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## **US Immigration Reform: Can the System Be Repaired?**

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## US Immigration Reform: Can the System Be Repaired?

Marc R. Rosenblum<sup>1</sup>

The existing immigration regime was designed in 1952-1965 with the primary goals of allowing nuclear and extended family reunification, and with secondary goals of permitting humanitarian admissions (which will not be addressed here) and necessary labor inflows. Almost from the start, the system proved problematic, and by 1970 (just two years after the 1965 amendments were implemented) major new nonimmigrant programs (the L and H-1 programs) were being tacked on to the LPR system and Congress began devoting sustained attention to the problem of undocumented inflows. Yet even as Congress passed major reform packages in 1976(8), 1986, 1990, and 1996, the LPR system has increasingly failed to satisfy the country's immigration demands, and an ever-expanding diversity of temporary and undocumented flows have come to dominate immigrant labor markets.

Today's system differs from almost 200 years of immigration precedent in two key respects. On one hand, changing technology, the falling cost of international travel, and decades of previous migratory flows have made the underlying structure of immigration flows more complex and difficult to manage than was the case during the last great wave of migration (1890-1920) or in the first decades after World War Two when today's legislative structure was created. On the other hand, whereas early immigration legislation, for better or worse, produced a system where most arriving immigrants entered as legal permanent residents on a predictable path and with ample opportunities to contribute to their communities, recent immigration restrictions have left the system badly out of alignment with the US national interest in immigration policy. In particular, today's immigration system fails to ensure that the United States attracts and retains the legal permanent immigrants who are most able to contribute valuable human resources, that new immigrants are successfully integrated within the United States with minimal negative consequences for native workers and immigrant within the United States, or that immigration and immigration policy enhance US national security and foreign policy interests, rather than undermining them.

We recommend changes in each of three areas to address these flaws in a comprehensive fashion:

- Changes to the legal permanent and temporary admissions systems to promote the recruitment and retention of those immigrants best able to contribute to the US national interest in immigration;
- Changes to the institutional and regulatory structure governing the integration and employment of immigrants within the United States to ensure that immigrants make the largest possible contribution while minimizing possible costs of migration;
- Changes to immigration control policies and a renewed emphasis on the use of immigration as a tool of foreign policy.

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It must be emphasized at the start that when it comes to immigration legislation the whole is bigger than the sum of its parts. Indeed, if the experience of the last four decades teaches anything it is that incomplete or poorly designed immigration reform—legislation which “muddles through” rather than confronting the challenge of radical reform—tends to do more harm than good. Current calls to “fix enforcement” without addressing flaws in the recruitment and integration of legal immigrants are not only doomed to fail, but also likely to undermine future efforts at fixing admissions and integration policies.

Likewise, simply tacking on a new temporary worker program without addressing long-term issues related to immigrants’ role in the economy and broader issues related to immigrant recruitment would put off tough decisions and raise additional barriers to broadly fundamental reform in the future. The politics of immigration also require a truly comprehensive approach: moving from the status quo regime to a system that is productive and sustainable will require sacrifices from parties on all sides of this immigration debate, including immigration advocates, employers, labor interests, and social conservatives. Only when each of these groups accepts its second-best alternative will we return to our roots as a nation that thrives on its ability to attract the world’s best immigrants and transforms them into the world’s greatest citizens.

## **I Attracting and Retaining the Immigrants We Need**

Global demographics and limited US absorption capacity mean that demand for visas will always exceed supply, and how to distribute scarce visas is a critical question for immigration policymakers. But rather than throwing their hands up at the complexity of the immigration system, policymakers should see the global market for immigrants as an opportunity: visa scarcity means that policymakers are in a “buyer’s market,” and visa laws should take advantage of this situation by ensuring that recruitment advances the US national interest in immigration. To this end, policymakers should consider changes to the type and number of immigrants admitted, and also to the system for making these decisions. Along with new recruitment rules and procedures, policymakers should consider changes to the terms of legal immigration, including by backing away from the recent trend toward temporary migration in favor of the historical US preference for permanent resettlement.

