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May 29, 2013

Re: City Bar Immigration & Nationality Committee Opposes Six Additional S. 744 Amendments Reversing Advances in Immigration Reform

To further the public debate on immigration reform, the New York City Bar Association (the "City Bar"), and its Committee on Immigration and Nationality Law (the "Committee"), briefly analyze six additional amendments to S. 744, the Senate draft immigration reform bill.[1] Previously, on May 13, 2013, the Committee analyzed and opposed nine amendments to S. 744 relating to detention and due process.[2]

These analyses build upon City Bar's April 24, 2013, letters to the Senate Judiciary Committee, which praised S. 744 for its advances in reducing detention and increasing due process and appointed counsel, and urged further steps.[3] City Bar, in a 2009 report, also

[1] *See* S. 744, the "Border Security, Economic Opportunity, and Immigration Modernization Act," *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113s744is/pdf/BILLS-113s744is.pdf.

[2] Those nine amendments were Senator Charles Grassley's (R-IA) Amendments 39, 40, 41, 42, 47, 48, 51, and 53, and Senator Jeff Sessions' (R-AL) Amendment 12. *See* New York City Bar Association, *City Bar Immigration & Nationality Committee Opposes Amendments to S. 744 Reversing Detention and Due Process Advances in Immigration Reform* (May 13, 2013), *available at* http://www2.nycbar.org/pdf/report/uploads/Immigration.pdf.

[3] *See* New York City Bar Association, *City Bar Praises Senate Immigration Reform Bill for Right to Counsel, Due Process and Detention Advances and Urges Further Steps* (May 3, 2013), *available at* http://www.nycbar.org/44th-street-blog/2013/05/03/city-bar-praises-senate-immigration-reform-bill-for-right-to-counsel-due-process-and-detention-advances-and-urges-further-steps/, *citing* New York City Bar Association, *Letter to Senate Judiciary Committee Advocating Appointed Counsel* (Apr. 24, 2013), *available at* http://bit.ly/105sqW0; New York City Bar Association, *Letter to Senate Judiciary Committee Advocating Reduced Detention* (Apr. 24, 2013), *available at* http://bit.ly/101jk1Y.

previously advocated for reforms to immigration detention, including the right to representation for detained immigrants.[4]

In the analysis below, the City Bar and its Committee oppose six amendments to S. 744 that would reverse S. 744's advances in reducing detention and providing due process and appointed counsel. These six amendments—Senator Charles Grassley's (R-IA) Amendments 14, 15, 23, and 45; Senator Jeff Sessions' (R-AL) Amendment 20; and Senator Michael Lee's (R-UT) Amendment 11—were filed on Tuesday, May 7, 2013 with the Senate Judiciary Committee, along with over 300 amendments to S. 744.[5] Of the six, five were not introduced before the Senate Judiciary Committee, and Grassley 45 was rejected by a 10-8 vote. We hope this analysis is useful as the bill, approved by the Senate Judiciary Committee overall, is now considered before the full Senate.

Respectfully submitted,

Prof. Lenni Benson
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[4] Association of the Bar of the City of New York, Committee on Immigration & Nationality Law, *Report on the Right to Counsel for Detained Individuals in Removal Proceedings* (August 2009), *available at* http://www.nycbar.org/pdf/report/uploads/20071793-ReportontheRighttoCounsel.pdf.

[5] *See* http://www.judiciary.senate.gov/legislation/immigration/amendments.cfm.

ANALYSIS OF GRASSLEY 14

Grassley 14[6] (ARM13502): Makes S. 744 temporary exception to employment requirement, for RPIs seeking to adjust status, nearly impossible to meet

Short summary: Grassley 14 makes it harder for RPIs, when later applying for a green card, to claim unemployed time as falling under a "temporary exception," and thus meet the requirement to have been employed except for 60-day "brief periods."[7]

Grassley 14 changes the catch-all exception in new INA Sec. 245C(b)(3)(E)(iii)(III) from "unable to work due to circumstances outside the control of the alien," to "unable to work due to **extraordinary** circumstances outside the control of the alien (**including acts of God**)" (emphases added).[8]

Analysis:

- Grassley 14 frustrates a genuine path to citizenship. Further, it increases the possibility of creating a permanent underclass of RPIs who later cannot qualify for lawful permanent residence (i.e., a green card).

