# IMMIGRATION REFORM

## A SYSTEM FOR THE 21st CENTURY

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# U.S. Immigration Reform

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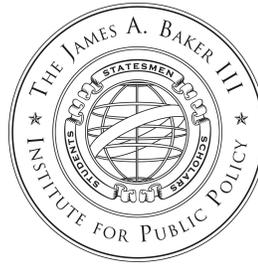
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LATIN AMERICA INITIATIVE IMMIGRATION RESEARCH PROJECT
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# U.S. IMMIGRATION REFORM

BY

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**Abstract**

This paper seeks to explain the apparent paralysis that has affected efforts to address the very real immigration problems that the United States faces. The answer appears to lie in the divergence between the politics and the economics of immigration that has prevented the Congress from adopting comprehensive reforms that would rationalize an immigration system riddled with contradictions and continuing tolerance for illegal migration. The paper begins with a historical overview of immigration policy decision-making processes in the United States. It then briefly presents current immigration policies and explains their successes and failures. This section also sets out the principal policy recommendations that have been under consideration to reform immigration. The paper then discusses three factors that help explain the difficulties in enacting comprehensive reform: 1) the coalitions that form around immigration policy, which often successfully coalesce over specific provisions in the law but break apart over others; 2) public ambivalence about immigration, particularly among those who see their own immigrant forebears through rose-colored glasses but are fearful that today's immigrants will fail to adopt American norms and values; and 3) practical impediments that make effective reform difficult to achieve. The final section discusses future prospects for immigration reform and presents recommendations for steps that may help achieve that end.

**Historical Patterns of Immigration Reform**

Comprehensive immigration reform is the exception, not the rule, in American politics.[1] Until 1875, there were few laws regulating immigration to the United States. From then until 1921, the Congress put into effect a series of rules that restricted immigrants from certain countries or races (primarily Asian countries) and on the basis of their health, morals, likelihood to become public charges, and other similar factors. During the last decades of the 19th century and early into the 20th century, debate on immigration heated up as the numbers of southern and eastern European immigrants increased dramatically. At first the debate focused on a literacy test that

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[1] For further information on the history of U.S. immigration policies, see Susan F. Martin, *A Nation of Immigrants* (New York: Cambridge University Press, 2011), Daniel J Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton: Princeton University Press, 2002), and Aristide R Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Cambridge: Harvard University Press, 2006).

proponents thought would restrict immigration to those with higher levels of education. After passage of the literacy requirements in 1917 failed to shift immigration origins and numbers as expected, opponents of mass migration turned to a more comprehensive approach that resulted in the national origins quota system passed in 1921 and refined in 1924.

The national origins laws stayed in place until 1965, despite great criticism in the period after World War II and a series of bills that enabled admission of refugees and displaced persons outside of the quotas. President Harry Truman established a commission that issued a report, "Whom Shall We Welcome," which recommended elimination of national origins and establishment of criteria based on broader U.S. interests. Nevertheless, the Congress, over Truman's veto, renewed the national origins quotas in the 1952 McCarran-Walter Act. It was not until 1965 that a comprehensive overhaul of U.S. immigration policy took place. Trumpeted as a civil rights initiative, the 1965 amendments eliminated national origins quotas and rescinded the various Asian exclusion acts that had been enacted in the 19th century.

Similar delays in enacting legislation for admission of refugees can be seen. During the 1930s and early 1940s, many refugees were rejected for admission to the United States. The most extreme case was the St. Louis, the ship of Jewish refugees that was turned back by the United States and forced to return to Nazi-controlled Germany, where many passengers died in the Holocaust. After the war, the U.S. admitted thousands of displaced persons via a series of presidential rulings and laws that, in effect, mortgaged the national origins quotas. In 1951, the UN Convention Relating to the Status of Refugees was adopted, but the United States did not ratify the convention despite its participation in its drafting. Only in 1969 did the U.S. ratify the 1967 Protocol to the Refugee Convention. It was not until 1980, however, that the country passed legislation that adopted the UN refugee definition and put in place a permanent system for refugee resettlement and asylum proceedings. Previously, refugees from Hungary, Cuba, Indochina, and the Soviet Union were admitted through the parole authority of the attorney general because those emergency programs exceeded the 17,000 refugee visas included in the regular immigration legislation.

When unauthorized migration grew in the 1970s, Congress considered legislation but failed to reach consensus. Instead, it formed the bipartisan Select Commission on Immigration and Refugee Policy (SCIRP), a time-honored way to navigate the complexities and emotions in immigration policy. SCIRP included four Cabinet officers, four senators, four representatives and four public members. The final report issued in 1981 recommended a three-legged stool that included enhanced enforcement, particularly in the form of sanctions against employers who hired illegal workers; legalization for the estimated 3 to 6 million unauthorized migrants already in the country; and reforms in legal admissions programs that would increase dramatically the number of immigrants to be admitted on the basis of their skills. The basics of the SCIRP proposals were taken up by successive Congresses. The employer sanctions and legalization recommendations were enacted in the 1986 Immigration Reform and Control Act by a narrow vote in the lame duck Congress. The legal admission reforms were not enacted until the 1990 Immigration Act.

The 1990 Act created the U.S. Commission on Immigration Reform (USCIR), which was to monitor implementation of the new legislation and report to Congress on changes that would be needed. Although originally established to assess the legal immigration system,[2] persistent undocumented migration soon grasped the attention of Congress and the commission itself. USCIR's first report, issued in 1994, made the point that unauthorized migration undermined the credibility of the legal admissions system. It urged Congress to enact legislation to improve worksite enforcement, including a secure employment verification system, along with the enhancements already undertaken in beefing up border security. The commission's recommendation was taken up in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, with a requirement that the administration pilot test new forms of electronic verification. Almost 20 years later, the pilot testing continues and Congress has been deadlocked on legislation to mandate its use.

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[2] The name of the commission was originally the Commission on Legal Immigration Reform.

**Recent Efforts at Immigration Reform**

The most recent round of serious debate on immigration began in 2000 with the inauguration of George W. Bush. Bush campaigned for the presidency with a pledge to make immigration reform a top priority of his administration. He had served as governor of Texas, a border state with close ties to Mexico, where over one-third of the population is of Hispanic origin. Texas also depends heavily on cross-border trade with Mexico for its economic livelihood, especially after the launch of NAFTA in 1994. Familiarity with U.S.-Mexico issues thus predisposed the new Bush administration to place immigration at the forefront of the political agenda.