### **1. Defining Numerical Limits**

Since 1952, the primary function of US immigration policy has been to allow family reunification and to meet the labor market’s demand for workers. These goals are unquestionably worthy: preservation of the family unit is not only the ultimate example of family values in action, but also associated with a long list of positive social, health, and economic outcomes as families are uniquely successful support networks. And economic migration is a prime engine of US growth, with immigrants accounting for a majority of new jobs created between 2000 and 2003. Given replacement-level birth rates for the last three decades, immigration also represents the only opportunity for prime-age labor force growth in the foreseeable future.

Yet America’s legal visa policy is based on an outdated preference system redesigned in 1965 and last modified in 1990; and it fails to live up to these goals. Waiting lists for some family visas are as long as 22 years. As a result, many family members who apply for visas in the prime of their lives are not granted admission until they reach retirement age, undermining their economic contribution and the logic of family reunification and encouraging some frustrated relatives to resort to illegal migration.

Rules governing employment-based admissions are even more out-of-date. Only 5,000 LPR visas are set aside for the relatively low-skilled immigrants who make up 43 percent of the foreign-born workforce in the United States; and only 160,000 permanent visas are set aside for workers in an economy that absorbs over one million immigrant workers each year. Even this number overstates labor recruitment because over half of “employment-based” visas are actually issued to immediate families of primary visa recipients, lowering the number of LPR visas targeting incoming workers to just 72,500 in 2004—just 7.7 percent of all LPR visas issued and just 12 percent of the net increase in the foreign-born workforce (DHS/BLS data). Meanwhile, demand for employment-based visas far outpaces their supply: even with a job offer in hand, skills-based LPR visa applicants may wait five or six years for a visa. The main programs designed to relieve these pressures (the H-1B and H-2B temporary work visas) are themselves regularly exhausted early in the fiscal year (on the first day of fiscal year 2005 in the case of high-skilled H-1B visas, and in the first month of fiscal year 2006).

Not only does the current system thus fail to ensure adequate or timely migration inflows, but the mismatch between visa supply and demand also means that hotly debated statutory ceilings bear no relationship to actual immigration flows. Instead, with numerical limits so out of step with systemic pressures, LPR flows adjust up or down as a function of how quickly visa backlogs are processed. And variation in overall inflows is mainly the result of changes in temporary and undocumented immigration, which have become essential to the smooth functioning of the overall immigration system.

*Recommendation: Establish flexible numerical limits with built-in mechanisms for adjusting limits up or down.*

Ultimately, the failure of LPR rules to provide adequate visas to meet demand reflects the lack of consensus about a basic question: how many immigrants should the United States admit each year? In part disagreement about this question is inevitable given American ambivalence about the social and cultural effects of immigration, a set of issues which are purely subjective and not easily resolved. But it is possible to quantify many of the economic benefits and costs of immigration, and to have an informed debate about the optimal level of inflows vis-à-vis the US economy. In short, as demand for labor in immigrant-dependent regions and sectors increases, the United States benefits by making such labor available through legal channels. Yet the answer is not simply a wide open system: economic downturns and declining demand for immigrant labor should lead to reduced inflows to ensure that immigrants do not depress native wages or otherwise damage the US economy.

With immigrant accounting for a majority of new jobs created since 1996, establishing the right level of legal immigration flows should be viewed as one of the most powerful tools available to economic policymakers, similar in its impact to the making of monetary policy by manipulating interest rates. Yet in contrast with interest rates, which are formally reviewed eight times a year on the basis of calculations by over 400 professional economists working for the Federal Reserve Board, immigration limits are established by Congress (subject to presidential approval), which revisits the question on an unpredictable schedule—usually less than once per decade—and makes its decision largely on the basis of short-term political calculations during contentious legislative debates.

The stakes are too high for the United States to leave finding the proper level of legal immigration to chance in this way. Thus, while Congress’ plenary power gives it the right and the responsibility for establishing the principles to guide the setting of limits (e.g., maximize economic growth while preventing a rise in unemployment or a drop in native wages), legislators

should follow the precedent they have set in other difficult areas where political calculations often conflict with the national interest in wise policy outcomes. At least four different models are available to depoliticize these negotiations and ensure that the level of legal immigration flows is revisited on a regular basis:

