Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	SECTION 2 – CONGRESSIONAL FINDINGS	
Sec. 2. Congressional Findings— [Mark-up Bill p.853]	"(2)…We have a right, and duty, to maintain and secure our borders…(3)…in order to qualify for the honor and privilege of eventual citizenship, our laws must be followed…(4) All parts of this Act are premised on the right and need of the United States to achieve these goals, and to protect its borders and maintain its sovereignty."	The soaring rhetoric found in the revised bill is at stark counterpoint to the sordid reality of the bill, which, as will be seen in the sectional analysis that follows, turns a blind eye to, and forgives, all manner of law-breaking, while doing little or nothing to ensure the future integrity of our borders or sovereignty.
	SECTION 3 – EFFECTIVE DATE TRIGGERS	
Sec. 3(a)(4). Effective Date Triggers, Definition of "Effectiveness Rate"— [Mark-up Bill p.855]	States: "The 'effectiveness rate', in the case of a border sector, is the percentage calculated by dividing the number of apprehensions and turn backs in the sector during a fiscal year *by the total number of illegal entries in the sector* during such fiscal year." (emphasis added)	The validity of existing border metrics have been questioned by a number of scholars. For instance, a Rand Corporation report of 2011 ("Measuring Illegal Border Crossing Between Ports of Entry") found that U.S. Customs and Border Protection [CBP] explained *increases* in apprehensions in some border sectors to improved CBP operations and *decreases* in apprehensions in other sectors to the deterrent effects of improved CBP technologies. The authors concluded, "Clearly, a measure that reflects successful performance whether it rises or falls has limited value as a management tool." Now we find that this bill would levy on DHS responsibility for a whole new metric: determining "the total number of illegal entries in the sector during such fiscal year" as a trigger for granting of benefits. At present *there is no trustworthy*

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		methodology for determining the total number of illegal entries in any sector. Given this administration's keen interest in "regularizing" the status of millions of illegal aliens, and its already-evidenced propensity for manipulating border statistics (even the president has referred to them as "a little deceptive"), the inevitable consequence will be for DHS to produce low, and empirically indefensible, projections of total illegal entries in key sectors, in order to achieve the 90% effectiveness trigger required to move forward.
Sec. 3(c)(2)(A). Triggers: Adjustment of Status of RPIs— [Mark-up Bill p.856]	Provides that the DHS Secretary may not begin adjusting aliens from RPI to lawful permanent resident [LPR] status until certifying that "the Comprehensive Southern Border Security Strategy has been submitted to Congress and is *substantially deployed and substantially operational*." (emphasis added)	(1) It is problematic that aliens will become "provisional" immigrants immediately: by using linguistic gymnastics, the bill's authors ensure that illegal aliens receive an amnesty; that they must later adjust to LPR status is of little moment since there is little legal distinction between the two categories. (2) The bill provides no definitions of either of the phrases used in 3(c)(2)(A)(i) — "substantially deployed" or "substantially operational" — leaving these important concepts open to subjective interpretation. (3) In addition, as written, the bill does not require the Secretary to certify substantial *success* in the strategy—only operational deployment. As a consequence, previously-illegal aliens continue their march toward LPR status while the southern border remains unsecured, and the alleged enforcement

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		emphasis of this bill proves ephemeral.
Sec. 3(c)(2)(B)(i). Triggers: Adjustment of Status of RPI: Exception— [Mark-up Bill p.857]	Establishes an exception to the prohibition against the Secretary adjusting aliens to LPR status until the triggers have been met. The exception permits adjustment without triggers in the event that "litigation or a force majeure has prevented one or more of the conditions…from being implemented; or the implementation…has been held unconstitutional by the Supreme Court; or the Supreme Court has granted certiorari to the litigation…and ten years have elapsed since enactment."	These exceptions are exceedingly troubling in that they invite litigation by parties who have a keen interest in amnesty but no interest whatever in enforcement of the immigration laws. The third clause is most troubling of all, because a simple grant by the Supreme Court of a request to hear the case (certiorari)—with no assurance at all that the litigants would win—is enough to move forward with adjustment of status. But just by granting certiorari, the Court moots the case since the issue in contention is whether or not to initiate adjustment proceedings for RPIs—which the grant of certiorari provides. It is a deliberate catch-22 built into the system to ensure that adjustment happens no matter what.
SECTION 4 – SOUTHERN BORDER SECURITY COMMISSION		
Sec. 4. Southern Border Security Commission— [Mark-up Bill p.860]	States: "If the Secretary certifies that the Department has not achieved effective control in all high risk border sectors during any fiscal year beginning before the date that is 5 years after the date of the enactment of this Act, not later than 60 days after the date of the certification there shall be established a commission to be known as the 'Southern Border Security Commission.' "	Creation of such a commission is predicated only on a certification of failure by the DHS Secretary. For political reasons, as explained in our analysis of Sec. 3(a)(4) above, it is highly unlikely that the Secretary will certify failure. But even if this were to occur, why should the American public invest confidence in a policy advisory commission, when recent experience (such as with the Simpson-Bowles Commission) indicates that the reports and recommendations of such groups are

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		routinely ignored?
SECTION 5 – COMPREHENSIVE SOUTHERN BORDER SECURITY STRATEGY AND SOUTHERN BORDER FENCING STRATEGY		
Sec. 5. Comprehensive Southern Border Security Strategy and Southern Border Fencing Strategy— [Mark-up Bill p.864]	Requires the Secretary to submit to Congress, within 180 days of enactment, the two strategies (security and fencing), outlining goals and priorities, plus the requisite fiscal, human and technical resources needed to achieve them.	(1) Decades have passed and no administration has had either the foresight or political will to protect the integrity of our border; it beggars belief that the bill requires the Secretary to put together and submit a credible plan within a six-month time frame. (2) Despite the fact that, until there is an adequate track record, we have no way to know whether the strategies will be successful, or whether the fiscal and resource requirements will be met, as soon as the Secretary submits a "Notice of Commencement" [per Sec. 3(c)(1)], processing of RPI applications will begin. Thus, as is evident throughout the bill, enforcement possibilities take a backseat to amnesty realities.
SECTION 6 – COMPREHENSIVE IMMIGRATION REFORM TRUST FUND		
Sec. 6(a)(1). Comprehensive Immigration Reform Trust Fund: Deposits— [Mark-up Bill p.872]	This subsection lays out the many sources of money—beginning with a massive infusion of funding from the Treasury and, thereafter, a variety of user fee and fine and penalty accounts—which will be used to bankroll the Fund whose purpose is to carry out the Comprehensive Southern Border Security and Southern Border Fencing Strategies, to augment southern border prosecutions, etc.	Issue #1: It is important to remember that at least 40% of the present illegal alien population of the United States consists of visa overstays who are *not*, in the main, in the southern border purview of operations. Apportioning these user fees for strictly southern border-related strategies leaves a funding hole for other DHS immigration enforcement components such as ICE, which have relied on the user fee accounts to fund nationwide interior enforcement activities.

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		Issue #2: Given the multiplicity of items for which the Fund must pay (many of them relating not to enforcement, but to the benefits applications processes), there is no assurance that the amounts collected from the various user fees and penalties will be adequate to the purposes. At present, this is an unknown, and could have a significant adverse impact on enforcement activities if the fund falls short of expectations. Issue #3: There is a provision in the bill that specifically authorizes the DHS Secretary to limit fee collections from families, and to waive fees to classes designated by the Secretary, such as the indigent. While this would be counter-intuitive in that aliens applying for RPI (and, ultimately, LPR) status are supposed to be self-sufficient, historically federal immigration benefits-granting agencies have promulgated fee-waiver rules for virtually every benefit imaginable, and been liberal in their application. Thus the concern we raise in Issue #2 immediately above (funding shortages) could be further exacerbated by such an agency rule.
Sec. 6(a)(3)(B)(ii). Comprehensive Immigration Reform Trust Fund: Ongoing Funding— [Mark-up Bill p.872]	States that $50 million will be provided each fiscal year, 2014 – 2018, to carry out the activities described in section 1104(b) of the bill [the Border Patrol's Operation Stonegarden project].	A review of the referenced section 1104(b) [found at bill p. 903] shows that law enforcement agencies in southwest border states may use the money for personnel, overtime, travel, and other costs related to *drug smuggling*, as well as illegal-immigration related activities. (emphasis added)

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

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		While narcotics interdiction is a valuable and worthy endeavor, the statutory language provides *no assurance* that the majority of the cumulative $250 million dollars set aside (90% of which is specifically for state and local agencies) will be used to interdict alien smuggling or impede illegal border crossings.
Sec. 6(b)(4). Comprehensive Immigration Reform Trust Fund: Limitation on Collection— [Mark-up Bill p.885]	States: "No fee described…may be collected under this Act except to the extent that the expenditure of the fee to pay the costs of activities and services for which the fee is imposed is provided for in advance in an appropriations Act."	Although the bill lays out huge amounts to be set aside in advance and apportioned from the Fund for specific purposes, years into the future, this "Limitation" provision makes clear that *unless specific authorizing language is included in appropriations bills for each federal fiscal year*, collections are impermissible under the law. Given the frequent and repetitive difficulties with Congress being able to pass appropriations acts in a timely and routine manner in recent years (witness the current stalemate), we could easily end up with a multitude of unfunded enforcement mandates—resulting in lack of enforcement ,even while amnesty and benefits-granting activities move forward on a grand scale.
Sec. 9. Grant Accountability— [Mark-up Bill p.891]	**NEW LANGUAGE: The bill now contains a provision which specifies that grants made from the Comprehensive Immigration Trust Fund will be subject to yearly Inspector General audits; "unresolved audit findings" from such reviews shall result in 2-year grant**	**NEW LANGUAGE DISCUSSION: This is one of the few bright spots in the bill.** **In addition to the measures described in the column to the left, the bill also now makes clear that grant funds may not pay for conferences; that no NGOs using offshore accounts to evade taxes are eligible**

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	suspensions of offending non-governmental organizations (NGOs) who are the subject of unresolved findings; and such NGOs will be obliged to pay back the funds.	**for grants; and that executive compensation levels of the NGOs' officers are subject to scrutiny.**
	TITLE I—BORDER SECURITY	
Sec. 1103(d). National Guard Support to Secure the Border: Materiel and Logistical Support— [Bill p.899]	Authorizes State governors, with approval of the U.S. Defense Secretary [SecDef], to assign national guard units for the purposes of assisting CBP's Border Patrol in securing the Southern border. Subsection (d) directs the SecDef to "deploy such materiel and equipment and logistical support as may be necessary to ensure success of the operations and missions conducted by the National Guard under this section."	*There is no funding mechanism contained within this section to pay for the salaries and benefits of the National Guard troops used*. We must presume therefore that such payments, which could be substantial, must be taken out of the Comprehensive Immigration Reform Trust Fund, and thus unavailable for use by CBP itself to undertake the enhanced patrol and inspectional duties envisioned by other parts of the bill.
Sec. 1104(b). Enhancement of Existing Border Security Operations: Operation Stonegarden— [Mark-up Bill p.903]	**NEW LANGUAGE: The bill now directs the Federal Emergency Management Agency to enhance law enforcement preparedness and operational readiness along the borders through administration of Operation Stonegarden grants on a competitive basis.**	**NEW LANGUAGE DISCUSSION: FEMA administration of the grants is new language. Insofar as Operation Stonegarden is a U.S. Border Patrol program, conflicts may develop between FEMA and USBP over which agencies should most appropriately receive the funding. What is more, the new language requires a competitive grant application process.** **While evidence of efficiency in use of grants is appropriate, as are post-audits, we question whether a competitive process truly serves the**

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(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		purpose of enhanced border enforcement. It may simply mean a state or local agency has a better grant application writer.
Sec. 1104(d)(5). Enhancement of Existing Border Security Operations: Whistleblower Protections— [Bill p.907]	**NEW LANGUAGE: A new provision in the bill augments the number of federal judgeships in several federal judicial districts in Texas, Arizona and California.**	**NEW LANGUAGE DISCUSSION: In addition to the added judicial strength, a new provision has been included that extends whistleblower protections to employees who provide information or assist in an investigation regarding violation of Federal laws or regulations, or misconduct, by a judge, justice, or any other employee in the judicial branch.**
Sec. 1105(b). Border Security on Certain Federal Land: Support for Border Security Needs— [Mark-up Bill p.909] *—and—* **Sec. 1105(d). Border Security on Certain Federal Land: Intermingled State and Private Land—** [Mark-up Bill p.911]	Subsection (b) provides that to achieve effective control of Federal lands, "the Secretary concerned [Agriculture or Interior]shall authorize and provide U.S. Customs and Border Protection personnel with immediate access to Federal lands for security activities", such as patrols; and deployment of communications, surveillance, and detection equipment. But Subsection (d) goes on to make clear that the right of access *does not apply to state or private lands which are encompassed inside federal lands.* (emphasis added)	The prohibitions in subsection (d) actually *diminish* the right of access to border lands by patrol officers, as presently authorized in the Immigration and Nationality Act (INA) and its implementing regulations— Section 287(a)(3) of the INA [8 USC 1357(a)(3)] states: "(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant-…(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, *and within a distance of twenty-five miles from any such external boundary to have access to private lands*, but not dwellings for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States…" (emphasis added)

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		Because subsection (d) of this bill does not carve out the 25-mile exception permitting access to private lands, it can readily be construed as amending existing INA 287(a)(3) to no longer permit that access.
Sec. 1106(b)(1). Equipment and Technology: Limitations— [Mark-up Bill p.912]	**NEW LANGUAGE: The provision has been amended to state, "U.S. Border Patrol may not operate unarmed, unmanned aerial vehicles in the San Diego and El Centro Sectors, *except within 3 miles* of the Southern border." (emphasis added)**	**NEW LANGUAGE DISCUSSION: Given that these two Border Patrol Sectors are extremely high-apprehension/ high-risk areas with a considerable geographic scope of responsibility, we question the wisdom of restricting the drones to within 3 miles and believe that the traditional 25-mile boundary (as discussed above) would be more appropriate.**
Sec. 1108(b). Reimbursement to State and Local Prosecutors for Federally Initiated Criminal Cases: Exception— [Mark-up Bill p.916]	**NEW LANGUAGE: A new "exception" has been added to the provision authorizing reimbursement for border-related enforcement and prosecution:** **"The Reimbursement…shall not be available…if the Attorney General determines that there is reason to believe that the jurisdiction seeking reimbursement has engaged in unlawful conduct in connection with immigration-related apprehensions.**	**NEW LANGUAGE DISCUSSION: No one would wish to countenance illegal law enforcement conduct. However, in the rough-and-tumble between this administration and the states over the appropriate limits of state authority to protect its citizens from the deleterious effects of illegal immigration, the phrasing of the exception (which relies simply on the Attorney General's view, with no independent judicial or other substantiation) is objectionable, especially in light of recent aggressive legal action initiated by DOJ in coordination with local civil liberties groups to try to shut down or at least intimidate local law enforcement agencies that are more aggressive in targeting illegal alien criminals or enforcing state laws that illegal aliens violate.**
Sec. 1110.	This section reauthorizes federal funds to	SCAAP funding has been problematic in the past few

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SCAAP Reauthorization— [Mark-up Bill p.918]	be used to reimburse state and local governments, through fiscal year 2015, under the State Criminal Alien Assistance Program (SCAAP). In so doing, it extends the life of the program several years into the future. **NEW LANGUAGE: an amendment has added to require the federal government to reimburse state and local governments "(4) In the case of an alien whose immigration status is unable to be verified by the Secretary of Homeland Security, and who would otherwise be an undocumented criminal alien if the alien is unlawfully present in the United States."**	years because millions of dollars have been given to a number of state and local governments which actively obstruct federal immigration enforcement efforts, by— □ enactment of sanctuary statutes and ordinances; implementation of policies making it difficult for state or local employees to communicate with federal immigration authorities; □ restricting access of federal immigration authorities to detained criminals suspected of being deportable aliens; and □ refusing to honor federal immigration detainers filed against deportable aliens. If this bill, as claimed, carefully balanced immigration enforcement interests against the demands that large numbers of illegal aliens receive benefits permitting them to remain in the U.S., then the authors would have ensured that SCAAP reauthorization language *restricted access to the funds solely to those state and local governments which unreservedly cooperate with federal immigration enforcement efforts*. **NEW LANGUAGE DISCUSSION: The amendment is circular in its logic: the federal government will be required to pay for the detention of individuals whom it cannot even identify as removable aliens (often because the local jurisdiction bars cooperation with ICE). Further, the amendment actually ensures that sanctuary cities and counties can continue to actively impede ICE access to inmates in their jails while continuing to collect**

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		payment because they need not worry that failure to affirmatively identify the person as an alien will affect their claim for funds.
Sec. 1111. Use of Force— [Mark-up Bill p.919]	Obliges the Secretary to establish rules for use of force; reporting of use of force; discipline for use of force.	The section makes no attempt to define "use of force"; to distinguish between levels of the use of force; or to carve out exceptions for the reasonable use of force. Queries: □ If an alien raises his fist to strike a blow and the officer uses his arm to block the blow, has the officer committed a use of force? □ If an alien flees and the officer is obliged to tackle the alien to effect arrest, has the officer committed a use of force? Additional observation: the language of this section may have a chilling effect on officers' reaction times when deciding whether to use necessary force to protect themselves or others, with injurious consequences.
Sec. 1112. Training for Border Security and Immigration Enforcement Officers— [Mark-up Bill p.920]	Requires the Secretary (in consultation with the Assistant Attorney General for Civil Rights) to provide training to all CBP inspectors, agricultural inspectors, Border Patrol agents and ICE agents within 100 miles of any land or maritime border, or any U.S. port of entry [POE]. The training mostly involves civil rights-related matters, but also includes fraudulent document identification.	The language is anomalous for two reasons: □ First, because it is only required for officers stationed within 100 miles of external U.S. borders, or at international POEs; and □ Second, because it is not required for USCIS employees. The fraudulent document training would seem to be particularly apt for USCIS examiners and adjudicators, given the huge volume of documents that they will be receiving from applicants seeking RPI and Blue Card status

