FEDERATION FOR AMERICAN IMMIGRATION REFORM

Summary of S. 744—The Border Security, Economic Opportunity, and Immigration Modernization Act

On April 17, 2013, Senators Chuck Schumer, John McCain, Dick Durbin, Lindsey Graham, Bob Menendez, Marco Rubio, Michael Bennet, and Jeff Flake introduced S.774, entitled the Border Security, Economic Opportunity, and Immigration Modernization Act. If passed, S.744 would grant amnesty to the approximately 12 million illegal aliens currently living in the U.S., create new guest worker programs for agricultural workers and low-skilled workers, and significantly increase legal immigration.

High-Skilled Workers
Bringing in hundreds of thousands of foreign workers to fill jobs in high-skilled occupations would make sense only if there were a critical shortage of native workers, and not the oversupply that currently exists. Companies use guest worker visa programs not to supplement American workers but to *supplant* them. The H-1B visa is the most widely used method of bringing in high-skilled workers and has steadily grown into a federally sanctioned program used by U.S. employers to circumvent the domestic labor market and to displace or disqualify capable American workers.

One of the critical moments during the Judiciary Committee markup was a deal struck by Sen. Chuck Schumer (D-NY) and Sen. Orrin Hatch (R-UT) to "reform" the H-1B visa program in order to gain Hatch's support for the bill. The Hatch-Schumer deal eliminates the few protections for American workers written into the legislation. The deal includes limiting the number of employers required to attest that they have not displaced U.S. workers within certain timeframes, and excluding most employers from the requirement in S. 744 that all employers offer jobs to equally or better qualified U.S. workers. Additionally, the deal nearly triples the H-1B cap to 200,000, with the specific number determined by how quickly the cap is reached during the previous year instead of taking into account market conditions.

The following summary covers the provisions in Title IV of the bill that would expand the H-1B and L (or "**high-skilled**") guest worker visas.

Title IV—Reforms to Nonimmigrant Visa Programs, Subtitle A
Employment-Based Nonimmigrant Visas

MARKET-BASED H-1B VISA LIMITS (section 4101, p. 672*)*

- Raises the H-1B ceiling from 65,000 to a base of 115,000 to 180,000 per year plus an additional number determined by how quickly the cap is reached. Under the Hatch-Schumer deal, if the base is 180,000 and is filled within 45 days, another 20,000 H-1B visas are issued, making the true maximum cap 200,000 per year.
  - The ceiling cannot adjust upwards if the BLS "management, professional, and related occupations" category averages a 4.5 percent unemployment rate over the prior year.
    - *Note: the "management, professional, and related occupations" category is extremely broad and encompasses significantly more than the STEM fields; effectively masking the true employment situation in tech fields.*

- *Note: the unemployment rate for this category is currently **3.7 percent** which is **nearly double** what is was when the 2007 amnesty bill was defeated.*

- Increases the additional H-1B allocation for advanced degree holders from U.S. universities from 20,000 to 25,000 per year, but restricts those visa holders to individuals with science, technology, engineering, and mathematics (STEM) degrees.
  - Defines STEM as encompassing the DOE's Classification of Instructional Programs "within the summary groups of computer and information sciences and support services, engineering, mathematics and statistics, biological and biomedical sciences, and physical sciences."
- In effect, this nearly triples the maximum number of allocated H-1Bs from 85,000 to 225,000 per year. *Note: This calculation does not include H-1Bs who are employed at an institution of higher education or a nonprofit/governmental research organization which are **exempt** from the H-1B ceiling.*

EMPLOYMENT AUTHORIZATION FOR DEPENDENTS OF EMPLOPYMENT-BASED NONIMMIGRANTS (section 4102, p. 677*)*

- Grants work authorization to all H-1B worker spouses. *Note: revised prevailing wage requirement (see below) does not apply to accompanying spouses granted work authorization.*
  - Secretary has discretionary authority to suspend employment authorization if the H-1B's home country does not offer reciprocal employment to spouses of U.S. workers.
- Maintains work authorization to L nonimmigrant spouses.
- Amends section 214(c) to change authority from Attorney General to DHS Secretary.

