

# THE CARTER IMMIGRATION BILL: A CRITICAL ANALYSIS

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## INTRODUCTION

Once again, the usually clandestine undocumented person is emerging in the public spotlight as a prominent societal concern. Certain interests advocate for their expulsion alleging that they cause unemployment, depress wages, drain public assistance funds and cause or contribute to various other social maladies.<sup>1</sup> Amid the hyperbole and hysteria,<sup>2</sup> however, there exists a distinct absence of reliable data to support even the most elementary of these accusations.<sup>3</sup> This lack of an adequate factual basis, taken in tandem with the traditional emotional milieu surrounding the issue of immigration, makes the formulation of an effective rational policy very difficult.

The continuing entrance of undocumented persons into the United States, and how to deal with those already here, presents a major domestic and foreign relations dilemma.<sup>4</sup> The Carter administration has responded to this issue by proposing legislation to reduce and regulate the presence of undocumented persons in the United States.<sup>5</sup> On October 12, 1977, a bill prepared by the administration, the Alien Adjustment and Employment Act, was introduced in the House of Representatives as H.R. 9531 by Rep. Peter W. Rodino, Jr.<sup>6</sup> Shortly thereafter, on October 28, 1977, the identical bill was introduced in the Senate as S. 2252 by Senators James O. Eastland, Edward M. Kennedy, Lloyd Bensten and Dennis DiConcini.<sup>7</sup> The Alien Adjustment and Employment Act contains two principal provisions. First, the administration proposes a two-tier adjustment of status as a means of regulating undocumented persons

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1. See, e.g., A. Fragomen, *The Illegal Alien: Criminal or Economic Refugee?*, Center for Migration Studies (1973); J. Bustamante, *The Wetback Deviant*, 77 Am. J. Soc. 706 (1972); A. Portes, *Return of the Wetback*, 11 Society 40-46 (Mar/Apr. 1974).
2. Much of the hyperbole contributing to the hysteria surrounding the issue of undocumented persons is the result of irresponsible statements made by some high governmental officials. The problem is further exacerbated by the propagation of these factually unsupported statements in the media. See, e.g., L. Chapman, Jr., *Illegal Aliens: A Time To Call A Halt!*, Readers Digest (Oct. 1976); W.B. Saxbe, *Address by Honorable William B. Saxbe, Attorney General of the United States, before the Cameron County and Hidalgo County Bar Associations*, Brownsville, Texas, (Oct. 1974). For a critique of media reporting on this issue, see S. Jacoby, *Immigration and the News Media: A Journalistic Failure*, Migration Today, Vol. 5, No. 2, at 20 (Apr. 1977).
3. With regard to the factual basis of the present legislative proposal, Prof. Wayne A. Cornelius of M.I.T. has said, "No other major policy affecting the livelihood of millions of people, in this country and abroad, has been formulated on the basis of such inadequate supporting evidence." W.A. Cornelius, *Undocumented Immigration: A Critique of the Carter Administrations' Policy Proposals*, Migration Today, Vol. 5, No. 4, at 6 (Oct. 1977).
4. For the foreign relations implications of this issue, see R. Fagan, *The Realities of U.S. - Mexican Relations*, 55 Foreign Affairs 685 (July 1977); Domestic Council Committee On Illegal Aliens, *Preliminary Report*, at 52 (Dec. 1976).
5. H.R. Doc. 95-202, 95th Cong., 1st Sess. (Aug. 4, 1977). The President's message delineated the main sections of his immigration policy and elaborated on practical implementation considerations.
6. H.R. 9531, 95th Cong., 1st Sess. (1977). The bill was referred to the Committee on Judiciary which has assigned it to the Subcommittee on Immigration, Citizenship and International Law.
7. S. 2252, 95th Cong., 1st Sess. (1977). The bill was referred to the Committee on the Judiciary which has assigned it to the Subcommittee on Immigration.

who have resided in the United States as of specific dates.<sup>8</sup> Second, the administration seeks to reduce the flow of undocumented persons into the United States by restricting employment opportunities through employer sanctions.<sup>9</sup>

The purpose of this note is to analyze the validity of the basic policy assumptions supporting the administration's proposal and to determine the probability of the bill accomplishing its avowed purpose of "reducing" and "regulating" the presence of undocumented persons in the United States. The administration's espousal of adjustment of status (so-called amnesty) is laudable as a humane and practical means of dealing with undocumented persons already in this country. In addition, the expressed preemption of State and local law imposing employer sanctions reflects a positive step toward establishing uniformity in the application of immigration policy.<sup>10</sup> Nevertheless, a circumspect analysis of the relevant historical and socioeconomic factors indicates that the effectiveness of this legislation is questionable, and its potential for generating and shielding discrimination against minorities, especially Chicanos, is formidable.

## HISTORY

For almost a century following the signing of the Declaration of Independence, the policy of the United States was one of open and unrestricted immigration.<sup>11</sup> It was not until 1882 that the first general immigration law was enacted,<sup>12</sup> providing for a head tax and the exclusion of certain classes of people. Restrictionist proponents continued to make insistent demands, usually stoked in times of economic downturns and predicated on ethnic and racial misconceptions,<sup>13</sup> for increased restriction of immigration. Although incremental restrictions were imposed in the latter part of the nineteenth century,<sup>14</sup> the culmination of restrictionist efforts during this phase did not come about until 1917 with the passage of the Literacy Act.<sup>15</sup>

8. H.R. 9531 and S. 2252, 95th Cong., 1st Sess., at §§2-4 (1977).

9. *Id.*, §5.

10. *See De Canas v Bica*, 424 U.S. 351 (1976). There, the Supreme Court ruled that a California statute (Cal. Labor Code §2805) which imposed sanctions on employers of undocumented persons, was a regulation of labor rather than immigration. Thus, the Court rejected the argument that this state law interfered with exclusive federal power over immigration. Since this ruling, numerous states and one municipality have passed employer sanctions. *See Centro de Inmigracion, State and Local Legislative Activity*, Georgetown University Law Center (Nov. 1977).

11. C. Wittle, *Immigration Policy Prior to World War I*, *Annals Am. Acad. Pol. and Soc. Sci.* (1949); Educational and Public Welfare Division, Congressional Research Service, Library of Congress, *Illegal Alien: Analysis and Background*, Committee on the Judiciary, U.S. House of Representatives, at 38 (June 1977). (Hereinafter cited as *Illegal Aliens: Analysis and Background*.) *See generally* Jaffee, *The Philosophy of Our Immigration Law*, 21 *Law and Contemp. Prob.* 358 (1956).