In the aftermath of September 11, serious discussion of immigration reform languished in the United States although some progress was made in achieving agreements with Canada and Mexico on border security strategies. The Summit of the Americas held in Monterrey, Mexico, from January 12-13, 2004, provided the opportunity for President Bush to return to the issue of immigration reform. Less than a week before the summit, he unveiled his proposal for a new temporary worker program, titled the "Fair and Secure Immigration Reform." The temporary worker program outlined by President Bush on January 7, 2004, sought to provide a broad framework for resolving some of the many problems that plague the U.S. immigration system. Chief among these was the need, in his words, to better "match willing foreign workers with willing American employers, when no Americans can be found to fill the jobs."[3]

The dynamics of a presidential campaign year impeded the immigration reform agenda. Efforts to curry favor among voters in the battleground states of the upper Midwest refocused the political debate on issues other than immigration, most notably the war in Iraq and the U.S. economy, for fear of alienating critical undecided voters. After the presidential election, the Bush administration indicated it planned to return to the issue of immigration reform. Secretary of State Colin L. Powell and Secretary of Homeland Security Tom Ridge announced on November 9, 2004, while attending meetings of the U.S.-Mexico Binational Commission in Mexico City,

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[3] White House statement, January 7, 2004. Also see Maia Jachimowicz, "Bush Proposes New Temporary Worker Program," in *Migration Information Source* (Washington, Migration Policy Institute, 2004).

that moving forward with a temporary worker program was a "high priority" for Bush in his second term. Still, Ridge cautioned that disagreements within Congress could block achieving such reform in the near term (*New York Times* 2004).

The president's proposal for "Fair and Secure Immigration Reform" at its most basic was an uncapped temporary worker program. Although the program would provide status as a temporary worker, it would not lead directly to citizenship. Temporary workers would be eligible to apply for permanent residency, but only through the existing application process and without any preferences over other applicants for citizenship. De-linking the temporary worker program from citizenship status was designed to deflect criticism of Bush's proposal from conservative political groups that oppose amnesty for immigrants illegally in the country. Instead, program participants would be eligible to work in the U.S. for an initial period of three years, with the possibility to renew their temporary worker visa for an unspecified number of three-year periods. Return to the country of origin otherwise would be required at the end of three years.

The primary incentive for individuals to come forward and participate in the guest worker program was the guarantee of the right to live and work in the United States. It would eliminate the risk of deportation for three years. A related benefit of the temporary worker program, according to the proposal, was that it would assure "circularity," or freedom of travel between the United States and the temporary worker's country of origin. Program participants no longer would have to fear being barred reentry to the United States after a visit to their home community.

The Bush proposal was criticized widely. At the conservative end of the political spectrum, critics voiced concern that the temporary worker proposal amounted to an amnesty for unauthorized migrants[4]. While the Bush proposal did not provide an automatic path to citizenship to unauthorized aliens currently in the United States, it nevertheless would have allowed temporary workers participating in the program to apply immediately for a green card if

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[4] W. James Antle, III, "Amnesty By Another Name is Still Amnesty: Bush Compounds an Immigration Disaster," *Intellectual Conservative*, January 12, 2004, www.intellectualconservative.com/article3017.html.

they had an employer's sponsorship for the very limited number of visas available for lesser-skilled workers (*World Net Daily* 2004).

Equal criticism of Bush's proposal emanated from the liberal side of the political aisle. After the plan was unveiled in January, Senator Edward Kennedy disparaged the temporary worker proposal for being grossly inadequate to resolve the nation's broken immigration system.[5] Senators Tom Daschle and Joe Lieberman specifically criticized the proposal for failing to offer guest workers a direct path to citizenship, such as through an earned legalization process.[6]

An additional concern was that most of the onus of reforming the immigration system was placed on the immigrant guest worker, not the employer that hired the worker. Despite calls for increased workplace enforcement and verification of compliance with other labor laws, the proposal earmarked very little funding to verify that employers were hiring only those individuals with temporary worker cards and were complying with fair labor standards. Whereas the President's proposal designated $2.7 billion for border security inspections in the FY 2005 budget, the funding for worksite enforcement was increased to a mere $25 million (U.S. Department of Homeland Security 2004). The AFL-CIO asserted that the president's proposal did nothing to strengthen protections for wages, benefits, and other rights for either immigrant or domestic workers. Instead, the proposal would create a permanent, and larger, underclass of workers in the U.S. economy. The plan allegedly would reward large corporations and employers with a steady stream of vulnerable and underpaid workers, while weakening the rights of workers and exacerbating disrespect for individual's rights within the immigration system, according to the AFL-CIO (Sweeney 2004).

Several legislative alternatives to President Bush's temporary worker proposal were introduced but not enacted during the 108th to 110th Congresses. Two bills, AgJOBS and the Dream Act, had bipartisan sponsorship in Congress. AgJOBS, introduced by Senator Larry Craig, was the principal legislative effort to reform the system for admitting temporary agricultural workers. It focused on reform of the H-2A visa category and proposed two basic reforms. First, it would

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[5] Subsequently, he and Senator McCain introduced their own version of comprehensive immigration reform.
[6] CNN News, "Democrats: Bush Immigration Plan Not Enough," January 7, 2004, www.cnn.com

grant legal residence, on a one-time-only basis, to unauthorized migrants who had worked in the agricultural sector for the equivalent of 100 workdays, during any 12 consecutive months, of the 18-month period ending on August 31, 2004. This would apply to approximately 500,000 foreign farm workers in the U.S. at the time of the bill's introduction, in addition to their spouses and minor children. Adjustment to permanent residency (green card) would be possible if the migrant performed an additional 360 days of agricultural work over the following six years. Second, AgJOBS would streamline the H-2A temporary, non-immigrant guest worker program. It would make the hiring process more similar to the expedited hiring for H-1B high-tech workers. The H-1B process only requires an "attestation" that the employer has complied with the requirements, as opposed to the much lengthier certification process that is required to obtain an H-2A visa.[7]

The DREAM Act (Development, Relief, and Education for Alien Minors Act), originally sponsored by Senator Orrin Hatch of Utah, sought to facilitate the entry into institutions of higher education of those illegal immigrant minors who have obtained a high school diploma. These students were barred legally from seeking employment and were constrained from pursuing additional education because of the high costs of out-of-state tuition. The DREAM Act would authorize states to determine residency for higher education purposes, regardless of an individual's immigration status. It also would suspend removal of students who were admitted to an institution of higher education or joined the military. After a six-year wait, the immigrant could adjust to permanent residence.

Despite their bipartisan support, AGJobs and the Dream Act languished as Congress considered more far-reaching reform. In the 109th Congress, the Senate and the House of Representatives took very different approaches to the issue. The House focused primarily on enhanced enforcement while the Senate tried for comprehensive reform. The "Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005,'' which passed the House in December 2005, was roundly criticized because it included what were widely seen in immigration circles as draconian measures and lacked any legal alternatives to unauthorized migration. The bill's border security provisions included increased staffing and training for the Border Patrol, technology to be deployed along the border, and physical infrastructure to deter

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[7] "AgJOBS Legislation," Issue Briefing, Senator Larry Craig, craig.senate.gov.

unauthorized crossings. The bill also required development of a national strategy for border security. It expanded the scope of and enhanced the penalties for smuggling and trafficking offenses.

