known-close-harmony ensembles in music history. It also includes historical exhibits tracing the history of American vocal harmony from its roots in the Nineteenth Century and the history of musical recording technology, as well as an operating radio station for remote broadcasters by guest stations.

With the help of Goldmine Magazine, the Vocal Group Hall of Fame elected a dynamic class of inductees this year. The initial class includes: the Ames Brothers, The Andrews Sisters, The Beach Boys, Crosby, Stills, and Nash, the Drifters, the Manhattan Transfer, the Platters, and the legendary Supremes. These groups graced us with their catchy melodies and unforgettable songs that have stood the test of time.

But the Vocal Group Hall of Fame also realized the importance of the groups that influenced this class of inductees by giving them the Pioneers of Musical Style Award. This award was given to groups prior to 1940 who contributed to the foundations of American vocal harmony and substantially influenced other artists. This year, they included: the Boswell Sisters, The Five Blind Boys of Mississippi, the Golden Gate Quartet, the Mills Brothers, the Ravens, and the Sonny Til and the Orioles.

My fellow colleagues, please join me in congratulating these music groups for their induction in the Vocal Group Hall of Fame & Museum. This institution has made it possible for us to honor and preserve the pioneers that have influenced the music we know today.

AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT

HON. LAMAR S. SMITH

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

Thursday, November 12, 1998

Mr. SMITH of Texas. Mr. Speaker, The H–1B visa bills passed by the Senate and by the House Judiciary Committee both proposed to increase the quota of H–1B temporary visas for foreign professional workers. Both bills responded to the fact that demand has exceeded the annual quota of 65,000 in each of the past two fiscal years. The reason for this increased demand is thought to be a shortage in America's information technology workforce. While evidence for this shortage is inconclusive, it was my belief that we should give the industry the benefit of the doubt and grant the additional visas.

The Senate and House Judiciary Committee bills did have large differences. The Judiciary Committee bill (H.R. 3736, which I introduced in my capacity as chairman of the Subcommittee on Immigration and Claims) required that employers comply with two new attestations when petitioning for H–1B workers. Employers would have had to promise not to lay off (displace) American workers and replace them with aliens on H–1B visas, and to recruit American workers before petitioning for foreign workers. I felt that these protections for American workers were necessary because of the large number of documented abuses of the H–1B program—instances of companies actually laying off Americans to be replaced by H–1Bs and companies recruiting workers exclusively from overseas. The Senate bill (introduced by Senator SPENCER ABRAHAM) contained no comparable provisions.

With the assistance and support of the leadership of the House and Senate along with House and Senate Judiciary Committee Chairmen HENRY HYDE and ORRIN HATCH, Senator ABRAHAM and I drafted a workable compromise between the two bills. We then agreed to further changes after negotiations with the White House in order to gain Administration support. H.R. 3736 was brought to the House floor on September 24, 1998. The base text was the compromise worked out with Senator ABRAHAM along with as many of the acceptable changes requested by the White House as could be drafted in time. The bill passed by a vote of 288–133. Language was then drafted to make the bill fully consistent with the agreement with the White House. A bill encompassing this latter language was included in H.R. 4328, as enacted, which makes omnibus consolidated and emergency supplemental appropriations for fiscal year 1999.

The final bill, entitled the American Competitiveness and Workforce Improvement Act of 1998, is a negotiated agreement. That is the nature of any legislative process. What is important is that we have come up with a bill that both responds to the needs of American industry and adds protections for American workers.

Under the American Competitiveness and Workforce Improvement Act, the H–1B quota will be set at 115,000 in 1999 and 2000, and 107,500 in 2001. Then the quota will return to 65,000 (at which time the attestations will sunset).

The employers most prone to abusing the H–1B program are called ''job contractors'' or ''job shops''. Much, or all, of their workforces are composed of foreign workers on H–1B visas. Many of these companies make no pretense of looking for American workers and are in business to contract their H–1Bs out to other companies. The companies to which the H–1Bs are contracted benefit in that the wages paid to the foreign workers are often well below what comparable Americans would receive. Also, the companies don't have to shoulder the obligations of being the legally recognized employers—the job contractors/shops remain the official employers.

Under the American Competitiveness and Workforce Improvement Act, the no-lay off/non-displacement and recruitment attestations will apply principally to job contractors/shops, defined in the bill (for larger companies) as those employers 15% or more of whose workforces are composed of H–1B workers. These businesses, designated as ''H–1B-dependent'', will be subject to the attestations in those instances where they petition for H–1Bs without masters degrees in high technology fields or where they plan to pay the H–1Bs less than $60,000 a year. Thus, the attestations are being targeted to hit the companies most likely to abuse the system—job contractors/shops who are seeking aliens without extraordinary talents (only bachelors degrees) or offering relatively low wages (below $60,000). Other employers, who use a relatively small number of H–1Bs, will not have to comply with the new attestations unless they have been found to have willfully violated the rules of the H–1B program.

Since a Conference Committee Report was never prepared for the American Competitiveness and Workforce Improvement Act, I felt it important to supplement the existing legislative history (such as H. Rep. No. 105–657) with the present document. What follows is an explanatory statement as to some of the provisions of the Act.

Let me start off by saying that when interpreting the statutory language, each provision should be read in the light most protective of American workers. This was, in my view, the intent of the House of Representatives and the way in which the body would want the Secretary of Labor, the Attorney General, and the Commissioner of the Immigration and Naturalization Service to interpret the language. On September 24, 1998, the House passed H.R. 3736. As consistent with the compromise agreement I had helped negotiate, I supported the bill and opposed the Democratic substitute offered by Representative WATT. However, it should be remembered that a majority of the members of the House that day either voted in favor of the Watt amendment or against H.R. 3736 on final passage (or both).