12. Act of August 3, 1882, 22 Stat. 214. This act extended the classes that were excluded in the Act of March 3, 1875, 18 Stat. 477.

13. *See* Hignam, *American Immigration Policy in Historical Perspective*, 21 *Law and Contemp. Prob.* 213 (1956). Prof. Hignam delineates the historical context in which the early U.S. immigration policy was formed. *See also* J. Bustamante, *The Historical Context of Undocumented Mexican Immigration to the United States*, *Aztlan*, Vol. 3, No. 2, at 257 (Fall 1972).

14. *See* Act of February 26, 1885, 23 Stat. 332; Act of February 23, 1887, 24 Stat. 414. These alien contract labor laws forbade the prepaying of transportation of an immigrant to the United States in return for services. *See also* Act of March 3, 1891, 26 Stat. 1084; Act of March 3, 1893, 27 Stat. 569. The Act of 1891 placed in the hands of the federal government the exclusive function of inspection and regulation of newly arriving immigrants, and it extended the classes of persons precluded from entering the country. The Act of 1893 established a special board of inquiry to pass on the admissibility of arriving immigrants.

15. Act of February 5, 1917, 39 Stat. 874. The act's main provision provided for the exclusion of all aliens over sixteen years of age who were physically able to read but did not read English or some other language or dialect. This act is probably the first sweeping victory for restrictionist forces, but its impact on limiting immigration was nugatory.

The Chinese Exclusion Act of 1882<sup>16</sup> and the Japanese-American Gentlemen's Agreement of 1907<sup>17</sup> had the result of excluding Oriental labor from the Southwest. As a result of this shortage of labor and the internal rural to urban migration of this era, a demand for cheap labor was created in the expanding fields and factories of the Southwest.<sup>18</sup> The railroad had opened up new markets and irrigation had expanded new areas for cultivation. Consequently, American capitalists and nascent agribusiness, faced with a strong and growing restrictionist movement, had to seek alternative sources of cheap labor. The proximity of Mexico to the Southwest and the relative poverty of its people, made it a logical and practical place to turn for cheap labor. It is the ebb and flow of this demand for Mexican cheap labor that has constituted the underlying basis for United States immigration policy toward Mexico.<sup>19</sup>

The immigration of Mexicans was covered under the 1917 Literacy Act and had the act's provisions been enforced, Mexican immigration would have been negligible. In 1918, however, the Commissioner General of Immigration, with the approval of the Secretary of Labor, issued a Departmental Order<sup>20</sup> exempting Mexican immigration from the provisions of the 1917 act and the contract labor laws.<sup>21</sup> The exemption was justified on a war-caused manpower shortage, but its existence continued long after the termination of the war. The fundamental policy approach of the United States was thus established: the government would relax immigration laws or their enforcement when it became desirable to import Mexican workers, but the government would prevent permanent settlement by invoking restrictionist laws when it became desirable to deport these workers.<sup>22</sup>

The enactment of the quota laws of 1921<sup>23</sup> and 1924<sup>24</sup> ushered in the quantitative phase of immigration restrictions. The national origins formula embodied in those laws effectively limited European immigration to the point where large scale immigration ceased.<sup>25</sup> Exponents of the national origins quota were only temporarily satisfied, however, and soon thereafter they clamored for the inclusion of the Western Hemisphere under the ambit of the 1924 act. Thus, they extended many of the ethnic and racial arguments levied against Southern and Eastern Europeans to Mexicans. Rep. John O. Box capsulized the gravamen of their concern:

16. Act of May 6, 1882, 22 Stat. 58.

17. 1 Foreign Rel. U.S. 766 (1907); For full text, see 2 U.S. Dept. of State, Papers Relating to the Foreign Relation of the United States, 1924, at 337-71 (1939).

18. C. McWilliams, *North From Mexico* (1968). See generally C. McWilliams, *Factories in The Fields* (1971). John Gardner, vice president during FDR's first term, publicly stated before a congressional committee, "In order to allow landowners now to make a profit of their farms, they want to get the cheapest labor they can find, and if they get the Mexican labor it enables them to make a profit."

V. Martinez, *Illegal Immigration and the Labor Force*, Current Issues in Social Policy, at 101 (1976).  
19. J. Samora, *Los Mojados: The Wetback Story* (1971); R. Acuna, *Occupied America: The Chicano Struggle Toward Liberation*, Ch. 6 (1972); *Illegal Alien: Analysis and Background*, supra note 11, at 48.

20. Department Order No. 52461/202. See U.S. Immigration Ser. Bull., Vol. I, No. 3, at 1-4 (1918).

21. Act of February 26, 1885, 23 Stat. 332; Act of February 23, 1887, 24 Stat. 414.

22. G. Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 Chicano L. Rev. 66 (1975). Prof. Cardenas' article is an important contribution to the study of Mexican immigration history.

23. Act of May 19, 1921, 42 Stat. 5. This act was viewed as a stop-gap measure to hold the gate while a permanent law was planned. However, it is important since it established the policy of national origins quota based on a percentage of the pre-existing national composition of the American population.

24. Act of May 26, 1924, 43 Stat. 153. The basic thrust of this act was to make the 1921 Act permanent with a few revisions.

25. Cardenas, supra note 22, at 69. See also U.S. Immigration and Naturalization Service, *Annual Report*, at 53-55 (1973).

