are taken out) to two categories: (1) adult sons and daughters of citizens (married under 31 and unmarried, combined); and (2) adult sons and daughters of LPRs.

Employment-Based Immigration. S.744 maintains the current cap on employment-based green cards at 140,000, but makes two changes that significantly increase the overall number of employment-based immigrants. First, the bill exempts the first category of employment-based immigrants (EB-1) — which includes aliens with extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers — from the cap. (Sec. 2307, p.1206) Second, the bill removes spouses and children of employment-based immigrants from the cap so their numbers become unlimited. (Sec. 2307(b), p.1200) Finally, with EB-1 now exempt from the cap, the bill redistributes the available 140,000 green cards to the second through fifth categories of employment-based immigration, increasing the caps for the EB-2, EB-3, EB-4, and EB-5 categories.

S.744 makes several other changes to the employment-based immigration system. It exempts individuals with advanced degrees in STEM fields (science, technology, engineering, and math) from the employment-based cap if: (1) they have a job offer from a U.S. employer in a field related to their degree and (2) have eared the advanced degree within 5 years prior to applying. (Sec. 2307(b), p.1203)

S.744 also expands the second category of employment-based immigrants (EB-2) to include certain researchers at federal laboratories and exempts certain alien doctors, who are already eligible for green cards under EB-2, from the employment-based cap. (Sec. 2307(b), p.1203)

The bill removes the current cap on unskilled workers (now at 10,000) who may be admitted under the third category for employment-based immigration (EB-3). This category covers a variety of skilled, unskilled and professional workers. For the first four years after enactment, the bill requires all of the green cards available from the Track One merit-based program (at least 120,000) to be allocated to the EB-3 category. (Sec.2301, p.1147)

S.744 also creates a new employment-based category (EB-6) for “INVEST immigrants.” This category authorizes the issuance of 10,000 green cards annually to “qualified entrepreneurs” who meet certain requirements. (Sec. 4802, p.1853)

Finally, S.744 eliminates the per country cap for employment-based immigrants. (Sec. 2306, p.1195) This change will accelerate immigration from countries whose citizens seek to immigrate to the U.S. in high numbers, such as India and China.

Merit-Based Immigration: Track One. In addition to the changes made to the existing employment-based immigration system, S.744 creates a new, merit-based green card program that has two tracks. Track One provides 120,000 to 250,000 green cards for individuals based on points earned. The cap for Track One may not increase if the unemployment rate is **more than** 8.5 percent.

For the first four years after enactment, Track One green cards shall be allocated to the third category of employment-based immigration (EB-3)(see above). (Sec. 2301, p.1145) Beginning with the 5th fiscal year after enactment, Track One program splits into **two tiers**, each of which receives 50 percent of the cap. Tier One emphasizes education and work experience related thereto. Tier Two emphasizes work experience and work in high demand occupations, granting points, for example, to aliens with "a record of exceptional employment, as determined by the Secretary." Both Tier One and Tier Two grant points based on family relationships.

Merit-Based Immigration: Track Two. While called "merit-based," this method for obtaining green cards is designed to eliminate the backlog of immigrants who have approved LPR petitions, but are waiting for green cards to become available so that they may be admitted to the U.S. Between the time of enactment and 18 months after enactment (the point at which the family-based system changes), the Track Two system grants green cards to aliens who have been waiting to receive green cards in the 3rd and 4th family-based categories: married sons/daughters of citizens and brothers/sisters of citizens, respectively.

Between FY 2015 and FY 2021, the Track Two system grants green cards to aliens waiting in both the family-based and employment-based lines. After FY 2021, Track Two provides green cards to aliens who have been lawfully present in the U.S. with work authorization for 10 years (excluding W nonimmigrant workers). Because "lawfully present" is not defined by statute, the executive branch may, in its own discretion, administratively designate who is lawfully present — as it did with the Deferred Action for Childhood Arrivals (DACA) program. This essentially creates a rolling amnesty provision. After FY 2028, the requirement period of lawful presence/work authorization jumps to 20 years.

The Track Two system is uncapped, and FAIR estimates the number of green cards that will be admitted under this category will be over 4.5 million.

Visa Lottery. S.744 repeals the visa lottery. (Sec.2303, p.1165)

VI. GUEST WORKERS (NONIMMIGRANTS)

S.744 dramatically expands and relaxes requirements for existing guest worker programs and, in addition, creates new guest worker programs. FAIR estimates that these changes to U.S. immigration law will increase the number of guest workers by at least 50 percent. In addition to

increasing the sheer numbers of new guest workers, relaxing requirements for certain guest worker programs will help drive down wages for American workers.