- Federal Reserve Board (FED): The FED is an autonomous non-partisan agency whose members are drawn from the private sector (officers of regional reserve banks) and by political appointment (FED governors). The FED is constrained by a broad statutory mission statement (to maximize employment while maintaining price stability), but otherwise has nearly complete autonomy to adjust US interest rates up or down by buying and selling US securities.
- Base Realignment and Closure Commission (BRAC): The BRAC is an independent body whose membership is chosen by the president in consultation with Congress. The commission holds public meetings to gather data on base closure options, reviews recommendations by the Secretary of Defense, and submits a final report to Congress which must be accepted or rejected in an up or down vote.
- Annual refugee consultation: Under the 1980 Refugee Act, the president is required to provide House and Senate Judiciary Committees with a proposal for annual refugee admissions before the start of each fiscal year. Congress typically defers to executive branch estimates of impending humanitarian demands, but may adjust the limit up or down from presidential recommendations. The executive branch also retains the ability to admit supplemental inflows in response to an unexpected humanitarian crisis.
- Market-based (fee-based?) system: The US Commission on Immigration Reform proposed an alternative approach in which employers would have unlimited ability to petition for immigrant workers—subject to their willingness to pay relatively high fees which make the employment of immigrants somewhat more expensive than the employment of natives. Such a system would provide protection to US workers while generally allowing labor markets to operate without the imposition of arbitrary limits on labor inflows.

*Recommendation: Restructure family-based visa rules to reduce backlogs*

Current selection criteria draw a sharp line between family- and employment-based flows, and are overly biased in favor of the former with more than three-quarters of all LPR visas going to family-based immigrants (including derivative visas) and just one in twelve LPR visas distributed on the basis of immigrants' expected contribution to the US economy. Extended family migration is especially problematic in the context of visa scarcity because the ability of new immigrants to petition for the admission of their siblings and adult children (and their families) ensures persistent backlogs. The legal visa system should preserve nuclear family-based migration, while ensuring that employers have access to needed immigrant labor and that highly skilled immigration is particularly encouraged. Policymakers should consider the following changes to reduce family backlogs:

- Redefine the LPR visa unit from the individual to the nuclear family level while reserving most primary visas for skills- and employment-based immigrants. Thus, any individual entitled to a skills- or employment-based visa automatically would be entitled to bring his or her spouse and minor children, a right already held by employment-based visa-holders. Following an initial adjustment period covering existing second preference backlogs, this change could eliminate a substantial share of backlogs by eliminating the family-based second preference category and making the families of skills- and employment-based migrants non-quota admissions. In addition, this change would promote family values and maximize immigrants' earning potential by ensuring that most migrants to the United States enjoy the advantages of family-based support networks.

- Create an extended family lottery to replace the current (first,) third, and fourth preference categories (i.e., visas for (single adult children), married adult children(,) and siblings of US citizens). The benefits of extended family reunification must be balanced against the fundamental fact of visa scarcity. As an alternative to maintaining persistently long visa backlogs—and as an alternative to eliminating extended family immigration, as recommended by the Commission on Immigration Reform—the United States should consider distributing extended family visas on the basis of an annual lottery, a system more consistent with the wide gap between visa supply and demand.

*Recommendation: Make more LPR visas available on the basis of immigrants' job skills*