The Mexican peon is a mixture of Mediterranean-blooded Spanish peasant with low grade Indians who did not fight to extinction but submitted and multiplied as serfs. Into this was fused much negro slave blood. This blend of low grade Spaniard, peonized Indians and negro slave mixes with negro, mulattoes and other mongrels, and some sorry whites, already here. The prevention of such mongrelization and degradation it causes is one of the purposes of our laws which the admission of these people tend to defeat.<sup>26</sup>

Ultimately, the Western Hemisphere was not placed under the national origins quota because of staunch opposition by business interests and governmental agencies that were concerned with the availability of Mexican labor.<sup>27</sup>

The largest admittance of Mexican immigrants into the U.S. occurred in the 1920's and there is little doubt that government inducements and business encouragements contributed significantly to this large migration.<sup>28</sup> The Mexican immigrant, however, was more tolerated as a laborer than welcomed as a citizen. The government's Dillingham Commission<sup>29</sup> limpidly expressed this prevailing attitude toward the Mexican immigrant when it said "it was evident that in the case of the Mexican, he was less desirable as a citizen than as a laborer." Nevertheless, the commission recommended the continued use of Mexican labor.<sup>30</sup>

U.S. government policy had two basic aspects. First, the availability and access of Mexican labor to U.S. employers had to be maintained. Second, adequate laws and enforcement mechanisms had to be established for the expulsion of the immigrant when he became unwanted as a laborer. In response to the second aspect, the Border Patrol was established in 1924<sup>31</sup> and the Act of 1929<sup>32</sup> made it a felony for an alien to enter the country illegally. The legal groundwork was thus laid for future deportation of "illegal aliens".

The depression of 1929 created the political and economic climate that made the Mexican worker undesirable, except as a scapegoat.<sup>33</sup> The Border Patrol was mobilized and existing immigration laws began to be strictly enforced.<sup>34</sup> The restrictive efforts were so successful that while immigration from Mexico into the U.S. decreased, emigration and repatriation from the

26. See 69 Cong. Rec. 2817-18 (1928). For a compilation of congressional statements and testimony illustrating racist perceptions, see Greenfield, Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Calif. L. Rev. 695 (1975).

27. Cardenas, *supra* note 22, at 69.

28. Another significant factor is this mass immigration of people from Mexico was the social upheaval caused by the Mexican Revolution of 1910. See generally H. Parkes, *A History of Mexico* (1969); C. Cumberland, *Mexico: The Struggle for Modernity* (1968); J. Wilkie, A. Michaels, *Revolution in Mexico: Years of Upheaval 1910-1940* (1969).

29. Act of February 20, 1907, 34 Stat. 897, created and defined the duties of the immigration commission which is popularly referred to as the Dillingham Commission after Senator William P. Dillingham, the commission's chairman. Its 42-volume report had an immense influence on the Act of 1917 and both the 1921 and 1924 quota laws.

30. Abstracts of Reports, Immigration Commission, Vol. 1, S. Doc. 747, 61st Cong., 3rd Sess., at 682-691 (1911).

31. Act of May 28, 1924, 43 Stat. 240, as amended by the Act of February 27, 1925, 43 Stat. 1049. For a description of the impact of the Border Patrol on undocumented persons work relations and conditions, see J. Bustamante, *The Historical Context of Undocumented Mexican Immigration To The United States*, Atzlan, Vol. 3, No. 2, at 270-71 (Fall 1972).

32. Act of March 4, 1929, 45 Stat. 1551.

33. For an excellent account of the plight of the Mexican immigrant during the depression period, see A. Hoffman, *Unwanted Mexican Americans in The Great Depression: Repatriation Pressures, 1929-39* (1974).

34. "Merely by a rigid enforcement of old regulations, such as the public charge proviso of 1882, and the contract labor ban of 1885, the consulars who issued visas to prospective Mexican immigrants drastically reduced their number." Hignam, *supra* note 13, at 232; see also 72 Cong. Rec. 7111 (1930).

U.S. increased.<sup>35</sup> In the frenzy to deport the "illegal alien" many of the constitutional rights and legal status of aliens were given only passing consideration by the Border Patrol and other enforcement agencies.<sup>36</sup> This disregard of peoples' rights prompted one writer to comment: "The restrictive and repressive immigration policies of the 1920's led to one of the most sordid pictures in law enforcement history."<sup>37</sup>

The mobilization and preparation for the Second World War brought renewed economic prosperity with the corresponding demand for cheap labor. As before, the demand for Mexican labor did not manifest itself in liberalized opportunities for permanent legal immigration. Rather, methods were devised by which Mexican workers could be imported on a legal temporary basis. A bilateral agreement between Mexico and the United States established the Bracero Program in 1942.<sup>38</sup> Though the need for the Bracero Program was attributed to the labor shortage caused by the war, the program was not terminated until 1964. What was intended as an emergency program became the principal conduit for temporary legal immigration of Mexicans for more than two decades.<sup>39</sup>

The 10-year period between 1944-54 was a time of an unprecedented illegal immigration from Mexico.<sup>40</sup> The same economic interests and factors that established the Bracero Program also stimulated the immigration of undocumented persons. In fact, the existence of the Bracero Program may have encouraged the northern migration of the Mexican *campesino*.<sup>41</sup> The influx of undocumented persons and the toleration of their presence in large numbers appears very similar to the influx of legal European immigration during periods of rapid economic expansion,<sup>42</sup> with the exception that the Mexican immigrant was always susceptible to expulsion.

In the late 1940's and early 50's the demand for cheap labor contracted while illegal immigration continued. Thus, pressure was created for the government to stem the "wetback invasion."<sup>43</sup> In 1954, the infamous "Operation Wetback"<sup>44</sup> was launched and with military proficiency. As much as one-sixth of the total Mexican-origin population living in this country was deported.<sup>45</sup> From 1954 to 1964 the immigration of undocumented persons remained relatively small.

A survey of recent legislative activity reveals a continued use of restrictive immigration proposals as anodyne for current economic ills. As the economic situation becomes more distressful, greater efforts are made to curb the influx

35. Cardenas, *supra* note 22, at 74.

36. The Wickersham Report characterized the method of apprehension and examination of the alien as "unconstitutional, tyrannic and oppressive." 5 National Commission On Law Observance and Enforcement, *Report of Enforcement of the Deportation Laws of the United States* (1931).

37. Wasserman, *The Immigration and Nationality of 1952 - Our New Alien And Sedition Act*, 27 Temple L. Quar. 69 (1953).

38. For a treatment of the various dimensions of the Bracero Program, see E. Galarza, *Merchants of Labor: The Mexican Bracero History* (1964); R. Craig, *The Bracero Program; Interest Groups and Foreign Policy* (1971); President's Commission on Migratory Labor Report, *Migratory Labor in American Agriculture* (1951).

39. Cardenas, *supra* note 22, at 75-76.

40. Hadley, *A Critical Analysis of the Wetback Problem*, 21 Law and Contemp. Prob. 334 (1956).

41. J. Samora, *Los Majados: The Wetback Story* (1971); Note, *Commuters, Illegals And American Farmworkers: The Need For A Broader Approach to Domestic Farm Labor Problems*, 48 N.Y.U. L. Rev. 482 (1973).