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		in the U.S. If the training is important, then it should be mandatory for all DHS officers.
Sec. 1114. **DHS Immigration Ombudsman—** [Mark-up Bill p.928]	Amends the Homeland Security Act (6 U.S.C. 272) to create a DHS immigration ombudsman. **NEW LANGUAGE: The original bill envisioned the existing subordinate agency (USCIS) ombudsman simply being moved into the Department. However, amendments embedded in the mark-up significantly expand the responsibilities and hierarchical position of the ombudsman (who will report to the Deputy Secretary).** **Among the expanded responsibilities: inspection of detention facilities; and reviewing, examining, and making recommendations regarding "the immigration and enforcement policies, strategies, and programs of U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services".**	**NEW LANGUAGE DISCUSSION: We are pleased that the amended responsibilities will now include a duty to assist individuals and families who have been the victims of crimes committed by aliens or violence near the border.** **However, we believe the bill has gone overboard by assigning functions to the Ombudsman far beyond an appropriate scope and intrudes on areas more appropriate for the Inspector General and the Offices of Professional Responsibility of each of the mentioned agencies.** **In fact, a whole new layer of bureaucracy is envisioned, as is obvious from subsection (c): "In addition to the functions specified in subsection (b), the Ombudsman shall—(1) *monitor the coverage and geographic allocation of local offices of the Ombudsman*, including appointing a local ombudsman for immigration related concerns…" (emphasis added)**
Sec. 1115. **Protection of Family Values**	**NEW LANGUAGE: Establishes multiple new requirements on apprehending**	**NEW LANGUAGE DISCUSSION: Some of the procedures (such as inquiring who else an alien**

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in Apprehension Programs— [Mark-up Bill p.931]	**agencies to: ascertain whether aliens arrested illegally crossing the border are parents or caregivers; and whether repatriation will raise safety issues for the crosser. It also requires determining the impact on children of caregiver arrestees before deciding to repatriate or prosecute the alien.** **Finally, it mandates initial and periodic training for agents and officers developed by a host of authorities including independent immigration, child welfare, family law, and human rights experts on "best practices and changes in relevant legal authorities, policies, and procedures pertaining to the preservation of a child's best interest, family unity, and other public interest factors."**	**might have been traveling with) are already in place, as a part of the common-sense approach arresting agents must take in confronting the daunting daily routine of patrolling a frequently rough, dangerous and untamed frontier.** **However, many of the requirements—such as determining the impact on children of arrestees before deciding to prosecute or repatriate—are onerous, unlikely to achieve the desired results, and will make border patrol responsibilities even more difficult than they already are. In reality, they seem designed more to impede the Border Patrol from removing aliens than to protect them from the risks they willingly took on to attempt an illegal entry.** **It seems to us that among the "public interest factors" that have gotten lost in this bill are those relating to the need to protect our borders, laws and sovereignty —precisely the things the bill's preamble claims that it will achieve.**
Sec. 1118. Prohibition on Land Border Crossing Fees— [Mark-up Bill p.937]	**NEW LANGUAGE: The Secretary shall not establish, collect, or otherwise impose a border crossing fee for pedestrians or passenger vehicles at land ports of entry along the Southern border or the Northern border, nor conduct any study relating to the imposition of such a fee.**	**NEW LANGUAGE DISCUSSION: A blanket prohibition seems to us imprudent, considering the enormous cost of maintaining the infrastructure and security of the land ports, which are used regularly by only a tiny fragment of the US population. We suggest that the language should have taken the form of reciprocity — leaving open at least the possibility of imposing crossing fees in response to fees imposed by our neighbors to the north or south.**

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(As reflected in the Committee mark-up version MDM13735)

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Sec. 1120. Rule of Construction— [Mark-up Bill p.941]	**NEW LANGUAGE: "Nothing in this Act may be construed to authorize the deployment, procurement, or construction of fencing *along the Northern border." (emphasis added)***	**NEW LANGUAGE DISCUSSION: The prohibition hidden beneath the innocuous title is curious. While conditions between the southern and northern borders are certainly different, there might in fact be northern border locales where a mutually-agreed-upon short physical barrier would serve both U.S. and Canadian security interests – for instance, in poorly patrolled remote areas *where human and contraband smuggling moves in both directions* – and might even be welcomed by Canadian officials , provided that the place, nature and extent of the fence was closely coordinated between the two nations. The point here is that a blanket prohibition seems anomalous and unnecessary.**
Sec. 1121. Limitations on Dangerous Deportation Practices.— [Mark-up Bill p.941]	**NEW LANGUAGE: The provision begins with a requirement that the Secretary certify to the Congress, every 180 days into perpetuity, that DHS "has only deported or otherwise removed a migrant from the United States through an entry or exit point on the Southern border during daylight hours."** **Exceptions may be made in select cases, when "the manner of the deportation or removal is in accordance with an applicable Local Arrangement for the Repatriation of Mexican Nationals entered into by the appropriate Mexican Consulate."**	**NEW LANGUAGE DISCUSSION: The provisions of this new section reveal an astounding lack of understanding about the border apprehension and removal system.** **(1) The reiterative certification is burdensome; the requirement is overbearing.** **(2) The obligation only to effect removals during daylight hours (with certain exceptions) is a classic example of Congressional micromanagement.** **(3)The Mexican Consulate exception cited is curious in that they permit a foreign government a power of veto in what is, essentially, a U.S. domestic law enforcement issue, and one of the most basic**

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	Another requirement imposed is that aliens must be repatriated to Mexico within the Border Patrol sector where they were arrested, unless they give their permission to do otherwise.	**exercises in American sovereignty: *the right to control our own borders.*** **(4) The requirement to repatriate an individual only in the Border Patrol Sector where apprehended will almost certainly lead to a rise in recidivism; repatriation to the interior is often the only way to dissuade aliens from attempting a second entry as quickly as they are removed, when the repatriation location is immediately proximate to their prior attempt. What is more, many of the aliens apprehended in any particular sector do not necessary originate from the corresponding area south of the border. Often, they have migrated northward, originating in southern Mexican states such as Chiapas and Oaxaca, which are among the poorest in that nation.**
TITLE II—IMMIGRANT VISAS		
Sec. 2101(a). Registered Provisional Immigrant [RPI] Status— *Reference to* **"Immigration and Nationality Act [INA] Sec. 245B(a)(3). Adjustment of Status of Eligible Entrants Before Dec. 31, 2011 to RPI"** [Mark-up Bill p.944]	Under the bill, a grant of RPI is predicated, among other things, on whether the applicant "(3) has paid the fee required under subsection (c)(10)(A) and the penalty required under subsection (c)(10)(C), if applicable."	Once the DHS Secretary promulgates fee-waiver regulations for indigence or other circumstances, the requirement that an alien remit his fees and penalties before receiving RPI status has little meaning.

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Sec. 2101(a). **RPI Status—** *Reference to* **"INA Sec. 245B(b)(2)(B).** **RPI Eligibility Requirements:** **Break in Physical Presence."** [Mark-up Bill p.945]	As proposed in the bill, INA Sec. 245B(b)(2)(B)(i) will state that, "*Except as provided in clause (ii),* an alien who is absent from the United States without authorization after the date of the enactment of this section does not meet the continuous physical presence requirement." (emphasis added)	A careful reading of the referenced exception clause (ii) indicates that "An alien who departed from the United States after December 31, 2011 will not be considered to have failed to maintain continuous presence in the United States if the alien's absences from the United States are brief, casual, and innocent *whether or not such absences were authorized by the Secretary*." (emphasis added) It is difficult to conceive of *any* absence from the United States which was not legally authorized, as being "brief, casual, and innocent." The juxtaposition of the two clauses stands logic on its head, because the only way an illegal alien could reenter the U.S. without permission is *illegally,* making him a repeat violator. What could possibly be brief, casual or innocent about such conduct? This is one of the many ways in which the bill subverts any culture shift away from disrespect, and toward one of compliance and respect for the nation's immigration laws.
Sec. 2101(a). **RPI Status—** *Reference to* **"INA Sec. 245B(b)(3)(A)(i)(I).** **RPI Eligibility Requirements:** **Grounds for Ineligibility:** **Felony Convictions."**	This section provides that an alien is ineligible for RPI status if he has been convicted of a felony in the convicting jurisdiction, "(other than a State or local offense for which an essential element was the alien's immigration status or a violation of this Act)…"	The parenthetical phrase is troubling. State and local police—particularly in southern border areas—are frequently first responders at smuggling safe houses, where the smuggled aliens are often held under extortionate and dangerous conditions. Consequently several States have criminalized alien smuggling, and some of the State laws use language taken from, or incorporate by reference, the relevant

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[Mark-up Bill p.946]		portion of the anti-smuggling provisions in the INA [section 274, 8 USC 1324]. The parenthetical phrase suggests that a State felony conviction for alien smuggling could not be used to deny RPI status to the smuggler himself, if he is an alien (as border smugglers often are) since such a conviction arguably devolves around "a violation of this Act."
Sec. 2101(a). Registered Provisional Immigrant [RPI] Status— *Reference to* **"INA Sec. 245B(b)(3)(A)(i)(III). RPI Eligibility Requirements: Grounds for Ineligibility: Misdemeanor Convictions."** [Mark-up Bill p.946]	An alien is ineligible for RPI status if he has been convicted of three or more misdemeanor offenses "(other than minor traffic offenses, or a State or local offense for which an essential element was the alien's immigration status or a violation of this Act)…… *if the alien was convicted on different dates for each of the 3 offenses*…" (emphasis added)	Issue #1: We question the wisdom of permitting aliens with fewer than 3 misdemeanor convictions to apply for RPI status. Such aliens may have a rap sheet as long as one's arm, but simply be either too lucky (or violent and intimidating toward witnesses) to have sustained convictions for anything but the most trivial of offenses. Or the misdemeanors may have reduced from serious felony offenses as part of a plea bargain process. This is often the case, for instance, with domestic violence charges that sometimes lead later to fatal consequences. Issue #2: The bill provides no definition of "minor traffic offenses". Does "minor" include DUI / DWI offenses in this context? How about illegal street-rodding, which endangers innocent pedestrians? Issue #3: Once again, the language excluding crimes for which an essential element was "a violation of this Act" [the INA] has been included. Once again, we reiterate our objections.

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		Issue #4: The phrase "convicted on different dates for each of the 3 offenses" is troubling. Was the intent to ensure that 3 misdemeanor convictions arising out of a single scheme of misconduct should be treated as one offense? If that was the intent, this language goes far beyond it. Consider: • Because of court backlogs, an alien is awaiting trial on a misdemeanor committed in June. In August, he is again arrested for a misdemeanor, and then a third time in September. Each time he posts bond. In the interest of judicial economy, all three trials are ultimately consolidated and held on the same day in December, and the alien is convicted of all three. Three different offenses; no single scheme; but all 3 convictions occurring on the same date. Under the language of this bill, such an alien is entitled to apply for RPI status.
Sec. 2101(a). **RPI Status—** *Reference to* **"INA Sec. 245B(b)(3)(A)(ii)(II).** **RPI Eligibility Requirements: Grounds for Ineligibility: Inadmissibility."** [Mark-up Bill p.947]	This section requires that an alien applying for RPI status cannot be inadmissible to the U.S. under INA section 212(a), *except* that, in determining an alien's inadmissibility— "(II) subparagraphs (A), (C), (D), (F), and (G) of section 212(a)(6) and paragraphs (9)(C) and (10)(B) of section 212(a) *shall not apply* unless based on the act of unlawfully entering the United States after the date of the enactment of [this] Act…" (emphasis	Translated into English, among the rather surprising grounds of inadmissibility / ineligibility forgiven of RPI applicants by this provision are the following— • aliens who have committed fraud and misrepresentations, including false claims to U.S. citizenship; • aliens civilly penalized for use of false documents; • alien students who have engaged in visa abuse; and • aliens who reentered the United States after having been deported.

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	added)	
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(b)(3)(A)(ii)(III). RPI Eligibility Requirements: Inadmissibility."** [Mark-up Bill p.948]	This section of the bill requires that an alien applying for RPI status cannot be inadmissible to the U.S. under [INA] section 212(a), *except* that in determining an alien's inadmissibility— "(III) paragraphs (6)(B) and (9)(A) of section 212(a) *shall not apply* unless the relevant conduct began on or after the date on which the alien files an application for registered provisional immigrant status…" (emphasis added)	This section of the bill forgives aliens who are inadmissible as— □ absconders who failed to appear for their duly ordered immigration judge hearings; and □ prior deportees (regardless of the underlying legal grounds that were the basis of the removal from the United States).
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(b)(3)(B)(i). RPI Eligibility Requirements…Waiver."** [Bill p.Mark-up Bill 949]	The bill provides that aliens legally in the U.S., including nonimmigrants, are ineligible to apply for status as RPIs. However, clause (b)(3)(B)(i) permits the DHS Secretary to waive such ineligibilities "for humanitarian purposes, to ensure family unity, or if such a waiver is otherwise in the public interest."	The key point to consider is the waiver of ineligibility when needed "to ensure family unity". One can, without a stretch, visualize a cottage industry of marriage fraud springing up, as otherwise-ineligible nonimmigrants seek out pliable RPI spouses in order to procure for themselves the ability to remain and work in the U.S. There is no reason to think that this won't happen—it already does with great regularity in other situations within our much-abused immigration system.
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(b)(3)(C). RPI Eligibility Requirements…Conviction**	This provision states that "For purposes of this paragraph, the term 'conviction' does not include a judgment that has been expunged, set aside, or the equivalent."	The provision is overly-broad. Consider the case of an alien who pleads *nolo contendere* (no contest) to serious criminal charges, or who serves probation for simple possession of narcotics, after which judgment is deemed to be "withheld." Under the language in this bill, it appears that such aliens would be entitled to file for RPI status.

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Explained." [Mark-up Bill p.950]		The language is a significant departure from present constructions of immigration law and regulation, which provide that, even in the event a legal judgment has been set aside, if the judgment serves as a conviction for *any* purpose under the law of the jurisdiction, then it is adequate to initiate deportation proceedings.
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(b)(4). RPI Eligibility Requirements…Applicability of Other Provisions."** [Mark-up Bill p.950]	This provision states that "Sections 208(d)(6) and 240B(d) [of the INA] shall not apply to any alien filing an application for registered provisional immigrant status under this section."	The language forgives aliens who have— □ previously filed frivolous asylum applications, or □ refused to leave after being granted by an immigration judge the privilege of departing voluntarily in lieu of being formally deported, and permits them to apply for RPI status. In our view, this continues to perpetuate the culture of disrespect for the rule of immigration law.
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(c)(2). RPI Application Procedures: Payment of Taxes."** [Mark-up Bill p.953]	"An alien may not file an application for [RPI] status under paragraph (1) unless the applicant has satisfied any applicable Federal tax liability [as] assessed in accordance with section 6203 of the Internal Revenue Code…an applicant may demonstrate compliance with this paragraph by submitting appropriate documentation, in accordance with regulations promulgated by the [DHS] Secretary, in consultation with the Secretary of the Treasury."	The language will mislead ordinary Americans into believing that alien applicants will end up paying back taxes. We don't believe that, since in the case of most aliens, the Internal Revenue Service [IRS] has never assessed their liability under § 6203—either because they received their wages under the table, paid no taxes and are not of record; or because they worked by means of identity theft, using someone else's name and social security number (SSN). What is more, this section contains *no* language waiving the statutory confidentiality of tax or social

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		security files, and thus provides no method of DHS and IRS, or the Social Security Administration, sharing information with the idea of unscrambling records relating to the alien applicant's use of phony names and stolen SSNs. Given this fact, and the massive volume of applicants anticipated, it is entirely likely that the DHS and Treasury Secretaries will simply write regulations forgiving past tax debts, and render no assessments against any individual alien except in notorious or exceptional circumstances.
Sec. 2101(a). **RPI Status—** *Reference to* **"INA Sec. 245B(c)(3).** **RPI Application Procedures:** **Application Period."** [Mark-up Bill p.954]	"(A) Except as provided subparagraph (B), the [DHS] Secretary may only accept applications for registered provisional immigrant status from aliens in the United States during the 1-year period; (B) If the Secretary determines, during the initial period described in subparagraph (A), that additional time is required…the Secretary may extend the period for accepting applications…for an additional 18 months."	These two provisions follow a pattern that is detectable throughout the bill—the first paragraph is filled with stern language that is eviscerated by the exceptions, waivers, and minutiae which follow in succeeding paragraphs. Can there be any doubt whatever that the Secretary will find it necessary to extend the application period another 18 months? We take it as a given. This bill is creating an amnesty that will likely endure for 2½ years (after which will likely come many further years of litigation and class action lawsuits at taxpayer expense).
Sec. 2101(a). **RPI Status—** *Reference to* **"INA Sec. 245B(c)(5).** **RPI Application Procedures:**	"If an alien who is apprehended during the period beginning on the date of the enactment of [this] Act and the end of the application period described in paragraph (3) appears prima facie eligible for [RPI] status… the Secretary… (B) *may not*	This language establishes no qualifiers about the circumstances under which an alien is apprehended. Imagine an alien being arrested in a region closely proximate to the physical southern land border, who nonetheless makes a verbal claim to being eligible for RPI status. Likely the apprehending officer, rather

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Aliens Apprehended Before or During the Application Period." [Mark-up Bill p.956]	*remove the individual until a final administrative determination is made on the application…"* (emphasis added)	than risk career difficulties or disciplinary action, will take the safer course and simply release him to apply, even though the officer may suspect that the application—if ever submitted—will in all likelihood be fraudulent. This provision perpetuates—in fact reinforces—the southern border's status as a turnstile and not a barrier.
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(c)(5)(A), (B),** *and* **(C). RPI Application Procedures: Aliens Apprehended Before or During the Application Period."** [Mark-up Bill p.956]	Subparagraph (A) begins by saying that an alien who departed from the United States while subject to an order of exclusion, deportation, or removal, or pursuant to an order of voluntary departure and who is outside of the [U.S.], or who has reentered the [U.S.] illegally after December 31, 2011 without receiving consent to reapply for admission "*shall not be eligible to file an application for [RPI] status*…" (emphasis added) But subsequent Subparagraphs (B) and (C) make clear that the prohibition in (A) is far from absolute— "(B) Waiver. *The [DHS] Secretary… may waive the application of subparagraph (A) on behalf of an alien*…."(emphasis added) "(C) Eligibility. Notwithstanding subsection (b)(2), section 241(a)(5), or a prior order of exclusion, deportation, or removal, *an*	This is another example of "tough" talk in one subparagraph, followed by giveaways in those that follow. Note also that the prohibition in subparagraph (A) is not consonant with earlier provisions of the bill* which made clear that— □ absences from the U.S. of 180 days or less, with or without the Secretary's consent, would not constitute a break of physical presence; and that □ illegal reentries, prior removals, and failures to depart were not grounds of inadmissibility which would bar filing applications for RPI status. *See "INA Sec. 245B(b)(2)(B)," and "INA Sec. 245B(b)(3)(A)(ii)(III)," and "INA Sec. 245B(b)(4)," discussed previously in this analysis.