The Watt amendment contained the heightened protections for American workers contained in H.R. 3736 as passed by the Judiciary Committee. It is clear that the members—constituting a majority of the House—who voted for the Watt amendment or against final passage were very concerned about the impact of a large-scale increase in the H–1B quota on American workers in the impacted professional fields. Many of the members who voted against the Watt amendment and in favor of H.R. 3736 on final passage were also concerned about American workers and only voted as they did because they understood that the worker protections in the final compromise would be reasonably interpreted and vigorously enforced. Thus, a large majority of the House of Representatives would want H.R. 3736 read in the light most protective of American workers.

Finally, the following legislative history ends after section 413 of the bill. The remaining provisions were deemed self-explanatory, and thus, not in need of further explanation.

THE AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT OF 1998

SECTION 401. SHORT TITLE; TABLE OF CONTENTS; AMENDMENTS TO IMMIGRATION AND NATIONALITY ACT

This section specifies the short title, the ''American Competitiveness and Workforce Improvement Act of 1998,'' the table of contents for the legislation, and the rule that, unless otherwise specified, the legislation amends the Immigration and Nationality Act.

Subtitle A—Provisions Relating to H–1B Nonimmigrants

Subtitle A contains the changes the legislation is making to current law regarding H–1B visas.

SECTION 411. TEMPORARY INCREASE IN ACCESS TO TEMPORARY SKILLED PERSONNEL UNDER H–1B PROGRAM

This section specifies the new ceilings for these visas: 115,000 in FY 1999 and 2000, 107,500 in FY 2001, and 65,000 thereafter.

SECTION 412. PROTECTION AGAINST DISPLACEMENT OF UNITED STATES WORKERS IN CASE OF H–1B–DEPENDENT EMPLOYERS

This section provides for three new obligations that covered employers must attest to prior to sponsoring temporary foreign workers who either do not have a master's degree or who are paid less than $60,000 annually.

Subsection 412(a) amends section 212(n)(1) of the Immigration and Nationality Act to

add three new attestations, and provisions relating to these attestations, that must be included on H–1B applications filed by certain employers on behalf of certain H–1B nonimmigrants. Subsection 412(b) contains definitions relating to the new requirements. Given the close nexus between these two subsections, they are discussed here together, so as to allow the discussion of the substantive provisions to be illuminated by the discussion of the definitions.

1. The ''no-lay off/non-displacement'' attestation. Subsection (a)(1) first adds a new attestation by amending section 212(n)(1) of the Immigration and Nationality Act to add a new subparagraph (E)(i). This provision requires a covered employer to attest that its hiring of an H–1B worker is not displacing an American (United States) workers. The term ''displace'' is defined in new subparagraph (4)(B) of section 212(n), added by section 412(b) of this legislation. That paragraph states that an employer ''displaces'' an American worker in hiring an H–1B worker if it lays off an American worker with substantially equivalent qualifications and experience whose job has ''essentially the same responsibilities'' (although it is not necessarily the same job the H–1B worker is being hired to do) and is located in the same area of employment.

It is the intent of the Congress through this provision to prevent covered employers from replacing or displacing American workers with H–1B nonimmigrants. The legislation clearly states that an ''employer is considered to 'displace' a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought.'' By defining displacement in such a way, Congress makes clear that the prohibition is directed to circumstances in which a covered employer hires H–1B workers with similar qualifications to those of laid off American workers in similar jobs.

This language should not be interpreted as prohibiting and preventing only a on-for-one replacement of a particular laid off American worker; such an interpretation would be an overly rigid reading and a mischaracterization of Congressional intent. The focus of the provision is on the placement of H–1B workers in the kinds of jobs previously held by American workers. If an American worker was laid off from a job and the employer then hires an alien (on an H–1B visa) with sufficiently similar skills and experience to perform a sufficiently similar job, a prohibited displacement has taken place. This is a violation of the attestation regardless of whether the replacement was intentional or unintentional, or whether it was done in bad faith or not.

A covered employer, of course, is prohibited from concealing a lay off/displacement making a modest or cosmetic change in job duties and responsibilities. The covered employer, is also prohibited by concealing a layoff/displacement by some other subterfuge or pretense. This point is made clear by Congress' stipulation that the expiration of a temporary employment contract will be treated as a lay off (as discussed below) if an employer enters into such a contract with the intent of evading the anti-displacement attestations contained in new paragraphs (E) and (F) of subsection 212(n)(1).

For similar reasons, the geographical reach of the prohibitions is extended so as to include work sites within normal commuting distance of the work site where the H–1B worker is or is to be employed. This provision is intended to cover the possibility of an employer trying to evade this prohibition by displacing an American worker with an H–1B worker assigned to a nearby work site.

It should also be noted that under new paragraph (E)(i), displacement is prohibited only if it occurs within 90 days before or after the employer files an H–1B petition supported by the application. Congress decided that 180 days around the filing of such petition is the period of time during which such displacement would be most likely to occur as a practical matter.

The definition of ''lays off'' set out in new subparagraph (4)(D) of 212(n) (added by section 412(b) of this legislation), while excluding the expiration of a temporary employment contract from the definition, clarifies that the expiration of such a contract will be treated as a lay off if an employer enters into such a contract with the specific intent of evading the anti-displacement attestations contained in new paragraphs (E) and (F) of subsection 212(n)(1).

Finally, the legislation expressly states that its definition of ''lay off'' is not intended to supersede the rights which employees may have under collective bargaining agreements or other employment contracts; private rights under such contracts are preserved for the American worker to pursue through appropriate channels. However, the preservation of such contractual rights is not intended by Congress to negate the protections or remedies available to that worker under this or any other Act. Thus, in those circumstances where Department of Labor has jurisdiction, those remedies, in addition to the private rights of employees under collective bargaining or other employment contracts, are to continue to be available. Congress anticipates that, in reviewing complaints and other credible information, the Department should look carefully at any evidence of lay offs, including those which may have implications for collective bargaining or other employment contracts.

The legislation specifies that an American worker who is offered a ''similar employment opportunity'' as an alternative to loss of employment has not been ''laid off'' for purposes of this provision. The intent of Congress is that the ''similar employment opportunity with the same employer at equivalent or higher compensation and benefits'' would be a meaningful offer. It is Congress' intent that an employer should not be able to evade liability for a violation of the displacement attestation by making an offer of an alternative employment opportunity without considerations such as relocation expenses and cost of living differentials if the alternative position was in a different geographical location.