42. Cardenas, *supra* note 22, at 80.

43. The term "wetback" has obvious offensive and denigrating racist connotations to Chicanos.

44. Samora, *supra* note 41, at 33-57.

45. Cardenas, *supra* note 22, at 81.

of undocumented persons. These efforts manifest themselves in restrictionist proposals that, because of a lack of an understanding of the historical and economic role of the undocumented person, are either overly simplistic or a source of greater pressure for undocumented migration.

The Immigration and Nationality Amendments of 1976<sup>46</sup> is illustrative of a recent enactment that contributes to a greater inflow of undocumented persons. Since 1969, Mexico has been sending an average of 40,000 legal immigrants per year to the United States.<sup>47</sup> The 1976 Amendments drastically reduced the permissible number of legal immigrants to 20,000 per year.<sup>48</sup> This severe limitation of legal immigration is likely to contribute to greater illegal immigration. In evidence of this concern, *The New York Times* reported that an Immigration and Naturalization Service spokesman said, "pressures caused by reduced quota for Mexico would probably produce an increase in the number of Mexicans seeking to enter the United States illegally."<sup>49</sup> In addition, President Ford implicitly acknowledged the bill would have the result of creating greater pressure for illegal migration at the signing ceremony.<sup>50</sup>

Imposing sanctions on employers of undocumented persons have become a popular method of restricting illegal immigration.<sup>51</sup> Proposals containing employer sanctions were introduced in the 92nd, 93rd and 94th Congress by Representative Rodino.<sup>52</sup> The basic thrust of these provisions is to penalize employers that knowingly hire undocumented persons.<sup>53</sup> These sanctions are intended to remove the "economic incentives" that draw these people illegally to the United States.<sup>54</sup> Exponents of employer sanctions, however, fail to recognize that the historical utilization of Mexican labor, and the economic benefit derived from their employment, provides strong motivation for the continued use of these workers. Vague and standardless legislation, that relies to a large degree on voluntary compliance,<sup>55</sup> is proposed to curtail a longstanding practice that yields considerable economic benefit to employers.

The Carter administration's proposed Alien Adjustment and Employment Act appears to be a mere extension of past Rodino bills.<sup>56</sup> Although the administration bill is more carefully drafted and contains certain unique

46. Act of October 20, 1976, Public Law 89-236, 79 Stat. 2703.

47. *Illegal Aliens: Analysis and Background*, *supra* note 11, at 41.

48. See G. Reyes, *What Is The Eilberg Bill and What Will Its Affect Be?*, *La Raza*, Vol. 3, No. 1, at 15 (Spring 1977).

49. *The New York Times*, Oct. 24, 1976, at 26.

50. President Ford voiced concern "about one aspect of the legislation which has the effect of reducing the legal immigration from Mexico." Weekly Compilation of Presidential Documents, at 1548 (Oct. 25, 1976).

51. Federal efforts to penalize employers of undocumented persons date back to 1951 and 1952 when Senator Paul Douglas of Illinois introduced bills which made it a felony for an employer to hire undocumented immigrants. See Centro de Inmigracion, *Laws Prohibiting Employment of Undocumented Workers: An Unjust Solution to U.S. Economic Problems*, Georgetown Law Center, at 1 (May 1977); see also N. Copp, *Wetback and Braceros: Mexican Migrant Laborers and American Immigration Policy 1930-1960*, at 84-94 (1963).

52. H.R. 16188, 92nd Cong., 2d Sess. (1972); H.R. 982, 93rd Cong., 1st Sess. (1973); for an analysis of this legislation, see Note, *The Undocumented Worker: The Controversy Takes A New Turn*, 3 Chicano L. Rev. 164 (1976). H.R. 8713, 94th Cong., 2d Sess. (1976); for an analysis of this legislation, see Note, *The Rodino Bill On Illegal Aliens: A Legislative Note*, 3 J. Legis. 39 (1976).

53. The employment of undocumented persons has never been deemed unlawful under §274(a) of the Immigration and Nationality Act. This section prohibits the harboring, transporting and smuggling of undocumented persons, but ordinary employment practices are not construed as harboring.

54. H.R. Rep. No. 94-506, 94th Cong., 1st Sess., at 6 (1975).

55. Domestic Council Committee on Illegal Aliens, *Preliminary Report*, at 112 (Dec. 1976).

56. "The Administration's proposal is more the result of mindless legislative momentum than detailed analysis. This Legislative momentum began to build with Representative Peter W. Rodino's introduction of an undocumented alien bill in the second session of the Ninety-second Congress." Mexican American Legal Defense and Education Fund, *Statement of Position Regarding the Administration's Undocumented Alien Legislative Proposal*, at 2 (Nov. 1977).

provisions, its main provisions and policy foundations are substantially those of past Rodino bills, especially of H.R. 8713.<sup>57</sup> Unfortunately, the Alien Adjustment and Employment Act also fails to address the basic reasons for the presence of undocumented persons in our society, namely, Mexico's languishing economy and U.S. desire for cheap labor.<sup>58</sup>

### POLICY RATIONALE

President Carter's message to Congress expressly or implicitly mentioned three policy concerns that support passage of the Alien Adjustment and Employment Act (hereinafter the administration bill).<sup>59</sup> The administration bill addresses the concerns of: (1) displacement of native workers, (2) the depressing effect on wages and working conditions, and (3) the drain on public assistance funds caused by undocumented persons. An analysis of the administration bill requires at least a cursory examination of its underlying policy rationale.