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	alien described in subparagraph (B) who is otherwise eligible for [RPI] status may file an application for such status." (emphasis added)	
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(c)(5)(D), (E), (F)** *and* **(G). RPI Application Procedures: Crime Victims' Rights to Notice and Consultation; Crime Victims' Rights to Intervention; Confidentiality Protections for Crime Victims;** *and* **Reports.** [Mark-up Bill pp.958—962]	**NEW LANGUAGE: This series of subsections requires the Secretary to initiate contact with prosecuting authorities when an RPI applicant previously convicted of a crime seeks a waiver. The prosecutors may refer the Secretary to the victims of the crime, who are then granted substantive rights to provide their views on the propriety of granting the waiver, and of finding out if the waiver is granted. If the victim was also an alien, his or her own status is shielded during this process. The last subsection requires the Secretary to provide yearly reports concerning exercise of the waiver for criminals, and data surrounding victims' exercise of their rights.**	**NEW LANGUAGE DISCUSSION: These new provisions are an important step in the right direction in redressing the imbalance exhibited in the bill in favor of excusing crimes and serious administrative offenses while overlooking the rights of victims or the community at large. Regrettably, they do not, in the end, fully make up the difference. The bill is entirely too weighted toward grants of amnesty, whatever the authors choose to call it, and does not adequately protect American society.**
Sec. 2101(a). RPI Status— *Reference to*	RPIs may not be detained or removed from the U.S. unless… "(i)(I) such alien is, or has become, ineligible for [RPI] status [or] (II) the alien's [RPI] status has been revoked…"	This is a near guarantee of no action. Consider— □ First, once having been released from custody (as required by INA Sec. 245B(c)(5), discussed earlier) to pursue his claim, an alien will only appear for

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
"INA Sec. 245B(c)(7)(A). RPI Application Procedures: Suspension of Removal During Application Period: Protection from Detention Or Removal." [Mark-up Bill p.962]		interviews or other adjudicative activities as long as it is (literally) to his benefit. He will certainly not put his liberty in jeopardy by making himself available for apprehension, if denied. ☐ Second, we can imagine very few circumstances in which he will end up in detention or being removed, since <u>all</u> information derived from RPI applications is confidential and may not be used in expulsion proceedings, or even to locate the alien.
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(c)(7)(C)(i)(I). RPI Application Procedures: Suspension of Removal During Application Period: Treatment of Certain Aliens."** [Mark-up Bill p.965]	The language provides that if an alien who otherwise meets eligibility requirements, is present in the U.S. and has been ordered excluded, deported, or removed, or ordered to depart voluntarily, *"(I) notwithstanding such order or section 241(a)(5) [of the INA], the alien may apply for [RPI] status under this section*." (emphasis added)	The language is subtle but significant. In recent years, tens of thousands of aliens have absconded from proceedings rather than obey the lawful directives of immigration judges who order their deportation, or grant them, as a matter of discretion, voluntary departure in lieu of formal removal. (Some estimates put the number of alien fugitives who have absconded from proceedings as high as 400,000.) Under this provision, each and every one of these scofflaws, who have shown their contempt for the due process of law, will be entitled to file for RPI status.
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(c)(7)(D)(iii). RPI Application**	This provision states, "An employer *who knows that an alien employee is an applicant for [RPI] status or will apply for such status* once the application period commences is not in violation of section 274A(a)(2) if the employer continues to	The phrase "knows that an alien employee…will apply for such status" provides the employer a continuing defense against being penalized for hiring or continuing to employ an illegal alien *who may or may not be eligible to apply for RPI status, and who may or may not in fact file for the status.*

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Procedures… Continuing Employment." [Mark-up Bill p.967]	employ the alien pending the adjudication of the alien employee's application." (emphasis added)	This is because that language permits the employer to simply take an employee's word that he is eligible and intends to apply (how else could he "know" since the information is confidential and unavailable to him?). The provision as written *makes no reference to any official proof* (such as a receipt for filing), *and establishes no time limit in which the alien must present evidence that he has applied.* Thus the employer is most probably buying himself 2½ years of protection against sanctions, if one tallies the initial 12 month application period, *plus* a Secretary-authorized 18 month extension. There is no reason for this kind of wide-open language, which could instead provide a window of opportunity, after which the alien must provide the employer evidence that he has applied (in the form of an official DHS receipt). It could additionally require the alien to present to the employer his RPI document, within 30 or 60 days of receipt, if-and-when approved.
Sec. 2101(a). **[RPI Status—** *Reference to* **"INA Sec. 245B(c)(8)(C)(i). RPI Application Procedures…Security and Law Enforcement**	This provision requires the Secretary to collect from each alien applying for status…biometric, biographic, and other data appropriate— ''(I) to conduct national security and law enforcement clearances; and ''(II) to determine whether there are any national security or law enforcement	While such checks are of course a necessary prophylactic, they are also of limited utility, as the recent tragic events in Boston have once again shown. No one should fool themselves into believing background checks are a panacea against the unknown, or in the face of a statutory or adjudicative bias in favor of approvals.

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Clearances: Data Collection." [Mark-up Bill p.968]	factors that would render an alien ineligible for such status."	
Sec. 2101(a). [RPI Status— *Reference to* **"INA Sec. 245B(c)(8)(C)(ii)** *and* **(iii). RPI Application Procedures…Security and Law Enforcement Clearances: Additional Security Screening** *and* **Prerequisite."** [Mark-up Bill p.970]	**NEW LANGUAGE: This clause requires the Secretary to undertake additional screening procedures when "an alien or alien dependent spouse or child is or was a citizen or long-term resident of a region or country known to pose a threat, or that contains groups or organizations that pose a threat, to the national security of the United States" and that the screening "shall be completed before the alien may be granted registered provisional immigrant status."**	**NEW LANGUAGE DISCUSSION: We agree with the premise of this new provision, because the current administration and the first draft of the bill cancelled a similar program (NSEERS) which required the registration, and monitoring of entry and exit, of aliens who are nationals of designated countries that constitute a threat to the U.S.** **However, this bill forgives aliens who failed or refused to comply with the NSEERS program when it was a regulatory requirement— see Sec. 2104(d) on p. 1020 of the mark-up bill. With such a background, we wonder if the new clause will be taken seriously or that effective procedures will be put into place.**
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(c)(9)(B)(ii). RPI Application Procedures…Employment or Education Requirement."** [Mark-up Bill p.971]	This provision states that an alien who receives RPI is only entitled to a 6-year extension of RPI status *after* showing that he is able to "demonstrate average income or resources that are not less than 100 percent of the *Federal poverty level* throughout the [initial] period of admission as a Registered Provisional Immigrant." (emphases added)	We were quite surprised, when we logged onto the official website of the Department of Health and Human Services [http://aspe.hhs.gov/poverty/13poverty.cfm] to find the following advisory: *The poverty guidelines are sometimes loosely referred to as the 'federal poverty level' (FPL), but that phrase is ambiguous and should be avoided, especially in situations (e.g., legislative or administrative) where precision is important.*

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		It would appear that the bill's drafters did not consult with HHS about the ambiguity of the phrase "Federal poverty level", nor its lack of utility as a guideline—especially when crafting legislation.
Sec. 2101(a). **RPI Status—** *Reference to* **"INA Sec. 245B(c)(10)(A)(ii). RPI Application Procedures…Recovery of Costs."** [Mark-up Bill p.972]	"The processing fee…shall be set at a level that is sufficient to recover the full costs of processing the application, including any costs incurred to—" □ adjudicate applications, □ process biometrics, □ perform national security/criminal checks, □ prevent and investigate fraud, and □ administer fee processing and collection.	The language is a fig leaf. The federal government has *never* assessed fees adequate to recover all of the costs of administering any of its benefits processes. We suspect it will not and cannot now do so, without risk of putting the fees outside the reach of most potential applicants. For this reason, we believe that the fees assessed will never even closely approximate the full cost to American taxpayers—especially if DHS issues fee waiver regulations, as permitted by the bill, and as we expect they will for reasons discussed earlier.
Sec. 2101(a). **RPI Status—** *Reference to* **"INA Sec. 245B(c)(10)(A)(iii). RPI Application Procedures…Authority to Limit Fees."** [Mark-up Bill p.973]	The provisions of this clause state that the [DHS] Secretary, by regulation, may (I) *limit* the maximum processing fee payable under this subparagraph by a family…and (II) *exempt* defined classes of individuals, including DACA recipients, from payment of the fee authorized. (emphases added)	These follow-on clauses undo the strict language of the preceding clause, described above. Although the bill purports to require recovery of all costs expended in administering the RPI program, the fee limitations available to families or other designated classes ensure that recovery of costs will not and cannot possibly take place.
Sec. 2101(a). **RPI Status—**	Clause (i) of 245B(c)(10)(C) requires any RPI applicant, except designated	**NEW LANGUAGE DISCUSSION: The language has now been watered down so that not even half of**

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Reference to **"INA Sec. 245B(c)(10)(C)(i)** *and* **(ii). RPI Application Procedures…Penalty."** [Mark-up Bill p.973]	"childhood arrivals," to pay, in addition to the fees specified by regulation, a $1,000 penalty. **NEW LANGUAGE: Clause (ii) permits the entire penalty to be made in installments.** ***The original language of the bill specified that applicants needed to pay half of the penalty ($500) up front in order to obtain RPI status.*** **It is only should they seek an extension of an additional 6 years that aliens must make good on the penalty.**	**the penalty will be obtained upfront. We believe that many aliens will default entirely on their obligation, and thus obtain 6 years to reside and work legally in the U.S. while showing no intention to fulfill the penalty.** **We also believe that the bookkeeping required to track such installments will be so onerous and expensive to the government to maintain, especially if contracted-out to private entities, that more will be expended maintaining the program than it will bring into the Treasury, thus belying statements of the bill's authors that it is "stern but fair." It is neither stern, nor fair to American taxpayers.**
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(c)(13). RPI Application Procedures: DACA Recipients."** [Mark-up Bill p.976]	Provides that the Secretary may grant RPI status to aliens previously placed into administrative DACA ["Deferred Action Childhood Arrivals"] status pursuant to the DHS Secretary's June 15, 2012 memorandum *provided* that renewed national security and criminal history checks are performed "on behalf of the alien".	The provision places these individuals in the enviable position of receiving RPI status without need to undertake the full application process. Consequently it would appear that they are automatically exempt payment of fees and penalties. What is more, if they obtained DACA status by means of undetected fraud, this provision essentially grandfathers that fraud into a legally protected status without any opportunity for the government to reexamine the facts and circumstances surrounding the initial DACA request. (See, also, our analysis below, of Sec. 2103(a) of the bill, relating to the constitutionality of DACA.)

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Sec. 2101(a). RPI Status— *Reference to* **"INA Sec. 245B(d)(2)(A). Terms and Conditions of [RPI Status: Revocation: General."** [Mark-up Bill p.979]	In the original bill, this subsection provided that the Secretary may revoke the status of an RPI for only three reasons: □ no longer meets eligibility requirements; □ knowingly used RPI documents provided to him for a fraudulent or illegal purpose; □ extended absences which break the continuous physical presence requirements. **NEW LANGUAGE: A fourth reason has been added—an alien's RPI status may be revoked after being convicted for fraudulently claiming or receiving a Federal means-tested benefit.**	Issue #1: The legal bases for revocation are singularly limited. It would have been better by far had the bill *at least* added a clause to the following effect: "The [RPI] status of an alien shall be deemed automatically revoked in the event that the alien becomes the subject of a final order of removal, or is granted voluntary departure in lieu of removal from the United States pursuant to section 240B(d) for any violations of this Act occurring after grant of status." Issue #2: Curiously, there is no provision to revoke RPI status based on *withholding of material facts or uttering false statements*—use of fraudulent documents is the only overt basis for revocation in this regard. What is more, many LPRs have been known to sell their resident cards for fraudulent use by others, after which they apply for a replacement, claiming that the original was "lost." Clause (ii) should have contemplated this possibility with regard to RPIs as well, as follows— "(ii) knowingly used *or provided to others* documentation issued under this section for an unlawful or fraudulent purpose." (emphasis added for clarity) **NEW LANGUAGE DISCUSSION: We agree with the added proviso.**
Sec. 2101(a). RPI Status—	This subsection authorizes the Social Security Commissioner to assign a Social Security number and issue a card to each	Nothing in the subsection *requires* the Commissioner to arrange for the numbers and cards to be issued on a time-limited basis that is commensurate with the

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Reference to **"INA Sec. 245B(d)(5)(A). Assignment of Social Security Number: General."** [Mark-up Bill p.982]	alien granted RPI status.	timeframes for which RPI status is issued initially (6 years) or after extension (6 years). While it is entirely possible that the Commissioner will issue regulations to that effect, the bill should have made this a statutory requirement.
Sec. 2102(a). Adjustment Of Status Of RPIs— *Reference to* **"INA Sec. 245C(b)(1)(B). Adjustment of Status of RPIs…Continuous Physical Presence."** [Mark-up Bill p.985]	This provision requires the alien to establish that he was not continuously absent from the United States for more than 180 days in any calendar year during the period of admission as a registered provisional immigrant, unless the alien's absence was due to extenuating circumstances beyond the alien's control.	The provision specifies no aggregate of time spent outside the U.S., beyond which the alien will be deemed ineligible to seek adjustment. As written, such an alien could be outside of the U.S. for half of each year, and still be entitled to apply for adjustment to LPR status.
Sec. 2102(a). Adjustment Of Status Of RPIs— *Reference to* **"INA Sec. 245C(b)(3)(B)(ii)(V). Adjustment of Status of RPIs…Other Documents."** [Mark-up Bill p.989]	This provision permits the Secretary to accept ''(V) sworn affidavits from nonrelatives who have direct knowledge of the alien's work or education, that contain— ''(aa) the name, address, and telephone number of the affiant; ''(bb) the nature and duration of the relationship between the affiant and the alien; and ''(cc) other verification or information…"	Issue #1: The provision should have required that each affidavit overtly include a phrase, to be inserted just above the affiant's signature, to this effect: "This affidavit has been prepared, sworn to and subscribed by me, in a language I speak and understand, under penalty of perjury." Issue #2: As written, there is no prohibition to aliens who are seeking (or who have obtained) benefits under this bill from filing affidavits for one another—clearly this is an invitation to large-scale and egregious fraud and misrepresentation.
Sec. 2102(a).	Subclause (iii) contains the following	Issue #1: Given our fragile economy and the high

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Adjustment of Status of RPIs— *Reference to* **"INA Sec. 245C(b)(3)(E)(iii). Adjustment of Status of RPIs…Temporary Exceptions."** [Mark-up Bill p.992]	"temporary" exception to the requirement that RPIs applying for permanent residence have regular employment: "(iii) was unable to work due to circumstances outside the control of the alien."	unemployment rate, does this ambiguous language permit, as a valid excuse, assertions that the alien was unable to work because he *could not find* work? Isn't such an alien a likely public charge? And how does all of this reconcile with other portions of the bill stating that RPIs are ineligible for federal means-tested benefits? Issue #2: The term "temporary" is undefined. If an alien cannot find gainful employment for one year, is that temporary? How about 18 months? Two years?
Sec. 2102(a). Adjustment Of Status Of RPIs— *Reference to* **"INA Sec. 245C(b)(4) Adjustment of Status of RPIs: Security and Law Enforcement Clearances."** [Mark-up Bill p.996]	"The Secretary may not adjust the status of a registered provisional immigrant…until renewed national security and law enforcement clearances have been completed with respect to the registered provisional immigrant, *to the satisfaction of the Secretary*." (emphasis added)	The phrase in italics may be used by USCIS to justify—as it has done in the past—a regulation stating that if it has not received a response to a national security or law enforcement check in 90 days, it shall be deemed satisfactory and the adjustment should proceed.

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Sec. 2102(a). Adjustment Of Status Of RPIs— *Reference to* **"INA Secs. 245C(b)(5)(A), B). Adjustment of Status of RPIs… Processing Fees; Penalties."** [Mark-up Bill pp.996 — 998]	The language for the fees and penalties to be assessed to RPIs seeking resident alien status is substantially the same as the language for the fees and penalties assessed when they applied to become RPIs – that the fees and penalties must be sufficient to recover all costs.	We reiterate the very same concerns which we raised previously regarding the initial RPI applications—after the various waivers are written into the regulatory structure, any fees and penalties collected will almost certainly be inadequate to recover all costs of administering the benefit.
Sec. 2103(a). The Dream Act— *Reference to* **"INA Sec. 245D(a)** *and* **(b). Adjustment of Status for Certain Aliens Who Entered the United States as Children."** [Mark-up Bill p.1000]	Creates new provisions in the INA providing for adjustment to lawful resident alien status for childhood arrivals. The requirements are similar to those imposed on RPIs (biometrics, background checks, etc.); and the waivers of inadmissibility also very similar.	The weaknesses discussed above, in reference to the provisions for granting illegal aliens RPI status—forgiveness of serious grounds of inadmissibility; waiver of fees and penalties; inadequacy of background checks to ensure public safety; forgiveness of multiple criminal offenses, etc.—also exist in this section of the bill, so we will not repeat them here. *See our analyses above.*
Sec. 2103(a). The Dream Act— *Reference to* **"INA Sec. 245D(b)(2)(C). Adjustment of Status for Certain Aliens Who Entered the United States as Children: DACA Recipients."**	This portion of the bill permits the DHS Secretary to streamline applications for adjustment of status by childhood arrivals who were recipients of the administration's DACA initiative.	Many believe that the DACA initiative was an unlawful intrusion by the executive branch into the legislative powers granted Congress by the Constitution (see, e.g. the preliminary decision of Judge Reed O'Connor, dated April 23, 2013, in *Crane v. Napolitano*, No. 3-12-cv-03247-O, U.S. District for the Northern District of Texas (Dallas)). By specifically embedding DACA recipients into the

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
[Mark-up Bill p.1006]		bill—and in fact giving them preference—Congress is establishing a principle which may result in future incursions of the executive branch into "administrative lawmaking" when it cannot persuade the Congress to pass laws it wishes.
Sec. 2103(a). The Dream Act— *Reference to* **"INA Sec. 245D(d). Adjustment of Status for Certain Aliens Who Entered the United States as Children: Restoration of State Option to Determine Residency for Purposes of Higher Education."** [Mark-up Bill p.1007]	Succinctly states "(1) REPEAL.—Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1623) is repealed."	The dry language masks the purpose. The repealed provision states, "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident." Repeal of this statute gives a State the right to show preferential treatment to illegal aliens over U.S. citizens, by permitting the State to grant in-state tuition fees to those aliens, while out-of-state U.S. citizens would continue to pay higher fees.
Sec. 2103(a). The Dream Act— *Reference to* **"INA Sec. 245D(f). Adjustment of Status for Certain Aliens Who Entered the United States as**	**NEW LANGUAGE: "[A]liens granted registered provisional immigrant status and who initially entered the United States before reaching 16 years of age and aliens granted blue card status shall be eligible only for the following assistance under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.)…**	**NEW LANGUAGE DISCUSSION: The title is linguistic chicanery of the worst sort. The provision does nothing to "limit" federal student assistance; to the contrary, it <u>expands</u> federal student loan and subsidized work-study programs to "Dream Act" aliens who entered prior to their 16th birthday, as well as <u>all</u> Blue Card holders.**