2. The ''secondary non-displacement'' attestation. In addition to a covered employer's attestation that it has not displaced an American worker, the legislation prohibits a covered employer in certain circumstances fro placing an H–1B nonimmigrant with another employer where the ''other'' employer has or will displace an American worker. Therefore, Section 412(a) adds a ''secondary non-displacement'' attestation by amending section 212(n)(1) of the Immigration and Nationality Act to include a new subparagraph (F), requiring a covered employer to attest to not placing an H–1B employee with another employer (at another employer's worksite) without having inquired as to, and having no knowledge of, any such displacement or intention to displace by the other employer before and after the date of placement.

In enacting this provision, Congress intends that the employer make a reasonable inquiry and give due regard to available information. Simply making a pro forma inquiry would not insulate a covered employer from liability should be ''other'' employer displace an American worker form a job sufficiently similar to the one which would be performed by an H–1B worker. That is one of the reasons why subsection 412(a)(2) of the legislation requires that the employer be notified through a clear statement on the labor condition application (LCA) regarding the scope of a covered employer's liability with respect to a lay off by a secondary employer. Through the LCA form, the Department of Labor will make clear to covered employers their obligation to exercise due diligence in ascertaining whether the placement of H–1B nonimmigrants may correspond with the lay off or displacement of American workers in similar jobs. Some of the most egregious cases involving the abuse of the H–1B visa program have involved American workers being retained only long enough to train their H–1B replacements under contract with a different employer. A covered employer making this attestation must exercise due diligence in meeting its responsibilities regarding the secondary employer.

However, as discussed later, the attesting employer will still be subject to a penalty if the ''other'' employer has engaged in or does engage in a prohibited lay off/displacement even if the attesting employer has made a reasonable inquiry of the other employer and had reasonably concluded that the lay/off displacement has not taken place and will not take place. That is the other reason why subsection 412(a)(2) of the legislation requires that the employer be notified through a clear statement on the labor condition application (LCA) regarding the scope of a covered employer's liability with respect to a lay off by a secondary employer.

3. The ''recruitment'' attestation. The last new required LCA statement added by section 412(a) is a ''recruitment'' attestation, set out in new subparagraph (G) of section 212(n)(1). It requires a covered employer to attest that it has taken good faith steps to recruit American workers for the job for which it is seeking the H–1B worker, and has offered the job to any equally or better qualified American worker. Congress intends for an employer to at least use industry-wide recruiting practices (unless the employer's own recruitment practices are more successful in attracting American workers), and, in particular, to use those recruitment strategies by which employers in an industry have successfully recruited American workers. The Department of Labor, in defining and determining whether certain recruitment practices meet the statutory requirements, should consider the views of major industry associations, employee organizations, and other interest groups.

Section 412(a)(3) of this legislation adds language at the end of section 212(n)(1), stating that the recruitment attestation is not to be construed to preclude an employer from making employment decisions based upon ''legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applies in a discriminatory manner.'' The employer's recruitment and selection criteria therefore must be relevant to the job (not merely preferred by the employer), must be normal and customary (in the relevant industry) for that type of job, and must be applied in a non-discriminatory manner. Just because an employer in good faith believes that its selection criteria meet such standards does not necessarily mean that they in fact do. Any criteria that would, in itself, violate U.S. law can clearly not be applied, including criteria based on race, sex, age, or national origin. The employer cannot impose spurious hiring criteria that discriminate against American applicants in favor of H–1Bs, thereby subverting employer obligations to hire an equally or better qualified American worker.

Any ''good faith'' recruitment effort, as required by this legislation, must include fair,

adequate and equal consideration of all American applicants. The Act requires that the job must be offered to any American applicant equally or better qualified than a nonimmigrant. Congress recognizes that ''good faith'' recruitment does not end upon receipt of applications, but rather must include the treatment of the applicants. In evaluating this treatment, the Department should consider the process and criteria for screening applicants, as well as the steps taken to recruit for the position and obtain those applicants. It is Congress's intent that employers be able to demonstrate that they have recruited in ''good faith'' by maintaining a fair and level playing field for all applicants and by not skewing their recruitment process against American workers. Employers who consistently fail to find American workers to fill positions should receive the Department's special attention in this context of ''good faith'' recruitment.

In the Act, the Attorney General is separately charged with the adjudication of claims by American workers who believe that they were ''equally or better qualified'' than H–1B workers who were hired.

4. Employers and H–1B workers covered by the new statements. Section 412(a) of this legislation adds a new subparagraph (E)(ii) to section 212(n)(1) which specifies which employers are subject to the new attestation requirements. There are two categories of covered employers: (1) ''H–1B-dependent'' employers and (2) employers who, after enactment of the Act, have been found to have committed a willful failure to meet a condition set out in section 212(n)(1) or a willful misrepresentation of material fact on an LCA. These two categories encompass those employers most likely to abuse the H–1B program.

The first category, ''H–1B-dependent employers,'' is defined in new paragraph (3)(A) of section 212(n), added by section 412(b) of this legislation. Under that definition, an employer is H–1B-dependent if it has 51 or more full-time equivalent employees, 15% or more of whom are H–1B workers. Employers with 25 or fewer full-time equivalent employees are H–1B-dependent if they have more than 7 H–1B employees, and employers with between 26 and 50 full-time equivalent employees are H–1B-dependent if they have more than 12 H–1B employees.

The second category of covered employers is those who have been found to have committed a willful failure or a willful misrepresentation under section 212(n)(2)(C) or 212(n)(5). These employers are subject to the new attestation elements for five years after the finding of violation. Of course, in order to trigger the coverage of these elements, the finding of willful violation must have been made in a manner consistent with the procedural requirements in the Act, including the 12-month statute of limitations on the investigation of complaints or other information (section 212(n)(2)(A); 212(n)(2)(G); 212(n)(5)).

