ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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March 5, 2012

The Honorable Ronald Kirk
Ambassador
United States Trade Representative
600 17th St., N.W.
Washington, DC 20508

Dear Ambassador Kirk:

We understand that your office is currently engaged in discussions with various nations on a possible Trans-Pacific Partnership (TPP) Free Trade Agreement. We write to seek your assurance that your office will not negotiate immigration provisions with respect to the TPP or other future trade agreements.

As this Committee previously stated in the attached July 10, 2003 letter to the Office of the U.S. Trade Representative (USTR), the inclusion of immigration matters in trade agreements undermines Congress' plenary power over immigration matters. Such inclusion weakens Congress' ability to subject specific immigration policy proposals to the debate and amendment process so vital to creating sound policy. And immigration provisions in trade agreements cannot be later modified by Congress without placing the United States in violation of those agreements. These factors lead us to oppose the inclusion of immigration provisions in trade agreements.

We are pleased that the previous administration acknowledged these principles and agreed that any changes to U.S. immigration law be considered only through the normal legislative process. We ask that your office continue to refuse proposals to modify U.S. immigration law in future trade agreements and that you make this position clear to any foreign government involved in negotiations affecting the United States.

We attach this Committee's July 10, 2003 letter to the USTR, and the arguments therein, for your reference. Please let us know if you have any questions or concerns, and we look forward to working with you on these and other matters.

Sincerely,

Lamar Smith
Chairman

John Conyers, Jr.
Ranking Member

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July 10, 2003

The Honorable Robert B. Zoellick
Ambassador
United States Trade Representative
600 17th St., N.W.
Washington, DC 20508

Dear Ambassador Zoellick:

We have long been concerned about the practice of the Office of the United States Trade Representative of negotiating changes to the Immigration and Nationality Act with foreign countries during talks on free trade agreements. This reached its nadir with the North American Free Trade Agreement and then with 1994 General Agreement on Trade in Services. In NAFTA, the USTR negotiated a major new professional worker visa category for Mexicans and Canadians that contains few of the safeguards for American workers built into the longstanding H-1B visa category available to nationals of all countries. Not only did this process usurp Congress' Constitutional role in creating immigration law, but it forever bans Congress from making modifications to, or repealing, this new visa program. Even worse, in GATS, the USTR negotiated standards for the H-1B program itself, permanently barring Congress from making many modifications to the program. While you were of course not responsible for these acts by previous Administrations and previous Trade Representatives, we want to urge you in the strongest possible terms to never again agree to negotiate immigration provisions in bilateral or multilateral free trade agreements.

Article I, section 8, clause 4 of the Constitution provides that Congress shall have power to "establish an uniform Rule of Naturalization." The Supreme Court has long found that this provision of the Constitution grants Congress plenary power over immigration policy. As the Court found in Galvan v. Press, 347 U.S. 522, 531 (1954), "the formulation of policies [pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." And, as the Court found in Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967)), "[t]he Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'"

We appreciate the increased level of consultation with Congress that you have provided during your term over that provided by previous Trade Representatives, especially regarding the negotiations over the Chile and Singapore Free Trade Agreements. However, in the future, even heightened consultation will not alter our fundamental opposition to the inclusion of immigration matters in free trade agreements. First, such inclusion degrades Congress' ability to exercise its plenary power. Second, fast track authority takes away Congress' ability to subject immigration proposals to the debate and amendment process so vital to creating sound immigration law. And third, immigration provisions in free trade agreements cannot later be modified by Congress without placing the United States in violation of those agreements, despite fundamentally changed national circumstances. These factors seriously impair our ability to do the jobs we were elected to do – to legislate an immigration law that is in the best interests of our constituents.

Therefore, we urge you to no longer entertain proposals to modify U.S. immigration law in future free trade agreements. We also urge you to make this position clear to the foreign governments you are currently negotiating free trade agreements with, including but not limited to the negotiations pursuant to the Doha round of the General Agreement on Trade in Services, the proposed Central American Free Trade Agreement, and the proposed free trade accord with Australia.

Should immigration provisions be included in future free trade agreements, those of us who have supported trade promotion authority and free trade agreements in the past will be put in the troubling position of having to consider opposing future extensions of trade promotion authority or future trade agreements themselves. Of course, whenever the Administration would like to propose legislative changes to the Immigration and Nationality Act, we would be happy to give the proposals the most serious consideration through the regular legislative process.

We thank you for continuing to consult with us and look forward to working with you and the President to craft the best trade policy for America.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

JOHN CONYERS, JR.
Ranking Member