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Children: Limitation on Federal Student Assistance." [Mark-up Bill p.1008]		**Once again, we find that the only thing exceptionally tough about this bill is the overblown rhetoric used by its supporters to characterize it. The facts are at egregious variance with the reality.**
Sec. 2104(a). Additional Requirements— *Reference to* **"INA Sec. 245E(a)(1)** *and* **(2). Additional Requirements Relating to RPIs and Others: Disclosures."** [Mark-up Bill p.1009]	This provision creates a new section of the INA establishing both prohibited [(a)(1)] and required [(a)(2)] disclosures with regard to the information furnished by aliens to the government on their application forms.	□ The prohibitions under subsection (a)(1) do not allow federal employees to use the information "for any purpose other than to make a determination on any application by the alien for any immigration benefit or protection." Because of the prohibition, if a U.S. Attorney declines to prosecute an alien who has committed a fraud or uttered a false statement on his application, *no administrative action may be taken to initiate removal proceedings based on the evidence.* The most that can be done is to deny the application, or terminate the benefit—apparently leaving the alien free to wander about the U.S. illegally. □ The "required" disclosures under subsection (a)(2) permit limited sharing of information to pursue criminal or national security investigations *provided they are not related to the applicant's immigration status*, thus closing the door to prosecution for frauds committed on the applications themselves.
Sec. 2104(a). Additional Requirements—	This provision permits audit of information from files "for purposes of identifying	The language of this provision is puzzling, given the prohibition discussed immediately above. It would

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Reference to **"INA Sec. 245E(a)(3). Additional Requirements Relating to RPIs and Others: Auditing and Evaluation of Information."** [Mark-up Bill p.1010]	immigration fraud or fraud schemes" and permits the information so obtained to be used for denying or terminating benefits, or in criminal prosecutions.	appear to permit use of the information that has been derived from applications, as part of an audit and evaluation process, in order to prosecute—but we are unable to discern exactly how the two seemingly contrary positions can be reasonably reconciled. Furthermore, what is clear is that audit information *may not be used by immigration enforcement agents to initiate removal proceedings,* once an application has been denied, or a benefit terminated based on the fraud. This prohibition paralyzes interior enforcement. What happens to these denied aliens? Do they remain free until serendipitously encountered at some indefinable future date by enforcement agents?
Sec. 2104(a). Additional Requirements— *Reference to* **"INA Sec. 245E(a)(3)(C)(2). Additional Requirements Relating to RPIs and Others: Administrative Appellate Review"** [Mark-up Bill p.1011]	Provides that there will be a single appellate procedure for administrative review of denials; authorizes the Secretary to designate or establish the administrative appellate authority responsible for the reviews.	The required review might be handled by the already existing (and overburdened) Administrative Appeals Unit of USCIS, or through creation of an as-yet-nonexistent new unit. Although only a single administrative appellate review is authorized, chances are strong that regulations will be written that permit "motions to reopen / reconsider." If so, such rules would honor the letter while vitiating the spirit of the bill. Note also that follow-on subparagraph 245E(a)(3)(E) provides that aliens may not be removed during the pendency of the administrative review process. [Bill

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		p. 124] Note, finally, that the single administrative review is not the end-of-the-line for appeals by the alien, insofar as federal courts are now being endowed with new powers of judicial review (see the analysis below) of agency denials.
Sec. 2104(b). Additional Requirements: Judicial Review— *Reference to* **"INA Sec. 242(a)** *and* **(b). Judicial Review of Orders of Removal."** *—and—* **"INA Sec. 242(h). Judicial Review of Eligibility Determinations Relating to Status Under Chapter 5."** [Mark-up Bill p.1015]	The bill expands judicial review of – □ orders for an alien's removal, and □ denial of benefits under any of the legalization and adjustment provisions established in this bill by permitting the filing of requests for review, not only in the federal circuit courts of appeal where such appeals have been previously directed by law, but also to the federal district courts—after which the circuit courts again become involved. The expansion is accomplished by— □ altering the language of now-existing INA Subsections 242(a)(2)(B) and (D); □ altering INA Subsection 242(b)(2); and □ creating a new, extremely lengthy and detailed INA Subsection242(h).	Issue #1: Expansion of judicial review into U.S. district courts for the millions who will apply is virtually guaranteed to glut the federal system at all levels. Issue #2: It will also grind immigration law enforcement to a standstill, because earlier parts of the bill specify that no alien may be detained or removed for the entire duration of the pendency of his application (including appeals of denial, or revocation or termination of status). Issue #3: The bill practically invites U.S. District courts to assume an unwarranted supervisory role over the administrative practices of the immigration agencies— □ New Subparagraph 242(h)(5)(A) gives the courts "jurisdiction over any cause or claim arising from *a pattern or practice* of the Secretary of Homeland Security in the operation or implementation of the [Act], or the amendments made by such Act…" (emphasis added) □ New Subparagraph (h)(5)(B) specifies that the courts "may order any appropriate relief in a

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		clause or claim described in subparagraph (A) *without regard to exhaustion, ripeness, or other standing requirements…"* (emphasis added) □ New Subsection 242(h)(5)(E) even asserts that alien plaintiffs *do not need to exhaust their administrative remedies before filing suit* in federal district court. Cumulatively, all of this is quite extraordinary—particularly the assertion that courts may entertain review before a matter has become ripe for consideration, or administrative review exhausted—and is a clear invitation to litigious-minded groups to sue the Secretary at every opportunity.
Sec. 2104(c): Rule of Construction— *Reference to* **"INA Sec. 244(h). Temporary Protected Status: Limitation on Consideration in the Senate of Legislation Adjusting Status."** [Bill p.1020]	"Section 244(h)* shall not limit the authority of the Secretary to adjust the status of an alien under section 245C or 245D of the [Act], as added by this subtitle." *Sec. 244(h) states: "Except as provided in paragraph (2) [requiring a 3/5 supermajority], *it shall not be in order in the Senate to consider any bill, resolution, or amendment that…provides for adjustment to lawful temporary or permanent resident alien status for any alien receiving temporary protected status* under this section, or…has the effect of amending this subsection or limiting the	Using the arcane title, "Rule of Construction", this provision eviscerates Section 244 of the INA *to permit adjustment of status to TPS aliens as a class,* whether or not this bill will pass by "supermajority" – which is, of course, doubtful in the extreme. Section 244 was controversial when passed and was achieved only after promises by its sponsors that it was solely intended for temporary humanitarian purposes, not as a gateway to permanent residence. That is the reason for the existence of Subsection 244(h), which is now being gutted. This provision should engender recognition that promises of strict immigration enforcement and careful limitations made in one bill, blow away with

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	application of this subsection." (emphasis added)	the wind in future bills.
Sec. 2104(d): Effect of Failure to Register on Eligibility for Immigration Benefits— *Reference to* **"8 CFR Sec. 264.1(f). Registration, fingerprinting, and photographing of certain nonimmigrants."** [Bill p.1020]	"Failure to comply with section 264.1(f) of title 8, Code of Federal Regulations or with removal orders or voluntary departure agreements based on such section for acts committed before the date of the enactment of this Act *shall not affect the eligibility of an alien to apply for a benefit* under the [INA]…." (emphasis added)	The effect of the provision is wide-reaching, in that it permits □ alien fugitives who have fled orders of deportation, and □ alien scofflaws who ignored grants of voluntary departure by immigration judges in lieu of deportation, to gain benefits under *any* provision of immigration law—not just the RPI and Dream Act statuses created by this bill. In so doing, the provision destroys a key principle of many years standing: that those who ignore due process of law must sacrifice any claim to immigration benefits. It is also important to understand that the aliens the provision addresses by its reference to this specific CFR, are *special interest aliens,* a category which came into being as a national security measure after the attacks of 9/11. (See prior discussion regarding new "Additional Security Screening" procedures for RPIs imposed by amendment during the bill's mark-up.)
Sec. 2105. Criminal Penalty— *Reference to* **"18 U.S.C. Sec. 1430.**	Creates a new Sec. 1430 in the federal criminal code (18 USC 1430) criminalizing "improper" use of information from files of RPI applicants, punishable by a $10,000 fine, although no periods of confinement	It is ironic that while this provision criminalizes releases of information from the applications of aliens seeking to legalize—clearly a provision aimed at government employees and contract personnel—the bill waives and excuses a whole host of frauds,

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Improper use of information relating to registered provisional immigrant applications." [Mark-up Bill p. 1021]	for violation are mentioned.	false statements, misrepresentations and other forms of illegal conduct on the part of those self-same applicants. To say this is lopsided is to sorely understate matters. The provision also seems impermissibly vague, in that it includes, without qualifiers, a penalty for publishing or permitting examination of information. Does it apply to journalists?
Sec. 2106. Grant Program to Assist Eligible Applicants— [Mark-up Bill p. 1022]	Authorizes the Secretary to establish grants to "eligible public or private nongovernmental organizations" in order to assist individuals in applying for RPI status.	Subsection (d) would divert $50 million from the Comprehensive Trust Fund to award NGO grants, which removes use of that money for enforcement purposes. The subsection *also* authorizes additional taxpayer-funded appropriations to be applied to these grants, once again raising doubts that the legalization provisions will be self-funding, or that the Trust Fund will be adequate for immigration law enforcement operations.
Sec. 2107(a). Conforming Amendments to the Social Security Act: Correction of Social Security Records— *Reference to* **"42 U.S.C. 408(E)(1). Penalties: Application of subsection (a)(6) and (7) to certain**	This provision forgives aliens who have committed identity theft, by using the social security numbers and accounts of citizens and lawful workers, while employed illegally in the U.S. The provision does so by modifying the criminal provisions contained in the Social Security Act, at 42 U.S.C. 408(e)(1), to excuse such violations.	The innocuously titled, "Correction Of Social Security Records" in fact provides relief from criminal penalties for RPI-applicant aliens who misused social security accounts and numbers through identity fraud, yet *provides no basis* for unscrambling the accounts or earnings of the citizens and lawful resident aliens who were victimized.

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
aliens." [Mark-up Bill p. 1025]		
Sec. 2107(b). Conforming Amendments to the Social Security Act: State Discretion Regarding Termination of Parental Rights— *Reference to* **"42 U.S.C. 675(5)(E). Definitions: Case Review System."** [Mark-up Bill p. 1026]	Amends the provisions of 42 U.S.C. 675(5)(E) [section 475(5)(E) of the Social Security Act] with regard to State actions to terminate the parental rights of aliens who have been deported from the United States.	The title, "State Discretion Regarding Termination of Parental Rights" is deceptive in that paragraph (b)(1) of this provision creates a statutory presumption *against* termination of a deported alien's parental rights, without specific regard to the grounds underlying the alien's removal, such as criminal or immoral behavior. In addition, paragraph (b)(2) of the amended provision establishes onerous and costly procedures that a State must follow before attempting to terminate a deported alien's parental rights—provisions that include required attempts to locate, and initiate contact with, the parent in the foreign country.
Sec. 2107(c)(1). Conforming Amendments to the Social Security Act: State Plan for Foster Care and Adoption Assistance— *Reference to* **"42 U.S.C. 671(a). State Plan For Foster Care And Adoption Assistance: Requisite features of State plan."**	Amends the provisions contained in 42 U.S.C. 671(a) [section 471(a) of the Social Security Act] to require States to give "preference to an adult relative over a nonrelated caregiver when determining a placement for a child" in adoption or foster care, regardless of the adult relative's immigration status. Also requires states to ensure that assigned case managers are either fluent in the language of child and caregivers, or	Issue #1: There may be circumstances where the adult relative, even if illegally in the U.S., is the best possible caregiver for the child. But it is not axiomatic, given the precarious existence of aliens who have no right to reside or work in the United States. This is especially true if we accept assertions by the bill's supporters that the new employment verification procedures will ensure that illegal aliens cannot work in the U.S. How could such aliens possibly provide an adequate level of care for a child? Issue #2: These provisions levy new, onerous and

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
[Mark-up Bill p. 1028]	that interpreters are hired and assigned to assist case managers. [Paragraph (c)(1)(D), bill p. 1029]. Additionally levies a requirement that States maintain privacy and confidentiality "by not disclosing such information to other government agencies or persons…"	costly requirements on States by mandating language fluency of case managers, and/or use of interpreters in situations such as those described in Issue #1 just above. Issue #3: By establishing confidentiality requirements on States which prevent them from sharing information with "other government agencies" (clearly an oblique reference to DHS immigration agencies), the bill contradicts existing federal law which forbids States from prohibiting sharing of information with federal immigration authorities—see 8 USC 1373.
Sec. 2211(a). Program For Earned Status Adjustment Of Agricultural Workers: Requirements For Blue Card Status— [Mark-up Bill p. 1043]	Section 2201 of the bill creates new provisions in which an alien may qualify for "blue card status" [earned status adjustment as agricultural workers] if he meets certain agricultural work history requirements. Sec. 2211 lays out the work requirements, in addition to other requirements which are fundamentally the same as those imposed on RPIs and childhood arrival recipients (biometrics, background checks, continuing employment, etc.). The waivers of inadmissibility also very similar, as are the fee and penalty provisions.	The weaknesses discussed earlier, in reference to the provisions for granting RPI and Dream Act status—forgiveness of serious grounds of inadmissibility; waivers of fees and penalties; inadequacy of background checks to ensure public safety; forgiveness of multiple criminal offenses, etc.—also exist in this section of the bill granting "Blue Card" status. See our prior analyses.
Sec. 2211(a).	2211(a)(1)(A) provides that an alien may	This is an inordinately short agricultural employment

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Blue Card Status: Requirements For Blue Card Status— [Mark-up Bill p. 1043]	qualify for "a blue card" if he has worked "not fewer than 575 hours or 100 work days during the 2-year period ending on December 31, 2012."	history to entitle one to obtain a blue card – for instance, 575 hours is less than 72 days of work, calculated on an 8-hour workday.* In other words, an alien would be entitled to a blue card *for having worked 72 days in agriculture, spread over the course of two years.* That's roughly one day of work for every 10 days. * Note, however, though that even the concept of an 8-hour workday has been vitiated in the bill. For purposes of granting a Blue Card, a work day *"means any day in which the individual is employed 5.75 or more hours in agricultural employment."* (emphasis added) See "Definitions," mark-up bill p. 1042.
Sec. 2211(d). Blue Card Status: Record of Employment— [Mark-up Bill p. 1062]	The bill requires agricultural employers to yearly provide alien employees a written record of their employment, with a copy to the Agriculture Secretary. There is a civil penalty of $500 against employers who fail to do so— although they may not be fined if the alien employee does not provide them proof of employment authorization.	Issue #1: It is not clear whether the Secretary of Agriculture or Secretary of Homeland Security is the penalty assessing authority. There is no indicator of how the penalty is assessed, or whether the employer has a right to appeal. Issue #2: There seems to be a catch-22 in the "fine limitation" provision in subparagraph 2211(d)(2)(B)— an employer is not required to pay the $500 fine if the alien does not show his employment authorization proof. But in that case, *the employer should not have hired or employed the alien in the first place, because without evidence of work authorization, he cannot legally hire the alien*. Thus the employer is in violation of the employer sanctions provisions under INA Sec. 274A, even as amended by

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		this bill.
Secs. 2211(f) *and* **(g). Blue Card Status: Limitation on Access to Information** *and* **Confidentiality of Information—**	~~The provisions in the bill limiting access to, and requiring confidentiality of, information are substantially the same as those articulated for RPI applicants, which are described above.~~ **AMENDED LANGUAGE: These provisions have been stricken from the mark-up version of the bill**	~~We disagree with the language of this confidentiality provision for the same reasons we did for the provision drafted for RPIs—see our analysis of Sec. 2104(a) of the bill earlier.~~ **AMENDED LANGUAGE DISCUSSION: We approve of the change.**
Sec. 2211(f). Blue Card Status: Penalties for False Statements in Applications— [Mark-up Bill p. 1073]	Subsection (f) *[which was subsection (h) in prior versions of the bill]* criminalizes false statements, fraudulent documents, withholding of material facts, and other similar acts, in connection with applications for blue card status, or subsequent adjustment of status to resident alien by blue card holders. Violators are subject to fines and 5 years imprisonment.	We wonder why there are no parallel provisions criminalizing false statements or fraudulent activities by applicants for RPI status or childhood arrivals.
Sec. 2211(g). Blue Card Status: Eligibility for Legal Services— [Mark-up Bill p. 1074]	This provision *[which was subsection (h) in prior versions of the bill]* authorizes recipients of federal funds under the Legal Services Corporation Act (42 U.S.C. 2996 et seq.) to provide legal assistance directly related to applications for blue card status under section 2211 or adjustment of status [to permanent residence] under the	Insofar as legal service corporations are recipients of federal monies, it would appear that taxpayers will share the burden of helping aliens prepare applications for benefits under the Blue Card provisions of the bill.