Under new subparagraph (E)(ii) of 212(n)(1), employers required to include the new statements on their applications are excused from doing so on applications that are filed only on behalf of ''exempt'' H–1B nonimmigrants. An ''exempt'' H–1B nonimmigrant is defined in new paragraph (3)(B) of section 212(n) as one whose annual wages, including cash bonuses and other similar compensation, will be equal to at least $60,000 (and will remain at such level for the duration of his or her employment while under an H–1B visa) or who has a master's or higher degree (or its equivalent) in a specialty related to the intended employment. It is important to note that the term ''or its equivalent'' is intended to mean an equivalent degree from a foreign university, and does not mean to imply that any amount of work experience can be substituted for such a degree. It is also important to note that the degree must be in a specialty which has a legitimate, commonly accepted connection to the employment for which the H–1B nonimmigrant is to be hired.

Exempt H–1B nonimmigrants are entirely excluded from the computation by which their employer's H–1B dependency is to be determined under new paragraph (3)(C) (also added by section 412(b) of this legislation) for the first six months after enactment of this Act, or until promulgation of final regulations, whichever is longer. However, once this transition period ends, they are included in the calculation of whether an employer is H–1B dependent.

Subsection 412(c) modifies subparagraph (1)(C)(ii) to authorize employers to post their required notices electronically. This provision is intended to allow employers a choice of methods for informing employees of the intended employment of H–1B nonimmigrants. An employer may either post a physical notice in the traditional manner, or may electronically notify employees of the identical information. By providing this flexibility, Congress intended to improve the effectiveness of posting in the protection of American workers. Therefore, the electronic notification must actually be transmitted to the employees, not merely be made available through electronic means such as inclusion on an electronic bulletin board.

Subsection 412(d) makes the new attestation requirements effective on the date of the Secretary's issuance of final regulations to carry them out, and the other provisions of the Act effective upon enactment. Subsection 412(e) allows the Secretary of Labor and the Attorney General to reduce the period for public comment on proposed regulations to no less than 30 days so that the necessary regulations may be promulgated in a timely manner.

SECTION 413. CHANGES IN ENFORCEMENT AND PENALTIES

This section specifies the penalty structure for failures (both willful and nonwillful) to meet the new labor condition attestations added by section 412 (as well failures to meet the pre-existing attestations or the misrepresentation of a material fact in an application). A special penalty is imposed for a willful violation in the course of which an employer displaces an American worker. The provision clarifies that certain kinds of employer conduct constitute a violation of the prevailing wage attestation, and that other kinds of employer conduct are also prohibited in the H–1B program. Finally, the provision grants certain new authorities to the Secretary of Labor and establishes a special enforcement mechanism administered by the Attorney General to address alleged violations of the selection portion of the recruitment attestation.

Subsection 413(a) revises the penalty structure set out in subparagraph 212(n)(2)(C) of the Immigration and Nationality Act. In that subparagraph as amended, clause (i) specifies the penalties for a failure to meet a condition of subparagraph (1)(B) (strike or lockout) or a substantial failure to meet a condition of subparagraph (1)(C) (posting) or (1)(D) (contents of application), or a misrepresentation of material fact. These penalties remain as they were under the prior law: administrative remedies including a $1000 fine per violation, and (at least) a one-year debarment. The clause is expanded to make these penalties also apply to a failure to meet a condition of new subparagraphs (1)(E) or (1)(F) (non-displacement) and to a substantial failure to meet a condition of new subparagraph (1)(G)(i)(I) (good faith recruitment). New clause (ii) of section 212(n)(2)(C) sets out the new increased penalties for willful failures to meet any condition in paragraph (1), willful misrepresentations of material fact, or violations of new clause (iv) prohibiting retaliation against whistle blowers. These penalties consist of administrative remedies including a $5000 civil fine per violation, and (at least) a two year debarment.

New clause (iii) of section 212(n)(2)(C) sets out a further enhanced penalty for willful failures to meet a condition of paragraph (1) or willful misrepresentation of material fact in the course of which violation the employer displaces an American worker within 90 days before or after the date of the filing of a visa petition. This penalty consists of administrative remedies including a $35,000 civil fine per violation, and (at least) a three year debarment. Congress intends that this new penalty will assure that there are adequate sanctions for (and hence adequate deterrence against) any willful violation of the existing wage-payment requirements in the course of which an employer ''displaces'' an American worker with an H–1B worker.

It is important to note that in clauses (i), (ii), and (iii), authorizing the Secretary to impose ''administrative remedies * * * as [she] determines to be appropriate,'' Congress intends that such remedies will include ''make-whole'' relief for affected American workers (such as, in appropriate circumstances, monetary compensation to the American worker or reinstatement to the job from which the American worker was dismissed or placement in the job to which the American worker should have been hired).

New clause (iv) essentially codifies current Department of Labor regulations concerning whistle blowers in the H–1B program. This statutory provision is included not in order to change current standards concerning whistle blowers, but to provide an unarguable statutory basis for the existing regulations. New clause (v) is intended to complement clause (iv) by directing the Secretary of Labor and the Attorney General to devise a process to make it easy for someone who has filed a complaint under clause (iv) to seek a new job in the U.S. It is contemplated that this process would be expeditious and easy to use, so that the employee does not need to wait for a new employer to obtain approval for a new petition in order to change jobs in these circumstances.

New clause (vi) prohibits employers from obtaining payments of money from H–1B workers in specified circumstances. Subclause (I) prohibits employers from requiring H–1B workers to pay a penalty for leaving an employer's employ before a date agreed to between the employer and the worker. It directs that the Secretary is to determine whether a payment is a prohibited ''penalty'' or a permissible ''liquidated damages'' clause under relevant State law. This provision was added because of numerous cases that have come to light where visa holders or their families were required to make large payments to employers because the worker secured other employment. The Secretary may impose a penalty of $1,000 and require that the employer refund the payment to the worker (or to the Treasury if the worker can not be located) under new subclause (vi)(III).