In a particularly criticized provision, the bill increased the penalties for "harboring" an unauthorized migrant in a manner that would risk imprisonment of staff of religious and social services organizations that assist immigrants. As described by the American Immigration Lawyers Association, "This incredibly overbroad definition of smuggling would criminalize the work of social service organizations, refugee agencies, churches, attorneys, and other groups that counsel immigrants, treating them the same as smuggling organizations. In addition, family members and employers could be fined and imprisoned for 'harboring,' 'shielding,' or 'transporting' undocumented family members or employees, filling our prisons with people who have done nothing more than try to reunite their families, or help a worker, friend or client."[8]

In an equally criticized provision, the bill created a new felony offense—unlawful presence in the United States. Traditionally, simple violations of immigration law have been treated as civil offenses, not criminal ones. Other provisions enhanced the use of mandatory detention; expanded still further the definition of aggravated felonies that would result in mandatory removal; put into place new definitions of terrorist related reasons for inadmissibility and removal; and eliminated or reduced access to the courts to hear certain immigration related cases. It also made changes in the burden of proof for an asylum seeker. It required such a person to establish that "his or her life or freedom would be threatened in the country in question, and that race, religion, nationality, membership in a particular social group, or political opinion would be at least one central reason for such threat." A number of these provisions overturned federal court rulings.

In addressing the work magnet for unauthorized migration, the bill required the secretary of Homeland Security to implement an employment eligibility verification system, building on the pilot program already in use to verify work authorization. The system would become mandatory

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[8] American Immigration Lawyers Association, "The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437), as Amended and Passed by the House on 12/16/05, Section-by-Section Analysis," 5.

for employers. Employers would need to verify not only new hires but also their existing workforce.

The House-passed legislation created an uproar among immigrant advocacy organizations, businesses, and civil rights and civil liberties groups. Opponents argued that enforcement-only approaches would not solve the immigration problem, but would further criminalize individuals whose main purpose in violating immigration law was to work. Demonstrations across the country showed the depth of concern within ethnic communities with large immigrant populations. These demonstrations, along with the concerns of business that immigration reform must address their legitimate need for foreign workers, paved the way for a radically different approach in the Senate.

The Secure America and Orderly Immigration Act was introduced by Senators John McCain and Edward Kennedy and Representatives James Kolbe, Jeff Flake and Luis Gutierrez. The bill addressed a wide range of issues ranging from legalizing unauthorized migrants and creating temporary work programs to increased border security and new employment verification provisions. It attempted to provide answers to three aspects of reform: 1) what to do about the existing unauthorized migrants; 2) how to meet the legitimate needs of employers for foreign labor and families for reunification; and 3) how to deter future unauthorized migration. Senators John Cornyn and Jon Kyl introduced a competing bill, the Comprehensive Enforcement and Immigration Reform Act of 2005, in the Republican-controlled 109th Congress. It too provided a mechanism to legalize the status of unauthorized migrants in the United States, but it was far more restrictive than the McCain-Kennedy approach. A compromise was then negotiated by Senators Chuck Hagel and Mel Martinez, which paved the way for passage of the legislation by the Senate. There was no prospect for agreement with the House enforcement-only approach, and the bills died with the elections and the turnover of the Congress to Democratic Party leadership.

In the 110th Congress (2007-2008), immigration reform once more came on the political agenda but again died before enactment of legislation. The Senate and the House once more took different approaches although both bodies were under the control of the Democratic Party. In the

Senate, closed door discussions between senators from both parties and the administration led to introduction of a bill that lifted elements from each of the previous legislative attempts and introduced new policies not previously encompassed in any of the legislative packages. The bill was comprehensive in scope and radical in many of its strategies for curbing unauthorized migration and reforming legal admissions. The House, by contrast, held numerous hearings on immigration reform issues, but the leadership decided to take a wait and see attitude and defer action until the Senate debated its legislation. When the Senate failed to end debate on the bipartisan bill supported by the president, the House also deferred action.

The most controversial element of the Senate bill was its legalization provisions. The legislation included what was called an earned regularization program (Z visa) that was at the same time more generous and more restrictive than previous versions. It was more generous in its scope, providing a route to legal status for all unauthorized migrants in the country as of January 2007. Eliminating a tiered system used in previous legislation, the provision would treat all unauthorized migrants similarly. They would regularize their status with a new nonimmigrant visa that could be renewed every four years, with additional fees and with English and civics testing requirements applied at the renewals. While eligible for eventual permanent residence and citizenship, the Senate bill put new restrictions on access to these benefits. The persons granted the new Z visa would be at the back of a long waiting list, estimated to take about eight years to clear. Moreover, the Senate bill would require what is referred to as a 'touch back' in which the heads of all regularized families would have to return home to re-enter as permanent residents. They would also have to meet the requirements of a point system. While unauthorized migrants would immediately find relief from deportation, the full regularization program would only go into effect when certain benchmarks were met in the enforcement of immigration laws.

The Senate bill also included a new temporary worker program (Y visa) that would introduce a rotational requirement. Workers would be granted an initial two year visa, renewable twice more. What makes the Senate version of a temporary worker program a radical departure is the requirement that workers return home for one year between each renewal. After three rotations, they would not be eligible to re-enter. A ceiling of 200,000 Y workers was approved by

amendment on the floor of the Senate, but a mechanism remained to permit increases in the ceiling if demand was high.

Also included in the Senate legislative initiative were major changes in the program for permanent admission. After clearing the backlogs of current applicants, the legislation would eliminate the extended family, employer-petitioned and diversity visa categories for admission. While immediate family (spouses, minor children, and parents) of U.S. citizens and permanent residents would still be eligible, all other immigrants would be admitted on the basis of a point system that would reward education, English language ability, and qualifications in occupations with a shortage of workers. A small number of points would be awarded for family ties if the applicants amassed a minimum number of points in these other areas.

Most of the enforcement provisions were lifted in their entirety from previous bills or represent a variation on the themes of already negotiated provisions. The legislation emphasized both border security and interior enforcement. With regard to worksite enforcement, the bill included provisions for mandatory electronic employment verification, as well as increased penalties for illegal hiring of unauthorized workers.

As negotiations over the Senate bill continued, provisions were added that troubled the proponents of comprehensive reform without satisfying the opponents. The agreement began to unravel in its own bipartisan way, with some Democrats peeling off because of concerns about the open-endedness of the temporary worker programs and its lack of labor protections, the new enforcement measures and the elimination of many family categories. Many Republicans remained opposed, and they were joined by some newly elected Democrats from typically Republican-leaning districts, because of what they called an amnesty program that, to their supporters, signified a reward for illegal activity. When the Senate leadership tried to end debate over the legislation, it failed to garner the 60 votes needed to bring the legislation to a vote. With the 2008 elections looming, few members expected immigration reform to regain any momentum until a new administration was in place.

The economic crisis that accompanied the start of the Obama Administration made comprehensive reform even more elusive. Supporters of reform feared that a new Congressional debate would inflame sentiments against immigrants in a period of heightened anxiety about high levels of unemployment. Relieved that immigrants had generally not been scapegoated for the country's economic woes, advocates for legalization of undocumented migrants were wary of raising the visibility of immigration. The 2010 elections, which brought a new Republican majority to the House and reduced the Democratic majority in the Senate, spelled an end to any hope that the gridlock of previous Congresses about core elements of immigration reform could be overcome.

In the absence of legislative changes at the federal level, much of the attention shifted toward action at the state and local levels as well as executive branch changes that required no congressional ratification.

**Current Immigration Policies**

The following sections set out the broad outlines of U.S. policy today, with discussion of some of the most pressing issues on the U.S. immigration agenda.