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	section.	
Sec. 2221. Blue Card Status: Correction of Social Security Records— *Reference to* **''42 U.S.C. 408(e)(1). Penalties."** [Mark-up Bill p. 1078]	This provision forgives aliens applying for blue cards, who have committed identity theft by using the social security numbers and accounts of others while working illegally in the U.S. It does so by modifying the criminal provisions contained in 42 U.S.C. 408(e)(1) [section 208(e)(1) of the Social Security Act] to ensure that they do not apply.	The provision is parallel to the Social Security identity theft forgiveness provision for RPI applicants; we register the same objections to this language as we did previously – see our prior analysis in that regard.
Sec. 2232. Establishment Of Nonimmigrant Agricultural Worker [NAW] Program— *Reference to* **"INA Sec. 218A (e)(4)(G)(iii)(I). NAW Program…Public Housing."** [Mark-up Bill p. 1109]	The new INA section 218A, created by Sec. 2232 of the bill, provides in pertinent part, "*If the employer arranges public housing for nonimmigrant agricultural workers through a State, county, or local government program* and such public housing units normally require payments from tenants, such payments shall be made by the employer directly to the landlord." (emphasis added)	We cannot imagine why indigent United States citizens or longtime resident aliens should have to compete with employers seeking to place nonimmigrant agricultural workers into public housing units—potentially without fee—particularly at a time of economic hardship and sequestration in which many state public assistance programs have been cut, and their federal grants and matching funds significantly reduced.
SEC. 2232. Establishment of NAW Program— *Reference to* **"INA Sec. 218A (g)(2)(B). NAW Program…Eligibility of**	The new INA section 218A provides that: "A nonimmigrant agricultural worker shall be considered to be lawfully admitted for permanent residence for purposes of establishing eligibility for legal services under the Legal Services Corporation Act… on matters relating to wages, housing,	Insofar as legal service corporations are recipients of federal monies, it would appear that taxpayers will share the burden of assisting nonimmigrant agricultural workers who contemplate, for instance, unionizing or filing suits against their employers for violation of the various health-and-welfare requirements embedded in this provision, or other

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
NAW for Certain Legal Assistance." [Mark-up Bill p. 1124]	transportation, and other employment rights."	protected legal activities. Since the provision exists to assist agricultural employers, why should they not be required to contribute to a fund set aside for this purpose instead?
SEC. 2232. Establishment of NAW Program— *Reference to* **"[INA] Sec. 218A (g)(2)(C)(i). NAW… Free Mediation Services."** [Mark-up Bill p. 1124]	Proposed new INA section 218A provides that: "The Federal Mediation and Conciliation Service shall be available to assist in resolving disputes arising under this section between nonimmigrant agricultural workers and designated agricultural employers *without charge to the parties*." (emphasis added)	Why should nonimmigrant agricultural workers and their employers be accorded access to this taxpayer-funded activity for free? Since the provision exists to assist agricultural employers, why should they not be required to contribute to a fund set aside for this purpose instead?
SEC. 2232. Establishment Of NAW Program— *Reference to* **"[INA] Sec. 218A (g)(3). NAW Program: Worker Protections and Dispute Resolution: Other Rights."** [Mark-up Bill p. 1127]	"Nonimmigrant agricultural workers shall be entitled to the rights granted to other classes of aliens under [INA] sections 242(h) and 245E."	The phrasing is oblique: the rights mentioned [in INA sections 242(h) and 245E] do not now exist; they would only come into existence with passage of the bill, and the rights accorded by those sections *significantly* expand aliens' access to the federal courts in order to contest denials of benefits and removals (see our analysis above). This proviso would extend those significant appellate and review rights to nonimmigrant agricultural "guest workers."
SEC. 2232. Establishment Of NAW Program. *Reference to*	This provision requires that "The Secretary shall monitor the movement of nonimmigrant agricultural workers through…the Employment Verification System described in section 274A(b); and	Neither of the two monitoring systems described in this provision presently exist, and creating them will be arduous, costly and time-consuming. The cost of establishing a "system modeled on SEVIS"

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
"[INA] Sec. 218A(j)(2). NAW Program…Monitoring Requirement." [Mark-up Bill p. 1139]	establish[ment of] an electronic monitoring system, which shall…be modeled on the Student and Exchange Visitor Information System (SEVIS) and the SEVIS II tracking system administered by U.S. Immigration and Customs Enforcement…"	is particularly troubling, since that system would be nonimmigrant agricultural worker-specific, whereas at least the electronic employment verification system would be universally applicable. The SEVIS-modeled system cannot simply be cloned and pressed into use for agricultural workers: the forms, inputs, and key data fields are significantly different, and this provision has no equivalent to Designated School Officials, who are critical to inputting data and maintaining the accuracy and timeliness of the SEVIS system. Tens of millions of dollars will be spent to develop any new agricultural worker-specific system.
Sec. 2243. Benefits Integrity Programs. *Reference to* **"[INA] Sec. 204(a)(10)(B)(ii). Petitioning Procedure: Work Authorization."** [Mark-up Bill p.1144]	**NEW LANGUAGE:** **Subsection (a) requires USCIS to conduct benefits integrity programs for virtually all of the immigrant-granting programs (RPI, Blue Card, Iraqi Crisis and Afghan Allies Protection), and a select few nonimmigrant-granting programs such as "U" visas, established or modified by the bill. Such programs consist of Benefit Fraud Assessments and Compliance Reviews.** **Subsection (b) establishes reporting requirements for the integrity programs. Subsection (c) permits use of any findings of fraud to be used against the individuals to deny or revoke benefits, or to refer to ICE for**	**NEW LANGUAGE DISCUSSION: The new section is extremely welcome as a partial balance to the multiplicity of benefits programs established by this bill, although in the main, we believe that most of the amendments added during mark-up have actually been even more injurious to the concepts of compliance or enforcement of federal immigration laws which were already so weak in the original bill.**

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	consideration of prosecution.	
Sec. 2313(a)(3). Relief for Orphans, Widows, and Widowers: Eligibility for Parole. [Mark-up Bill p.1229]	Paragraph (3) states "If an alien described in section 204(l) of the [INA]…was excluded, deported, removed, or departed voluntarily before the date of the enactment of this Act…such alien shall be eligible for parole into the United States pursuant to the Secretary's discretionary authority."	Compare this parole authority with that contained in prior paragraph (2) on p. 1228 of the bill, which limits the eligibility for parole *only* to those aliens who were removed *based solely upon the alien's lack of classification as an immediate relative.* Because paragraph (3) does not mirror the language of prior paragraph (2), an alien who was removed for substantive grounds *having nothing to do with lack of classification as a relative* could still apply for parole and subsequent adjustment.
Sec. 2313(b)(2)(B). Relief for Orphans, Widows, and Widowers: Inapplicability of Bars to Entry [Mark-up Bill p. 1231]	The provision states that "Notwithstanding section 212(a)(9) of the [INA]… an alien's application for an immigrant visa shall be considered if the alien was excluded, deported, removed, or departed voluntarily before the date of the enactment of this Act."	See our analysis immediately above. This "inapplicability of bars to entry" (due to prior exclusions, deportations or voluntary departures) is similarly open-ended, and creates no delimiters based on the *reasons* that the alien was previously removed. We do not believe that a blanket forgiveness of prior removals is in the best interest of society or public safety. Such removals might well have been based on criminal behavior; repeated illegal (and felonious) reentries; or commission of any number and types of fraud.
Sec. 2314(a). Discretionary Authority With Respect to Removal, Deportation or Inadmissibility of Citizen	Amends INA Sec. 240(c)(4) by adding a new paragraph (D), "[T]he immigration judge may exercise discretion to decline to order the alien removed, deported or excluded from the United States and terminate	Issue #1: We cannot discern how excludable or deportable aliens could be "prima facie eligible for naturalization," whether or not an immigration judge grants them relief (which isn't the same as ruling they were not inadmissible/removable).

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
and Resident Immediate Family Members: Applications for Relief from Removal— *Reference to* **"[INA Sec. 240(c)(4)(D). Judicial Discretion."** [Mark-up Bill p. 1233]	proceedings if the judge determines that such removal, deportation, or exclusion is against the public interest or would result in *hardship* to the alien's United States citizen or lawful permanent resident parent, spouse, or child, or the judge determines the alien is prima facie eligible for naturalization…" (emphasis added) This paragraph also goes on to specify that the judge *may not use discretion to decline to remove, deport, exclude aliens* who are inadmissible for certain specific reasons under Section 212(a) of the INA*, but permits the exercise of discretion to waive a number of significant grounds of inadmissibility in order to provide relief from expulsion.* (emphasis added)	Issue #2: The immigration judge is authorized to exercise discretion to refuse to remove, deport or exclude aliens who are inadmissible for a host of serious offenses, including— □ fraud and false claims to U.S. citizenship, □ alien smuggling, □ coming to the U.S. to engage in commercial vice, □ having been previously removed or excluded from the United States, and □ aliens permanently ineligible for citizenship. Past standards for grants of relief required a finding of *extreme* hardship—note that the key word "extreme" is absent from this provision. The omission, plus the substantial expansion of discretionary authority (solely to grant relief) will result in a significant number of undesirable aliens being permitted to remain in the U.S.
Sec. 2314(b). Discretionary Authority…Secretary's Discretion— *Reference to* **"INA Sec. 212(w). Secretary's Discretion."** [Mark-up Bill p.1234]	Amends INA Sec. 212 by adding a new subsection (w), which authorizes the DHS Secretary to exercise discretion commensurate with that given to immigration judges as described immediately above: to waive the same grounds of inadmissibility in cases which would result in hardship to the alien's United States citizen or permanent resident parent, spouse, or child.	Once again, the key word "extreme" has been deleted from the hardship requirement. The exercise of discretion granted to the Secretary by this section is unacceptably broad, in that it permits waiver of too many significant grounds of inadmissibility and will result in a significant number of undesirable aliens being permitted to remain in the U.S. (See our analysis immediately above.)

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Sec. 2314(c). Discretionary Authority…Reinstatement Of Removal Orders— *Reference to* **"INA Sec. 241(a)(5). Detention and Removal of Aliens Ordered Removed: Reinstatement of removal orders against aliens illegally reentering."** [Mark-up Bill p.1235]	Amends INA Sec. 241(a)(5) by modifying existing language, which permits federal officers to reinstate prior orders of removal when aliens are apprehended back in the U.S. after reentering illegally. The new language would now prohibit reinstatements if the alien reentered "prior to attaining the age of 18 years, or reinstatement of the prior order of removal would not be in the public interest or would result in hardship to the alien's United States citizen or permanent resident parent, spouse, or child."	Although entitled "Reinstatement of Removal Orders" in point of fact, the first proposed amendment *precludes* reinstatement orders for aliens who reenter the U.S. illegally before their 18th birthday (present law cuts off the age at 16). The provision is ill-considered as written, because it would apply as equally to alien youths charged as adults by the justice system and convicted of serious crimes, as to alien youths who were previously removed for less significant, administrative reasons. [For better, more nuanced language, look at subparagraph (2) under "(e) Affirmative Defenses" on bill p. 1555.] The second modification again eliminates the "extreme hardship" standard, referring instead simply to hardship. We also believe this modification will result in abuse by encouraging 11th hour marriage frauds, since an alien who marries a citizen or resident after illegally reentering the U.S. will then be in a position to solicit relief. The provision's amendments will also adversely affect felony prosecutions for reentry after deportation, because other portions of the bill prevent U.S. Attorney's Offices from prosecuting aliens who have reentered as long as there is a pending application for relief. This in turn will contribute to the "revolving turnstile" border the bill purports to end. [It is significant in this regard to note that more than 25% of ICE interior apprehensions in recent years have been of previously deported aliens.]

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Sec. 2315(b) Waivers of Inadmissibility: Aliens Unlawfully Present— *Reference to* **"INA Sec. 212(a)(9)(B)(v). Aliens Unlawfully Present: Waivers."** [Mark-up Bill p.1236]	Amends INA 212(a)(9)(B)(v) which presently permits waiver of the "unlawfully present" ground of inadmissibility for an "immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence [if] the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent (emphasis added).	The new language expands the waiver grounds, by permitting the unlawfully present *parent* of a U.S. citizen or resident alien to also seek a waiver—even though there is no requirement to establish that the parent provided financial support, or was ever actively involved in rearing the child. The new language also eliminates the word *extreme* in favor, simply, of hardship. In practical effect, without this key modifier, any hardship, no matter how trivial, may be used as a basis to request relief. Is not deportation itself a "hardship" on the family? Using this standard, virtually any alien would be entitled to remain.
Secs. 2315(d)(1) *and* **(2). False Claims: Inadmissibility** *and* **Deportability—** *Reference to* **"INA Sec. 212(a)(6)(C)(i). Misrepresentation."** *and* **"INA Sec. 212(a)(6)(C)(ii). Falsely Claiming Citizenship."** *and* **"INA Sec. 212(a)(6)(C)(iii). Waiver."** *and*	Subsection (d)(1) amends INA 212(a)(6)(C)(i), which renders inadmissible an alien who, "by fraud or willfully misrepresenting a material fact, seeks to procure (or within the past 3 years has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act…" Subsection (d)(1) also amends the grounds of inadmissibility for falsely claiming U.S. citizenship under INA 212(a)(6)(C)(ii). In addition, Subsection (d)(1) creates a new	The amendment to clause (i) would limit the inadmissibility *solely to misrepresentations made in the last 3 years;* this is a singular narrowing of scope over existing law for which we cannot find any reasonable justification. The clause (ii) amendment would vitiate applicability of false claims to citizenship against any alien under the age of 18, without regard to the facts and circumstances surrounding the false claim or its maker. The waiver authority established by clause (iii) is entirely new—presently there is no waiver for false claims to U.S. citizenship—although it is limited to

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
"INA Sec. 237(a)(3)(D). Falsely Claiming Citizenship." [Bill p.1237-1240]	clause (iii) which establishes a waiver for grounds of inadmissibility under both clause (i) and (ii). Finally, Subsection (d)(2) amends the deportation provision of the INA at §237(a)(3)(D), so that it adopts the same new circumscribed definition, and narrowed applicability, of false claims to U.S. citizenship previously applied to the inadmissibility provision.	cases where the inadmissibility would cause extreme hardship to a citizen or LPR spouse, parent, son or daughter. However, it provides that the waiver may be granted *without regard to whether the alien is inside or outside of the United States*. (emphasis added)
Sec. 2316. Continuous Presence— *Reference to* **"INA Sec. 240A(d)(1). Termination Of Continuous Period."** [Bill p. 1240]	**CHANGED LANGUAGE: The proposed provision alters the date at which "continuous presence" ceases to accrue, changing it *from* the date the alien is served with charging papers in deportation proceedings, *to* the date the immigration court receives and files them. The language differs from the original bill, in that it at least now carves out an exception to the more liberal time construction, so that it does not apply to cancellation of removal cases.** **A second provision in the original bill has been stricken (see discussion in the column to the right).**	**CHANGED LANGUAGE DISCUSSION: Continuous presence is highly significant, in that it permits an alien to accrue time needed in order to apply for cancellation of removal under the law.** **The provision as now proposed in the mark-up bill acts in the alien's favor, because additional weeks—perhaps months—of continuous presence are permitted to accrue, despite the fact that he has at that point been charged with violating the law. It is a small victory, but at least under the changed language, aliens seeking cancellation of removal will not benefit from the additional time.** **The second (now stricken) provision had proposed to eliminate an important clause now existing in the law, which terminates accrual of continuous presence: "(B) when the alien has committed an offense that renders the alien inadmissible to …or**

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		removable from…the United States, whichever is earliest." We are pleased that this unwise amendment was stricken.
Sec. 2318. Extension and Improvement of The Iraqi Special Immigrant Visa Program— *Reference to* **"8 U.S.C. 1157 note, at Sec. 1244. Special Immigrant Status for Certain Iraqis."** [Mark-up Bill pp. 1248-1254] *--and—* **Sec. 2319. Extension and Improvement of the Afghan Special Immigrant Visa Program.** *Reference to* **"8 U.S.C. 1101 note, at Sec. 602(b). Special Immigrant Status for Certain Afghans."**	8 USC 1157 note, Section 1244 presently permits Iraqis (and their family members, including siblings of any age) who were or are "*employed by or on behalf of the United States Government* in Iraq, on or after March 20, 2003, for not less than one year [and who] provided faithful and valuable service" to apply for special immigrant status. (emphasis added) Similarly, 8 USC 1101 note, Section 602(b) permits Afghans (and their family members, including siblings of any age) who were or are "employed *by or on behalf of the United States Government in Afghanistan* on or after October 7, 2001, for not less than one year [and who] provided faithful and valuable service" to apply for special immigrant status. (emphasis added)	The proposed amendments would expand the pool of Iraqis and Afghans eligible for special immigrant visas *beyond* those who were employed by or on behalf of the U.S., to include Iraqis and Afghans employed by NGOs or the media, or "an organization or entity closely associated with the United States…" We are concerned by the potentially serious and adverse national security consequences of this expansion, and are uncertain why Iraqis or Afghans employed by NGOs or the media should be entitled to such extraordinary benefits—why should they receive treatment equal to that of Afghans or Iraqis who faithfully served our military and civilian government officials? Existing law already provides that individuals who worked for NGOs or media are entitled to priority processing for refugee status. This amendment may set new standards of expectation for other troubling and dangerous parts of the world.

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
[Mark-up Bill pp. 1255-1262]		
	TITLE III—INTERIOR ENFORCEMENT	
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A Unlawful Employment of Unauthorized Aliens."** [Mark-up Bill p. 1301]	The bill amends, by re-writing, virtually all of the provisions of Sec. 274A, commonly referred to as the "employer sanctions" provisions of the law.	The re-write of INA Section 274A appears to have been cobbled together. For instance, the definitions—which are critical to understanding the import of the section, and which in most statutes appear as the first subsection—are embedded several pages into the relevant provisions of this section. The result is confusion and misunderstanding, with a considerable amount of flipping back and forth to comprehend the meaning of the opening provisions.
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(b)(3). Unlawful Employment of Aliens: Definitions: Employer."** [Mark-up Bill p. 1307]	This provision limits the definition of employer someone who "hires, employs, recruits, or refers for a fee an individual for employment in the United States *that is not casual, sporadic, irregular, or intermittent* (as defined by the Secretary)."	Use of the phrase in italics widely opens the door to abuse by notorious employers and middle-men who hire unauthorized day laborers that congregate around convenience stores, street corners and other informal but notorious locations. They can easily argue that they do not meet the definition of employer and are not subject to sanction, since the individuals they hire or obtain for fee are working sporadically, irregularly and intermittently.
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec.**	As a part of the document verification regimen to ensure that only authorized workers are employed, employers must review specified documents that either confirm both identity and work authorization or, alternatively, one	Real ID Act-compliant documents should be limited solely to identity verification purposes. They are not appropriate to verify work authorization status, because Sec. 202 of the Real ID Act permits States to issue them to a variety of nonimmigrants

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
274A(c)(1)(C)(iii)(I). Unlawful Employment of Aliens: Document Verification System: Employer: Documents Establishing Identity and Employment Authorized Status." [Mark-up Bill p. 1313]	document that proves identity and another that proves work authorization. The lists containing these documents are enumerated within the bill. Subclause 274A(c)(1)(C)(iii)(I) places into the list of documents that verify both identity and work authorization, "An enhanced driver's license or identification card issued to a national of the United States by a State or a federally recognized Indian tribe that…meets the requirements under section 202 of the REAL ID Act of 2005."	and other aliens whose work authorization is either time-limited or circumscribed to particular circumstances: circumstances which will not be evident on a driver's license usually facially valid for 5–10 years, depending on the State. Consequently, employers will be relying on facially valid documents that do not necessarily accurately reflect the limitations on an alien's actual employment authorization.
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(c)(1)(D)(ii). Unlawful Employment of Aliens: Document Verification System: Employer: Documents Establishing Identity."** [Mark-up Bill p. 1315]	Clause 274A(c)(1)(D)(ii) would place voter registration cards into the list of documents acceptable to verify identity.	It is unlikely that voter registration cards can adequately verify identity since few, if any, contain evidence that they relate to the person presenting them. They have no security features, no photographs or other biometrics, no biographic data and, sometimes, not even a signature. By way of comparison, look at the requirements for (non-Real ID Act compliant) driver's licenses contained in clause 274A(c)(1)(D)(i) of this bill, which are listed just before the voter's registration card on the list: they are acceptable only when they reflect a variety of substantive identity verifiers.
Sec. 3101(a). Unlawful Employment of	Subparagraph 274A(c)(1)(F) provides that, for certain documents, in addition to the	The mechanisms described by clause (iii) and (iv) *do not exist*; the bill requires them to be created by the