New subclause (vi)(II) prohibits employers from accepting reimbursement from H–1B workers for the filing fees imposed under new section 214(c)(9) of the INA. Congress included this prohibition to make it very clear that these fees are to be borne by the employer, not passed on to the workers. If the Secretary determines that the worker has reimbursed or otherwise compensated the employer for the filing fee, the Secretary may impose a penalty of $1,000 and require that the employer refund the payment to the

worker (or to the Treasury if the worker can not be located) under new subclause (vi)(III).

New clause (vii) addresses an issue known colloquially as ''benching,'' which means holding an H–1B worker after admission for employment in underpaid or unpaid status. An extreme example of ''benching'' occurs where an employer brings an H–1B worker to the U.S. on the promise of a certain wage, but then pays the worker only a fraction of that wage or no wage at all because the employer does not have enough work for the H–1B worker. While the full extent of this practice is not known, ''benching'' is a frequent cause of wage violations found in Department of Labor investigations. This is a very serious situation. H–1B nonimmigrants are only allowed to be employed by the petitioning employer and admitted to the U.S. on the basis of an employer's claim of an urgent need for the worker. Therefore, ''benching'' both reflects a less than honest claim and often results in foreign workers being in this country without adequate means (sometimes without any means) of support.

Subclause (I) clarifies that ''benching'' is a violation of the employer's obligation to pay the prevailing or actual wage. An employer's failure to pay wages during an H–1B worker's non-productive status, due to a decision by the employer (based on factors such as lack of work for the worker) or due to the worker's lack of a license or permit, is included in the definition of ''benching.'' It is the intent and understanding of Congress that in such circumstances the employer has an obligation to provide full wages as well as the benefits package that the employer would provide to an American worker as required under clause (viii) discussed below.

Subclause (II) further clarifies that in the case of an H–1B worker designated as part-time on a visa petition, an employer commits a ''benching'' violation if it fails to pay the H–1B worker for the full number of hours and at the full rate of pay stated on the petition. Nothing in subclause (II) is intended to preclude part-time H–1B employment, as long as that was the agreement made by the employer and the H–1B worker prior to the submission of the visa petition. The employer should accurately designate a worker as full or part-time, and the employer's misrepresentation of this material fact should be scrutinized by the Secretary in her determination of whether any ''benching'' violation has occurred or misrepresentation has been made, and to pay particular attention to whether the fringe benefits provided by the employer to American workers would include paid leave for such nonproductive time (see clause (viii) regarding benefits).

The Congress anticipates that the Secretary will look closely at circumstances that appear to be contrived to take advantage of non-paid time. Subclause (IV) provides that the employer is not required to pay wages where the H–1B worker's nonproductive status is due to non-work-related reasons, such as the worker's voluntary request for leave of absence or ''circumstances rendering the nonimmigrant unable to work.'' The alleged ''voluntariness'' of the worker's request would, of course, be determined in the context of the employment circumstances. Further, this H–1B provision regarding non-paid status must be consistent with any other applicable law, such as the Rehabilitation Act or the Family and Medical Leave Act, which may require payment of wages in some circumstances.

Subclause (III) describes the manner in which the provisions of subclauses (I) and (II) apply to an H–1B worker who has not yet entered into employment with an employer. In such cases, the employer's obligation is to pay the H–1B worker the required wage beginning no later than 30 days after the H–1B worker is first admitted to the U.S., or in the case of a nonimmigrant already in the United States and working for a different employer, 60 days after the date the H–1B worker becomes eligible to work for the new employer. Such ''eligibility'' is to be understood to mean the completion of the visa process, and not other formalities, such as obtaining a license or permit.

Subclause (V) is intended to make clear that a school or other educational institution that customarily pays employees an annual salary in disbursements over fewer than 12 months may pay an H–1B worker in the same manner without violating clause (vii), provided that the H–1B worker agrees to this payment schedule in advance. Congress specifically limited this exemption to schools and educational institutions in recognition of their unique salary patterns.

The intent of the ''benching'' provision is to prevent the exploitation of H–1B workers. It is not the intent of Congress that a circumstance be created under which an employer could avoid compliance with the ''benching'' provision by laying off an American worker. If an employer were to do so, this would trigger the enforcement and penalty provisions of the Act.

Clause (viii) adds an additional clarification concerning an employer's obligations under the attestation on wages and working conditions set forth in 212(n)(1)(A). The new provision states that it is a violation of those obligations for an employer to fail to offer ''benefits and eligibility for benefits'' to H–1B workers ''on the same basis, and in accordance with the same criteria,'' as the employer offers to American workers. The statement ''on the same basis'' is intended to mean equal or equivalent treatment, not preferential treatment for any group of workers. Thus, if an employer offers benefits to American workers, it must offer those same benefits to H–1B workers. Similarly, if an employer offers performance-based bonuses to American workers, it must give similarly-situated H–1B workers the same opportunity to earn such a bonus.

Clause (viii)'s phrasing of the employer's duty as an obligation to provide ''benefits and eligibility for benefits,'' rather than just one or the other, was chosen to cover two eventualities. On the one hand, it would not be proper for an employer to make an H–1B worker ''eligible'' for benefits on the same basis as its American workers but then actually provide the benefits only to American workers. On the other hand, ''providing'' or delivering the benefits is required and is to be done in accordance with whatever criteria apply to American workers. In order to actually receive many kinds of benefits, employees are required to take some kind of action such as to select a plan, to provide partial payment for the benefits, to work for the employer for a certain period of time, or to perform at a high level. The receipt of other kinds of benefits may turn on other contingencies such as, in the case of some kinds of bonuses and stock options, the company's year-end performance. Accordingly, the employer's obligation is to make H–1B workers ''eligible'' for the benefits and to actually provide the benefits ''on the same basis, and in accordance with the same criteria'' as American workers.

