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111th Congress }
2d Session }

SENATE

{ REPORT
{ 111-248

TO ALLOW CERTAIN U.S. CUSTOMS AND BORDER PROTECTION EMPLOYEES WHO SERVE UNDER AN OVERSEAS LIMITED APPOINTMENT FOR AT LEAST 2 YEARS, AND WHOSE SERVICE IS RATED FULLY SUCCESSFUL OR HIGHER THROUGHOUT THAT TIME, TO BE CONVERTED TO A PERMANENT APPOINTMENT IN THE COMPETITIVE SERVICE

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 1517

TO ALLOW CERTAIN U.S. CUSTOMS AND BORDER PROTECTION EMPLOYEES WHO SERVE UNDER AN OVERSEAS LIMITED APPOINTMENT FOR AT LEAST 2 YEARS, AND WHOSE SERVICE IS RATED FULLY SUCCESSFUL OR HIGHER THROUGHOUT THAT TIME, TO BE CONVERTED TO A PERMANENT APPOINTMENT IN THE COMPETITIVE SERVICE



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Mr. LIEBERMAN, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany H.R. 1517]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 1517) to allow certain U.S. Customs and Border Protection employees who serve under an overseas limited appointment for at least 2 years, and whose service is rated fully successful or higher throughout that time, to be converted to a permanent appointment in the competitive service, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of H.R. 1517 is to allow the U.S. Customs and Border Protection (CBP) to resolve a longstanding issue involving twenty-five employees stationed abroad. These employees initially received temporary appointments, but have remained in their jobs between eight and twenty years. Under international agreements reached after their hiring, and to address potential liabilities under the laws of the countries in which they work, they now must hold permanent positions or face termination of their employment. This bill would give CBP a very targeted exception from civil service rules that require agencies to use a competitive process to hire for permanent jobs. It will thereby allow this small group of long-time employees to keep their jobs and allow the United States to retain their expertise.

II. BACKGROUND AND NEED FOR LEGISLATION

H.R. 1517 will allow CBP to rectify mistakes made by the Immigration and Naturalization Service (INS) and the Department of Agriculture, which employed the individuals covered by the bill prior to the creation of the Department of Homeland Security. The twenty-five CBP employees at issue work in Aruba, The Bahamas, Bermuda, Canada, and the Republic of Ireland.¹ The INS and the Department of Agriculture originally hired the employees, all United States citizens residing permanently in these countries, as overseas temporary part-time appointments.² Under Department of State rules, such appointments are supposed to last a specified period of time, not to exceed one year, and are aimed at meeting a temporary employment need in a foreign country. Over time, however these 25 employees' work gradually evolved, and their jobs became full-time and permanent but their jobs remained in a gray area between typical civil service positions and locally engaged staff (who are typically hired locally and compensated in local currency). These 25 employees receive compensation as if they were in the U.S. civil service system, but since they were hired locally, outside the civil service competition rules, they are ineligible for actual civil service positions.

One unintended consequence of this situation is that it may put the United States government in violation of local employment laws. Because these individuals' positions are technically not considered U.S. government civil service positions, the U.S. government's employment relationship with these permanent resident employees is subject to the laws of the host country in question. The U.S. government could thus be in violation of local law if the benefits provided to the employees do not meet the requirements of the host country's employment laws (e.g., a certain number of holidays per year and paid maternity leave, among other things).³ The CBP employees in question are currently paid in accordance with the General Schedule System (GS) rather than the Local Compensation Plan developed in accordance with each country's pre-

¹ One of these employees is in the process of retiring, so the overall number of employees affected by this bill may be 24 by the time it is enacted.

² 17 of these employees were originally hired by the INS to undertake immigration inspections. 8 of them were originally hired by the Department of Agriculture to undertake agricultural inspections. See 5 C.F.R. Part 301.

³ CBP believes that this is in fact the case for Ireland.

vailing compensation practices. As such, the Department of State has raised concerns about this potential violation and has requested that CBP correct the employees' status.

All twenty-five employees work in "pre-clearance operations," an important component of the United States government's ongoing efforts to secure international travel. At pre-clearance ports in foreign countries, CBP officers conduct immigration, customs, and agricultural inspections of travelers before they travel to the United States. This allows the U.S. government to better identify dangerous or inadmissible individuals before they actually board an airplane bound for the United States. In order to place a pre-clearance facility in a foreign country, CBP must enter into an agreement with that country governing how pre-clearance operations will be carried out.

Apart from the Department of State's general concerns about whether the U.S. is violating local employment laws, there is a specific issue relating to an international agreement between the United States and Ireland, where 15 of the employees in question work. The agreement between the United States and Ireland that allows U.S. personnel to conduct pre-clearance operations requires that the CBP employees stationed in Ireland be in the U.S. civil service system. Because the CBP pre-clearance individuals addressed by H.R. 1517 were hired in Ireland to work there on overseas limited appointments, even though they are receiving pay and benefits as if they are permanent employees, CBP is technically in violation of the two countries' agreement.

Unfortunately, the executive branch cannot solve this international disagreement on its own. Civil service laws prohibit agencies from non-competitively promoting an individual from a limited overseas appointment to a permanent civil service position.⁴ To provide an equitable solution that recognizes the work done by these employees for the United States, H.R. 1517 provides CBP the authority to convert this select group of employees non-competitively to the competitive service. Congress has previously granted the Internal Revenue Service⁵ and the Library of Congress⁶ the authority to convert employees from limited positions to permanent, civil service positions.

In late 2007, the Department of State requested that CBP either convert the employees to Locally Engaged Staff (LES), who work for the U.S. government but are compensated in local currency and typically pay local taxes, or to place the employees into competitive positions. Since then, CBP and the Department of Homeland Security have been working with the Department of State and the Office of Personnel Management to develop a solution that would allow the employees to continue their work in their current positions and avoid adverse impacts to the employees.