ELIMINATING IMPEDIMENTS TO WORKER MOBILITY (section 4103, p. 679*)*

- Establishes a 60-day transition period for H-1B workers to change jobs without losing lawful status. *Note: There is no grace period to find a new employer under current law.*
- The Secretary must give deference to a prior approval of H-1B and L Nonimmigrant visas in reviewing a petition to extend the status, unless the Secretary determines that:
  - There was a material error with previously approved petition;
  - A substantial change in circumstances occurred;
  - New "material information" was discovered that "adversely impacts" the eligibility of either the employer or the nonimmigrant; or
  - "In the Secretary's discretion, such extension should not be approved."
- The Secretary of State may waive the interview requirement for "low-risk" H-1B and L nonimmigrant visa applicants.

STEM EDUCATION AND TRAINING (section 4104, p. 682*)*

- Establishes a $1,000 employer fee per application for the labor certification required by INA 212(a)(5).
- Specifies that 40 percent of funds in the H-1B Nonimmigrant Petitioner Account (INA 286(s)) go to STEM education for low-income and underrepresented groups.
  - 30% of funds for low-income STEM scholarship program with an emphasis on underrepresented groups (to include women and minorities).

    - Funds may be used for loan forgiveness or repayment of student loans for low-income STEM degree holders.
  - 10% of funds for K-12 STEM grant program with an emphasis on grants that target lower income populations with a focus on women and minorities.
- Fees collected under sec. 212(a)(5)(A)(v) are deposited in the newly created STEM Education and Training Account (INA 286(w)) and the Secretary of Education distributes the funds as follows:
  - 70% of funds proportionately allocated to the 50 states, D.C., and the U.S. territories to improve STEM education.
    - No state or territory will get less than 0.5 percent of the total amount allocated.
  - 20% of funds for minority-serving colleges to encourage STEM studies.
    - Funds may be used for loan forgiveness or repayment of student loans for low-income STEM degree holders.
  - 5% of funds for statewide workforce investment activities, including programs that benefit veterans and their spouses;
  - 3% of funds for American Dream Accounts; and
    - These accounts are for low-income students (those eligible for free or reduced price lunch) that monitor higher education readiness and include a college savings account.
      - A maximum of 25 percent of grant funds can be used for the initial deposit of a college savings account.
      - The student's parent may withdraw funds from the account (except the college savings account) at any time.
    - Grants awarded to entities that set up these accounts are for 3 years and may be extended for an additional 2 years.
  - 2% of funds for administrative expenses, including an annual evaluation of the impact of the activities funded by the account.

H-1B AND L VISA FEES (section 4105, p. 690*)*

- Adds a new fee for employers of H-1B and L visa workers:
  - $1,250 *per petition* from employers with 25 or fewer full-time employees.
  - $2,500 *per petition* from employers with more than 25 full-time employees.

    Note: petitions often include multiple applications for employees so this fee is not imposed per worker.
  - Nonprofit research institutions and educational institutions are exempt from the fee.

Title IV—Reforms to Nonimmigrant Visa Programs, Subtitle B

H-1B Visa Fraud and Abuse Protections

CHAPTER 1—H-1B EMPLOYER APPLICATION REQUIREMENTS

MODIFICATION OF APPLICATION REQUIREMENTS (section 4211, p. 691*)*

- Requires H-1B-dependent employers to pay H-1B workers a higher minimum wage than non-H-1B-dependent employers:

- H-1B-dependent employers must pay level 2 wages (see below)
- Non-H-1B-dependent employers must pay the greater of:
  - The actual wage paid by the employer to other employees with similar experience and qualifications for the specific job; or
  - The prevailing wage (see below)

- Raises the **prevailing wage** definition (taking into account experience, education, and level of supervision for each occupational classification by metropolitan statistical area): (p. 693)

  Note: the revised prevailing wage definition still allows employers to pay H-1B workers discounted wages because the prevailing wage does not factor in "hot skills" that command a premium in the open market.

  Note: the prevailing wage requirement does not apply to accompanying spouses granted work authorization.