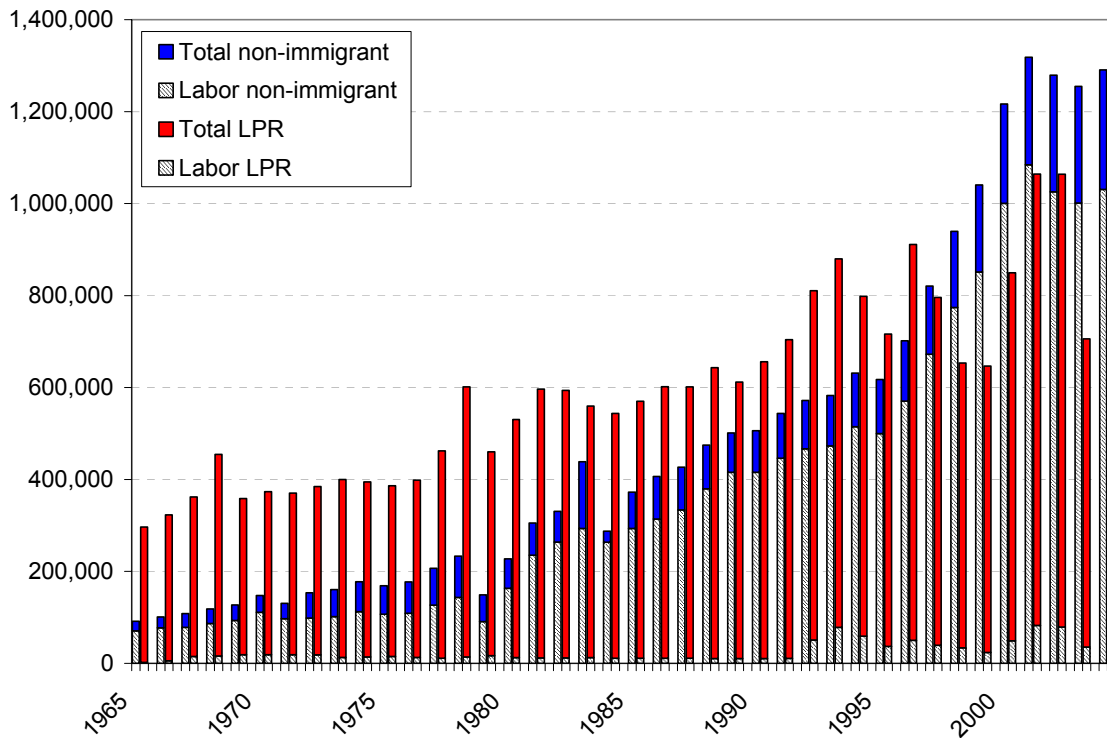
At both the high- and low-skilled levels, work-ready immigrants make critical contributions to the US economy, and these contributions are likely to increase in the future. Subject to limits discussed above, immigration policy should ensure that America makes the most of this resource by facilitating inflows as necessary:

- Encourage high-skilled and strategic LPR immigration. The United States should actively encourage immigration by individuals who are of prime working-age, have advanced degrees and at least two years of work experience, and who clear security-based background checks. High-skilled immigrants should be admitted independently of specific employment plans (i.e., not on the basis of an employer petition). Immigrants with advanced degrees and work experience within strategic growth industries (e.g., science and engineering) should be admitted as non-quota immigrants.
- Streamline low-skilled LPR immigration. The LPR visa system fails to provide an adequate level of legal unskilled immigrant labor, and 58 percent of job creation forecasted for the 2000-2010 period are expected to require little or moderate training, suggesting that low-skilled immigrants will continue to make critical contributions for the foreseeable future. The United States should ensure that immigrants who are of prime working-age, have high school degrees and at least two years of work experience, and who clear security-based background checks are efficiently integrated into the US labor market. Transitional visas which provide a clear path to LPR status, but make advancement along that path contingent on certain performance criteria may represent a politically viable strategy for ensuring adequate immigrant inflows (see below).

## 2. The Terms of Nonimmigrant Visas

Much of today's policy debate focuses on the possible establishment of a new large-scale temporary worker program, a change which would contribute to an existing trend toward replacing LPR migration with temporary ("nonimmigrant") flows. In part, the growth of temporary migration reflects technological changes and the declining cost of international travel. Yet two policy-based explanations should also be emphasized. On one hand, temporary migration is the unintended consequence of flaws in the permanent visa system, including relatively low numerical limits and extraordinarily long LPR processing times which cause some immigrants to opt for nonimmigrant visas even though they qualify, in principle, for available LPR visas. On the other hand, more temporary visas also represent a political compromise of increased immigration in exchange for more restrictions on immigrants' rights. Indeed, temporary visas seem like an attractive way to capture some benefits of migration—meeting employers' labor demands—while limiting perceived costs by blocking migrants' access to services and their long-term impact on US society. For these reasons, temporary visas now exceed LPR admissions, and are the source of 95 percent of all employment- and skills-based migration (see figure 1).

**Figure 1: LPR and Nonimmigrant Migration: Overall and Labor-Based, 1965-2004**



Note: Nonimmigrant migration is an estimate based on total nonimmigrant admissions, reported for all years by the INS and DHS and actual nonimmigrant visa issuance, reported by the State Department for 1992-2004 only. Reported nonimmigrant migration data are based on the ratio of visas issued to nonimmigrant admissions, weighted by type of nonimmigrant visa. For both visa types, labor migration refers to primary visa-holders only.