In June 2009, an interim administration action was taken to bring the affected positions under the purview of the National Security Decision Directive (NSDD) 38, which gives the Chief of Mission—the head of our diplomatic representation in a foreign country (usually the Ambassador)—control over the size, composition, and mandate of overseas full-time mission staffing for all United

⁴ 5 CFR Part 301.

⁵ P.L. 105–206, section 1201, 112 Stat. 685, 717 (1998).

⁶ P.L. 106–554, 114 Stat. 2763 (2000).

States government agencies. With respect to the employees working in Ireland, this interim action brought the positions under the umbrella of the U.S. Embassy in Ireland to allow CBP additional time to take official action to convert these positions to competitive status, while allowing CBP to increase staffing at pre-clearance operations, per the United States government's agreement with Ireland. The Department of State has given CBP a June 2011 deadline for adhering to the requirements of the international agreement.

Neither CBP nor the Department of State have been able to provide the Committee with a satisfactory answer as to how these individuals could have been hired outside of State's usual process for overseas limited appointments and why their status has not been addressed before now. Nevertheless, the individuals in question have, by all accounts, been exemplary employees and should not be held responsible for irregularities and inconsistencies in the hiring processes for overseas limited appointments at the INS, the Department of Agriculture, and the Department of State.

H.R. 1517, as passed by the House, provides discrete authority to the CBP Commissioner to convert these positions from limited overseas appointments to permanent civil service positions. The Senate substitute to H.R. 1517 makes two minor changes to the bill: it clarifies that the bill should not be construed as allowing for grants of retroactive pay or benefits, and it places a two-year sunset on CBP's authority to convert temporary employees. CBP has assured the Committee that converting these employees will not take longer than two years.

The Committee urges CBP and the Department of State to work together in order to minimize the impact on these individuals and their families.

III. LEGISLATIVE HISTORY

H.R. 1517 was introduced on March 16, 2009, by Congressmen Eliot Engel and Peter King. The bill was passed by the House on December 14, 2009, and referred to the Committee on Homeland Security and Governmental Affairs in the Senate. The Committee considered the bill on July 28, 2010, and ordered the bill reported favorably by voice vote with an amendment in the nature of a substitute. Members present for the vote on the bill were Senators Lieberman, Levin, Akaka, Carper, Pryor, Landrieu, McCaskill, Tester, Kaufman, Collins, and McCain.

IV. SECTION-BY-SECTION ANALYSIS

Section 1. Definitions

This section defines, for the purposes of this Act, the terms 'Commissioner', 'U.S. Customs and Border Protection', 'competitive service', and 'overseas limited appointment'.

Section 2. Authority to convert certain overseas limited appointments to permanent appointments

This section grants special authority to the Commissioner of CBP to adjust the appointment for certain CBP employees stationed overseas in order to correct their employment category and protect their Federal benefits and retirement.

Specifically, this section gives the Commissioner authority to noncompetitively convert CBP employees hired under an overseas limited appointment to permanent status if the employee has two or more years of continuous service and the service has been rated successful or an equivalent.

The section also requires the United States to indemnify and hold harmless employees covered under the Act from claims arising from the exercise of their duties before, on, and after enactment of the Act, including, but not limited to, claims arising from their residency status.

Further, the section requires that employees covered under this Act and their dependents receive services and monetary payments equivalent to those provided to other CBP employees in similar positions in the same country of assignment.

Lastly, the section provides guidance to the Commissioner with regard to the implementation of the conversion of an employee under this Act and specifically states that the implementation should meet the operations needs of CBP while at the same time, and to the greatest extent practicable, not be disruptive to the affected employees.

Section 3. Rule of construction

This section clarifies that nothing in the bill shall be construed as intending to authorize the payment of back wages or benefits to employees who undergo a status conversion.

Section 4. Termination

This section states that the authority of the Commissioner to convert the status of employees shall terminate 2 years after the date of enactment.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. The Congressional Budget Office states that the bill contains no intergovernmental or private sector mandates as defined in the Unfunded Mandate Reform Act and would not effect state, local, and tribal governments. The enactment of this legislation will not have significant regulatory impact.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JULY 30, 2010.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1517, an act to allow certain U.S. Customs and Border Protection employees who serve under an overseas limited appointment for at least two years, and whose service is rated successful or higher throughout that time, to be converted to a permanent appointment in the competitive service.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 1517—An act to allow certain U.S. Customs and Border Protection employees who serve under an overseas limited appointment for at least two years, and whose service is rated successful or higher throughout that time, to be converted to a permanent appointment in the competitive service

CBO estimates that implementing H.R. 1517 would have no significant cost to the federal government. Enacting the legislation would not affect revenues or direct spending; therefore, pay-as-you-go procedures would not apply.

H.R. 1517 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

H.R. 1517 would authorize U.S. Customs and Border Protection (CBP) in the Department of Homeland Security to change the employment status of certain individuals stationed overseas; this authority would expire two years after enactment of the legislation. The act would change those employees' status from "overseas limited appointment" to "permanent appointment in the competitive service" to comply with certain international agreements between the United States and other countries. The legislation would apply to 35 employees who began service with the former Immigration and Naturalization Service. H.R. 1517 would not change the salaries or significantly alter the benefits of those individuals. Thus, CBO estimates that implementing the act would have no significant effect on spending by CBP.

On December 3, 2009, CBO transmitted a cost estimate for H.R. 1517 as ordered reported by the House Committee on Homeland Security on November 17, 2009. The two versions of the legislation are similar, as are the CBO cost estimates.

The CBO staff contact for this estimate is Mark Grabowicz. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by H.R. 1517 as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

H.R. 1517 does not make any changes to existing law.