  - Level 1 wages: mean of lowest 2/3 of wages surveyed; not less than 80% mean wages.
  - Level 2 wages: mean of wages surveyed.
  - Level 3 wages: mean of highest 2/3 of wages surveyed.
  - Special Rule for universities and nonprofit research/governmental research organizations: 100 percent of the wage level determined to be the prevailing wage, only taking into account employees at the organization in the area of employment.
- Before hiring an H-1B worker, employers are required to advertise job openings on an Internet website maintained by the Secretary of Labor for at least 30 days. (p. 698) The posting must detail:
  - Wage ranges and other terms and conditions of employment;
  - Minimum education, training, experience, and other requirements;
  - Process for applying for the position;
  - Title and description of the position, including the job site location; and
  - The employer's name, city, and zip code.
- Nondisplacement of U.S. workers (p. 699)
  - The Hatch-Schumer deal gutted the requirement in S. 744 that all employers attest that they have not and will not displace U.S. workers during the 90 days before to 90 days after filing an H-1B petition.
  - Instead, the deal has 3 different nondisplacement time periods based on whether the employer is:
    - ***H-1B skilled worker dependent employer*** (created by Hatch-Schumer): may not displace a U.S. worker during the 90 days before through 90 days after filing a petition for H-1B workers. *(note this is current law for H-1B-dependent employers)*
      - H-1B skilled worker dependent employer is defined as employers with at least 15 percent of workforce in O*NET Job Zone 4 ("considerable preparation" needed) and Zone 5 ("extensive preparation" needed) positions are H-1B workers.
    - ***H-1B-dependent employers***: doubles the time period to 180 days before to 180 days after filing a petition for H-1B workers.
      - For employers with 25 or fewer full-time "equivalent employees" who are employed in the U.S., employ more than 7 H-1B nonimmigrants;
        - *Note: this allows 28 percent of the workforce to be H-1Bs*

        - For employers with between 26 and 50 full-time "equivalent employees" who are employed in the U.S., employ more than 12 H-1B nonimmigrants; or
            - *Note: this allows 46 percent to 24 percent of the workforce to be H-1Bs*
        - For employers with at least 51 full-time "equivalent employees" who are employed in the U.S., H-1B workers are at least 15 percent of full-time workforce.
        - Exempt from H-1B-dependent employer classification:
            - Nonprofit institutions of higher education;
            - Nonprofit research organizations; and
            - Employers whose primary line of business is healthcare and are petitioning for a physician, nurse, or physical therapist.
    - Non-H-1B-dependent employers are not subject to the non-displacement time period (meaning they can replace U.S. workers with H-1B workers) unless:
        - The employer is using the H-1B worker with the "intent or purpose" of displacing a *specific* U.S. worker; or
        - H-1B workers are displaced who work for a government entity or are public school teachers.
- Recruitment of U.S. workers (p. 700): prior to filing an H-1B application, all employers must:
    - The Hatch-Schumer deal eliminated the S. 744 requirement that all employers attest they have offered the job to any U.S. worker who is equally or better qualified.
    - Instead, only H-1B skilled worker dependent employers must offer the job to equally or better qualified U.S. workers while all other employers merely have to:
        - Advertise the position online; and
        - Take "good faith steps" to recruit U.S. workers "*using procedures that meet industry-wide standards*" and offer at least the wage rate offered to H-1B workers.
- Outplacement of H-1B workers (p. 701)
    - H-1B-dependent employers are prohibited from outsourcing H-1Bs.
        - Exception: H-1B-dependent employers may outsource workers for only a $500 fee if the employer is:
            - A nonprofit institution of higher education;
            - A nonprofit research organization; or
            - In the health care business and petitioning for a physician, nurse, or physical therapist.
    - Non-H-1B-dependent employers may outsource for only a $500 fee per outsourced worker.
- Exempts newly created "intending immigrant employee" from H-1B total when assessing whether an employer is an H-1B-dependent employer or H-1B skilled worker dependent employer. (p. 703) (***The "Facebook rule"***)
    - Intending immigrant employee: an alien who intends to work and reside permanently in the United States, as evidenced by:
        - A pending or approved application for a labor certification filed for the alien by a covered employer; or
        - A pending or approved immigrant status petition filed for the alien by a covered employer.