The lack of reliable data is a major impediment to the formulation of a rational immigration policy.<sup>60</sup> Basic requisites such as the size of the undocumented population remain unconfirmed.<sup>61</sup> Nonetheless, an evaluation of the administration's policy concerns with available data from three recent studies on undocumented persons is elucidating. The studies represent research conducted by David North and Marion Houstoun for the U.S. Department of Labor; by Vic Villalpando, *et al.*, for the County of San Diego, and by Prof. Wayne A. Cornelius of the Massachusetts Institute of Technology.<sup>62</sup>

The central complaint lodged against the Mexican<sup>63</sup> undocumented person is that his employment causes unemployment for native American workers. The Villalpando and Cornelius studies assert there is no direct evidence of displacement of native labor caused by the employment of undocumented

57. See H.R. 8713, 94th Cong., 2d Sess. (1972).

58. See *Preliminary Report*, *supra* note 55, at 62. Prof. Cornelius believes the most salient reason for recent illegal immigration is the "economic mess in Mexico." W.A. Cornelius, *Undocumented Immigration: A Critique of the Carter Administrations' Policy Proposals*, Migration Today, Vol. 5, No. 4, at 18 (Oct. 1977); but Prof. Cardenas believes the "problem is . . . one whose seed has been planted time and again by the United States when it has been in need of Mexican labor." Cardenas, *supra* note 22, at 89. MALDEF states, "It is generally agreed that undocumented immigration is prompted by a combination of unemployment and low wages in source countries, and the availability of employment and relatively high wages presently existing in this country." MALDEF, *supra* note 56, at 23.

59. H.R. Doc. 95-202, 95th Cong., 1st Sess. (Aug. 4, 1977).

60. See, e.g., G. Cardenas, *Public Data On Mexican Immigration Into The United States: A Critical Evaluation*, Current Issues in Social Policy, at 127 (1976); but see, V. Briggs, Jr. *Illegal Immigration and the American Labor Force: The Use of "Soft" Data for Analysis*, Current Issues In Social Policy, at 113 (1976).

61. See W.A. Cornelius, *Illegal Migration To The United States: Recent Research Findings. Policy Implications, And Research Priorities*, Center For International Studies, M.I.T., at 1 (1977).

62. V. Villalpando, et al., *A Study of the Socioeconomic Impact of Illegal Aliens on the County of San Diego*, Human Resources Agency, County of San Diego (1977); D. North, M. Houstoun, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study*, prepared for U.S. Department of Labor (1976); W.A. Cornelius, *Illegal Migration To The United States: Recent Research Findings, Policy Implications, And Research Priorities*, Center for International Studies, M.I.T. (1977).

63. It is important that comments in this section be specifically limited to the Mexican undocumented persons whom experts believe constitutes 60 to 65% of illegal immigration flow. This specific reference to the Mexican component is necessary because most of the research and conclusions are based on research conducted with this particular element. Subsequent mention of "undocumented person" in this particular section should be construed as "Mexican undocumented person". Since the administration bill appears to be primarily aimed at the Mexican component of illegal immigration, this data is useful for analysis.

persons.<sup>64</sup> Professor Cornelius explains "[w]orkers cannot be displaced if they are not there . . .", noting that jobs occupied by undocumented persons are the least desirable and thus unattractive to the native worker who, even if unemployed, may have more attractive alternatives for his sustenance.<sup>65</sup> Villalpando cites a recent Immigration and Naturalization Service project to replace jobs held by apprehended undocumented workers with citizens as illustrative of this proposition. The 340 jobs opened by apprehensions were eventually filled, but not by citizens. Villalpando notes that "90 percent of the positions were occupied by 'commuter workers' from Baja California, Mexico."<sup>66</sup> Similar job replacement projects have reached like conclusions.<sup>67</sup>

A corollary of the job displacement thesis is the allegation that employment of undocumented persons depresses wages and causes poor working conditions. North and Houstoun suggest "that the most significant impact of the illegal is on local labor standards in the area where they congregate."<sup>68</sup> But, as Professor Cornelius points out, this contention has not been substantiated.<sup>69</sup> This allegation is weakened by results from these studies reflecting that a relatively small portion of undocumented persons receive less than minimum wage. Thus, their employment does not appear to depress wages below the legal minimum to any great extent.<sup>70</sup> Moreover, the Cornelius study observes that undocumented persons are usually employed in small marginal firms and industries where the exploitation of undocumented labor is a financial *modus operandi*. Consequently, he argues that the removal of undocumented persons does not necessarily translate into more jobs or better working conditions for the native worker since businesses have other alternatives open to them.<sup>71</sup> An obvious alternative is to mechanize or, because of their inability to secure labor at prevailing wages and conditions, they simply go out of business.<sup>72</sup> A recent editorial in *The Wall Street Journal* echoed this concern when it stated, "[i]n a city like New York, which has been driving away business through high costs, the illegal may well be providing the margin for survival for entire sectors of the economy. . . ."<sup>73</sup> In short, the removal of undocumented workers does not necessarily create more employment opportunities for native workers.

The popular perception of the undocumented person as a parasite living off welfare is refuted by all three studies.<sup>74</sup> Even the administration admits that "they are not now a major drain on public assistance programs paid for

64. Cornelius, *supra* note 62, at 8; Villalpando, *supra* note 62, at 50. North and Houstoun determined that undocumented persons do not displace American workers within the skilled labor market. They contend, however, that they compete for jobs within the secondary labor market. North, Houstoun, *supra* note 62, at 162-163.

65. Cornelius, *supra* note 62, at 9.

66. Villalpando, *supra* note 62, at 62.

67. *Los Angeles Times*, July 3, 1975, at 1 col. 4.

68. North, Houstoun, *supra* note 62, at 159.

69. Cornelius, *supra* note 62, at 6. See also M. Piore, *Undocumented Workers and United States Immigration Policy*, Center for International Studies, M.I.T., at 3 (1977).

70. For a summary of average wage per hour for all three studies, see Cornelius, *supra* note 62, at 13-14.

71. Cornelius, *supra* note 62, at 11.

72. "The argument is sometimes advanced that illegal aliens do the job that all legal resident workers find so distasteful that these jobs would not be filled if there were no illegal aliens. In this view, illegal aliens are not substitutes in employment for legal workers because the latter would not accept the jobs the illegals fill. To attract legal workers to such jobs money wages and working conditions would have to be increased by so much that firms that now rely on illegal workers would go out of business or substantially change their conditions of employment through a substitution of capital for labor. The curtailment of the use of illegal alien labor may then have little effect on legal worker employment, but would raise costs to these firms and raise the relative prices of the items they produce." Domestic Council Committee on Illegal Aliens, *Preliminary Report*, at 160-161.