*Legal Permanent Residents*

During the 1990s, the United States admitted about 825,000 legal immigrants each year, up from about 600,000 a year in the 1980s (not counting those legalized under the 1986 amnesty), 450,000 a year in the 1970s, and 330,000 a year in the 1960s. In the past decade (2002-2011), more than 10.5 million legal immigrants were admitted, averaging about one million per year.[9] As immigration was increasing, the major countries of origin changed, from Europe to Latin America and Asia.

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[9] See Immigration Statistics at http://www.dhs.gov/immigration-statistics.

**Figure 1**
**Number of Immigrants Admitted per Decade**
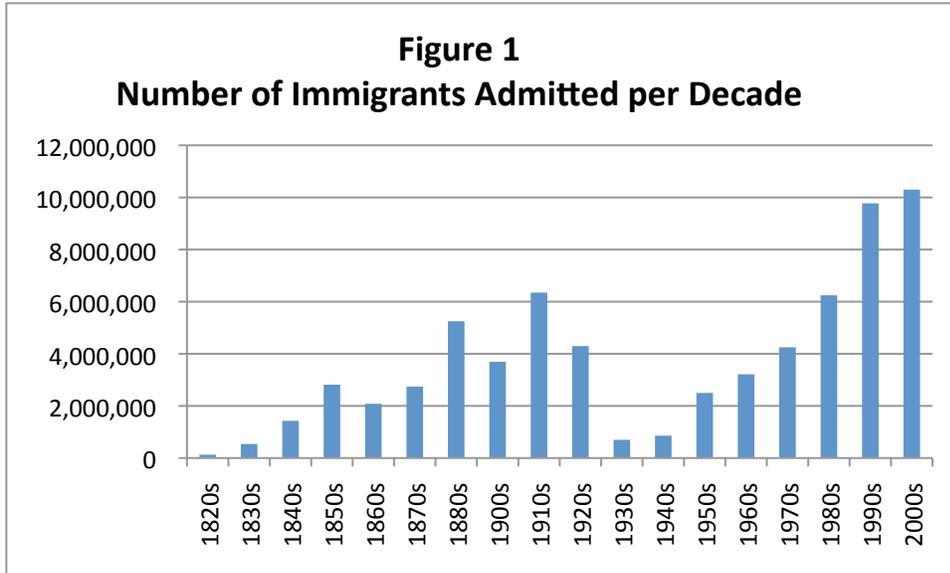


Source: Office of Immigration Statistics, US Department of Homeland Security

The four principal bases or doors for admission are family reunification (either sponsored by green carders or naturalized citizens), employment, diversity, and humanitarian interests. By far the largest admissions door is for relatives of U.S. residents. In FY 2011, 688,000 were admitted as family members of U.S. citizens and permanent residents. The second-largest category of immigrants is immigrants and their family members admitted for economic or employment reasons. The ceiling on such admissions is 140,000 per year. In FY 2011, 139,339 employment-based immigrants were admitted. Refugees, asylees, and other humanitarian admissions are the third-largest category. These numbers vary depending on international conditions for refugees and asylum seekers. In FY 2011, 168,000 received permanent status. Finally, about 50,000 immigrants come under the diversity visa category—immigrants from countries that have not recently sent large numbers of immigrants to the United States.

The family-based immigration category has two components. First are unlimited visas for the immediate relatives of U.S. citizens, defined as spouses, minor children, and parents. There is no quota for this group but applicants must meet all other requirements for entry. In particular, the sponsoring family member must demonstrate an ability to support the newcomers at a level that is 125 percent of the federal poverty guidelines. The second group includes other family members who are subject to numerical caps. This group is divided into four preferences, each

with its own admission ceiling. Unused numbers in higher categories theoretically can pass down to lower categories but each is so oversubscribed that this seldom happens. The first preference is adult unmarried children of U.S. citizens; the second is spouses and unmarried children of legal permanent residents; the third is married children of U.S. citizens; and the fourth is siblings of U.S. citizens. Many of these categories are severely backlogged. The sibling category is the most delayed, with applications made in 2001 now under consideration for most countries. Because of per-country ceilings, applications made in the Philippines in 1989 are only now eligible for admission.

The employment-based immigration category is divided into five preferences, or groupings, each with its own admission ceiling. The highest priority goes to persons of extraordinary ability, outstanding professors and researchers, and executives and managers of multinational corporations. The second group includes professionals with advanced degrees and workers of exceptional ability. The third group is composed of other professionals, skilled workers and a limited number of other workers, with the fourth permitting entry of religious workers and the fifth including entrepreneurs admitted for activities creating employment. Unused numbers in higher priority groups can be passed down to lower priorities.

Not surprisingly, the employment-based immigrants are much more highly skilled than any other class of immigrants. Nearly 20 percent are in managerial or executive occupations, and another two-thirds are professionals and technical sales workers (over 80 percent together). In contrast, only about one-fifth of family-sponsored immigrants are found in these two highly skilled occupational categories. Diversity immigrants, for whom a high school degree is required, are intermediate with about 45 percent finding work in these two occupational categories. Refugees for whom there are no economic screens are found most concentrated in operators, fabricators, and laborer occupations (41 percent).

Employers sponsor most employment-based immigrants. There are some clear advantages to such a system. Not surprisingly, rates of employment among these immigrants are very high since they already have jobs and, generally, a supportive employer. It is also argued that employers are the best judges of the economic contributions an individual can make. A checklist,

as used in a point system, may identify would-be migrants with educational or language skills, but arguably these individuals may not have more difficult to measure capabilities, such as an ability to work in teams, that employers find valuable.

The mechanisms to determine the legitimacy of employer demand can be quite cumbersome. Most employment-based admissions are subject to labor certification provisions. The employer must demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available at the time of the application for a visa, and admission into the United States and at the place where the alien is to perform the work; and the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Under new streamlined rules, the employer must attest to having recruited U.S. workers using prescribed mechanisms and demonstrate why applicants were not suitable to the job. In some cases, the Department of Labor (DOL) has established a Schedule A of occupations for which there are "not sufficient U.S. workers who are able, willing, qualified and available." These do not require a test of the labor market for green card admission. This list includes a rather limited number of occupations, most of which require master's or doctoral degrees. The labor certification process normally requires an attorney's help. Although great strides have been taken to reduce the processing time, the wait for approval can be extensive, first at DOL and then the Bureau of Citizenship and Immigration Services (CIS) at the Department of Homeland Security (DHS), which assumed responsibility from the Immigration and Naturalization Service.

Alternatives to labor certification have been proposed by a number of academics and experts. Some mechanisms test demand by pricing immigration in a way that tests employers' resolve, while others use objective measures of shortages or demand to vary visa allotments. For example, the congressionally appointed "Jordan Commission" for Immigration Reform proposed that employers could hire the immigrants quickly and easily if they paid a substantial $10,000 fee to a fund that would provide scholarships for U.S. workers willing to be trained to fill the jobs going to foreigners.[10] The idea was to make it as or more expensive to hire a foreign worker as it would be to hire a domestic one, with the fee going into a pool that would help fill skills

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[10] U.S. Commission on Immigration Reform, "Setting Priorities: Legal Admissions" (Washington: Government Printing Office, 1995).

shortages. For lower skilled positions, where training would not necessarily be needed to fill shortages, the fee could support testing of mechanization and other alternatives to admission of foreign workers. Auctions have been proposed as another way to test employer demand.