- During these times of severe economic uncertainty, it is unfair and counterproductive to expect noncitizens to work except for 60-day brief periods, or "acts of God."
    - Grassley 14 imposes unrealistic requirements on noncitizens who are productive members of society.
    - Many potential RPI immigrants are more financially vulnerable than the general population.
    - Fear of loss of employment, and thus status, may render RPI immigrants vulnerable to workplace exploitation by unscrupulous employers—ironically, perhaps most so as RPI immigrants stay and progress to a green card.
        - The RPI program should not repeat the abuses that have plagued guest and undocumented worker programs.[9]

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[6] *See* http://www.judiciary.senate.gov/legislation/immigration/amendments/Grassley/Grassley14-(ARM13502).pdf.

[7] *See* S. 744 § 2102, creating new INA § 245C(b)(3)(A) - pp. 98-99 (requirement of employment except for 60-day "brief periods"); new INA § 245C(b)(3)(E)(iii) - pp. 104-05 (temporary exceptions).

[8] The other two temporary exceptions are for (i) medical/maternity/other authorized leave per law or employer policy, or (ii) being the primary caretaker of a child, person who requires supervision, or is "unable to care for (him)self."

[9] *See Immigration Reform and Workers' Rights*, N.Y. Times (Feb. 20, 2013), *available at* http://www.nytimes.com/2013/02/21/opinion/immigration-reform-and-workers-rights.html.

ANALYSIS OF GRASSLEY 15

Purpose of Grassley Amendment 15:
The amendment prohibits advance parole for Registered Provisional Immigrants ("RPIs"), meaning that if an RPI temporarily leaves the country during the 13 years his or her status is being processed, he or she will forego RPI status and likely not be admitted when seeking re-entry to the U.S.

Commentary:

Advance Parole
Advance parole is a means by which non-citizens who have a pending application for adjustment of status but lack a valid visa stamp permitting international travel may temporarily leave the country for limited humanitarian, educational, and employment purposes, and then be allowed to re-enter under that parole document.[10] The non-citizen must apply for and receive advance parole while present in the U.S. prior to any travel abroad.

The Consequences of Denying Advance Parole are Harsh

- **Limited Permission to Leave.** DHS limits advance parole to particularly sympathetic circumstances. Without it, a person granted RPI status may not leave the country to visit family members in an emergency, attend funerals, study, or even travel for work without foregoing his or her RPI status.

- **Long-term Ban on Travel.** This ban on travel would apply during the estimated 13 years the RPI's application for permanent residency is pending.

- **Family Visits.** Since RPIs do not generally qualify to bring family members to the U.S. as do other non-citizens who entered lawfully, restricting their ability to visit loved ones abroad particularly disrupts visiting family.

- **Incentivizing Illegality.** Separating families by denying parole may even incentivize the family members residing abroad to try to enter the U.S. illegally.

Advance Parole Need not Open a Gateway to Adjustment of Status

- **Grassley 15 is Too Broad.** Sec. 245(a) section currently allows non-citizens to adjust their status to lawful permanent resident only if they entered the U.S. *with* inspection and were either admitted or paroled. Sen. Grassley has suggested[11] that upon lawful re-entry through advance parole, a non-citizen could potentially claim to be eligible for adjustment of status even if his or her initial entry was unlawful. If this is a real concern, the issue can be addressed with much narrower legislation than Grassley 15.

- **S. 744 Already Limits Adjustment: RPIs Do Not Get a Shortcut.** Sec. 2102(b) of S. 744 enumerates the provisions by which RPIs may adjust status and makes clear that 245(a) does not provide an avenue for adjustment. RPIs therefore already do not have access to adjustment of status as do those who entered the U.S. lawfully and will not be able to avoid their status to avoid a long path to citizenship.

Recommendation: No on Grassley 15, insertion to Section 2102 – preserve advance parole for Registered Provisional Immigrants.

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[10] For more information, see Customs and Border Patrol, Advance Parole, *available at* http://cbp.gov/xp/cgov/travel/id_visa/lpr/adv_parole.xml.

[11] *See* Sen. Charles Grassley's Floor Statement on President Obama's Immigration Directive, 112th Cong. 13 (July 17, 2012), *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=41828.