The underlying principle for this requirement is to protect American workers from having their wages and working conditions eroded by the presence of nonimmigrant workers who are not being treated equally, and being compensated in the same manner. There is particular concern regarding such erosion in instances where a foreign affiliate of a petitioning employer is involved as the agent for payment of wages and provision of benefits to the H–1B workers. The statutory obligations must be fully met in such instances. Congress intends that the ultimate and complete responsibility for all employer obligations under this Act, including the provision of benefits to the H–1B worker equal to those offered the employer's American workers based in the U.S., lies with the American (United States) employer who brings nonimmigrant workers into the country. Ultimately, it is the American employer, not the foreign subsidiary, pledging a benefit package similar to that of its American workers. Congress would expect the Secretary to look with particular care at circumstances involving a foreign subsidiary where there is an appearance of contrivance to avoid the obligation to provide equal wages and benefits to H–1B and American workers.

Section 413(b) adds a new paragraph (5) at the end of 212(n) that sets out the exclusive remedial mechanism for violations of the selection portion of the recruitment attestation set out in new paragraph 212(n)(1)(G)(i)(II) or any alleged misrepresentations relating to that attestation. It also contains a savings clause that states that the provision should not be construed to affect the authority of the Secretary or the Attorney General with respect to ''any other violations.'' This savings clause means that while the Secretary is not authorized to remedy a violation of (1)(G)(i)(II) regarding an individual American worker, the Secretary retains the broad authority to investigate and take appropriate steps regarding the employer's ''good faith'' recruitment efforts, including ''good faith'' consideration of American applicants.

The Congress anticipates that the Secretary will exercise her enforcement discretion so as not to use the ''good faith'' recruitment investigation as a ''back door'' way around the exclusivity or the arbitration remedy set out in 212(n)(5) for a violation of (1)(G)(i)(II) regarding an individual American worker. It should also be noted that by setting up separate mechanisms, one lodged at the Department of Labor concerning recruitment and one lodged at the Department of Justice concerning selection, Congress contemplates that the separate enforcement mechanisms will be operated in a cooperative, non-duplicative manner. In this context, we recognize that evidence tending to establish a non-selection violation would be pertinent to the matter of whether the recruitment, overall, had been conducted in ''good faith.'' Finally, Congress would expect that both the Attorney General and Department of Labor, in promulgating their regulations concerning recruitment procedures and selection criteria, will provide clear guidance to employers, including recognition that employers may use job-relevant standards and industry-wide recruitment practices.

Under the enforcement scheme set up by paragraph (5), any person aggrieved by an alleged violation of 212(n)(1)(G)(i)(II) or a related misrepresentation and who has applied in a reasonable manner for the job at issue may file a complaint with the Attorney General within 12 months of the date of the violation or misrepresentation. The Attorney General is charged with establishing a mechanism for examination of such a complaint to determine whether it provides reasonable cause to believe that such a violation or misrepresentation has occurred.

If the Attorney General does find reasonable cause, she is charged with initiating binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the Service's roster. The arbitrator is to be selected in accordance with the procedures and rules of the Service. The fees and expenses

for the arbitrator are to be paid by the Attorney General.

The arbitrator is charged with deciding whether the alleged violation or misrepresentation occurred and, if it occurred, whether it was willful. The complainant has the burden of establishing such violation or misrepresentation by clear and convincing evidence, but the complainant does not need to allege or prove that the violation or misrepresentation was willful. Congress intends that the arbitrator would not simply substitute his or her judgment for the employer's judgment concerning the relative qualifications of potential employees, but would carefully consider all the evidence presented, in accordance with section 212(n)(1) which permits the employer to use job-relevant standards applied in a non-discriminatory manner. However, just because an employer in good-faith believes that an American worker is not as well qualified as an H–1B alien does not necessarily mean that the American worker is in fact not as well qualified.

The arbitrator's decision is subject to review by the Attorney General only to the same extent as arbitration awards are subject to vacation or modification under sections 10 or 11 of title 9 of the United States Code, and to judicial review only in an appropriate court of appeals on the grounds described in section 706(a)(2) of title 5 of the United States Code.

The remedies for violations resemble those established for the other violations of the labor condition attestations. Congress anticipates that the authorized ''administrative remedies'' could include not only the specified $1,000 fine per violation or $5,000 fine per willful violation, but also other appropriate ''make-whole'' remedies. Further, a debarment penalty of one year (or two years for a willful violation) is authorized. A finding of a willful violation will subject an employer to the no-lay off/non-displacement attestation and the recruitment attestation for a period of five years (as provided in section 212(n)(1)(E)(ii)) and to random inspections for a period of five years (as provided in section 212(n)(2)(F), to be discussed later).

The Attorney General is prohibited from delegating the responsibilities assigned to her to anyone else unless she submits a plan for such a delegation 60 days before its implementation to the Committees on the Judiciary of each House of Congress. This is in order to assure that Congress has an adequate opportunity to be involved in the decision regarding where at the Department of Justice the Attorney General plans on lodging this function.

Section 413(c) adds a new section 212(n)(2)(E) describing the liability of an employer who has executed the ''secondary non-displacement attestation'' for placing a non-exempt H–1B worker with respect to whom it has filed an application containing such an attestation with another employer under the circumstances described in paragraph (1)(F). If the other employer has displaced an American worker (under the definitions used in this legislation) during the 90 days before or after the placement, the attesting employer is liable as if it had violated the attestation.

In all instances, the sanction may be an administrative remedy (including civil monetary penalties and ''make-whole'' remedies to the American worker affected). The attesting employer can only receive a debarment, however, if it is found to have known or to have had reason to know of the secondary displacement at the time of the placement of the H–1B worker with the other employer, or if the attesting employer was previously sanctioned for a secondary displacement under 212(n)(2)(E) for placing an H–1B nonimmigrant with the same other employer. If an employer has conducted the required inquiry prior to any placement with a ''secondary'' employer, and has no information or reason to know of that employer's past or intended displacement of U.S. workers, then the attesting employer should ordinarily be presumed not to have willfully violated the secondary displacement attestation. Congress anticipates that the Department of Labor, in promulgating and enforcing regulations, would require a reasonable level of inquiry.