Even longer waits derive from the overall and per-category backlogs in visa availability. As of November 2012, visas for Indian and Chinese nationals in the second employment-based preference (that is, those with advanced degrees) were available for those who applied before September 1, 2004, and September 1, 2007, respectively. Visas for Indian professionals entering under the third preference (those with a bachelor's degree) were available for those who applied before October 22, 2002. These represent waits of from five to 10 years between application and visa availability.

Because the U.S. system is employer/employee driven and a job offer is essential, most of those admitted to permanent residence in the employment-based categories are already in the United States. Because of the delays in processing and availability of visas, employers tend to use temporary visa categories to bridge the gap between the decision to hire the worker and the government's grant of permanent resident status. As a result, the recruitment process required by labor certification rules is often a farce—the employer has already hired the foreign worker.

*Temporary Workers*

Individuals referred to as non-immigrants in U.S. immigration law (that is, temporary visitors) are the second principal category of newcomers. The Department of Homeland recently issued estimates on the size and characteristics of the non-immigrants currently residing in the United States: "The size of the resident nonimmigrant population was about 1.9 million on average during July 1, 2010–June 30, 2011. Approximately 45 percent of the population were temporary workers and their families, nearly 40 percent were students and their families, half were from Asian countries, and over 80 percent were ages 18 through 44." [11]

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[11] Department of Homeland Security, "Estimates of the Size and Characteristics of the Resident Nonimmigrant Population in the United States: January 2011" (Washington D.C.: Department of Homeland Security, 2012).

Temporary work categories are increasingly important as the vehicle for admission of foreign workers in all skill categories. Each year, hundreds of thousands of visas are issued to temporary workers and their family members. In addition, an unknown number of foreign students are employed either in addition to their studies or immediately thereafter in practical training. The growth in the number of foreign workers admitted for temporary stays reflects global economic trends. In fast-changing industries, such as information technology, having access to a global labor market of skilled professionals is highly attractive. Also, as companies contract out work, or hire contingent labor to work on specific projects, the appeal of temporary visas, rather than permanent admissions, is clear. Some foreign firms, understanding that it may not be possible to undertake an entire project offshore, obtain temporary work visas to the U.S. so their employees can complete the job at the U.S. client's facilities. The temporary programs also give employers and employees a chance to test each other before committing to permanent employment. Multinational corporations find the temporary categories useful in bringing their own foreign personnel to work or receive training in the United States.

Over time, a large number of different temporary admission visa categories have amassed, each referred to by the letter of the alphabet under which it is described in the Immigration and Nationality Act. The visa categories now encompass almost the entire alphabet (A-V). The principal sections under which temporary workers enter are the H1-B for specialty workers, H-2A for agricultural workers, H2-B for other seasonal workers, E visa for traders and investors entering under bilateral treaties, L for intracompany transfers, and J for exchange scholars among others. Smaller numbers enter under the O visa (extraordinary ability in the sciences, arts, education, business, or athletics), P (artist or entertainer), Q (cultural exchange and training), and R (religious workers) visa categories. In addition, there are visa categories for officials of foreign governments, foreign journalists, and officials of the United Nations and other intergovernmental organizations. Professionals, managers, and executives may also enter under the North American Free Trade Agreement. With the exception of the H2-A and H2-B visas, all of these temporary work categories require a significant level of skill or education.

The regulations governing admissions vary from visa to visa. The high-skilled H-1B visa generally requires a bachelor's degree; and the employers first "attest" that they will pay

prevailing wages and conform to certain employment conditions. There is no pre-test of the labor market. Holders of these visas may stay for three years and reapply for an extension of stay for up to six years with either the same or a different employer. They may intend to apply for permanent residency and about half do so. If there are delays in receiving a green card, their temporary work visa may be extended beyond the six years. By contrast, the H-2 visas require, like the permanent employment visas, that employers first test the labor market and receive a DOL certification that they did so. The workers cannot intend to stay beyond the term of their visa, which typically is for a stay of no more than one year.

Movement of foreign workers for temporary reasons, at today's levels, is a new phenomenon for the United States. Statistics on temporary admission count every entry into the United States and, hence, are a multiple count of oftentimes the same individual. Nonetheless, only 770,000 temporary admissions were counted in the first decade of the 20th century, a number that went on to increase to 7 million in the 1950s; by the last decade of the 20th century, there were some 230 million temporary admissions. In FY 2011 alone, more than 53 million non-immigrant entries occurred. Because these are multiple counts they reflect both a stupendous increase in the number of individuals involved, as well as a significant increase in back and forth mobility.

Revolutions in transportation, tourism, and the global economy are driving a level of temporary international mobility not prefigured by past experience. To be sure, a substantial fraction of the supposedly "permanent" international flows of yesteryear was actually temporary migrants or "birds of passage." That dynamic exists today as well. It is common for "permanent" immigrants to circulate regularly to their original homeland and many immigrants end up returning home for good. However, the temporary movement that exists today is fundamentally different because it is not a by-product of otherwise permanent visa holders. More precisely, policy mechanisms explicitly define it as "temporary" at the outset. The only major precedent for such policies in the United States is the Bracero Program under which Mexican seasonal workers entered the country from its inception during World War II until its end in the 1960s.

The class of so defined temporary movement has reached levels that easily surpass the past or present return movements of legal permanent residents, as well as exceed the level of permanent

immigration itself. Note that as early as 1994, the United States counted the admission of 804,000 permanent legal residents. In the same year, 5.6 million individual temporary visas were issued and 22 million entries and exits of temporary visa holders were tallied (State 1994). The only available estimate of "person years" suggests that this temporary flow generated a year-round presence equivalent to at least 1.4 million persons as of 1994. As stated above, that number is now estimated at 1.9 million. What is clear is that the temporary worker classes have grown significantly and exceed the number of employment-based permanent admissions.

*Unauthorized Migration*

While the United States continues to admit large numbers of legal immigrants and temporary workers, the fastest growth in immigration until recently came from those without authorization to be in the country. An estimated 12 million unauthorized migrants were in the United States in 2007, with an estimated 500,000 net new entries each year. As a net number, it reflects the difference between new entries and those who return home or who adjust their status and become legal immigrants. As of today, it is estimated that there are 11 million unauthorized migrants, down from its height. Several factors are believed to have caused the reduction: poor employment outcomes in the United States, heightened border enforcement, and growing economic opportunities in Mexico. The net entry of Mexican migrants—the largest source of undocumented migration—was estimated at zero in 2012. This does not mean that Mexicans have ceased to come altogether to the United States, but the number of those who are returning to their home country appears to be equal to those newly arriving.