Source: US Department of State, "Report of the Visa Office"; US Department of Homeland Security, *Yearbook of Immigration Statistics*, US Immigration and Naturalization Service, *Yearbook of Immigration Statistics*.

This figure reprinted from Marc R. Rosenblum. 2006. "Fixing a Broken System: An Analysis of Reform Proposals for Employment-Based Immigration." Washington, DC: Migration Policy Institute. Policy Brief #13.



Temporary migration has always been an important feature of the US system, especially in the case of Mexican and Caribbean Basin immigrants; and policymakers should take steps to restore the natural pattern of voluntarily circular flows. But most immigrant jobs are now permanent positions, and immigrant labor markets are a structural feature of the US economy. The reliance on short-term visas to fill these jobs should be avoided for three reasons.

First, calling immigration “temporary” does not prevent migrants from putting down roots in their new homes, and many will prefer to remain in the United States. An open society cannot effectively guarantee return migration, and labor-based temporary migration gives migrants the resources—US economic and social networks—to overstay their visas. Indeed, European “guest-worker” programs regularly experienced overstay rates of between one-third and one-half. Thus, if policymakers see a “temporary worker program” as politically expedient, they should not deceive themselves: many of these immigrants will remain in the United States with or without legal status.

Nonimmigrant visas are also problematic because temporary status is inherently second-class status. The designation of some immigrants as temporary undermines their bargaining power at the workplace—especially where temporary visas are linked to particular employers—with negative ripple effects for US workers. Efforts to compel return migration or otherwise clarify distinctions between temporary immigrants and other workers—including, for example, many provisions found in the Cornyn-Kyl TWP proposal—further undermine nonimmigrants’ rights and promote their exploitation.

For these reasons, temporary visas are particularly unattractive as a tool to attract the best and brightest high-skilled workers, who typically have the resources to shop around for the best offer from a destination state. The United States has enjoyed great success at skimming the best workers from the top of the global labor pool in the past, but recent recruitment efforts by the European Union and by countries of origin like China and India threaten US access to these strategically important resources and place a premium on a welcoming immigration policy.

A third reason to be cautious about temporary immigration is there are important social and economic advantages to long-term immigration. Indeed, the United States is one of only a handful of “settler states” in the world, and a strong historical presumption exists that immigrants should have the right to remain in the country, and that we all benefit as the diverse universe of immigrants are transformed into “Americans.” These national myths are well-founded: migrants’ economic contributions increase over their lifetimes as they gain experience and earn higher wages; and long-term immigrants are more likely to pursue additional educational opportunities, become homeowners, and invest within the United States, rather than sending investment dollars abroad in the form of remittances. The benefits of migration are greatest when immigrants have the opportunity to become fully integrated and productive members of their communities, rather than simply temporary workers.

*Recommendation: Make most nonimmigrant visas “transitional.”*

Some immigrants work in jobs which are genuinely temporary, including seasonal agricultural jobs and contract related to projects with discrete timelines. Yet the majority of nonimmigrants accept jobs which are open-ended, and the United States does not benefit from imposing arbitrary deadlines on the productive relationships between immigrants and their employers. Thus, most nonimmigrant workers should be given the opportunity to transition to LPR status, as some highly-skilled nonimmigrants (those on E, H-1A, H-1B, L, or O-1 visas) already may do.

In a transitional system of this kind, nonimmigrant visas would be understood as provisional, rather than temporary; and the visa would take the form of a contract in which migrants who meet clearly-defined responsibilities would earn the right to remain permanently in the United States. “Contracts” could be written in a variety of ways to promote successful immigrant integration (e.g., requiring transitional immigrants to remain employed, learn English, and be active in their communities) and to allow additional oversight of immigrants (e.g., checking in with immigration officials) during the early stages of provisional status. In this way, immigrants who prove their ability to contribute to the United States would be invited to remain in the country, and others would be identified early in the process before extensive integration occurs. As long as probationary status is associated with the opportunity to earn LPR status, most immigrants would be expected to buy in to such a system.