        - Covered employer: an employer that sponsors at least 90 percent of H-1Bs for green cards during the 1 year period ending 6 months before the filing date.
    - Intending immigrant employees count as U.S. workers when determining whether an employer is a "dependent" employer.

NEW APPLICATION REQUIREMENTS (section 4213, p. 708)

- Employers are prohibited from:
    - Listing a job only available to H-1B and OPT workers;
    - Giving priority to H-1B and OPT workers; and
    - "Solely recruit[ing]" H-1B and OPT workers.
- The combined H-1B and L nonimmigrant workforce for employers with more than 50 employees is "capped" at:
    - FY15: 75% of workforce.
    - FY16: 65% of workforce.
    - FY17 and beyond: 50% of workforce.

  Note: "educational or research" employers are exempt from the cap and intending immigrants do not count for this calculation.
- Employers must submit an annual report to the DHS Secretary that includes W-2 information for H-1B workers.

APPLICATION REVIEW REQUIREMENTS (section 4214, p. 711)

- Doubles the time the DHS Secretary is permitted to provide H-1B certification from 7 to 14 days from the date of filing the application.

CHAPTER 2—INVESTIGATION AND DISPOSITION OF COMPLAINTS AGAINST H-1B EMPLOYERS

GENERAL MODIFICATION OF PROCEDURES FOR INVESTIGATION AND DISPOSITION (section 4221, p. 712)

- Doubles the time from 12 months to 24 months for filing a complaint with the Secretary that an H-1B employer violated the terms of the labor condition application.
- Requires the Secretary to create a toll-free number and Internet website for submitting complaints that a petitioner violated the terms of the labor condition application.
    - H-1B employers (excluding nonprofit institutions of higher education and research organizations) must inform their employees of the number and website according to regulations issued by the Secretary.
    - The DOL Inspector General must submit a report to certain Congressional committees within a year after enactment and then every 5 years regarding the Secretary's enforcement of these requirements.

INVESTIGATION, WORKING CONDITIONS, AND PENALTIES (section 4222, p. 713)

- Doubles the fine for an employer violating the labor condition application from $1,000 to $2,000. Makes employers who fail to pay the proper wage liable to any harmed employee for lost wages and benefits.

- Changes the DHS Secretary's authority from discretionary to mandatory to impose other administrative remedies against employers.
  - Doubles the civil monetary penalty cap from $5,000 to $10,000 per violation.
  - Makes employers liable for lost wages and benefits to any harmed employee.
  - Employers that willfully violated the petition and displaced a U.S. worker are subject to mandatory increased penalties. (p. 715)
    - Doubles the non-displacement of U.S. worker time from 90 days to 180 days +/-
    - Makes employers liable for lost wages and benefits to any harmed employee
  - Employers must offer H-1B workers benefits "on the same basis, and in accordance with the same criteria, as the employer offers to similarly situated United States workers." (p. 716)
    - The civil monetary penalty per violation is doubled from $1,000 to $2,000.

INITIATION OF INVESTIGATIONS (section 4223, p. 717)

- Grants Secretary of Labor authority to conduct an investigation into an employer's compliance based on information provided by a Labor employee.
- Doubles the time from 12 months to 24 months for the Secretary to conduct an investigation.
- Requires the Secretary to provide the employer with notice of the investigation unless the Secretary determines that would interfere with the investigation.
  - This determination is not subject to judicial review.
- If the Secretary finds a reasonable basis that the employer failed to comply, the Secretary must notify the employer within 120 days.

INFORMATION SHARING (section 4224, p. 719)

- The U.S. CIS Director shall provide the Secretary of Labor with any information submitted by an employer that indicates the employer is not complying with the requirements.
- The Secretary of Labor must provide State labor or workforce agencies with the job descriptions required to be posted on the website.

TRANSPARENCY OF HIGH-SKILLED IMMIGRATION PROGRAMS (section 4225)

- The Bureau of Immigration and Labor Market Research must annually submit to the Senate and House Judiciary committees a detailed report on the employers and nonimmigrants utilizing H-1B and L-1visas.
- The Bureau must also conduct an annual survey of H-1B and L-1 employers on the methods used to satisfy the good faith recruitment of U.S. workers requirement.