ANALYSIS OF GRASSLEY 23

Grassley 23 (MDM13394):[12] Strikes S. 744's new United States Citizenship Foundation and other innovative initiatives encouraging immigrant integration

Summary: Grassley 23 strikes sections of S. 744 that provide direct assistance to permanent residents integrating into American civic life and citizenship.

Specifically, it strikes **three key provisions:**

1. The new **United States Citizenship Foundation** (USCF), a public-private partnership advancing immigrant civic involvement and integration.[13]

2. **Initial Entry, Adjustment, and Citizenship Assistance (IEACA) grants** to nonprofits that assist permanent residents in (a) preparing naturalization applications and (b) developing understanding of American civic values and traditions.[14]

3. **Pilot programs promoting integration** at lower levels of government, including grants to state and local governments "on a competitive basis"[15] to establish New Immigrant Councils and other localized sources of integration assistance.[16]

Analysis:

- Grassley 23 frustrates flexible, responsive solutions to encouraging immigrant integration on the path to U. S. citizenship.
    - The USCF establishes best practices for citizenship preparation by providing low-income permanent residents with the knowledge to become successful citizens, through innovative, localized, and technologically advanced approaches.
    - The USCF would directly assist permanent residents in understanding our civic values, traditions, and constitutional principles, beyond rote memorization of answers to civics test questions.[17]
- Although Grassley 23's stated purpose is to cut the US Citizenship Foundation, it eliminates more than that. The IEACA and pilot program grants, since not specific to the Foundation, could assist other nonprofit organizations working toward similar objectives.

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[12] *See* http://www.judiciary.senate.gov/legislation/immigration/amendments/Grassley/Grassley23-(MDM13394).pdf.

[13] *See* S. 744 §§ 2531 – 2536 (pp. 393-397).

[14] *See* S. 744 § 2537 (pp. 397-399).

[15] The bill also includes "other qualifying entities" and appears to give the Chief of the Office of Citizenship and New Americans considerable discretion over these grants.

[16] *See* S. 744 § 2538 (pp. 399-404).

[17] *See Citizenship Isn't About Passing a Civics Test*, CNN (May 6, 2013), *available at* http://www.cnn.com/2013/05/06/opinion/levine-citizenship.

ANALYSIS OF GRASSLEY AMENDMENT 45

Short Summary of Grassley Amendment 45:

The amendment alters the language of S. 744 and its revisions of the criminal penalties for illegal entry, reentry, passport fraud, and a few other provisions by **expanding the penalties** and **reducing the intent elements** of the crimes.

In S. 744, Sections 3704 to 3707 revise existing criminal penalties in the INA and in a rigorous manner expand the potential criminal sanctions of many border or document violations. The severity of the criminal sanctions and the increase in many penalties is balanced in some sections of S. 744 by requiring specific thresholds or more than a single offense to trigger the stiffer penalties. Almost all of the Grassley amendments eliminate those balancing factors.

Analysis:

Grassley 45 goes much further than S. 744's proposed expansion of civil and criminal penalties.

- Grassley 45 narrows exceptions, expands the scope of the crimes, and lengthens sentences for some offenders due to past criminal convictions, even if those convictions were relatively minor violations. Grassley 45 is unnecessary given the tools provided in the INA and the expanded criminal sanctions in S. 744 as introduced.

Grassley 45 would increase the costs of the bill disproportionally to the impact sought.

- Criminal prosecution of immigration violations is one of the most expensive elements of immigration law enforcement.[18]
- In recent years the U.S. Attorneys have increased the number of criminal prosecutions. Last year immigration criminal prosecutions represented 27% of all federal criminal cases.[19]
- When the government acts under its criminal authority, the U.S. attorneys' offices, federal public defenders, and federal district courts must devote substantial resources to these prosecutions. S. 744 already expands the tools of criminal enforcement, but Grassley 45 expands it even further.
- Grassley 45 will lead to increased and costly litigation about the vagueness of its terms. S. 744 has clearer adjudication standards.

Grassley 45 is an unprecedented effort to charge children with federal crimes

- Removes **any** exception for minors.
- Given the long statute of limitations, could subject a person over 18 (such as the Dream Act children) to criminal prosecution for illegal entry as a child.