A system of transitional visas would promote transparency and force the United States to confront the relationship between US labor needs and permanent resettlement. If most transitional visa-holders meet performance criteria which make them attractive citizens, policy-makers should choose among fewer initial admissions, tougher criteria for transitional adjustments, and the acceptance of higher—but also more easily assimilated—numbers of foreign-born citizens.

*Recommendation: Streamline and simplify the process of adjusting to LPR status*

Regardless of how transitional visas are structured, the criteria for earning LPR status should be unambiguous and the adjustment process should be transparent and straightforward. Under existing rules, even nonimmigrants whose visas permit their eventual adjustment to LPR status typically must hire attorneys in order to navigate the complex adjustment system and endure long periods of uncertainty while applications are pending. Other nonimmigrants—at greater expense and under more uncertainty—hire attorneys in search of legal loopholes to permit a status change. Establishing clear criteria for adjustment of status would allow most transitional immigrants to self-petition at great cost savings to immigrants, immigration officials, and the judicial system.

*Recommendation: Promote voluntary circularity*

While history teaches us that efforts to coerce return migration are expensive and often unsuccessful, it also shows that roughly one-third of LPR immigrants chose to return to their countries of origin during the last great wave of migration (1890-1920). Indeed, even during the 1970s and '80s, a majority of undocumented Mexican immigrants were “sojourners” who regularly traveled back and forth between their home and work communities—a pattern which transferred knowledge and resources back to Mexico to the benefit of both countries. As many analysts have observed, one of the main unintended consequences of enhanced enforcement at the U.S.-Mexican border has been to discourage voluntary return flows of this kind.

Legalizing existing migration flows and restoring order to the U.S.-Mexican border would thus remove a barrier to traditional circular migration patterns. The United States should also work with Mexico and other countries of origin, and with immigrant hometown associations and other transnational social networks, to encourage voluntary return migration by promoting economic development within communities of origin. In the long run, as official commission and academic analysts have long observed, investment in migrant-sending communities is also the only viable strategy for reducing *emigration* pressures. Mexico’s “Tres por Uno” program, which matches migrant remittances with federal, state, and local funds, and the binational Partnership for

Prosperity, which seeks to nurture Mexican business development, are important models which should be emulated and expanded.

## **II Recruitment and Regulation of Immigrant Workers<sup>2</sup>**

A second major policy goal should be to ensure that the United States reaps the full benefits of immigration by allowing migrants to contribute as full members of US society, while also protecting US workers from potentially harmful wage effects of migration. Thus, making the most of immigration requires that existing regulations aimed at protecting US wages be rationalized. And new institutions also are required to give immigrants the tools to quickly become productive members of their communities on a path to full integration within the United States.

### Regulation of Immigrant Workers

United States demographics and labor markets ensure that immigrants will continue to account for a significant portion of US workforce growth for the foreseeable future. Yet labor migration represents a particular challenge: how can policymakers ensure that employers have an adequate supply of labor while also protecting native workers from any negative wage effects from migration? Currently, the system seeks to strike this balance by allowing employers broad authority to initiate immigrant recruitment but situating employer recruitment within a dense regulatory framework designed to ensure that immigrants are only hired where US workers are unavailable and that immigrants are paid at the prevailing native wage.

This system fails on both counts. On one hand, the Labor Condition Application (LCA) upon which protection of US workers is based has little impact on actual hiring outcomes because its recruitment rules are based on self-reporting by employers that US workers are unavailable at existing market rates. Yet this requirement is meaningless given that “market rates” reflect existing levels of immigration, so that employers have no incentive to offer higher wages to attract natives over immigrant workers. The LCA also requires that employers pay immigrants the prevailing wage as defined by state labor departments. Yet formal wage requirements may bear little resemblance to actual working conditions, especially where new immigrants lack English language skills and information about US regulations.

If the LCA system fails to protect US workers or to guarantee fair wages and working conditions, it also fails to serve employers effectively. One problem from employers’ perspective is that LCA paperwork is complex—the wage determination alone requires employers to consult a database which includes over 500,000 lines of data—so that most employers require expert assistance simply to recruit immigrant workers. More importantly, the LCA process prevents timely hiring decisions as employers are typically required actively to recruit native workers for 30 days prior to completing the LCA. These recruitment efforts as well as employer’s wage calculations are then reviewed on a case by case basis by state employment agencies and the US Department of Labor (DOL), a process which adds anywhere from a few days, to several months, to two years to the hiring process. These time-consuming and complex procedures encourage many employers to opt out of the legal migration system altogether, and make compliance unduly difficult under the best of circumstances.