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Unauthorized Aliens— *Reference to* **"INA Sec. 274A(c)(1)(F). Unlawful Employment of Aliens: Document Verification System: Identity Authentication Mechanism.** [Mark-up Bill p. 1317]	verification procedures for identity, employers must use either an "identity authentication mechanism *described in clause (iii) or provided in clause (iv)* after it becomes available to verify the identity of each individual the employer seeks to hire."	Secretary. The electronic and technical development of these tools will be time-consuming and expensive, but the bill provides no guidance about where the funds will be obtained to create them, nor does it contemplate timeframes for their completion.
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(c)(4). Unlawful Employment of Aliens: Copying of Documentation and Recordkeeping."** [Mark-up Bill p. 1324]	Paragraph 274A(c)(4) provides that the Secretary may promulgate regulations specifying conditions under which employers may photocopy the identity and work authorization documents presented by employees as a part of the verification process.	Existing statute makes clear that employers have that right, without reference to the regulatory process: "Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection. " We believe the existing language better protects the integrity of the verification process *and* provides employers with better protection as well.
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(c)(7). Unlawful Employment of**	Paragraph 274A(c)(4) provides that an applicant may present a receipt for a lost or stolen document required to verify employment, "on a temporary basis not to exceed 1 year, after which time the individual shall provide documentation sufficient to satisfy the documentation	Issue #1: Permitting an individual to work for a full year before having to provide an acceptable document is excessive. Existing regulations limit the use of receipts to 90 days. The bill should mirror such prudence, since the ostensible purpose of the bill is to eliminate the magnet of unauthorized employment and dissuade aliens from entering the

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Aliens: Receipts." [Mark-up Bill p. 1325]	requirements under this subsection."	U.S. illegally to seek jobs. Issue #2: The provision does not require that the document finally provided relates to the receipt initially presented. This opens the door to abuse by unauthorized aliens, who could present a false receipt (because even legitimate receipts have few if any security features) for one kind of document, while buying time to procure legitimate documents of another sort, quite possibly by fraud.
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(d). Employment Verification System."** [Mark-up Bill p. 1325]	This provision of the bill requires the Secretary, in consultation with the Social Security Commissioner, to "establish the Employment Verification System".	In addition to the many specific concerns expressed in our analyses above and below, here are our concerns: Issue #1: As can be seen later in this analysis, the bill eliminates the existing E-Verify system, in favor of a new system that does not exist. The bill's authors do not explain what, if anything, will fill the gap (likely many years in the making) between elimination of the one, and commencement of the other. Issue #2: Creating a new a replacement will be onerous, time-consuming and expensive, and, if past information technology and systems development history at DHS is any gauge, it will require several iterations before becoming fully functional.
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens—	This paragraph requires that the DHS Secretary "…create processes to provide an individual with direct access to the	An exception should be carved out of this requirement to exempt revealing law enforcement, national security or intelligence queries against the

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Reference to **"INA Sec. 274A(d)(1)(C). Employment Verification System: Monitoring: Procedures."** [Mark-up Bill p. 1326]	individual's case history in the System, including…the identities of all persons or entities that have queried the individual through the System…"	system, when doing so would be prejudicial to the ongoing inquiry or investigation should the subject become aware of the interest. Note, however, that this is not contemplated because, in language found later in this section of the bill, it is clear that *law enforcement, national security or intelligence officers are not permitted to view the information*. This is a mistake. Compare, by way of example, the required disclosures to enforcement and intelligence agencies under the bill's proposed INA Sec. 245E(a)(2), discussed earlier in our analysis. (See, also, our related observations regarding the prohibition laid out by proposed INA Sec. 274A(d)(9) in the analysis below.)
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(d)(2)(F). Employment Verification System: Agricultural Employment."** [Mark-up Bill p. 1330]	This subparagraph specifies that employers of agricultural workers need not participate In the electronic verification system until 4 years after enactment of the Legal Workforce Act.	Four years is an inordinately long delay in establishing verification rigor in an employment sector historically known to hire aliens who have no work authorization. We also note that the agricultural industry is being provided the opportunity to avail itself of a host of workers under the NAW and INA 218A programs. Is it not in the government's interest, then, to initiate electronic verification quickly, so as to determine the effectiveness of these programs in ensuring an adequate supply of *lawful* workers in the agricultural sector?
Sec. 3101(a). Unlawful Employment of	**CHANGED LANGUAGE: As originally written, this clause required participating**	**CHANGED LANGUAGE DISCUSSION: We approve of this change. In response to the confused (and**

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Unauthorized Aliens— *Reference to* **"INA Sec. 274A(d)(4)(A)(v)(II). Employment Verification System: Procedures for Participants In The System."** [Mark-up Bill p. 1335]	**employers to obtain, and record in the system, identification or authorization numbers as specified by the Secretary "if the individual does not attest to United States citizenship *or noncitizen nationality*." (emphasis added) The phrase in italics was confusing and has been clarified to say "if the individual does not attest to United States citizenship or status as a United States national." (See the discussion in the column on the right).**	**confusing) language, we observed in our prior "Key Section Analysis" that if the intent was to include those individuals who are United States nationals, then it should simply have said, "if the individual does not attest to United States citizenship or United States nationality."**
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(d)(4)(C)(iii)(II). Employment Verification System: Confirmation or Nonconfirmation: Contest."** [Mark-up Bill p.1342]	**CHANGED LANGUAGE: As originally written, this subclause permitted an individual to contest findings of the verification system—not only if the system responds that he is ineligible for employment, but also if it produces a "notification of further action" when the findings are inconclusive—*through personal interview and document verification by a federal officer*.** **The language now provides that the personal interview shall only occur if deemed necessary by the Secretary, and further provides that the Secretary shall establish alternative secondary verification procedures for individuals who contest a finding they are not work**	**CHANGED LANGUAGE DISCUSSION: In our prior Key Section Analysis, we observed that, given the immense volume of aliens who will likely receive work authorization under the various provisions of the bill, and the lag times involved in system updates, requiring a mandatory interview at the request of the employee posed a real potential to bog federal immigration offices down in so many "secondary verification interviews" that they will be unable to accomplish little of their primary mission tasks.** **We additionally observed that one way to confirm inconclusive results was already provided later in the bill (see "(I) Self-Verification" on bill p. 1355). It would appear based on the changed language that our concern was recognized.**

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	authorized, or for whom the response is inconclusive.	**However, there is still an unresolved issue: During the entire time an individual is awaiting resolution by secondary verification methods (which may be exceedingly lengthy if backlogs build up), an employer *mus*t retain the individual on the payroll. This encourages unauthorized individuals to game the system, and is unwieldy for employers who will find themselves continually checking to "find out the latest" lest they fall afoul of the law, since there does not appear to be a methodology by which the employer is automatically notified of the final resolution.**
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(d)(4)(D)(iv). Employment Verification System: Procedures for Participation in the System: Weekly Report."** [Mark-up Bill p.1348]	**NEW LANGUAGE: Requires the Director of USCIS to forward, on a weekly basis, a report to the Assistant Secretary (Director) of ICE, with detailed information relating to all "nonconfirmations" derived from the system for that timeframe.**	**NEW LANGUAGE DISCUSSION: Such a report could be invaluable to ICE workplace enforcement efforts…but that presumes that ICE has either the desire or the will to undertake such efforts. We are not heartened in that regard, given the many strictures that the present director of ICE has imposed on agents and officers. Under this administration, workplace enforcement is primarily a paper exercise and doesn't actually result in the physical apprehension of illegal aliens. If that remains the case, then the information contained in the weekly reports will likely lay fallow.**
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens—	Subclause (d)(4)(C)(iii)(VI): An employer *may not terminate employment or take any other adverse action* against an individual solely because of a failure of the	During the entire pendency of the administrative appeal to agency authorities provided by paragraph (6), or the administrative law judge provided by paragraph (7), an employer cannot terminate the

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Reference to **"INA Sec. 274A(d)(4)(C)(iii)(VI). Employment Verification System: Employee Protections."** [Mark-up Bill p. 1344] *—and—* **"INA Sec. 274A(d)(6). Administrative Appeal."** [Mark-up Bill p. 1356] *—and—* **"INA Sec. 274A(d)(7). Review by Administrative Law Judge ."** [Mark-up Bill p. 1358] *—and—* **"INA Sec. 274A(d)(7)(G). Appeal [by Federal Circuit Court] ."** [Mark-up Bill p. 1363]	individual to have identity and employment eligibility confirmed…until "a nonconfirmation has been issued" or the appeal time has tolled, or the appeal before an administrative law judge is final and adverse. Subparagraph (d)(6): if as the result of the federal officer interview authorized by section 274A(d)(4)(C)(iii)(II) described above, the system thereafter issues a notice that the individual is not authorized to work (a "nonconfirmation" notice), he may file an appeal of the notice. This results in an automatic stay of the notice during the pendency of the appeal to the administrative authorities at USCIS, or SSA, as appropriate. Subparagraph (d)(7), if the administrative appeal is unfavorable to the individual, he may then appeal that decision to a corps of administrative law judges (AlJs), who will conduct hearings under a host of conditions and stipulations provided by the bill. And again, during the pendency of the appeal to an ALJ, unless the judge finds the appeal to be frivolous, the appeal generates an automatic stay of an action to terminate employment. And, finally, if the individual is dissatisfied	individual's employment without risking penalties, including attorney's fees or other costs. We understand the important of preserving individual rights in an important area such as the right to work, but sheer volume can paralyze a system, in which case the whole purpose behind the system, in this case eliminating the magnet of unauthorized employment, falls apart. A system such as the one presented by the bill—which is so tilted toward repetitive appeals for workers, and filled with complex, burdensome and expensive requirements for employers—is virtually guaranteed to fail by falling under its own weight. It will likely cure nothing.

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	with the decision of the ALJ, subparagraph (7)(G) authorizes him to file an appeal of that decision to the federal circuit court of appeals.	
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(d)(8)(C)(iii)(III). Reduction of Penalties for Recordkeeping or Verification Practices Following Persistent System Inaccuracies.** [Mark-up Bill p. 1370]	**NEW LANGUAGE: Prohibits the Secretary or administrative law judges from imposing fines of more than $1,000 per violation for first-time violators in any year following a year in which the Inspector General has found during audit that the error rate of the verification system was higher than *0.3 percent* (emphasis added).**	**NEW LANGUAGE DISCUSSION. The permissible error rate is infinitesimally small – it is worth observing that the best statisticians in the country, when conducting analyses of any number or kind of subjects, routinely put their own error rates at around ± 3.0 percent. Note that the figure specified in this provision is *"zero-point-three" percent* – a small fraction of what those statisticians strive for.** **We do not see how a system of this size and complexity can possibly meet the statutory requirement. One might speculate that the figure was deliberately placed out of reach in order to undermine the ability to assess fines adequate to deter unlawful employment, by forcing the government to thread a camel through the eye of a needle.**
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(d)(9). Limitation on Use of the System."**	States, "Nothing in this subsection may be construed to permit or allow any department, bureau, or other agency of the United States Government or any other entity to utilize any information, database, or other records assembled under this subsection for any purpose other than for employment verification or	We disagree with this prohibition, and *strongly* believe that law enforcement, national security and intelligence officers should be given access to the system upon providing appropriate cause. Such information could prove critical in combating terrorism and other serious public safety violations. (See, also, our related comments above.)

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
[Mark-up Bill p. 1379]	to ensure secure, appropriate and nondiscriminatory use of the System."	
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(e)(6)(E). Requirements for Review of a Final Determination: Scope and Standard for Review."** [Mark-up Bill p. 1397]	The bill permits employers who are the subject of civil penalties to appeal to the federal circuit courts. This subparagraph provides that "The court of appeals shall conduct a *de novo review* of the administrative record on which the final determination was based *and any additional evidence that the Court finds was previously unavailable* at the time of the administrative hearing."	The provision imposes an extremely unusual standard of review on circuit courts, which almost exclusively review decisions and issue rulings based on the record developed in the lower courts and tribunals. This standard of review inappropriately places the circuit court in the situation of acting as a court of first impression.
Sec. 3101(a). Unlawful Employment of Unauthorized Aliens— *Reference to* **"INA Sec. 274A(g)(1). Government Contracts: Contractors and Recipients."** [Mark-up Bill p. 1404]	This paragraph provides that federal contractors may be debarred after violating the civil hiring and verification provisions more than 3 times, or for any criminal violation. Contractor is defined as "an employer who holds a Federal contract, grant, or cooperative agreement, or reasonably may be expected to submit an offer for or be awarded a government contract."	Issue #1: Permitting a federal contract employer to violate the civil provisions more than 3 times before initiating debarment is too lenient, especially given that taxpayer funds are involved. Issue #2: The definition of a "federal contract employer" should be expanded to include contractors to States and political subdivisions, when the State or political subdivision is using monies derived in whole or part from federal grants or funds (such as TARP).
Sec. 3101(b). Report on Use of the System in the Agricultural Industry— [Mark-up Bill p. 1409]	Sec. 3101(b) lays out an exacting and detailed requirement for the Secretary to report to Congress on implementation of the System with regard to agricultural employers and employees (including	Insofar as prior Sec. 3101(a) already creates (within the INA) a requirement for the Secretary to provide a detailed report to Congress on all aspects of the System, and a concurrent requirement for the GAO to report to Congress *yearly* on all aspects of the

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	nonimmigrant "guest workers under the proposed new INA Sec. 218A).	System, this additional report seems superfluous: the above-mentioned sections could be modified to include specific agricultural-related informational requirements in those reports.
Sec. 3101(c). Report on Impact of the System on Employers— [Mark-up Bill p. 1410] *—and—* **Sec. 3101(d)— Government Accountability Office Study of the Effects of Document Requirements on Employment Authorized Persons and Employers.** [Mark-up Bill p. 1410]	Bill Sections. 3101(c) and (d) lay out detailed requirements for the Secretary and GAO, respectively, to report to Congress on implementation of the System with regard to employers and employees.	Insofar as prior Sec. 3101(a) already creates (within the INA) a requirement for the Secretary to provide a detailed report to Congress on all aspects of the System, and a concurrent requirement for the GAO to yearly report to Congress on all aspects of the System, we believe the above-mentioned sections could be modified to include the specific additional requirements articulated by these sections.
Sec. 3101(e). Repeal of Pilot Programs and E-Verify and Transition Procedures— [Mark-up Bill p. 1412]	**CHANGED LANGUAGE: The original bill repealed the existing electronic verification system now in place, and only provided transitional procedures *once a new system is in place,* leaving a gap of no system whatever in the interim.** **The new language alters that defect by providing for maintenance of the existing system pending development and takeover of the new system.**	**CHANGED LANGUAGE DISCUSSION: We are pleased the authors recognized the gaping flaw in the original language.** **But there should be no misunderstanding: creation of this new system will be onerous, time-consuming and expensive and—if past information technology projects of this size are any indicator—preliminary versions of the new system will be riddled with flaws requiring years to iron out. And in the meantime, error rates over .03% will cripple the government's ability to assess meaningful fines and**

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		penalties, and virtually assure that as quickly as the existing 11 million illegal aliens are granted amnesty, a new queue of unauthorized workers will begin.
Sec. 3102(b). Multiple (Social Security) Cards— *Reference to* **''42 U.S.C. 405(c)(2)(G). Evidence, procedure, and certification for payments."** [Mark-up Bill p. 1416]	Amends the noted section of the Social Security Act to limit "issuance of multiple replacement social security cards to any individual to 3 per year and 10 for the life of the individual" but also permits "reasonable exceptions from the limits under this clause on a case-by-case basis in compelling circumstances.''	The provision is overly generous—particularly since the Social Security Commissioner is also given discretion to waive limits in compelling circumstances. Individuals should be limited to one replacement card per year, five for life. An additional provision should be created to require the Commissioner to direct investigation in the case of any individual who solicits three or more cards.
Sec. 3104. Responsibilities Of The Social Security Administration— *Reference to* **Title XI of the Social Security Act (42 U.S.C. 1301 et seq.)** [Mark-up Bill p. 1420]	Creates a new Part E, outlining the employment verification responsibilities of the Social Security Commissioner, with regard to the new employment verification system to be created, including the obligation to share information with said system so that it may accurately and timely issue notices of employment eligibility confirmation or nonconfirmation.	For reasons we cannot discern, the provision does not specify a requirement to refer instances of apparent fraud against the system for further investigation. [Fraud against the system is referred to in the "Reports to Congress" specifications—but findings of that type are at a high level, and not the same as taking prompt and effective action against perpetrators of fraud at the individual level.]
Sec. 3105(a). Improved Prohibition on Discrimination Based on National Origin or Citizenship Status—	**NEW LANGUAGE: "(8) An individual who is authorized to be employed in the United States may not be denied a professional, commercial, or business license on the basis of his or her**	**NEW LANGUAGE DISCUSSION: The blanket prohibition seems both overbroad and unnecessary. There are ample court precedents which already make clear that restrictions on job occupations and licenses based on citizenship or immigration status,**

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Reference to **"INA Sec. 274B(a)(8). Prohibition on Discrimination Based on National Origin or Citizenship Status: Professional, Commercial, and Business Licenses.** [Mark-up Bill p. 1427]	**immigration status."**	**whether at the federal, state or local level, must be grounded in a showing of logic and necessity. Some such restrictions are eminently reasonable. Consider, for instance, permitting aliens to enforce the federal immigration laws.** **We anticipate that this prohibition will result in a substantial outcry from state governments unhappy at having their statutory and regulatory processes stripped away by federal legislators in an excess of zeal.**
Sec. 3107. Office of the Small Business and Employee Advocate— [Mark-up Bill p. 1427]	**NEW LANGUAGE: Subsections (a) and (b) establish an advocate within USCIS whose job is to provide advice and counsel to small businesses and employees about the workings of the employment verification system: how to comply; how to resolve difficulties; and even proposing changes to the system, law or regulations to Congress through the Secretary.** **Subsection (c), however, authorizes the Advocate to issue "assistance orders" on application by a small business or individual alleging "significant hardship". Such "orders" may direct the Secretary to take remedial action, or may abate fines and penalties being imposed. Such orders can only be modified or lifted by the USCIS Director, Deputy Director, or**	**NEW LANGUAGE DISCUSSION: To the extent that the Advocate is in fact advocating the items enumerated in (a) and (b), then it appears to us that this position is redundant to that of the DHS Ombudsman.** **We are most concerned, however, about subsection (c). Having established a system of fines and penalties with plenary due process, including hearings by administrative law judges with the possible of federal court reviews, Congress has now passed an amendment permitting a mid-level bureaucrat to call a halt to the *entire system* through issuance of a so-called "Assistance Order."** **Further, it is hierarchical anarchy to legislate that this mid-level functionary should have the capacity to order his ultimate boss, the Secretary, to undertake any kind of action as would be required**