Unauthorized entry occurs in a number of different ways. About 55 percent of those illegally in the United States are believed to have entered clandestinely, largely across the land border with Mexico although others arrive by sea, often in makeshift boats or rafts. About 45 percent enter through recognized ports of entry. Some do so with fraudulent documents; counterfeit passports, visas and other identity documents may be used. Others use impostor documents of people who bear superficial likeness to their own appearance. These may be documents possessed by family or friends, or they may be purchased for the specific purpose of gaining admission.

Still others enter having obtained legitimate visas, often as tourists, and then overstay the period that the visa covers. Or, they obtain a longer-term visa that does not permit employment, such as a foreign student visa, and then work in contravention of the terms of their admission. In still other cases, the migrants enter as temporary workers but fail to leave when their period of work authorization ends. In some cases, migrants seek the visa knowing that they plan to violate its terms. As with those who come clandestinely, they may seek the visa on their own or obtain it through the assistance of smugglers. In other cases, the migrants have no intention of overstaying or working illegally, but circumstances change and they enter into irregular status.

Most unauthorized migrants come from Mexico (about 56 percent) and Central America, but they represent a wide array of countries.[12] The majority is concentrated in about seven states within the United States. During the past decade, however, there has been a significant dispersal throughout the country, with large numbers of irregular migrants now living in new settlement areas. Many live in mixed households, with legal permanent resident spouses or parents and U.S. citizen children. On average, the unauthorized migrants are less educated than natives or legal immigrants. They work primarily in services, building cleaning, perishable crop agriculture, food processing, construction, landscaping and gardening, and light manufacturing.

Efforts to prevent unauthorized migration largely failed in the 1990s and early 2000s. The Immigration Reform and Control Act of 1986 ostensibly tried a three-track approach that introduced new border enforcement measures, sanctions against employers who hired unauthorized workers, and a legalization program for those who were already illegally in the country. To address prevention at the source, IRCA authorized a commission to recommend ways to reduce emigration pressures. A notable recommendation was adopted in the 1990s as the North American Free Trade Agreement.

The provisions did not succeed in slowing down unauthorized migration, as had been promised in IRCA. In fact, the mechanisms for determining work authorization, needed to have an

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[12] Jeffrey Passel and D'Vera Cohn, "A Portrait of Unauthorized Immigrants in the United States" (Washington: Pew Hispanic Center, 2009), at http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/.

enforceable system of employer sanctions, were so faulty that it was no more difficult for irregular migrants to find jobs post-IRCA than it had been before its passage. A proliferation of fraudulent documents allowed employers to hire unauthorized workers with little risk of sanction. Employers were not expected to weed out the counterfeits if the documents looked valid on their face. In fact, if an employer requested additional documentation, he or she faced penalties imposed to ensure that employers did not discriminate against foreign-looking or sounding workers.

In the early 1990s, when public outcry about the loss of control of the southern border erupted in California, in particular, the Clinton administration adopted new border strategies to try to halt unauthorized entries. Operations Hold the Line in El Paso and Gatekeeper in San Diego succeeded in slowing movements in these locations, but the illegal crossings just moved to other parts of the border. Crossings became more expensive and, in some locations, more dangerous, but most of those who were serious about entering the United States succeeded in doing so. Moreover, the border enforcement did nothing about visa overstayers. Calls for new employment verification systems to strengthen the employer sanctions regime were largely ignored, although Congress passed legislation in 1996 to pilot test electronic verification.

During the second half of the 1990s, with an economic boom that produced a record number of new jobs, unauthorized migration increased still further. As long as the economic boom continued, little was done to curb the growth in irregular migration. In fact, the Immigration and Naturalization Service suspended most worksite raids because of complaints that these enforcement actions were too disruptive of business. By the time of the economic recession of the early 2000s, the stock of unauthorized migrants had grown to an estimated 8 million, and though there appeared to be some slowing of new admissions, the stock continued to grow until the recent economic crisis.

**Problems in the Immigration System**

There are a number of problems in U.S. immigration policy that need attention. These relate to the mechanisms for controlling unauthorized migration and for admitting legal immigrants.

*Unauthorized Migration*

As long as employers hire persons without authorization to work in the United States, migrants will continue to enter the country illegally in order to obtain jobs. With economic recovery, unauthorized migration is likely to resume unless significant changes are made in the area of worksite enforcement. In the absence of more effective mechanisms to verify work authorization and to sanction employers who hire unauthorized workers, efforts to stem illegal migration or to redirect persons seeking work into legal channels are unlikely to succeed.

To comply with the law today, new hires fill out an I-9 form and show documentation of their identity and authorization to work. The most frequently used documents are a state driver's license (to demonstrate identity) and a social security card (to demonstrate work authorization). Both documents can be easily counterfeited at relatively little cost. Employers are not expected to be document experts, and, in fact, can be fined for immigration-related employment discrimination if they request different or additional documents of persons they suspect are unauthorized to work.

Employers fall into two categories: those who unwittingly (although perhaps willingly) hire persons who are illegally in the country and those who knowingly hire such persons in order to exploit their labor.

Among the first group are employers who hire unauthorized workers who present seemingly good documents. Already employed workers who vouch for the new hires often refer these new workers to the employer, who fulfills the letter of the law in receiving the documents presented with the I-9 form. Given the efficiency of network hiring of this type, employers are unlikely to participate in legal foreign worker programs unless they face sanctions for hiring unauthorized workers. Without a more effective employment verification system, however, it would be unfair to sanction them for hiring workers with seemingly acceptable documents.

Much of the congressional focus has been on mandatory deployment of what is now referred to as the Basic Pilot program for electronically verifying work authorization. There are many flaws in the Basic Pilot, however. The number of false positives (that is, unauthorized workers borrow

legitimate identities that pass muster) and false negatives (that is, authorized workers who are rejected by the system) are too high. The quality of the data must be improved, as well as the mechanisms used to check on identity so imposters cannot pass through the verification process. This process will depend on the type of biometric information used to ensure that the identification materials presented belong to the person who is being hired. Moving from the current Basic Pilot Program to a more effective and efficient system for verifying work authorization will require substantial investment in resources.

Verification in and of itself will not reduce the incentives to hire undocumented migrants, at least among employers who violate a range of labor and tax laws in addition to hiring unauthorized workers. These may include violations of wage and hour laws, child labor laws, and occupational safety and health laws. The employers may pay salaries in cash, failing to pay their share of social security taxes. These employers may seek unauthorized workers because they are less likely to complain about ill treatment and violations of their rights. In the most egregious cases, employers may be complicit with human traffickers and smugglers who hold migrants in bondage. Worksite enforcement to ensure labor standards and to bring criminal sanctions against traffickers and smugglers is essential not only to stop illegal hiring but also to protect highly vulnerable workers. The seriousness with which Congress and the administration take these issues will be measured not only in the authorizing legislation but even more so in the appropriations of funds to implement a more effective verification system and more widespread and effective labor standards enforcement.

Even with new efforts to curb future unauthorized migration, the status of those already in the country remains. Having a large underclass of persons who are unknown to the government and in highly exploitable situations is not in the interest in the United States. Properly implemented, a regularization program could actually support more effective enforcement, if employers know that compliance with a new worker verification system would not jeopardize their existing workforce.