Further Detailed Analysis by INA Section Amended in S. 744 and Grassley 45:

Analysis of Grassley 45 impact on Sec. 275:

Casts too wide a net and will be very expensive.

- Increasing sentences tied to unrelated past criminal conduct, not the immigration violation, will have unintended consequences of potentially long incarceration for immigration violators with relatively minor state or federal criminal records. For example, in New York, a Class A

[18] *See* Appendix 1 (illustrating the growth of the use of criminal prosecutions related to immigration violations.) *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx

[19] *See* Appendix 2 http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/D04Sep12.pdf (summarizing data from federal courts regarding actual prosecutions and the immigration crimes charged.). *See also* http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx

misdemeanor can include a sentence of one year. Under S. 744 definitions for "felony,"—this misdemeanor could be a felony. But S. 744 balanced that problem by requiring a minimum predicate crime sentence of 30 months before imposing higher sanctions of up to 15 years. Grassley 45 instead makes all "felony" convictions subject to this higher sentence.

- Prosecutions under existing INA Sec. 275 are already at a very high level and represent one of the largest categories of federal criminal prosecution. Expanding the conduct that can be sanctioned and the prosecution and incarceration for immigration violators will be an expensive operation. As S. 744 was introduced the sanctions were already broadened and heightened. This amendment may actually increase litigation because defendants may be incentivized to challenge the categorization of misdemeanors as felonies.

The Proposed Revision to INA 275 in Sec. 3704 Has a Severe Impact.

- S. 744's Expansions
  - Increases penalties and the scope of the criminal sanction by going beyond "entry" to include a person who "crosses a border" in an undesignated location. Other provisions of S. 744 expand the border by 100 miles into the interior. Potentially the existing S. 744 language could greatly expand the number of people who could be criminal charged with illegal entry.

  - S. 744 also expands penalties for illegal entry to those who illegally enter after an order of voluntary departure. This greatly expands the ability of the federal government to prosecute violators who now may face a three-year sentence. In the existing INA, illegal reentry after a voluntary departure can only be punished as a misdemeanor.

- **Specifically, Grassley 45 adds** "attempts to enter" to this category of criminal entry. The amendment goes further by eliminating the willfulness element in INA 275 subsection (c) that punished entry willfully making a knowing false or misleading representation or the willful concealment of a material fact. Grassley 45 eliminates some of the quantity and severity measures and makes convictions for any 3 misdemeanors or any felony a basis to raise the sanction to up to ten years from one year. (S. 744 requires the 3 misdemeanors to have occurred on three separate dates and requires the felony conviction to have required a period of incarceration as a prerequisite to the longer sentence.) In Grassley 45 the qualifications are stripped out and any felony conviction with incarceration now triggers a 15-year sentence for illegal entry.

- **Grassley adds** to this category of criminal entry -- "attempts to enter." The amendment goes further by eliminating the willfulness element in subsection (c) that punished entry willfully making a knowing false or misleading representation or the willful concealment of a material fact. In line 21 of the amendment concerning subsection (2)(C), the amendment eliminates some of the quantity and severity measures and makes convictions for any 3 misdemeanors or any felony a basis to raise the sanction to up to ten years from one year. S. 744 also has the increase in sentence but requires the 3 misdemeanors to have occurred on three separate dates and requires the felony conviction to have required a period of incarceration as a prerequisite to the longer sentence. Similarly in subsection (2)(D) the qualifications are stripped out and any felony conviction for any period of incarceration now triggers a fifteen-year sentence for illegal entry.

- This amendment also restates two sections of the existing INA Sec. 275 but does not materially alter the provisions other than retitling one of the subsections.

Recommendation: No on Grassley 45 proposed new Sec. 3704.

Grassley 45 Sec. 3705: Proposed Revision to Section 276 Reentry of Removed Alien,

In the existing INA 276, an individual can be criminally prosecuted for illegal reentry after an order of removal. S. 744 increases the penalties, but links the severity of any past criminal convictions to the penalty for illegal reentry after removal. Further, S. 744 adds a severe penalty for those who repeatedly enter illegally after removal even if they have no criminal convictions.