73. Editorial, *The Wall Street Journal*, June 21, 1977 at 8.

74. Villalpando, *supra* note 62, at 121; North, Houstoun, *supra* note 62, at 140; Cornelius, *supra* note 62, at 12.



by taxpayers.”<sup>75</sup> An often overlooked fact is that undocumented persons pay taxes through automatic wage deductions (they rarely file income tax returns), through sales tax on retail purchases, and through property tax calculated into rent payments.<sup>76</sup> In San Diego County, an area with a heavy undocumented population,<sup>77</sup> Villalpando found that undocumented persons receive around \$2 million in public assistance while they contribute approximately \$48 million in tax funds.<sup>78</sup>

In light of these studies, the administration's policy rationale appears unsound and unsupported by available data. Although the presence of undocumented persons does present a serious dilemma, it is not for the reasons enunciated by the administration. The failure to realistically perceive and define the problem will inevitably lead to inadequate solutions, as illustrated by the administration bill's substantive provisions.

## SUBSTANTIVE PROVISIONS

The administration bill has two principal objectives: (1) to adjust to lawful permanent resident alien status those undocumented persons who have resided in the United States continuously since prior to January 1, 1970, and to adjust to a temporary resident alien status those undocumented persons who have resided in the United States continuously since prior to January 1, 1977, and (2) to restrict employment opportunities for undocumented persons in the United States through employer sanctions.<sup>79</sup> The basic infirmities of these provisions are primarily a result of the speculative policy rationale from which they emanate. The provisions, however, merit analysis to determine their specific practical impact and to evaluate the probability of accomplishing their objectives.

### 1. Adjustment of Status

The administration bill proposes a two-tier approach to the question of regulating undocumented persons already in the United States. This so-called amnesty provision has dominated media reports and public discussion, relegating other important features of this legislative proposal to obscurity. Notwithstanding the public attention received by this provision, there still remains a lack of understanding as to its specific contents and potential ramifications.

First, the administration proposes to amend the registry provision, section 249 of the Immigration and Nationality Act,<sup>80</sup> to authorize permanent resident alien status to those undocumented persons who have “continuously resided” in the United States prior to January 1, 1970, and who are otherwise admissible.<sup>81</sup> Persons applying under this provision would have to provide “normal documentary proof” of their residence and the adjustment of status would not be charged to any numerical limitation.

75. Office of the White House Press Secretary, *Undocumented Aliens: Fact Sheet*, Aug. 4, 1977.

76. Orange County Task Force On Medical Care For Illegal Aliens, *The Economic Impact of Undocumented Immigrants On Public Health Services in Orange County: A Study of Medical Costs, Tax Contributions, and Health Needs of Undocumented Immigrants*, (Preliminary Draft) at 20 (Orange County Board of Supervisors) (Mar. 1978).

77. In 1975 it accounted for 43% of the total apprehensions of undocumented persons along the southern border and 25% of all apprehensions nation-wide.

78. Villalpando, *supra* note 62, at 57, 173.

79. H.R. 9351 and S. 2252, 95th Cong., 1st Sess., §§2-5 (1977).

80. Act of June 27, 1952, Public Law 82-114, 66 Stat. 163, 8 U.S.C. §1259 (1970).

81. H.R. 9351 and S. 2252, 95th Cong., 1st Cong., 1st Sess., §2 (1977).

The permanent adjustment of status proposed by the administration is laudable as a humane and practical method of dealing with undocumented persons residing in the United States. Its time limitation, however, is far too restrictive to be of value to the bulk of undocumented persons in this country. The selection of January 1, 1970, as the cut-off date has the effect of excluding the vast majority of undocumented persons from qualifying for permanent resident status.<sup>82</sup> The Mexican American Legal and Educational Fund expressed its concern with the restrictive cut-off date by stating:

Under the Administration's standard, hundreds of thousands of undocumented persons who have made substantial contributions to American society, and who have developed binding ties to their local community, would be denied legal residence status, and shunted into the netherworld of nondeportable status.<sup>83</sup>

By proposing a seven-year residence requirement the potential salutary effect of this commendable provision is needlessly minimized.<sup>84</sup>

Contrary to the popular notion that the administration's amnesty proposal is a major policy innovation, it does not appear to offer anything substantially different than what is included in current law. Section 244 of the Immigration and Nationality Act provides relief from deportation for aliens "physically present in the United States for a continuous period of not less than seven years immediately preceeding the date of such application" for "suspension of deportation."<sup>85</sup> Under section 244 an alien, if he has resided in the U.S. continuously for seven years, can obtain relief from deportation. Under this section, however, he has the added burden of proving good moral character and extreme hardship.<sup>86</sup> Thus, except for removing the minor requirement of having to establish good moral character and extreme hardship, the administration's adjustment of status provision is substantially the same as section 244. In effect, it is a mere modification of existing law rather than an innovative policy proposal.

Second, the administration proposes to accord a unique temporary resident alien status (hereinafter TRA) to undocumented persons who have "continuously resided" in the United States prior to January 1, 1977.<sup>87</sup> Persons granted TRA status would be permitted to legally reside in the U.S. for at least five years with authority to work, but are not guaranteed permanent residency at the conclusion of the five years. The TRA status also carries with it restricted

82. See W.A. Cornelius, *Illegal Migration To The United States: Recent Research Findings, Policy Implications, and Research Priorities*, Center for International Studies, M.I.T., at 7 (1977). "Among the illegals in my study 71% had remained in the U.S. for 4 months or less during their initial trip. Fifty-four percent had stayed for 4 months or less during their most recent work experience in the U.S.; only 11% had worked in the U.S. for more than 1 year before returning to Mexico." See also D. North, M. Houstoun, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study*, prepared for the U.S. Department of Labor (1976).

83. Mexican American Legal Defense and Educational Fund, *Statements of Position Regarding the Administration's Undocumented Alien Legislative Proposal*, at 26 (1977).

84. For this reason other legislation proposals have contained much shorter time restrictions. See, e.g., H.R. 6093, 95th Cong., 1st Sess. (1977), which proposed a January 1, 1977 cut-off date; H.R. 4338, 95th Cong., 1st Sess. (1977), which sets July 4, 1976 as the cut-off date.

85. 8 U.S.C. §1254 (1970).

86. The administration bill does require, however, that an applicant, under its adjustment of status provision, be otherwise admissible under §212 of the I.N.A. On the other hand, suspension of deportation relief under §244 of the I.N.A. is not precluded by inadmissibility under §212.