*Inflexible Ceilings*

Ceilings on both permanent and temporary admission categories limit flexibility to address changes in labor market demand at both the high and low end of the labor market.[13] In the permanent admission categories, two types of ceilings are imposed: ceilings on overall and subcategory numbers and per-country ceilings. By legislation, there are 140,000 numbers available for employment-based permanent admissions plus any unused family based visas from the previous year. Ceilings are set for each subcategory, although unused visas can flow down to other categories. There are also per-country limits that ensure that no more than 7 percent of visas go to any one country. The American Competitiveness in the Twenty-First Century Act (AC21) recaptured a "pool" of 131,000 employment numbers unused in fiscal years 1999 and 2000 and allowed those recaptured numbers to be used in subsequent years for countries that had met the ceiling. This process has since expired. There continue to be long waiting periods for second and third preference permanent employment admissions, especially for applicants from India and China, as discussed above.[14]

Inflexible ceilings have also created difficulties in the temporary worker programs. The H1-B program is capped at 65,000 visas per year. Although the ceiling was raised in the late 1990s following the dot.com boom, the numbers reverted to the original level during the dot.com bust. They were not raised again as the economy recovered (or lowered for that matter when the 2008 recession occurred). Legislation passed in 2005 provided certain exemptions from the ceilings that permitted new applications to be processed. At present, there are 65,000 regular visas and another 20,000 reserved for graduates of US universities. After 2008, demand was lower because of higher unemployment but the number of requests for H1-B visas has recently been seeing signs of recovery. As of June 2012, all visas for FY 2013 (which began on Oct 1, 2012) had been assigned.

The excessive backlogs in the family-based program are also problematic. Waiting times for the spouses and minor children of LPRs have reduced significantly in recent years, but family

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[13] For further analysis of ceilings on immigrant admissions, see Wasem, "U.S. Immigration Policy on Permanent Admissions" (Washington: Congressional Research Service, 2012), at http://www.fas.org/sgp/crs/homesec/RL32235.pdf

[14] See monthly Visa Bulletin issued by the U.S. State Department.

members must still wait for two or more years to reunify with their U.S. based sponsor. The backlog in the sibling category is especially problematic, raising questions about the value and purpose of the program. For example, with a 25-year waiting time, principal applicants from the Philippines are on average in their 50s by the time they are able to enter the United States. They spend the majority of their working life outside of the U.S., and arrive closer to retirement age.

Congress has considered short-term fixes to the problem but it has not gotten to the fundamental problem—that ceilings set in stone in legislation are too inflexible to respond in a timely manner to changes in the economy and labor market demand. If the concern is with abuse of the visa categories, market tests can be used to weed out inappropriate use of the visas. The U.S. Commission on Immigration Reform recommended that fees be set at a level that makes it somewhat more expensive for an employer to bring in a foreign worker rather than recruit and train a domestic person for the position. As discussed, labor certification provisions have been used to test the market for some categories, but these procedures pose problems of their own.

*Inadequate Mechanisms to Protect the Rights of Workers*
In immigration policy, there often appears to be a trade-off between the numbers who will be admitted and the rights of those who are allowed to enter. At one extreme is the large and rapidly growing number of foreign nationals without authorization to work in the United States who are nevertheless gainfully employed. They have few rights in the workplace, are vulnerable to exploitation, and have very restricted eligibility for social welfare programs. In the middle are temporary workers who have more rights in the workplace, but are often tied to a particular employer and may remain in a limbo status for many years while awaiting a green card. Legal permanent residents have the same workplace rights as U.S. citizens, but their access to certain safety net programs (including those designed for low-income workers) is restricted. Naturalized citizens have full rights and obligations as U.S. citizens.

As with other immigration matters, there are trade-offs in using temporary admission categories to meet labor market needs. While they may help increase business productivity and even generate job growth, they also render even highly skilled foreign workers more vulnerable to exploitation and may, thereby, depress wages and undermine working conditions for U.S.

workers. Generally, the foreign worker is tied to a specific employer who has requested the visa. Loss of employment may also mean the threat of deportation. Moreover, because the temporary visa is so often a testing period, the foreign worker may put up with any conditions imposed by the employer, fearing loss otherwise of the chance at permanent resident status.

Policy debates in the United States have long focused on expanded temporary or so-called guest worker programs, particularly for lower skilled workers. In some proposals, the numbers to be admitted are very large. An issue are the rights to be accorded to workers who enter through such mechanisms. Also at issue are provisions to protect already resident workers against unfair competition from new arrivals. Current programs, especially for lesser skilled workers, require employers to pay the higher of prevailing or adverse effect wage rates; attest that there is no strike or lockout; provide housing, meals, transportation, worker's compensation or equivalent insurance, and guarantees that the worker will have work on at least three-quarters of the work days within the contract period, and fulfill other similar requirements, depending on the visa category. While these provisions provide protections for workers, employers find them too burdensome and often inappropriate for the type of positions for which they wish to hire foreign workers. As a result, they claim, they are unable to use the existing programs to fill all of the jobs for which they need workers.

Another approach to protecting worker rights would provide greater mobility within the labor market so foreign workers would not be indebted to a single employer who holds sway over their wages and working conditions. Current policies allow for little mobility until a foreign worker receives a green card. Even when mobility is permitted, foreign workers are often unwilling to change jobs if it will adversely affect their ability to obtain permanent residence, as discussed above.

*Is Temporary Ever Temporary?*
The existing notions of temporary and permanent admissions do not reflect adequately the nature of today's job market or the realities of immigration. The old adage that "there is nothing more permanent than a temporary worker" is often borne out. When temporary workers are hired to fill year-round, permanent jobs, it is not surprising that many employers do not want them to leave at

the end of the term of employment and many foreign workers gain equities and interests in remaining beyond the period of stay. Since some statuses allow for extended stays of more than six years, it is not surprising that many temporary workers accrue such equities and ties to this country. Children are born in the United States, houses are bought, and roots are set in American communities. At the other end of the continuum, some immigrants seek permanent residence not because they plan to remain permanently but because a green card affords them opportunities denied to temporary workers (for example, work authorization for their spouses). In an increasingly transnational world in which people maintain ties in more than one country, there is not a clear, bright line between the two categories of permanent and temporary admissions.

This is not to deny the value of a system of permanent residency that leads to citizenship; in fact, the notion that immigrants are presumptive citizens is one of the reasons that immigration has served the national interest for so long. Rather, it is to suggest that there needs to be more flexibility in the definitions used and a recognition that for some, temporary migration may be a transition to permanent status whereas in other cases, temporary migrants (and permanent residents) will return to their home countries or move to a third country.

Some temporary work statuses do take these patterns into account. The H-1B and L visas allow for "dual intent." At the time of admission, a person seeking admission in these categories can admit to being an intending immigrant—someone who hopes to remain in the United States. Most temporary categories, including foreign students, require the foreign national to demonstrate that they have strong enough ties to their home country to overcome the presumption they are an intending immigrant. Even in the categories in which dual intent is allowed, the route to permanent residence may require the exceedingly long waits that were described above, leaving them in limbo until their number comes up in the immigration system.