Grassley 45 strikes the S. 744 proposed Sec. 3705 and offers an alternative that authorizes increased criminal sanctions **even for minor crimes or for a single unlawful reentry**. There are also problems in the technical drafting within this Sec. 3705. The language inserts a possible exception into subsection (c) that is identical to the affirmative defense articulated in subsection (e). The existing language of S. 744 is much clearer and while it gives prosecutors tremendous authority to charge individuals with felony reentry, it tempers that expansion by requiring more than one violation or particularly serious prior criminal conduct. Grassley 45 subsection (c) is entitled "reentry after repeated removal" but creates a sanction for a single reentry after removal.

As we mentioned above, we do urge a clarification of the definition of "felony" found in S. 744 Sec. 3705 (i). The proposed language could allow many state misdemeanor convictions to be characterized as felonies whenever the **possible** sentence for the crime could exceed one year. This will undoubtedly lead to litigation over the proper interpretation of the Act. By changing the definition to measure the actual sentence served by the individual rather than any possible sentence, it is less likely that minor crimes would trigger the higher sanctions in the immigration statutes and it may reduce litigation over the definitions.

Recommendation: No on Grassley 45 Section 3705

Proposed Revision to INA Sec. 243(c) Penalties Relating to Vessels and Aircraft, Sec. 3706

In S. 744, Sec. 3706 raises existing penalties for the vessels and aircraft that violate immigration statutes and regulations. The Grassley 45 provision adopts the same penalty increases but omits a section of existing Sec. 243 and S. 744 subsection "(C) Compromise." The Grassley amendment would eliminate the ability of the U.S. government to negotiate the amount of the sanctions. S. 744 allowed the compromise in limiting sanctions for stowaways. Grassley 45 removes that flexibility.

In S. 744, a humanitarian aid exception is provided in subsection D. Grassley 45 retains the subsection but narrows the exception from "humanitarian aid" to only providing emergency medical care or food or water. This narrow exception might mean that people, including law enforcement personnel, who chose to provide medical care that may be characterized as "not an emergency" could face criminal sanctions. Moreover, the provision of dry or warm clothing could lead to violations of the act without the humanitarian exception.

There is also a housekeeping amendment in this section that clarifies that the Secretary of Homeland Security, rather than the Attorney General, has the sole authority to issue these sanctions. The Grassley amendment has the same language. We note, however, that the Board of Immigration Appeals, part of the Department of Justice, currently hears appeals of these vessel and carrier fines. The Senate may well want to consider where any administrative appeals should be heard and if the current assignment to the BIA is appropriate as opposed to creating an internal administrative process within DHS components. Transportation companies generally do not appeal too many cases. In the EOIR Yearbook of 2012, the agency reports only 3 cases in this category.[20]

Recommendation: No on Grassley 45 Section 3706 – preserve the humanitarian aid exception and the limited compromise option.

[20] *See* http://www.justice.gov/eoir/statspub/fy12syb.pdf at Table 17.

Proposed revision to Section 1541 of Title 18 Passport Trafficking, Sec. 3707

In S. 744 Section 3707 significantly changes the criminal statute governing the production of false passports. The existing statute limits the criminal sanctions to the production of a passport "under U.S. authority." S. 744 appears to cover any false passport. This could have a very significant impact on people fleeing persecution who often have to rely on false documents to escape the country of persecution. We would recommend restoring the phrase "under U.S. authority" as it appears in the current statute. Moreover there is a separate existing criminal statute that has been used when an individual tries to use a false or forged **foreign** passport. *See* 18 U.S.C. Sec. 1543. This statute is not amended in S. 744. Cases have held it applies to foreign passports. *See, e.g., U.S. v. Dangdee,* 616 F.2d 1118 (9th Cir. 1980).

Grassley 45 Sec. 3707 is very similar to S. 744 but it creates liability for a single false passport rather than the S. 744 requirement of 3 false passports within 3 years. In subsection (c), S. 744 required ten instance of producing or selling or buying false passport materials but Grassley 45 eliminates that element making a single instance a violation. Thus this amendment alters potential prosecution from those who might be engaged in commercial fraud to a single instance of passport fraud or possessing, using, buying false materials. While even a single instance of such fraud could result in prosecution under other statutes, this statute is really aimed at professional traffickers.