CHAPTER 3—OTHER PROTECTIONS

POSTING AVAILABLE POSITIONS THROUGH THE DEPARTMENT OF LABOR
(section 4231, p. 720)

- The Secretary of Labor must establish a free, searchable Internet website within 90 days after enactment for posting positions.
- The Secretary must submit to Congress and publish notice of when the website will be operational.

- This requirement applies to applications filed 30 days after the website is operational.

REQUIREMENTS FOR INFORMATION FOR H-1B AND L NONIMMIGRANTS
(section 4231, p. 721)

- The issuing office or appropriate State Department official granting H-1B and L nonimmigrant visas is required to provide the applicant with:
  - A brochure outlining the obligations of the applicant's employer and the rights of the applicant with regard to employment under Federal law, including labor and wage protections; and
  - The contact information for appropriate Federal agencies or departments that offer additional information or assistance in clarifying such obligations and rights.
- The employer must provide the applicant a copy of the application within 30 days after filing the labor condition application. (p. 722)
- Within a year after enactment, the Comptroller General must prepare a report analyzing the accuracy and effectiveness of the Secretary of Labor's job classification and wage determination system. (p. 723) The report shall:
  - Specifically address whether the system accurately reflects the complexity of current job types and geographic wage differences; and
  - Make *recommendations* concerning necessary modifications.

FILING FEE FOR H-1B-DEPENDENT EMPLOYERS (section 4233, p. 724)

- Establishes a new fee required to be submitted by an H-1B-dependent employer with an H-1B application:
  - Beginning FY15: $5,000 for applicants that employ 50 or more employees if more than 30% and less than 50% of the applicant's employees are H-1B or L nonimmigrants.
  - FY15-24: $10,000 for applicants that employ 50 or more employees if more than 50% and less than 75% of the applicant's employees are H-1B or L nonimmigrants.
    - These fees are deposited in the CIR Trust Fund.
- Definition of "employer" does not include "a nonprofit institution of higher education or a nonprofit research organization."
- ***"Facebook rule"***: exempts "intending immigrant" employees from the percentage of employees that are H-1B or L nonimmigrants.

PROVIDING PREMIUM PROCESSING OF EMPLOYMENT-BASED VISA PETITIONS
(section 4233, p. 724)

- The Secretary must establish and collect:
  - A premium processing fee for employment-based immigrant petitions; and
  - A premium processing fee for an administrative appeal of any decision on a permanent employment-based immigrant petition.

    Note: under current law, the fee is $1000

APPLICATION (section 4233)

- Amendments made by this subtitle apply to applications filed on or after enactment.

- Amendments made to the application requirements (section 4211(c)) do not apply to any application or petition filed on behalf of an existing employee.

PORTABILITY FOR BENEFICIARIES OF IMMIGRANT PETITIONS (section 4237)

- Even if an employer withdraws an EB-1, EB-2, or EB-3 petition, the petition remains valid if:
  - The worker changes jobs or employers after the petition is approved; and
  - The new job is in the same or similar occupational classification.
- The original sponsoring employer's legal obligations end when the worker changes jobs or employers.
- An alien may file for adjustment of status if the petition is pending or approved, even if a green card is unavailable at the time the application is filed.
  - If a visa is unavailable when the application is filed, the beneficiary must pay a $500 supplemental fee. *The $500 fee does not apply to dependents.*

Title IV—Reforms to Nonimmigrant Visa Programs, Subtitle C

L Visa Fraud and Abuse Protections

PROHIBITION ON OUTPLACEMENT OF L NONIMMIGRANTS (section 4301, p. 727)

- Employers with at least 15 percent of the workforce are L-1 workers are prohibited from outsourcing L-1 workers.
- Other employers cannot outsource an L nonimmigrants with another employer unless:
  - The alien will not be controlled or supervised principally by the other employer;
  - The placement at the other employer's worksite is not essentially an arrangement to provide labor for hire for the other employer; and
  - The employer pays a $500 fee.