Subsection 413(d) adds a new section 212(n)(2)(F) granting the Secretary authority to conduct random investigations of certain employers in certain situations. This authority is in addition to the existing investigative authority in section 212(n)(2)(A), as heretofore exercised by the Secretary. This ''random investigation'' provision is applicable for a five-year period following a finding by the Secretary that the employer in question committed a willful violation or made a willful misrepresentation, or a finding in the Attorney General's arbitration proceedings that the employer willfully violated paragraph (n)(1)(G)(i)(II).

Subsection 413(e) specifies a particular investigative process, to be used by the Secretary during the three-year period following enactment of this legislation. This process does not supplant or curtail the Secretary's existing authority in paragraph (2)(A) and does not affect the Secretary's newly-created authority under paragraph (2)(F) (''random investigations''). Under the new provision, subparagraph (G) of 212(n)(2), added by paragraph (1) of subsection 413(e) of this Act, the Secretary is authorized under certain circumstances to initiate a 30 day investigation on allegations of willful failures to meet a condition of paragraph (1)(A), (1)(B), (1)(E), (1)(F), or (1)(G)(i)(I), allegations of a pattern or practice by an employer of failures to meet such a condition, or allegations of a substantial failure to meet such a condition that affects multiple employees.

This provision does not address the matter of ''self-directed'' or ''self-initiated'' investigations by the Secretary. Rather, as specified in clause (ii) and (iii), an investigation under this provision can be initiated only on the basis of a communication by a person outside the Department of Labor, or on the basis of information the Secretary acquires lawfully in the course of another investigation within the scope of any of her statutory investigative authorities. The source's identity must be known to the Secretary, but need not be revealed to the employer in certain circumstances (However, the Secretary may seek to ascertain the identity of a person who has submitted credible information anonymously so that the Secretary may pursue an investigation under this provision.). Under this investigative process, the Secretary is not to act upon information received from the employer in paperwork filed to obtain an H–1B visa.

Congress anticipates that in promulgating and enforcing regulations for this process, the Secretary will provide guidance as to the types of situations which would be appropriate for investigation, such as an intentional ''posting'' violation which affects numerous employees (a ''substantial failure to meet such a condition that affects multiple employees''), or perhaps a more significant violation that affects only one or a handful of people. For purposes of interpreting ''a substantial failure to meet such a condition that affects multiple employees'', the more substantial the failure is, the fewer employees need be affected. For a very substantial failure, only two employees need be affected.

Congress' intent in enacting this special enforcement process was to endorse the Secretary's efforts to be more vigilant and effective in the enforcement of this Act, especially given the authorization of a substantial increase in temporary foreign workers. The presence of almost twice as many H–1B workers during the coming years could undercut the wages, working conditions and job opportunities of American workers and Congress is concerned that American workers be protected.

Subparagraph (G) prescribes several procedural steps governing this new process. First, under clause (i), there must be a finding of reasonable cause to believe that an employer is committing one of the covered violations. Second, the Secretary (or the Acting Secretary, in the case of the Secretary's absence or disability) must personally certify that this requirement and the other requirements of clause (i) have been met before an investigation may be launched. Third, the investigation is to be completed in 30 days. Fourth, the Secretary's investigation should focus on the alleged violation or violations. Fifth, the information provided by the source must be put in writing, either by the source itself or by a Department of Labor employee on behalf of the source. Sixth, a 12-month statute of limitations applies.

Additionally, the Secretary is directed to provide notice to the employer of information, including the identity of the person who provided the information, that may lead to the launching of an investigation and an opportunity to respond to that information before the investigation is actually initiated. However, the Secretary is authorized to forgo this notice where she determines that to do so will interfere with her efforts ''to secure compliance by the employer with [the H–1B program requirements].'' It is Congress' expectation that the Secretary will forgo notice of the information where she has a reasonable belief that the employer may frustrate the investigation and avoid compliance as a result of the notice, and will forgo notice of the identity of the person providing the information where the person has a credible fear that he or she will be retaliated against. While many employers would correct a problem brought to their attention, it cannot be assumed that the simple disclosure of allegations of wrongdoing would, in itself, be sufficient to assure compliance. When the Secretary provides the name of the person providing the information, notice should also be provided as to the penalties for retaliation and blacklisting of individuals included in the Act.

Finally, the new procedure includes the employer's right to an administrative fact-finding hearing within 60 days after the investigative determination.

One last point must be made in regard to the H–1B enforcement processes. In requiring that the Secretary act where there is ''reasonable cause to believe'' that a violation has been committed, Congress does not intend to impose on the Secretary the same level of justification or proof as it required under the Fourth Amendment's ''probable cause'' for search and seizure of persons or property. These legal standards have well-established, distinctly different meanings. Employers who enter into the H–1B program as sponsors of temporary foreign labor have an obligation to be cooperative in furnishing the Department with the appropriate records and information. The structure and language of this Act make it clear that employers are expected to cooperate fully with the Secretary and the Attorney General in all investigations and proceedings. The Secretary and the Attorney General are, of course, required to exercise their discretion in an appropriate manner within the scope of their authority.

Subsection 413(f) clarifies that none of the enforcement authorities granted in subsection 212(n)(2) as amended should be construed to supersede or preempt other enforcement-related authorities the Secretary of Labor or the Attorney General may have under the Immigration and Nationality Act or any other law.

TRIBUTE TO CESAR PELLI FOR OUTSTANDING COMMUNITY DEVELOPMENT

HON. ROSA L. DeLAURO

OF CONNECTICUT

IN THE HOUSE OF REPRESENTATIVES

Thursday, November 12, 1998

Ms. DELAURO. Mr. Speaker, I am proud to stand before you to honor a citizen of Connecticut who has graced the New Haven area and the world with his architectural achievements. Over his long and illustrious career, Cesar Pelli has literally changed the landscape of our cities and our nation with his socially responsive and uplifting designs.