- Also in this Sec. 3707, both S. 744 and Grassley 45 amend **18 U.S.C. Sec. 1542 False Statement in an Application for a Passport.**

    - S. 744 Section 3707 amends existing 18 U.S.C. Sec. 1542 that criminalizes making material false statements in an application for a U.S. passport. Grassley 45 greatly expands this criminal statute by eliminating the materiality requirement and expanding the section to cover people who secure a U.S. passport for another person. Thus a parent who made a false statement, even a non-material one in order to secure a passport for his or her child, might violate this statute and could face a sentence of 15 years. If this statute needs to be expanded to cover situations where the passport is secured for another person, the materiality element should be retained. The Grassley 45 amendment of "any false statement" is very broad and could make listing an old address or changing the spelling of a name, a basis for serious criminal prosecution.

- Also in this Sec. 3707, both S. 744 and Grassley 45 amend **18 U.S.C. Sec. 1544 Misuse of a Passport.**

    Grassley 45 Language Covers "Attempts to use" Passports
    - Under existing law, people who misuse passports can face criminal sanctions. S. 744 requires the individual to misuse "for their own purposes." Grassley 45 covers "use" of another person's passport. The language goes further to include "attempts to use" these passports.
    - Grassley 45 deletes a provision included in S. 744 that also punished misuse of a "safe conduct" document. While the use of Safe Conduct documents are likely rare and limited to diplomatic or military context, it is unclear why Grassley 45 eliminated that provision in the criminal sanction.
    - As a general comment we note that there are other criminal statutes available to the U.S. Attorneys should people try to secure fraudulent documents. For example 18 U.S.C. § 1028 creates a ten-year penalty for people who fraudulently seek to secure identification documents.
    - 18 U.S.C. § 1001 is a general statute that prohibits any false statement in a form or document or uses any false document in an application to the federal government or federal agency, can be fined and imprisoned for five years. The sentence imposed is greater if the violation involved national security or abuse of children. There are also criminal sanctions for making a false claim of U.S. citizenship even when the individual is not presenting any false documents. *See* 18 U.S.C. Sec. 911.

- Grassley 45 mirrors S. 744 in Sec. 3707(d) that contains amendments to **18 U.S.C. Sec. 1545 Schemes to provide fraudulent immigration services.**
    - **There are no differences between S. 744 and Grassley 45 as to this section.**

- **Grassley 45 would leave the broader document fraud provisions.**
    - Grassley 45 omits S. 744 amendment to 18 U.S.C. Sec. 1546 Immigration and visa fraud provision found in S. 744 at page 624, line 13 to page 625, line 7.
    - The S. 744 provision strikes two subsections of the existing criminal statute and substitutes a provision aimed at people who traffic in false documents and have three or more instances of using or providing false documents.
    - Again, this appears to be an instance where S. 744 is aiming at professionals and individuals who go beyond a single mistake or misstep by using a false document a single time. Grassley 45 would authorize a **twenty-year sentence for a single mistake** of producing a false document to secure work.

Finally Sec. 3707 seeks to amend **18 U.S.C. Section 1547 and 1548** concerning the maximum imprisonment and an exception for authorized law enforcement activity. There is no difference between Grassley 45 and S. 744.

Recommendation: No on Grassley 45 Section 3707. The amendment expands harsh penalties and does not target enforcement on professionals and traffickers.

ANALYSIS OF SESSIONS 20

Purpose of Sessions Amendment 20:
The amendment alters the language of S. 744 such that an applicant for Registered Provisional Immigrant (RPI) status *must* be interviewed by the Secretary of DHS to determine whether they meet the eligibility requirements. The preexisting version of S. 744 stated that the Secretary *may* interview applicants.

Summary of Issue:
Title II of S. 744 amends Chapter 5 of Title II (8 U.S.C. § 1255 et seq.), by inserting a section on "Adjustment of Status of Eligible Entrants Before December 31, 2011, To That Of A Registered Provisions Immigrant." Section (c) describes the procedures for applying to be a RPI, including the application requirements and timeline. Section (c)(4)(C) currently states: "The Secretary may interview applicants for registered provisional immigrant status under this section to determine whether they meet the eligibility requirements set forth in subsection (b)." Sessions Amendment 20 replaces "may" in that sentence with "must," thereby requiring every applicant for RPI status to be interviewed before they can be considered eligible to become an RPI. Taken along with the other language in Section (c), the amendment would require applicants to meet all the eligibility requirements, submit an application with the information the Secretary deems necessary, and be interviewed by the Secretary, all "within the 1-year-period beginning on the date on which the final rule is published in the Federal Register" (*see* Section (c)(3)), with a possible 18 month extension for "good cause".