87. H.R. 9531 and S. 2252, 95th Cong., 1st Sess., §4 (1977).

constitutional and statutory rights.<sup>88</sup> Under TRA status, a person is precluded from reunifying his family in the U.S. and is denied eligibility for such federal social service benefits as medical assistance programs under Title XIX, supplemental security income under Title XVI, and aid to families with dependent children under Title IV of the Social Security Act,<sup>89</sup> and is also denied eligibility under the Food Stamp Act of 1964.<sup>90</sup>

President Carter has described the purpose of the TRA grant as preserving "a decision on the final status of these undocumented aliens, until much more precise information about their number, location, family size, and economic situation can be collected and reviewed."<sup>91</sup> This avowed purpose of collecting information through the use of a TRA status grant, however, may be thwarted by the very design of the provision. Registration under this provision will also provide precise information regarding the location of undocumented persons, thereby facilitating their eventual deportation. Consequently, it is unrealistic to assume that undocumented persons will be motivated to compromise their anonymity for a promise of a five year legal status with the possibility of deportation at its end, particularly since once in the U.S. the probability of being deported is very remote.<sup>92</sup>

Moreover, the administration's TRA status is objectionable in that instead of eliminating this sub-class of people, it legally institutionalizes this second-class status. For the right not to be deported, the undocumented person is required to sacrifice family ties, to pay taxes without the reciprocal benefit of public assistance in time of need, and generally to exist with restricted legal rights.<sup>93</sup> The characterization of the TRA grant as conferring the "right to work" may be misleading since it is uncertain whether such a right carries with it any assurance of equal employment opportunities in light of the Supreme Court's decision in *Espinoza v. Farah Manufacturing Co.*<sup>94</sup> There, the Court held that job discrimination on the basis of alienage was not actionable under Title VII of the Civil Rights Act of 1964.

In addition, workers under TRA status are left in an ambiguous position as to what rights they can claim under the administration bill. For example, it is uncertain whether TRA workers have access to unemployment insurance or workmen's compensation.<sup>95</sup> It is also uncertain whether these workers would have a right to join trade unions. In the absence of these basic protections, workers under the TRA grant will be reluctant to voice complaints about work related matters and may consequently be placed in an economically vulnerable position.<sup>96</sup> Thus, the TRA grant propounded by the administration makes the

88. Senator Bensten expressed his concern about TRA status, describing it as "a sort of second-class residency that is inconsistent with our notion of democracy and may constitute a tacit admission of our inability to come to grips with a problem of this magnitude and complexity." See 123 Cong. Rec. S. 18067 (daily ed. Oct. 28, 1977).

89. 42 U.S.C. §1381 *et seq.* (1970).

90. 7 U.S.C. §2011 *et seq.* (1970).

91. H.R. Doc. 95-202, 95th Cong., 1st Sess., at 5 (Aug. 4, 1977).

92. Given the I.N.S. enforcement practices of concentrating on the border and the possibility that this force will be substantially strengthened under the administration proposal for more Border Patrol personnel, the decision not to accept the TRA grant is eminently rational - the possibility of being apprehended once in the interior is minimal while the possibility of returning after being deported in five years is greatly reduced. Hence, it is possible that the TRA status grant will not be successful in drawing undocumented persons from their clandestine existence. See Cornelius, *supra* note 82, at 8.; *Preliminary Report, supra* note 72, at 73.

93. MALDEF, *supra* note 83, at 35.

94. 414 U.S. 86 (1976).

95. MALDEF, *supra* note 83, at 33.

96. See P. Schey, *Carter's Immigration Proposal: A Windfall For Big Business, Anathema For Undocumented Persons*, Agenda, Vol. 7, No. 5, at 11 (Sept./Oct. 1977).

undocumented person a legally recognized second-class person and leaves him in an economically disadvantaged position.

As noted above, an effect of the TRA grant will be to create a work force of second-class persons. In the past, the absence of such a labor force has caused business interests to oppose employer sanction legislation because they feared the availability of cheap labor might be jeopardized.<sup>97</sup> While it appears that this effect may enhance the probability of the bill's passage, it is questionable whether such a temporary work force should be created as an incidental result of the Administration's proposal. If a temporary work force is to be created at all, it should be a result of a considered policy decision.

## 2. Employer Sanctions

The administration bill makes it unlawful for employers to hire undocumented persons not authorized to work in the United States.<sup>98</sup> It prescribes a civil penalty of not more than \$1000 per person illegally employed. The Attorney General is required, upon belief that an employer has engaged in a "pattern or practice,"<sup>99</sup> to bring action for civil penalties and injunctive relief. Violation of the injunction could lead to criminal contempt citations.

The fundamental objection to the employer sanction provision is that it does not deter the employment of undocumented persons, while it does afford the employer an incentive for discrimination toward minorities, particularly Chicanos. The administration concedes that discrimination is a likely result of its employer sanction provision and it attempts to rectify this result by charging federal agencies to make greater efforts to ensure that existing anti-discrimination laws are enforced.<sup>100</sup> However, the administration does not propose to allocate more funds or personnel for that purpose. Thus, while it does not appear that employer sanctions will significantly reduce the employment of undocumented persons, it does appear that this provision will engender discrimination in employment against Chicanos and other Hispanics.<sup>101</sup>

Immigration is a complex area of the law with many intricate ways in which legal status can be obtained or lost, therefore, the locus of enforcement falling on the employer is problematic since they lack the expertise to make knowledgeable determinations of legal status.<sup>102</sup> This concern is compounded by the lack of any definite standards for proof of legal residence. An employer will be reluctant to hire Chicanos, and other Hispanics, because of a legitimate fear of bureaucratic entanglements and a desire to avoid a potential

97. It has been reported that Senator Eastland's opposition to past employer sanction legislation has stemmed from his fear that it would restrict the availability of cheap labor for farmers. Senator Eastland is chairman of both the Senate Judiciary Committee and its Subcommittee on Immigration. See Note, *The Undocumented Worker: The Controversy Takes a New Turn*, 3 Chicano L. Rev. 166 (1976); see also *Los Angeles Times*, Mar. 16 1976, Pt. II, 1-2.

98. H.R. 9531 and S. 2252, 95th Cong., 1st Sess., §5 (1977).

99. What constitutes "pattern or practice" is not defined in the Administration's bill, and it could receive varying interpretations. The Senate Section-by-Section Analysis notes that "the Government will be required to show more than just accidental, isolated, or sporadic hiring of undocumented workers in order to establish a 'pattern or practice'". 123 Cong. Rec. S. 18066 (daily ed. Oct. 28, 1977).