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	Secretary.	**by paragraph 3107(c)(4).** **This superficially innocuous section virtually eviscerates the integrity of the employer verification system envisioned in the bill. We are astounded that the amendment has been incorporated into it.**
Sec. 3201(a). Protections for Victims of Serious Violations of Labor and Employment Law or Crime: General— *Reference to* **"INA Sec. 101(a)(15)(U). Victims of Criminal Activity or Labor and Employment Violations."** *—and—* **"INA Sec. 274A(e)(10). Conduct In Enforcement Actions."** [Mark-up Bill p. 1437]	Collectively, these provisions change the INA in the noted sections to— □ redefine and expand the provision in the INA relating to nonimmigrant "U" visas for alien victims or crime, to include additional "covered" activities, to wit, labor and employment violations [amended INA 101(a)(15)(U)]; □ direct the Secretary to temporarily stay the removal of, and grant U visa protection to, any alien who is a material witness or "has been helpful, is being helpful, or is likely to be helpful, in the investigation, prosecution, or pursuit of civil remedies related to the…covered violation" and grant commensurate work authorization [new INA Sec. 274A(e)(10)].	The amendment lacks a proviso cancelling U visa protection, dissolving the stay, and revoking work authorization to— □ aliens who "[are] being helpful" or "[are] likely to be helpful" but later renege, refuse or otherwise decline to assist in the investigation, prosecution, or pursuit of civil remedies; or □ aliens who do not fully and satisfactorily discharge their duties as material witnesses.
Sec. 3201(f)(1). Expansion of Limitation on Sources of Information that	This provision of the bill expands the grounds of 8 USC 1367(a)(1), by which an alien may be designated as a "victim of	The provision is very expansive. Under the definition of "workplace claim" it appears that an unauthorized alien who is a member of the collective bargaining

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
May Be Used to Make Adverse Determinations: General— *Reference to* **"8 U.S.C. 1367(a)(1). Penalties for disclosure of information."** [Mark-up Bill p. 1444]	crime" to now include various civil actions involving workplace infractions and; as a consequence— □ precludes information which is evidence of those civil offenses, from being used against the individuals who provide it, as a basis to deny them benefits; □ defines workplace claims to include any "claim, petition, charge, complaint, or *grievance…"* filed with a federal, state or local court or agency "relating to the violation of applicable Federal, State, or local labor or employment laws…" (emphasis added)	unit could file a union grievance with a local or state agency alleging violation of collective bargaining unit regulations (or the contract itself), and as a consequence avail himself of a host of benefits, including a stay of removal, work authorization, etc.
Sec. 3201(f)(2). Protections for Victims of Serious Violations of Labor and Employment Law or Crime: Expansion of Limitation on Sources of Information that May be Used to Make Adverse Determinations— *Reference to* **"8 U.S.C. 1367(e)(2). Penalties for Disclosure of information."** [Mark-up Bill p. 1445]	The bill amends 8 USC 1367 to add a new paragraph (e)(2) to the end— "Any person who knowingly presents a false or fraudulent claim to a law enforcement official in relation to a covered violation for the purpose of The bill obtaining a benefit under this section shall be subject to a civil penalty of not more than $1,000."	Issue #1: The penalty seems puny compared with the potential benefits. On a risk-benefit basis, many aliens may think it worthwhile to file a false allegation—particularly in a "my word against his" situation—if all they risk is a fine, but what they gain is the right to work and live in the U.S. for a significant period of time. Issue #2: The penalty only relates to false or fraudulent claims to *law enforcement officials*. Many (perhaps most) of the officials throughout the federal, state and local governments who are charged with receiving workplace infraction allegations are not law enforcement officers.

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Sec. 3301(a) *and* **(b). Funding: Establishment of the Interior Enforcement Account** *and* **Appropriations.—** [Mark-up Bill p. 1449]	This section of the bill establishes an Interior Enforcement Account, and authorizes for appropriation $1B for placement into the account, which is to be used for enforcing the sanctions, anti-discrimination and other provisions of Secs. 274A, 274B and 274C of the INA— specifically including monitoring and support for the not-yet existing employer verification system.	Subsection (b) specifies that within 5 years, DHS must ensure that there are at least 5,000 individuals assigned to the oversight and administration provisions of Secs. 274A, 274B and 274C, to be paid out of the fund being created. But Paragraph (b)(1) makes clear that, despite the title of the account, the positions are comingled between ICE and USCIS, which emphatically *is not* an enforcement agency. In that USCIS will be responsible for day-to-day maintenance and administration of "the System" it seems possible, even likely, that agency will be given the lion's share of positions. If so, actual enforcement of the employment verification and sanctions provisions will in the future suffer the same fate they have for many years – starvation through attrition and neglect.
Sec. 3303(a). Mandatory Exit System: Establishment— [Mark-up Bill p.1456]	This section requires the Secretary to establish, no later than December 31, 2015, a mandatory system for the collection of data from machine-readable visas, passports, and other travel and entry documents for all categories of aliens who are exiting from air and sea ports of entry (POEs). **NEW LANGUAGE: As contained in:** □ **Subsection (a)(2) requires the Secretary to establish a biometric exit system at 10 major international**	**NEW LANGUAGE DISCUSSION: An exit system which only collects data from air and sea POEs is a three-legged stool with one broken leg. Most foreign visitors arrive via land POEs, and those who do exit, probably exit the same way they came. The problem, of course, is that if the land border arrivals don't depart, we won't know it. Given that ±40% of the aliens illegally in the U.S. are legitimate entrants who thereafter simply don't depart, this is a massive gap. Thus, we wholeheartedly endorse the amendments contained in the new subsections.** **We are also entirely in favor of using biometrics**

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	airports within 2 years. **Subsection (a)(3)establishes requirements for reporting results of the biometric system at those airport after 3 years.** **Subsection (a)(4) requires expansion of the biometric exit program to the "Core 30" international airports.** **Subsection (a)(5) requires the Secretary to submit a plan to Congress to expand the biometric program to sea and land ports.**	**instead of a solely biographically-based exit system, since use of biometrics is a fundamentally more sound way of ensuring the true identity of the person who is departing.** **Still, we are skeptical. Congress mandated the development of such an exit verification system in 1996, and has reiterated that demand five more times over the past 17 years, and it has yet to be accomplished. Several pilot programs have been completed establishing the feasibility and value of a biometric exit system. This system could be implemented much more rapidly than called for here if Congress chose to be firm with DHS.**
Sec. 3303(b)(3). Integration and Interoperability: Interoperable Data System— [Mark-up Bill p.1458]	Paragraph (b)(3) Requires the Secretary to integrate into the system "current and immediate" access to information in the databases of Federal law enforcement agencies and the intelligence community which is relevant to determine whether to issue a visa; or the admissibility or deportability of an alien. **NEW LANGUAGE: Subsection (c) requires the Secretary to report visa overstays to other federal law enforcement and intelligence agencies and to employ "reasonably available enforcement resources" to locate the alien and commence removal proceedings.**	This section of the bill has no companion provision requiring the intelligence and law enforcement communities to agree to integrate their data into the DHS system, nor does it specify which systems were contemplated. It is naïve to believe non-DHS agencies will construe a mandate to the Secretary as being binding on them, in the absence of specific language to that effect.

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Sec. 3305. Profiling— [Mark-up Bill p.1465]	This section prohibits profiling by federal law enforcement officers based on race or ethnicity, except under certain circumstance, such as in connection with a specific investigation; and in enforcing laws protecting the integrity of the Nation's borders, only as permitted by the Constitution and laws of the United States. It additionally requires, in Subsection (c), a study to be followed by regulations for "covered" DHS officers (ICE, CBP and TSA), and a report to Congress.	Issue #1: although the statute on its face prohibits all federal enforcement officers from profiling, the regulatory and reporting requirements only relate to "covered" DHS officers, not the entire federal government. We can discern no reason for this. It is curious that *even other DHS officers*, such as Secret Service or Coast Guard, are not deemed "covered" even though they engage in law enforcement duties. Issue #2: although the bill calls for a comprehensive study, the language immediately goes on to suggest that the regulation must address "race, ethnicity and *other suspect classifications*." (emphasis added) Use of the emotionally laden phrase, "suspect classifications" suggests a predisposition. There needs to be an honest recognition that in enforcing federal immigration laws, officers daily confront the fine line between race and ethnicity on one hand, and nationality-based traits on the other—traits which federal courts have repeatedly approved as "articulable facts" leading a reasonable officer to suspect alienage: facts such as heavy accents or limited English skills; foreign clothing; an apparent lack of familiarity with common social customs, etc. If these kinds of articulable facts are to be outlawed in the Secretary's regulations, then it is important—*especially* for immigration officers working in the interior, where there is no direct nexus to the physical border or at ports of entry—to provide immigration enforcement officers a regulatory

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		framework in which they can invest confidence, operate without fear, and be effective at their jobs.
Sec. 3306. Enhanced Penalties for Certain Drug Offenses on Federal Lands.— [Mark-up Bill p.1467]	**NEW LANGUAGE: As the title suggests, this section provides enhanced penalties for trafficking in drugs, planting booby traps, or engaging in illegal stream diversion or clear-cutting of timber on federal lands.**	**NEW LANGUAGE DISCUSSION: The enhancements are all laudable; we simply have no idea why they've found their way into an omnibus immigration bill. It exemplifies exactly what a "Christmas tree" this bill has become.**
Sec. 3401. Time Limits and Efficient Adjudication of Genuine Asylum Claims— *Reference to* **"INA Sec. 208(a)(2). Authority to Apply for Asylum: Exceptions."** [Mark-up Bill p.1470]	This section— □ eliminates the requirement of existing law that an asylum claim must be made within 1 year of arrival; □ permits aliens previously denied asylum to seek reopening of their cases, if a basis for denial was failure to apply within the year, or if they were granted withholding of removal but have not gained LPR status *provided* they apply for reopening no later than 2 years of passage of the bill; and □ permits aliens to seek reopening of prior denials on the basis of "changed circumstances" or if granted.	The reason that the existing requirements were inserted into the law in the 1980s and 1990s was because *the asylum process had become subject to abuse, delays, frivolous claims, and dilatory tactics.* Contrary to the reference to "efficient adjudication" in the title, the modifications proposed by this bill will return us to the *status quo ante,* including a repetition of the wholesale abuses of the nation's asylum regimen that have happened before.
Sec. 3403(b). Clarification on Designation of Certain Refugees—	This section proposes to amend existing INA 207(c)(1), through renumbering and insertion of a new 207(c)(1)(B)(i). That provision would permit the president to	Issue #1: The language in this provision stands refugee law on its head by suggesting that whole groups may be wholesale "designated" to be refugees. International law, treaty, and domestic law

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Reference to **"INA Sec. 207(c)(1). Annual Admission of Refugees and Admission of Emergency Situation Refugees."** [Bill p.1473]	identify and designate *as a class "*specifically defined groups of aliens" who, simply by virtue of being part of the class, would be granted refugee status. The only exception permitted for denying an individual who is part of such a class is if he has been found to have ordered or participated in the persecution of others.	have always held that a grant of refugee status is dependent on the *particular* facts and circumstances present in a person's life. That is why individual refugee interviews and "credible fear" determinations have formed such an important part of U.S. refugee and asylee programs. Issue #2: The sole exception that has been carved out, permitting denial to persecutors, is inadequate. To name just one overlooked arena: what about aliens who are members or associates of terrorist organizations, or who have provided material support to such groups? Should they be admitted just because they are part of the "specially defined group"?
Sec. 3404. Asylum Determination Efficiency— *Reference to* **"INA Section 235(b)(1)(B)(ii). Inspection by Immigration Officers…Asylum Interview."** [Bill p.1476]	This provision amends the inspectional procedures at U.S. ports of entry for individuals claiming asylum. At present, if an alien makes such a claim on entry, "An asylum officer shall conduct interviews of [such] aliens … If the officer determines at the time of the interview that an alien has a credible fear of persecution…the alien shall be detained for further consideration of the application for asylum. The amendment would permit asylum officers, after conducting a "nonadversarial	Issue #1: It is unreasonable to believe that asylum officers are well poised to make informed judgments about the propriety of a claim, or the truthfulness and accuracy of assertions made by applicants, in the environment of a port of entry (POE) or immediately after arrival. How, precisely, does the interviewing officer avail himself of adequate information about country conditions and other data, which is often voluminous and detailed, that may be relevant to the claim? Issue #2: Such spontaneous grants, based on non-confrontational interviews, permit no opportunity to thoroughly vet the individual and ensure that he is not himself a persecutor, war criminal, terrorist, or

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	asylum interview" and obtaining supervisory approval, to grant asylum on the spot.	otherwise undesirable and ineligible for asylum. When do the background checks take place? Issue #3: An on-the-spot grant regimen will most certainly lead to a sharp spike in the number of aliens arriving at POEs and making asylum claims, as the word gets out. (See the prior discussion, above, about systemic asylum abuses that have confronted our nation in the recent past.)
Sec. 3405. **Stateless Persons in the United States—** *Reference to* **"INA Sec. 210A. Protection of Certain Stateless Persons In The United States."** [Bill p.1476]	This section creates an entirely new provision within the INA at Sec. 210A, which would permit designation of "specific groups of individuals who are considered stateless persons, for purposes of this section" who, being in the U.S., would then be permitted to apply for conditional resident alien status. If granted, they would be entitled to apply to become full LPRs a year later. Those denied such status could renew their applications in proceedings, and additionally seek judicial review in the federal courts.	There are serious national security implications to this provision. Even with vetting, our government doesn't always know who is a threat. Speculate, for example, that Palestinians originally from the West Bank are designated as such a group. Do we really imagine that operatives and supporters of HAMAS (a designated terrorist organization) would not find their way into the U.S. and obtain status?
Sec. 3407. **Work Authorization While Applications for U and T Visas Are Pending—**	**NEW LANGUAGE: Directs the Secretary to grant employment authorization no later than 180 days after application, *whether or not the application has been approved* (emphasis added), to aliens who are**	**NEW LANGUAGE DISCUSSION: Given the sensitivity of these cases—and the undesirability of inadvertently encouraging frivolous filings for the sole purpose of obtaining work authorization—it might have been a better course had this new**

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Reference to **"INA Sec. 214(o)** *and* **(p). Admission of Nonimmigrants."** [Mark-up Bill p.1484]	**applicants for T or U visas (relating, respectively, to claimed victims of human trafficking or certain criminal activity).**	**provision simply required the prompt adjudication of the case-in-chief in all but the most exceptional circumstances.**
Sec. 3408. Representation at Overseas Refugee Interviews— *Reference to* **"INA Sec. 207(c) Annual Admission of Refugees and Admission of Emergency Situation Refugees."** [Mark-up Bill p.1485]	This section amends the INA— □ to permit refugees in refugee camps overseas to bring their attorneys or designated representatives with them to interviews by federal officers; □ by establishing new and detailed requirements for the way in which denials must be documented and transmitted to the applicant; and □ by creating a new process for denied applicants to seek administrative review of their denials.	The proposed new procedures will result in long delays and administrative inefficiencies or in the alternate, ill-considered grants of status, or quite possibly an unfortunate combination of both.
Sec. 3409(a) and (b). Law Enforcement and National Security Checks— *Reference to* **"INA Sec. 207(c)(1). Annual Admission of Refugees and Admission of Emergency Situation Refugees"** **–***and* **–** **"INA Sec. 208(d)(5)(A)(i).**	**NEW LANGUAGE: This section amends the INA to requires that national security checks be performed and completed for aliens applying as refugees (Subsection (a)) and asylees (Subsection (b)) before such status may be granted.**	**NEW LANGUAGE DISCUSSION: While this provision will ameliorate some of the worst excesses of the bill (for instance of Section 3404, discussed above, which permits on-the-spot grant of asylum at U.S. ports of entry), it does not completely undo them.**

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Consideration of Asylum Applications. [Mark-up Bill p.1488]		
Sec. 3411. Termination of Asylum or Refugee Status— [Mark-up Bill p.1490]	**NEW LANGUAGE: This section provides that individuals who, having obtained refugee or asylum status on the basis of persecution may not return, without good cause, to the country from which they sought refuge or asylum without obtaining a waiver in advance or after-the-fact from the Secretary. Failure to obtain said waiver will result in termination of status. Subsection (c) lays out an exception to the prohibition on return for Cuban nationals.**	**NEW LANGUAGE DISCUSSION: We agree with the prohibition, but believe it should not have provided for an after-the-fact waiver, and do not believe an exception should have been carved out for Cuban nationals. We also believe that the prohibition does not go far enough; it should have been extended to cover aliens (such as Tamerlan Tsarnaev, the late Boston Marathon bomber) who obtained their permanent residence on the basis of prior status as an asylee or refugee.**
Sec. 3412. Asylum Clock— *Reference to* **"INA Sec. 208(d)(2). Consideration of Asylum Applications.** [Mark-up Bill p.1491]	**NEW LANGUAGE: Directs the Secretary to grant employment authorization no later than 180 days after application, *whether or not the application has been approved* (emphasis added), to aliens who have applied for asylum.**	**NEW LANGUAGE DISCUSSION: This provision sets back the clock by decades, back to a time when the U.S. was being overwhelmed by asylum applicants with negligible claims to persecution, because they could be assured of obtaining work authorization for the entire duration of the pendency of their claim. This provision will almost certainly once again encourage frivolous filings for the sole purpose of obtaining work authorization.**
Sec. 3502. Improving Immigration Court Efficiency and Reducing Costs by	**NEW LANGUAGE: As originally written in the bill, this section amended INA Sec. 292 by eliminating the phrase "at no expense to the government" in order to**	**NEW LANGUAGE DISCUSSION: Issue #1: It is well established by law and court doctrine that aliens do not possess the same rights to counsel as defendants in criminal proceedings. There has**

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Increasing Access to Legal Information— *Reference to* **"INA Sec. Section 292. Right to Counsel."** [Bill p.1493]	**permit the Attorney General to "appoint or provide counsel *at government expense* to certain categories of aliens in removal proceedings, such as minors and mentally incompetent aliens (at present their interests are represented by *guardians ad litem*, usually on a pro bono basis). The language has now been amended to permit the Attorney General, in his sole and unreviewable discretion, to authorize aliens in deportation proceedings to be represented at taxpayer expense.** **The section also now requires the government to automatically provide to aliens in proceedings virtually the entire contents of their files with few exceptions— *including third agency materials from other federal, state or local entities*.(emphasis added)** **Finally, the section specifies that, if an alien does not receive all of the specified materials, the removal proceeding may not move forward.**	**always been a hard-and-fast line drawn at providing aliens in expulsion proceedings with attorneys at taxpayer expense. This provision breaks the line. It is reasonable to assume that this language would be unacceptable to the vast majority of Americans, who are not likely to want to establish a whole new Federal Alien Defenders corps at a time of economic hardship. And it is a legitimate concern, because this administration will likely expand representation at government expense to aliens denied asylum, withholding or cancellation of removal, or a host of other discretionary benefits.** **Issue #2: The provision requiring the equivalent of full discovery of virtually all materials in the individual's file will inevitably result in a decision by other agencies not to share documents or information with federal immigration enforcement agents for fear that the information will be compromised.** **Issue #3: The section precluding completion of removal proceedings until the "required" materials have been provided will almost certainly result in frivolous claims on the part of the aliens (and their newly-minted federal defenders) that they have not in fact received everything as a way of protracting the hearing for as long as possible.**
Sec. 3702(a) *and* **(b). Banning Habitual Drunk**	These two parallel provisions render an alien inadmissible under new INA	□ First, the 3-conviction threshold is too high. It should have been limited to two convictions, and