*Complexity in the Immigration System*

A final problem in the immigration system is its very complexity. There are dozens of nonimmigrant visa categories for temporary workers and difficult to define distinctions in both the permanent and temporary systems. For example, Employment Based (EB)-1 category is for "foreign nationals of extraordinary ability in the sciences, arts, education, business, or athletics"

whereas EB-2 is for those with merely exceptional ability. Given the proliferation of visa categories and the often-nuanced differences, applying for any immigration benefit has become an excessively difficult process requiring professional assistance.

**Elusive Reform Prospects**

In the context of these historic trends, the failure of recent Congresses to enact comprehensive reform is not surprising. Major changes in immigration policy generally require years of preparation and negotiation. Even the imprimatur of blue ribbon panels helps but does not ensure quick passage of new approaches. The nature of the political coalitions that form around immigration explains some of these difficulties in gaining consensus. These interests can be seen in Figure 2, which rates groups by their attitudes toward immigration numbers on one axis and immigrant rights on the other. The top left quadrant include groups that are favorable to high levels of immigration as measured by numbers of admissions and a commitment to the protection of the rights of immigrants; their preference is for permanent admissions that provide access to citizenship. The groups in the bottom left quadrant also support high levels of immigration, but they are willing to restrict the rights of those admitted; their preference is for large-scale temporary worker programs, limitations on access to public welfare programs, and measures that permit quick removal of any migrants that commit criminal or other offenses. The bottom right quadrant also supports limits on the rights of migrants, but they also support limitations on the numbers to be admitted. The top right quadrant see rights as paramount and are comfortable with numerical limits on admissions, especially on categories that inherently limit the capacity of migrants to exercise their rights (e.g., temporary worker programs and unauthorized migration).

**Figure 2: Interests of Political Coalitions**

|  | Levels of Immigration | |
| --- | --- | --- |
| Rights of Immigrants | High Levels/ Expansive Rights | Low Levels/ Expansive Rights |
|  | High Levels/ Restrictive Rights | Low Levels/ Restrictive Rights |

The interests that influence immigration policy often join together in support of specific provisions in the law, but they break apart over others, making the type of comprehensive reform that has been proposed very difficult to enact. Moreover, as has been the case throughout U.S. history, the public is highly ambivalent about newcomers, seeing their own immigrant forebears through rose-colored glasses but fearful that today's immigrants will fail to adopt American norms and values. That ambivalence makes immigration reform all the more difficult because there is seldom a strong constituency behind any set of policy changes. The public tends to favor restriction, but immigration seldom appears as one of the most important factors in determining how elections are decided. Making the process of reform even more difficult is a basic ambivalence within the American public regarding immigration. Most Americans speak fondly and nostalgically about their own immigrant forebears who, in their mind, created this nation of immigrants. At the same time, they are fearful that today's immigrants are somehow different and less likely to contribute and assimilate, and become true Americans. This ambivalence is by no means new. Benjamin Franklin worried that the Germans immigrating to Pennsylvania in the 18th century would never learn English. The result of this ambivalence is the absence of any strong consensus among the public about changes in immigration policy. A small group that knows what it opposes can often preempt action (as witnessed in both the immigrant rallies that derailed the House Republican enforcement measures and the talk radio shows that derailed the Senate regularization measures) but pressure for positive changes is too often lacking. The safe decision for politicians is no decision—at least until there is no choice but to act.

**Conclusion**

Since the 2012 election, the prospect for immigration reform has improved significantly. Democrats and Republicans alike acknowledged the importance of the Hispanic vote in re-electing President Obama. Mitt Romney's decision to take an extremely conservative stance on immigration reform was widely credited as a factor in his very poor showing with Latino voters. Although it is by no means a sure thing that a deeply divided Congress will act soon, the discussion about comprehensive immigration reform has taken a decidedly more positive tone.

There appears to be considerable consensus as to the contours of immigration reform—enforcement against unauthorized migration, measures to address the large population of undocumented migrants already in the country, and new admissions policies to enable the immigration system to respond to future demand for workers. Differences abound, however, when the discussion shifts to the details. Debate is likely to focus on the merits of comprehensive versus incremental changes; the relative weight to be given to various modes of enforcement (e.g., border versus worksite); the efficacy of mandatory electronic employment verification; whether and how to frame a program to legalize those who are currently in the country without legal status; the need for and nature of new admissions programs to fill jobs that undocumented migrants currently take; measures to reduce the backlog of approved applicants for family reunification; the unwieldiness of current mechanisms to set admission numbers and adjudicate applications for employment based visas; and other similar issues.

Reforming the U.S. immigration system should follow a number of good practices:

- A credible immigration system must be able to control unauthorized migration, which largely means addressing the job magnet for undocumented migrants. The keys to an effective enforcement system are 1) mechanisms to verify the identity and employment authorization of all workers in the U.S., with the use of secure biometric analysis that reduces the likelihood of false negatives and positives while still preserving privacy and security of information; and 2) enhanced enforcement of worksite standards, including wage and hour requirements, child labor prohibitions, counter-trafficking measures, and occupational health and safety provisions.

- Legalization of undocumented migrants should aim to bring an underclass out of the shadows while supporting new enforcement initiatives. It should be inclusive not only of the migrant working in the United States but also his or her immediate family. Otherwise, regularization will lead to new and large backlogs for family reunification that will also encourage new illegal movements. Finally, regularization should encompass the largest proportion of unauthorized migrants in the country in order to leave as small a residual group as possible, and its terms and mechanisms for implementation should be as simple and straightforward as possible in order to deter fraud and misrepresentation. The tiered approach adopted by the Senate during the

109th Congress violated both of these principles in offering a complex formula that would still leave large numbers of unauthorized migrants without access to effective relief. The "touch-back" provision and heightened penalties and fees of the 110th Senate bill also fail this test in placing hurdles on migrants and the administrative systems needed to implement the regularization program.

- Legal admissions policies should be flexible enough to respond to changing market conditions. Statutory ceilings tend to be too inflexible to permit rapid adjustment to economic cycles and needs. Market mechanisms to regulate flows—such as fees that make the cost of hiring foreign workers equal to or greater than U.S. workers or auctions—would constitute one way to manage numbers without ceilings. Another would be to assign a commission or task force the responsibility for setting numbers and priorities each year based on its assessment of supply and demand. The United Kingdom has been implementing this model. A systematic examination of its applicability in the United States and ways to overcome potential barriers is needed.

- Requirements placed on workers and employers should be reasonable and consistent with the way in which labor markets function. This is particularly the case when workers are admitted for temporary periods to perform jobs that are themselves indefinite in length. Provisions to permit transition into permanent status would be appropriate in these cases.

- The government apparatus for managing the system should be efficient and funded sufficiently to carry out its responsibilities for adjudicating applications and monitoring compliance.

- Workers should have true mobility within a system that protects them from abusive employment practices. While some provisions in current law meet this standard and are likely to protect workers from substandard wages and working conditions, others create burdens on employers with little or no corresponding benefits for either domestic or foreign workers.

- Policies should be transparent, understandable to employers and workers, and clear in their definitions and requirements. By contrast, current policies are complex and often indecipherable even to those who have worked many years in the immigration field.

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