Anyone who has flown into the new terminal designed by Cesar Pelli for the Washington National Airport can appreciate the genius of Pelli's designs: his belief that each building be shaped by its location and purpose; his sense of space, light and harmony; and his commitment to creating gracious, accessible buildings which facilitate public use, enjoyment, and interaction. Each of Pelli's designs complements and emerges from the existing cityscape, yet transcends and elevates the surrounding structures. His architectural projects across the world serve diverse purposes and peoples, including the Pacific Design Center in Los Angeles, the United States Embassy in Japan, the Commons of Columbus in Columbus, Indiana, the New York World Financial Center and Winter Garden, the Morse and Stiles Colleges at Yale University, the International Finance Center under construction in Hong Kong, and the renovation of the New York City Museum of Modern Art.

New Haven has been fortunate to have Cesar Pelli call it home since 1977, when he became the Dean of the Yale University School of Architecture. It is fitting that tonight in New Haven, Mr. Pelli is being honored at Casa Otonal, the residential community for the elderly whose inner city campus of workshops, residences, and on-site services and intergenerational programs was designed by Cesar Pelli 22 years ago. Pelli's campus fosters a sense of community among residents and the surrounding inner city neighborhood, reaffirming Casa Otonal's mission and enhancing its success. It is this commitment to city landscape and life which has earned Mr. Pelli more than 100 awards for design excellence, including the American Institute of Architects 1995 Gold Medal for a lifetime of distinguished achievement and outstanding contributions.

Cesar Pelli, we thank you for your commitment and contribution to our cities and to urban life. It is my great honor and privilege to join with the residents and staff of Casa Otonal, and with your family and friends, to pay tribute to your remarkable achievements.

TRIBUTE TO R. DAVID GUERRA

HON. RUBÉN HINOJOSA

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

Thursday, November 12, 1998

Mr. HINOJOSA. Mr. Speaker, it is a great honor to stand before you to pay homage to a man who has made such a difference in his community. Mr. R. David Guerra, President and Director of the International Bank of Commerce in McAllen, Texas, has been awarded the Cultural Leader of the Year Award by the South Texas Symphony Association.

Mr. Guerra, a graduate of the Stonier Graduate School of Banking at Rutgers University, soon began a prestigious career with the U.S. Treasury Department. He was commissioned in 1977 as a National Bank Examiner, Comptroller of the Currency. During this period, David received numerous achievement awards and participated in various special projects throughout the United States. In 1981, David became Executive Vice-President and Director of the International Bank of Commerce in Laredo, Texas, including the title of Vice President of International Bankshares, Inc. Adept in banking and management, David earned the title of President in 1990, and continues to lead seventeen International Bank of Commerce branches in South Texas in a successful banking enterprise.

Though his accomplishments within the banking industry are quite impressive, David has worked to extend his success to his community. David is active in numerous civic, political and professional organizations. In addition to his career accomplishments, he offers his business knowledge as Director of the Independent Bankers Association of Texas, and has served as President and Director of the Laredo Development Foundation, Director of the Laredo Chamber of Commerce, and the Corporation Director and Vice Chairman of the McAllen Economic Development Corp. Presently serving as Director of the Texas Higher Education Board and Director of The University of Texas-Pan American Foundation, David firmly believes in supporting students seeking further education. As a past Director and current Pace Setter Chairman of United Way of Hidalgo County, he is making a difference in the lives of the children who are the future of our community. Also the Director of McAllen Performing Arts, Inc., and past Director of the Hidalgo County Historical Museum, David promotes his cultural environment so often neglected by others.

R. David Guerra's commitment to education, enrichment, and achievement has made him a catalyst for accomplishment in his community. His ambition and commitment serves as standards for all leaders to admire. He has gained my admiration as a businessman, and my respect as a community leader. It is my pleasure to see him named the 1998–1999 Cultural Leader of the Year.

I wish for David, his wife, and his two children all the blessings that are mine to give. I look forward to your future works, and thank you for being a model for your community.

HONORING MAYOR TOM BRADLEY

HON. LUCILLE ROYBAL-ALLARD

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, November 12, 1998

Ms. ROYBAL-ALLARD. Mr. Speaker, I join my colleagues in honoring the memory of a great man and a great leader, Mayor Tom Bradley.

I am proud of the fact that Tom Bradley served for 20 years as mayor of my home town, the great city of Los Angeles.

He was dignified, gracious, and extremely effective. Known as a great coalition builder, he had no trouble getting the sometimes uncooperative city council to provide him the eight votes needed to approve his initiatives.

Through these initiatives, Mayor Bradley transformed the city's financial core and made Los Angeles the trade mecca it is today.

He expanded our seaport and our airport, helped build one of the most spectacular skylines of any city, and brought to Los Angeles one of the most successful Olympics ever: the 1984 Olympics.

I have no doubt that had it not been for the leadership of Tom Bradley, Los Angeles would not be the world class city that it is today. He is truly the father of modern Los Angeles.

But more importantly, the legacy Mayor Bradley left was his investment in the people of Los Angeles.

His leadership changed the face of the city government, by opening the doors of City Hall and creating opportunities for women and minorities.

He helped working parents and their children, by implementing an after-school day care/tutoring program named LA's Best.

He encouraged at-risk high school students to stay in school by providing them with a mentor and a city job through his Los Angeles City Youth Service Academy.

And, because Mayor Bradley knew it was important to produce and preserve housing for our families, he created the City's Housing Preservation and Production Department, which has made home-ownership and affordable housing a reality for many Angelanos.

Tom Bradley was truly a great mayor of Los Angeles. He was the people's mayor. We will miss him dearly.

COMMEMORATING THE 65TH ANNIVERSARY OF THE UKRAINIAN FAMINE

HON. MAURICE D. HINCHEY

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Thursday, November 12, 1998

Mr. HINCHEY. Mr. Speaker, this fall marks the 65th anniversary of the Ukrainian famine, or more precisely, of the world's recognition of the famine that had been developing in Ukraine for two years. We have seen many horrors in this century of civilization. The Holocaust in Germany and central Europe in World War II was the most shocking and has justifiably attracted the most recognition. But it was by no means the only incident of diabolic mass slaughter. We have seen the slaughter of Armenians in the early years of the century, the massacre of Cambodians by their own