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Drivers from the United States— *Reference to* **"INA Sec. 212(a)(2). General Classes of Aliens Ineligible to Receive Visas and Ineligible For Admission: Criminal Grounds."** *—and—* **"INA Sec. 237(a)(2). General Classes of Deportable Aliens: Criminal Grounds."** *—and—* **"INA Sec. 101(a)(43)(F). Definitions."** [Mark-up Bill p.1547]	subparagraph paragraph 212(a)(2)(J), and removable under new INA subparagraph 237(a)(2)(G) , as a habitual drunk driver if the alien has been "convicted of 3 or more offenses [on separate dates] related to driving under the influence or driving while intoxicated". [Note: The "separate conviction dates" standard is found only in the inadmissibility provision, and not, for some reason, repeated in the deportability provision. **NEW LANGUAGE: The deportability provision has been amended to specify that at least one of the 3 convictions must have occurred after enactment of the bill into law.** **In addition, language has been added to specify that an alien convicted of 3 or more drunk driving offenses may be treated under the INA as an aggravated felon. However, that language, too, is subject to the same proviso that one of the convictions must have occurred after enactment.**	only one if the offense which predicated the conviction involved injury or death to another. □ Second, the inadmissibility proviso requiring that the convictions occur on different dates is inapt. If the intent was to ensure the convictions did not arise out of a single scheme of misconduct, that phrase should have been used. Often, for reasons of judicial economy, substantively different and serial offenses will be consolidated into trials held on a single date. In that instance, the convictions would be on the same date, even though the factual circumstances would clearly indicate that the convicted alien is a dangerous and habitual drunk driver. □ Third, inaptness of the "separate conviction dates" has apparently been recognized by at least some of the bill's drafters, because the requirement is not used for deportation grounds. **NEW LANGUAGE DISCUSSION: We strongly disagree with the new requirement that at least one of the deportability convictions for drunk driving occur after enactment. Americans have a public safety interest in removing drunk drivers from our roadways. The change does not address that public safety consideration.**
Sec. 3704(a). Illegal Entry— *Reference to*	This section rewrites the existing provisions of INA Sec. 275 relating to illegal entry into the United States.	Decriminalizing attempts to enter the U.S. is inappropriate. There are many scenarios, particularly at land ports of entry, involving significant risk of injury to both officers and persons effecting legal

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
"INA Sec. 275(a) *and* **(b). Entry of Alien at Improper Time or Place…Criminal Offenses** *and* **Civil Penalties."** [Mark-up Bill p. 1550]	In subsection (a), it— □ *decriminalizes* attempts to illegally enter the United States (by removing that phrase from the reconstructed language; and □ enhances criminal penalties for 1st, 2nd and 3rd entries. INA 275(b)—the civil penalties provision—maintains the prohibition on attempts at entry; enhances the fine amounts for 1st offenses; and doubles them for subsequent offenses.	crossings in both directions even though the alien attempting to break through—often via dangerous and reckless use of a vehicle—is caught before effecting entry. This behavior should not be excused.
Sec. 3705. Reentry of Removed Alien— *Reference to* **"INA Sec. 276(a), (b)** *and* **(e). Reentry of Removed Alien."** [Bill p. 1553]	This section rewrites the existing provisions of INA Sec. 276 relating to illegal reentry into the United States after having been removed. Subsection (a) modifies the language relating to noncriminal re-entrants, but leaves the same criminalized acts substantially in place, including attempts to reenter. It also leaves in place existing penalty structure. Subsection (b) substantially modifies the language and categories relating to criminal re-entrants convicted of multiple misdemeanors and felonies. Subsection (e) creates an affirmative	Issue #1: Once again there is a reference, at proposed paragraph 276(b)(1), to three misdemeanors "with convictions occurring on different dates." For reasons explained above, this is inappropriate. Issue #2: The subparagraphs under276(b)(1) relating to conviction of one or more felonies are also significantly different from current law, in that they *delete any reference to, and enhancement of penalties against, aliens who were previously removed for commission of aggravated felonies*. Issue #3: for reasons described earlier in this analysis, we do not believe that a blanket statutory forgiveness of all aliens under 18 is a poor idea. We note that a number of violent alien gang members—for instance, participants in MS-13—would meet this definition, even though they are old beyond their

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	defense against prosecution for re-entry if the reentrant is under the age of 18.	years and seasoned criminals.
Sec. 3705. Reentry of Removed Alien— *Reference to* **"INA Sec. 276(f). Limitation on Collateral Attack on Underlying Deportation Order."** [Mark-up Bill p. 1556]	This portion of the section amends that part of INA Sec. 276, subsection (f), which statutorily limits attacks on underlying deportation orders in a criminal prosecution for reentry after removal. In subsection (f) as revised, the grounds permitting collateral attack are expanded from 2 to 3. The new ground permitting the attack is if "the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review".	The specified new ground appears to be a subrosa attack on the provisions in existing law that permit immigration enforcement officers to— □ expeditiously remove aliens; □ remove aggravated felons using administrative processes; and □ reinstate prior orders of removal, all without resort to immigration judge hearings under Sec. 240 of the INA. Without hearings there is, functionally, no opportunity for judicial review. Thus, the new ground invites litigation over whether such proceedings are therefore "improper" even though they are consonant with the law.
Sec. 3707(e). Immigration and Visa Fraud— *Reference to* **"18 U.S.C. 1546(b). Immigration and Visa Fraud."** [Mark-up Bill p. 1564]	Modifies presently existing Section 1546 of Title 18 (the federal criminal code, now entitled "Fraud and misuse of visas, permits, and other documents". The first subsection (a) remains unchanged. The second subsection (b) is substantially changed to criminalize trafficking in "immigration documents" using substantially the same language adopted for the modified passport provision of 18 USC 1541, to wit: the acts require *the illicit actor to commit the acts for 3 or more*	The key phrase in proposed subsection (b), "immigration documents," has not been defined, without which the criminalized behavior becomes unacceptably vague and open to question. (Compare, by way of example, the specific verbiage used in the retained subsection (a) to describe the kinds of immigration documents and instruments which may not be misused.)

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	documents within a 3-year timeframe.	
SEC. 3709(a) *and* **(b). Inadmissibility** *and* **Removal for Passport and Immigration Fraud Offenses—** *Reference to* **"INA Sec. 212(a)(2)(A)(i). General Classes of Aliens Ineligible to Receive Visas and Ineligible For Admission: Criminal Grounds."** [Mark-up Bill p.1568] *—and—* **"INA Sec. 237(a)(3)(B)(iii). General Classes of Deportable Aliens: Criminal Grounds."** [Mark-up Bill p.1569]	This section of the bill amends the INA's inadmissibility and deportation grounds to include convictions for the revised provisions relating to passport and immigration fraud, specifically 18 USC 1541, 1545, and Sec. (b) of 1546.	The language is troubling for the grounds that it *does not include*. Through silence, this rewritten provision of the bill specifically excludes criminal convictions for violations of 18 USC 1542, 1543, 1544, and 1546(a) as bases for inadmissibility and removal, yet all of these provisions, too, relate to fraud and misuse of passports and immigration documents.
Sec. 3710(b)(2). Directives Related to Passport and Document Fraud: Protection of Vulnerable Persons— [Mark-up Bill p.1571]	This provision, at (b)(2), prohibits prosecution of aliens for any of the passport and visa related provisions, or for illegal entry or illegal reentry, as long as they have a claim pending as a "protected person" which is defined, among other things, at (b)(3), as seeking asylum,	First: the provision will grind prosecutions to a standstill, as aliens discover that to forestall being charged, they can apply under one of the "protected" statuses—they need not be entitled, they need only drag the claim out through the various applications and extended reviews and appeals provided by other portions of this bill.

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	withholding of removal, or Convention Against Torture (CAT) protection.	□ Second: In the case of reentrants, had they been entitled to a claim as a protected person in the first place, they would never have been deported to begin with. □ Third: extending the provision to CAT, without appropriate caveats, is dangerous. Even known terrorists are entitled to CAT protection. Given the nexus between international terror and abuse of passports and visas, do we *really* not want to prosecute them for passport and immigration-related offenses, because they initiate a CAT claim? □ Fourth: the provision invites abuse of, and backlogs in, sensitive and important avenues of safe haven, throwing all of those avenues into serious disrepute in the eye of the public. □ Fifth and final: as mentioned before, more than one quarter of ICE interior apprehensions involve aliens who reentered after removal. This provision will drive that statistical spike even higher as prior removals discover they can reenter with impunity. This is not a way to instill rigor in the integrity of the system.
Sec. 3711. Inadmissible Aliens: Deterring Aliens Ordered Removed from Remaining in the United States Unlawfully—	This provision aims to amend the existing grounds of inadmissibility for aliens previously removed, by modifying the language in the noted clauses— (i)…''seeks admission not later than 5 years after the date of the alien's removal (or not later than 20 years after the alien's	□ First, the parenthesis has not been closed in either clause, leaving both typographically incorrect. □ Second, the amended language in both clauses is syntactically flawed and has no context as written, since there is no qualifying language to specify when the 5-year / 20-year distinction

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Reference to **"INA Sec. 212(a)(9)(A)(i) *and* (ii). Aliens Previously Removed."** [Bill p.1573]	removal''… (ii)…''seeks admission not later than 10 years after the date of the alien's removal (or not later than 20 years after the alien's removal''…	applies in clause (i); nor the 10-year / 20-year distinction in clause (ii). [Compare, by way of example, the distinguishing language in the existing INA 212(a)(9)(A)(i).] □ Third, since there is no change in the inadmissibility timeframes between this bill and existing law (which <u>does</u> specify when to apply the 5-versus-20 years, and the 10-versus-20 years), we can only conclude that the new language was drafted solely because *it eliminates reference to aggravated felonies.*
Sec. 3712. Organized and Abusive Human Smuggling Activities— *Reference to* **"INA Sec. 295(d)(7). Organized Human Smuggling: Enhanced Penalties."** [Mark-up Bill p.1582]	Creates a new INA Sec. 295, criminalizing organized and abusive human smuggling acts, including acts on the high seas and elsewhere where the individuals are destined to the U.S. The provision parallels, but also expands upon, existing INA Sec. 274 ("Bringing In And Harboring Certain Aliens"), and also establishes escalating penalties depending on the severity of the crime, and whether or not injuries or death occur as a consequence of the smuggling venture.	In this new provision, the INA paragraph 295(d)(7) provides that "in the case of a violation resulting in the death of any person, [the violator may] be fined under title 18, imprisoned for any term of years *or for life*, or both." (emphasis added) There is a sentencing disparity in this provision, as compared with the penalty assessed by INA 274(a)(1)(B)(iv), which states: "in the case of a violation…resulting in the death of any person, [the violator may] be *punished by death* or imprisoned for any term of years or for life, fined under title 18, United States Code, or both." (emphasis added)
Sec. 3715(d). Secure Alternatives Programs: Custody— [Bill p.1586]	States in pertinent part, "If an individual is not eligible for release from custody or detention, the Secretary shall consider the alien for placement in secure alternatives that maintain custody over the alien to	Existing provisions of the INA require mandatory detention for certain categories of aliens including, notably, aggravated felons. Current interpretations of the mandatory detention requirement do not contemplate various forms of home confinement,

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	serve as detention, including the use of electronic ankle devices."	shelter care or electronic monitoring to meet the definition of "detention." The language of this bill would permit aggravated felons and other serious violators to be placed into situations of soft confinement or remote monitoring by statutorily defining those situations as detention. The language puts the safety of the public at great risk, and will likely add to the already huge pool of alien absconders. In addition, there is no assurance whatever that alternatives to detention are not, in the long run, more expensive to the taxpayer than routine detention.
Sec. 3716(c)(3) *and* **(4). Oversight of Detention Facilities: Availability of Records** *and* **Consultation—** [Mark-up Bill p.1588]	Paragraph (3) specifies that "All detention facility contracts, memoranda of agreement, and evaluations and reviews shall be considered records for purposes of section 552(f)(2) of title 5, United States Code." Paragraph (4) states that "The Secretary shall seek input from nongovernmental organizations regarding their independent opinion of specific facilities."	Paragraph (3): By obliquely referring to 5 USC 552, the provision subtly but explicitly requires that all documents relating to evaluations and reviews of detention facilities be made public. There are many reasons this should not be the rule, particularly including the fact that such evaluations and reviews may reveal potential security weaknesses that could result in escape, or harm to detention or correctional officers or other inmates. The language makes no exception for such situations. Paragraph (4): If the NGOs have no substantive experience or expertise with the operation and maintenance of detention facilities—and, in many instances, are philosophically opposed to the concept of detaining aliens—of what value is their opinion?

Analysis of Selected Sections of the Senate "Comprehensive Immigration Reform" Bill, S. 744

(As reflected in the Committee mark-up version MDM13735)

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Sec. 3717(a). Procedures for Bond Hearings and Filing of Notices to Appear— *Reference to* **"INA Sec. 236(f)(1)** *through* **(6). Apprehension and Detention of Aliens: Procedures for Custody Hearings."** [Mark-up Bill p.1591]	Creates a new subsection (f) with several following paragraphs, requiring— □ the Secretary to present all aliens charged in removal proceedings to an immigration judge for a bond hearing, if the aliens have not already been released on bond or recognizance; □ the immigration judge to conduct the bond hearing *de novo*; □ the Secretary to bear the burden of proving to the immigration judge that an alien subject to mandatory detention should be placed in a facility rather than under an alternative to detention; and □ the immigration judge to convene another *de novo* hearing every 90 days in the case of an alien ordered confined in a detention facility.	□ Current interpretations of the law do not permit or require the presentation of mandatorily-detained aliens to an immigration judge for a bond hearing. This provision reverses that for no discernible reason. □ Requiring presentation of aliens to immigration judges in each and every filing flies in the face of judicial economy—immigration judge dockets are already unwieldy and backlogged by many months; imposing this new requirement can do no earthly good. □ Placing the burden on the Secretary to justify use of a detention facility for mandatory detentions, instead of using soft confinement and monitoring methods that as yet have no sustained track record of success is unconscionable. □ Requiring overburdened immigration judges to reconvene de novo hearings on the same alien every 90 days goes beyond unconscionable.
Sec. 3717(b). Limitations on Solitary Confinement— *Reference to* **"INA Sec. 236(d)(3) Apprehension and Detention of Aliens: Nature of Detention."** [Mark-up Bill p.1594]	**NEW LANGUAGE: This amendment creates a new INA subsection (d)(3) outlining very detailed and specific bases for, and strict limitations upon, the use of administrative segregation (solitary confinement).**	**NEW LANGUAGE DISCUSSION: The restrictions and instructions are so specific and detailed as to be troubling: we doubt that the Congress is the appropriate body to legislatively mandate arenas which, though sensitive, are also more appropriately the province of correctional and detention professionals.** **We believe that it would have been better by far for the provision simply to have required that the Secretary adhere to the standards of the American**

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
		Correctional Association, which evolve over time. The statutory approach has the deleterious effect of freezing the Department's approach at the instant of enactment and thus, ironically, precluding it from staying current with evolving standards.
Sec. 3720. Reporting and Record Keeping Requirements Relating to the Detention of Aliens— [Mark-up Bill p.1606]	**NEW LANGUAGE: The provision introduced by this amendment to the bill establishes several pages of reporting requirements to be complied with by DHS agencies and also by the immigration courts relating to each alien's detention. Following is a partial list—** **Specific legal authority for the detention.** **Beginning and end dates pursuant to that authority.** **If detention is authorized by different provisions of law during different periods, a record of the provision of law during each such period.** **The place where the alien was apprehended or custody assumed.** **Each location where detained until the released or removed.** **Any period of re-detention.** **The gender and age of each detained alien.** **Number of days detained, broken down by days spent in given detention facilities and the total time**	**NEW LANGUAGE DISCUSSION: This is an example of Congressional micromanagement at its worst.** **Much of the information required is already maintained by the DHS agencies, albeit not always in the form and manner prescribed. Reconfiguring the data for presentation in the manner prescribed will become a fulltime occupation for staff all over the country, who would otherwise be engaged in duties more aligned to their mission.**

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
	spent in detention. **The charges that are the basis for the removal proceedings.** **Status of the proceedings and each date on which those proceedings progress from stage to stage.** **Length of time detained following a final order of removal and the reasons for the continued detention.** **The initial custody determination or review, including whether the alien received notice of the determination or review.** **When the custody determination or review took place.** **The risk assessment results for the alien.** **Whether the alien is subject to mandatory custody or detention.** **The reason for the alien's release from detention and the conditions of release imposed.** **The new provision also requires that DHS routinely make the collected information available to the public concurrent with its provision to Congress.**	
Subtitle H **Sec. 3801 et seq.** **"The HELP Separated**	**NEW LANGUAGE: The entire subtitle is new and establishes innumerable requirements on immigration**	**NEW LANGUAGE DISCUSSION: Like many other portions of the bill—particularly those added by amendment, this entirely new subtitle, while well-**

Section/Subsection of Law	*Description of the Bill's Language*	*Discussion of the Effect of the Language*
Children Act"— [Mark-up Bill p.1621]	**enforcement officers of ICE and CBP engaged in law enforcement actions — not just with regard to minors under the age of 18, but also their putative parents and care-givers. For example, officers:** **Must, within 2 hours of an apprehension permit the individual to make telephone calls relating to the welfare of the child(ren), and contact consular officers, attorneys and others;** **May not transfer the individuals apprehended among detention facilities outside the area of apprehension;** **Must ensure that detained individuals who are parents are permitted regular phone calls and contact visits with their children, etc.**	**intended, micromanages to such a degree, and establishes so many detailed statutory mandates, as to virtually ensure that DHS agencies will fail in their mission, one ostensibly supported by this bill, to enforce the immigration laws of the United States.** **There is also a studied unreality about the field conditions under which DHS enforcement officers and agents operate. A prime example is the requirement that an alien be provided the right to make multiple telephone calls within 2 hours of arrest. Quite frequently, the enforcement action will not even have been completed, and/or the officers and detainees alike will still be in the field at such a point in time. Telephone calls are inappropriate at that juncture, as they put the safety of officers and arrestees alike at risk.**

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