LIMITATION ON EMPLOYMENT OF L NONIMMIGRANTS (section 4304, p. 731)

- Employers with 50 or more employees, the sum of H-1B and L nonimmigrants cannot exceed:
  - FY15: 75% of total employees.
  - FY16: 65% of total employees.
  - FY17 and beyond: 50% of total employees.
- Definition of employer does not include a nonprofit institution of higher education or a nonprofit research organization.
- ***"Facebook rule"***: exempts "intending immigrant" employees from the percentage of employees that are H-1B or L nonimmigrants.

FILING FEE FOR L NONIMMIGRANTS (section 4305, p. 733)

- Establishes a new fee required to be submitted by an H-1B-dependent employer with an L nonimmigrant worker application:
  - Beginning FY14: $5,000 for applicants that employ 50 or more employees if more than 30% and less than 50% of the applicant's employees are H-1B or L nonimmigrants.

  - FY14-27: $10,0.00 for applicants that employ 50 or more employees if more than 50% and less than 75% of the applicant's employees are H-1B or L nonimmigrants.
    - These fees are deposited in the CIR Trust Fund
- Definition of "employer" does not include "a nonprofit institution of higher education or a nonprofit research organization."
- ***"Facebook rule"***: exempts "intending immigrant" employees from the percentage of employees that are H-1B or L nonimmigrants.

INVESTIGATION AND DISPOSITION OF COMPLAINTS AGAINST L NONIMMIGRANT EMPLOYERS (section 4306, p. 735)

- Secretary of DHS has discretionary authority to investigate claims that any employer of L nonimmigrants violates compliance requirements.
  - Investigation barred if complaint not filed within 24 months after the date of alleged violation.
  - There is no judicial review of a determination by the Secretary under this clause.
- If Secretary determines a "reasonable basis" exists of a violation:
  - The Secretary must notify the employer within 120 days of the determination and provide an opportunity for a hearing.
  - If a hearing is requested, a final decision must be rendered within 120 days of the hearing.

PENALTIES (section 4307, p. 738)

- If the Secretary finds a violation, after notice and an opportunity for a hearing:
  - The Secretary shall impose administrative remedies, including civil monetary penalties not exceeding $2,000 per violation as the Secretary deems "appropriate;"
  - The employer cannot be approved for L nonimmigrants for at least 1 year; and
  - The employer must pay harmed employees all lost wages and benefits.
- If the violation involves a "willful failure" by employer to comply or a "willful misrepresentation of material fact" in the petition:
  - The Secretary shall impose administrative remedies, including civil monetary penalties not exceeding $10,000 per violation as the Secretary deems "appropriate;"
  - The employer cannot be approved for L nonimmigrants for at least 2 years; and
  - The employer must pay harmed employees all lost wages and benefits.

REPORTS ON L NONIMMIGRANTS (section 4309, p. 741)

- Requires the Attorney General to submit an annual report on L nonimmigrants as currently required for H-1B visas (and other visa categories) under INA 214(c)(8).

APPLICATION (section 4310, p. 741)

- The amendments made by this subtitle apply to applications filed on or after the date of enactment.

REPORTS ON L BLANKET PETITION PROCESS (section 4311, p. 741)

- The DHS Inspector General must submit to certain Congressional committees, within 6 months of enactment, a report on the use of blanket petitions for L nonimmigrants.

Title IV—Reforms to Nonimmigrant Visa Programs, Subtitle D

Other Nonimmigrant Visas

TREATMENT OF NONIMMIGRANTS DURING ADJUDICATION OF APPLICATION
(section 4405, p. 756)

- H-1B and L nonimmigrants whose status has expired but a timely application or petition for extension was filed are "authorized to continue employment with the same employer until the application or petition is adjudicated."

Additional High-Skill Worker Provisions in S. 744

- In addition to the significant increase in H-1B workers detailed above, the bill further ***floods the STEM market*** by allowing **unlimited green cards** to aliens who:
  - Earned a STEM advanced degree from a U.S. university;
  - Have an offer of employment in a field related to the degree; and
  - Earned the qualifying degree during the 5 year period immediately before the filing date of petition.
- Also note, a "special rule"—under INA 212(a)(5)(A)—exempts employers from the labor certification requirement (see Title II, Subtitle C—Future Immigration, section 2307, pp. 315 and 318).