100. H.R. Doc. 95-202, 95th Cong., 1st Sess., at 3 (1977).

101. See W.A. Cornelius, *Undocumented Immigration: A Critique of the Carter Administration Policy Proposal*, Migration Today, Vol. 5, No. 4 (Oct. 1977).

102. See Centro de Inmigración, *Laws Prohibiting Employment of Undocumented Immigrants: An Unjust Solution To Economic Problems*, Georgetown Law Center, at 3 (June 1977). See also Note, *The Rodino Bill On Illegal Aliens: A Legislative Note*, 3 J. Legis. 39 (1976). The author states in regard to employer sanctions:

This placed the burden of determining citizenship on the employer, who is not qualified to deal with it. The determination can be technical and complicated, requiring knowledge of immigration laws and constitutional law. Questions of derivative citizenship, loss of citizenship, and interpretation of the proliferation of visas and other proofs are beyond the employer's competence.

Justice Department lawsuit, with all its attendant financial costs and adverse publicity.<sup>103</sup> Furthermore, the employer who wishes to discriminate can use the pretext of "following the law" to shield his employment practices from allegations of unlawful discrimination.

As a means of reducing the bill's discriminatory impact, the employer is provided with a rebuttable presumption that he has not violated the law against hiring undocumented persons upon proof that he has reviewed certain documents designated by the Attorney General.<sup>104</sup> But given the large number of fraudulent documents in use by undocumented persons,<sup>105</sup> the rebuttable presumption may not allay employers' concerns that they are inadvertently violating the law. The employer could only securely rely on an identification card that the government recognizes as fool-proof with the reviewing of that document being a complete defense. In addition, the presumption is rebutted if the Attorney General adduces evidence that the surrounding circumstances should have alerted the employer to the illegality of the job applicant's status. Thus, employers may be encouraged to circumvent the problem of determining legal status by refusing to hire "foreign looking" persons.

The principal purpose of employer sanctions is to eliminate the employment opportunities that draw undocumented persons to the United States. However, the purported deterrence of the administration's employer sanction provision must be examined. The question that needs to be asked is: Will it markedly reduce the number of aliens attempting to enter the United States? Professor Cornelius responds: "My answer and, I believe, that of most experts outside the government who have studied the phenomenon is negative."<sup>106</sup> One of the primary reasons offered by Professor Cornelius, and others in the area,<sup>107</sup> is that there is no effective enforcement apparatus, and the establishment of one would entail a phenomenal cost.<sup>108</sup> The Cabinet-level Domestic Council Committee on Illegal Aliens graphically illustrated the enforcement problem observing, "[l]ate in 1974, about 85 percent of the 1,600 person Border Patrol force was assigned to the border, leaving the interior relatively unpoliced."<sup>109</sup>

Employers, some of which are stridently opposed to this legislation and stand to gain financially from the employment of undocumented persons, are asked to voluntarily comply with an employer sanction law. This is an unrealistic expectation since many of these businesses have systematically violated minimum wage laws, occupational safety and health laws, and tax withholding laws.<sup>110</sup> In sum, the administration bill will not be a deterrence to the employment of undocumented persons due to the lack of an effective enforcement apparatus. Furthermore, the safeguards against discrimination are of minimal value given the pragmatic concerns and financial interests of employers.

103. MALDEF, *supra* note 83, at 5.

104. H.R. 9531 and S. 2252, 95th Cong., 1st Sess., §5(c) (1977).

105. In 1974, immigration officers intercepted 15,825 fraudulent or altered immigration papers compared to 11,587 for the previous year. *Van Nuys News*, August 20, 1974, at 5-A.

106. Cornelius, *supra* note 101, at 16.

107. Schey, *supra* note 96, at 13.

108. *Illegal Aliens: Analysis and Background*, *supra* note 11, at 57; for an estimate of the potential cost of the total Carter immigration proposal, see Cornelius, *supra* note 101, at 20.

109. *Preliminary Report*, *supra* note 72, at 73. The report further states, "[a]s a result, if Mexican alien now successfully penetrates the border region, he is essentially 'home free'." *Id.*

110. Schey, *supra* note 96, at 13.

## CONCLUSION

The Alien Adjustment and Employment Act is more an extension of past legislative efforts than a careful analysis of the issue of illegal immigration. While the bill contains some ameliorating provisions, overall, it is ill conceived from a policy perspective, and its effectiveness is dubious. The lack of supporting data makes it speculative, and preliminary research findings fail to support the administration's policy rationale.

The substantive provisions of adjustment of status and employer sanctions fail to accomplish their avowed purpose of regulating and reducing the presence of undocumented persons in the United States. The permanent adjustment of status provision represents a humane and practical approach to the problem of regulating undocumented persons already here, but its seven-year residency requirement makes it too restrictive to affect the vast majority of undocumented persons. The temporary resident alien status is unacceptable because it legally institutionalizes a second-class status for undocumented persons. In addition, the fact that this provision only authorizes a five-year legal residency makes it ineffective for drawing undocumented persons out from their extra-legal existence. Hence, the likelihood that these people will not exercise their option to be covered under this provision will probably defeat the objective of collecting data.

The employer sanction provision does not provide a deterrent to the employment of undocumented persons, but does provide an employer with an incentive for employment discrimination against legal residents. The bill's anti-discrimination safeguards are inadequate. Employer sanctions place minorities, especially Chicanos, at a disadvantage in obtaining employment since they will have the onus of proving their legal status to an unknowledgeable and suspicious employer. One commentator explained the impact of employer sanctions in the following terms: "If you want to increase the exploitation of immigrant workers in this country, employer sanctions is probably the most effective way of doing it."<sup>111</sup>

The fundamental flaw in the Carter administration bill is that it seeks unilaterally to solve this complex and problematic phenomenon. The problem of illegal Mexican immigration should be analyzed from a bilateral perspective. The "push" factors in the sender country must be addressed if legislation aimed at the domestic "pull" factors are to prove successful. Failure to perceive the international dimensions of this issue will lead to ineffective and unrealistic solutions that may only serve to further aggravate the plight of the undocumented worker and to jeopardize the statutory and constitutional rights of legal residents.

111. Cornelius, *supra* note 101, at 16.