H-1B Guest Worker Program: S.744 increases the H-1B cap from 65,000 per year to a range of 115,000 to 200,000, with the exact number determined by the number of applications filed and certain unemployment data. On top of this cap, S.744 allocates an additional 25,000 H-1B visas for aliens who have Master's or Ph.Ds in STEM fields.

Pursuant to the Hatch-Schumer Amendment adopted in the Judiciary Committee, S.744 no longer contains provisions in the H-1B program that were in the original bill, designed to protect American workers. Specifically, the Hatch-Schumer Amendment:

- Allows DHS to grant work authorization to spouses of H-1B workers regardless of whether the worker's home country offers reciprocal treatment to U.S. workers abroad. Originally, S.744 allowed DHS to grant work authorization to spouses only if the sending country permitted reciprocal treatment.
- Eliminates the requirement placed on all H-1B employers in S.744 that they attest that they have not and will not displace U.S. workers beginning 90 days before to 90 days after the visa petition is filed. Instead, the Hatch-Schumer Amendment provides that only "H-1B skilled worker dependent employers" and "H-1B dependent employers" must attest that they have not displaced U.S. workers within 90 days before and after, or 180 days before and after, respectively.
- Eliminates the requirement placed on all H-1B employers in S.744 that they attest they have offered the job to any U.S. workers who applies and is equally or better qualified. Instead, the Hatch-Schumer Amendment provides that only H-1B dependent employers must satisfy this requirement.
- Allows non H-1B dependent employers to outsource their H-1B workers for a $500 fee per worker. It also allows certain H-1B dependent employers that are universities, nonprofit research organizations, or health care businesses to outsource their H-1B workers for a $500 fee per worker.

W Low-Skilled Guest Worker Program. S.744 creates a new, unskilled guest worker program (in addition to the existing H-2B program) by establishing a new W nonimmigrant visa for aliens who perform services or labor for a "registered nonagricultural employer" in a "registered position." Spouses and children of the W alien may accompany the W worker.

A W visa is valid for three years and may be renewed indefinitely. The alien is not required to leave the U.S. to renew. However, a W nonimmigrant who is unemployed for 60 consecutive days must leave.

Under S.744, the number of registered positions for W workers increases over time. Beginning in 2015, the program provides 20,000 positions for the first year, 35,000 for the second year, 55,000 for the third year, and 75,000 for the fourth year. (p.1829) Thereafter, the number of registered positions is calculated through a formula and capped at 200,000 (the annual cap on

construction workers is 15,000). However, in addition to this cap, the bill requires DHS to make additional registered positions available — not subject to any cap — for shortage occupations in specific metropolitan statistical areas and for specific employers who meet certain conditions. Shortage occupations shall be determined by a new agency created within USCIS, called the Bureau of Immigration and Labor Market Research.

W Agricultural Guest Worker Program. S.744 creates a new W agricultural guest worker program that will eventually replace the existing H-2A agricultural guest worker program. (Secs. 2231-2232, p.1078) The bill creates two subsets of the W visa program (see above) for agricultural workers, the W-3 visa and the W-4 visa.

The W-3 visa is available to aliens who come to the U.S. temporarily to perform full-time agricultural labor pursuant to a written contract and are guaranteed 75% of wages under their contract. (p. 1104) The W-4 visa is available to aliens who come to the U.S. temporarily to perform full-time agricultural labor that is at-will. A spouse or child of a W-3 or W-4 worker "shall not be entitled to a visa or any immigration status" based on his/her relationship to the worker, and may receive a W agricultural visa if the spouse or child is independently qualified.

Both visas are valid for an initial period of three years and may be renewed for one three-year period. (p.1090) An alien who has been in the U.S. as a W nonimmigrant agricultural worker for six years must return home for at least three months before re-entering under the program.

During the first five years these nonimmigrant agricultural visas are capped at 112,333. However, the Secretary of Agriculture may increase or decrease the number "as appropriate." Beginning in the sixth year of the W agricultural guest worker program, the Secretary of Agriculture shall set the annual cap.

X Guest Worker Program. S.744 creates a new X nonimmigrant visa for "qualified entrepreneurs. To be eligible for an X visa, the alien must demonstrate that within the three years prior to filling the petition, either: (1) there have been "qualified investments" of not less than $100,000 in the alien's U.S. business entity; or (2) the alien's U.S. business entity has created no fewer than three "qualified jobs" and during the 2 years has generated not less than $250,000 in annual revenue. The X guest worker program is capped at 10,000 nonimmigrants annually.