Analysis:
This change from discretionary to mandatory interviews of applicants for RPI status creates several problems. First, it diverts already scarce government resources that could be better spent processing the applications of immigrants who meet all of the eligibility requirements to become RPIs and targeting possible fraud. Under S. 744, RPI applicants will be reviewed at several stages, including when they later apply for full permanent resident status. Mandating interviews during the first stage will add unnecessary costs, and might not actually assist with fraud detection. Allowing agency officials to instead form expert fraud teams and do random sampling of applicants would be a more effective and efficient approach. Under existing regulations, DHS does not require an interview in every adjustment of status application. [21]

Second, Sessions Amendment 20 creates an unnecessary hardship for immigrants who obviously meet the prima facie requirements for RPI status who would not otherwise need to be interviewed. Finally, it could pose problems in conjunction with the one year period the Secretary is given to process RPI applications. If the Secretary is indeed required to interview all prospective RPIs within a one-year-period, it seems likely that there will be an enormous backlog of interviewees, swamping the agency and potentially severely limiting the number of RPI applicants who can successfully complete the requirements. The substitution of "must" for "may" could hamper the effectiveness of the entire RPI program.

Third, the USCIS already has a significant workload processing adjustment of status cases.[22] Other provisions of S. 744, if adopted, will increase the number of immigrant visas and exponentially increase the work of USCIS.

Recommendation: No on Sessions 20.

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[21] Adjudicator's Field Manual, Chapter 23.2(h)(3), available at http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm

[22] The most recent report indicates the below totals for I485 applications. The report is available at http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I485-performancedata-2013-Oct.pdf

2010 - Total I485 applications received: 340,463; complete: 375,525; pending 153,840

2011 - Total I485 applications received: 334,653; complete: 362,144; pending: 150,965

2012 – Total I485 applications received through October 2012: 311,949; complete: 330,810; pending: 139,352

ANALYSIS OF LEE 11

Lee 11[23] (EAS13518): Eliminates possibility of waiver of $1,000 RPI penalty, for any reason.

Short summary: Sen. Mike Lee's (R-UT) Amendment 11 eliminates any possibility of waiver of the $1,000 Registered Provisional Immigrant (RPI) penalty, for any reason, whether economic hardship, illness, age, etc. This penalty applies, on top of RPI fees, to those seeking RPI status (except for those eligible under new INA § 245D (i.e., the DREAM Act)).

Analysis:

- Lee 11 frustrates integration of the undocumented into the U.S. workforce, and federal, state, and local governments' ability to collect taxes from this population.
    - Until an individual secures work authorization through the RPI process, he or she may not be able to pay all initial fees due to special hardship. The RPI programs contain other substantial penalties and fees as well.

- Lee 11 appears **unnecessary** and **cruel**.
    - Many potential RPI immigrants are more financially vulnerable than the general population. The 2013 Poverty guidelines set the poverty level at $23,550 for a family of four. If two adults in the household applied for RPI status, this fee alone would represent nearly 8.5 % of annual income.[24]
    - Lee 11 prevents any immigrants from claiming hardship, due to economic hardship, illness, age, need for family support, etc.

- Lee 11 frustrates a genuine path to citizenship. Further, it increases the possibility of creating a permanent underclass of those who cannot qualify for RPI criteria.

- Unscrupulous lenders may exploit potential RPIs who cannot quickly raise initial capital.
    In recent regulations setting fee increases and discussing the waivers, the USCIS allowed an application for a waiver for initial Temporary Protected Status applications but were more restrictive for a renewal application.[25]

[23] *See* http://www.judiciary.senate.gov/legislation/immigration/amendments/Lee/Lee11-(EAS13518).pdf.

[24] http://aspe.hhs.gov/poverty/13poverty.cfm#thresholds

[25] Federal Register discussion of new rules on Fees, 75 Fed. Reg. 58961-58991 (Sept. 24, 2010) available at: http://www.gpo.gov/fdsys/pkg/FR-2010-09-24/html/2010-23725.htm.