*Recommendation: Eliminate the LCA, but require employers to obtain immigrant employer licenses*

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<sup>2</sup> Recommendations on reforms to strengthen immigrant integration policies are still being developed.

Employers are the best judges of their labor needs, and the United States has always organized labor migration around employer recruitment as a way to ensure efficient allocation of immigrant labor. Employer recruitment also ensures that immigrants have jobs when they get here, a feature of the US system which contrasts with Canada's points-based system, for example, which is characterized by high levels of under-employment among recent immigrants. Yet employers are inherently biased evaluators of labor markets, and cannot be expected to weigh their own appetite for low-cost labor against the possibility of harmful effects for US workers—the evaluation at the heart of the LCA. Moreover, in an economy which absorbs up to one million new immigrants workers each year, including 370,000 subject to LCA approval in 2004, individual reviews of each immigrant hiring decision is unrealistic, forcing the United States to choose between long hiring delays (as in the current system) and substantial additional expenditures on staffing for LCA reviews. More fundamentally, the benefits of case-by-case reviews are questionable given that many US jobs are now structurally dependent on immigrant labor, so that most immigrant recruitment seeks to fill jobs already held by immigrants.

Simply eliminating the LCA, however, would leave workers vulnerable, especially as the US seeks to expand immigrant recruitment. Indeed, immigrants are particularly vulnerable to exploitation at the worksite, including because many lack English language skills, are unaware of legal protections available to them, and are accustomed to more oppressive working conditions than the United States aspires to ensure. Immigrant vulnerability is exacerbated by employer recruitment since immigrants may feel beholden to their sponsors, and may be unaware of provision to ensure visa portability.

Thus, while case-by-case reviews of immigrant hiring decisions are impractical and ineffective, immigrant employment should be subject to additional oversight. Policymakers should therefore replace individual LCA's with a general requirement that employers obtain a license in order to hire immigrants. Employer licensing could be accompanied by special training to alert employers to other regulations governing immigrant employment, and would generate a list of worksites employing immigrants which would then be subject to additional oversight. Immigrant employer licensing fees could be set at a relatively high level if policymakers want to encourage employment of native workers, and could be adjusted in a variety of ways by sector and region as a tool of employment policy. Licensing fees would be an important source of revenue which should be applied to strengthening actual workplace oversight.

*Recommendation: Strengthen workplace enforcement of wages and labor standards.*

The LCA process is based on a logic of difference, imposing separate recruitment and wage guidelines for immigrants and natives. Yet one overarching goal of US immigration policy should be to promote a uniformity of experience, guarding against discrimination on the basis of citizenship. Thus, rather than monitoring employers' individual hiring decisions and calculating site-specific wages where immigrants are employed, oversight should focus on enforcing universal wages and standards at all worksites, a policy which would benefit immigrants and natives alike.

Redirecting oversight efforts to the worksite, rather than the recruitment process, offers two additional advantages. First, compliance with recruitment rules is burdensome and economically inefficient. Even in a best-case scenario, 30-day recruitment periods on top of additional application procedures are a significant barrier in an era of just-in-time production and in industries with unpredictable production needs (including agriculture, construction, and others with high levels of immigrant participation). Wage and standards guidelines, in contrast, have a

distributive effect and may ultimately drive price changes, but should not have any negative effect on productivity.

Second, hiring decisions are inherently subjective, so that proving qualified native applicants were turned away is difficult, and the enforcement of recruitment regulations is problematic. Wage and standards regulations are easier to enforce because factual findings of compliance or non-compliance may be based on payroll audits, worksite visits, and employee interviews. In the same way that employers face enhanced penalties where multiple workplace violations are detected, violation of minimum wage or other standards should be associated with higher penalties where employers are found to be exploiting immigrants, a vulnerable class of workers.

*Recommendation: Worksite enforcement should be the responsibility of the Department of Labor, not Homeland Security.*

Too often, employers have invited workplace oversight by immigration officials (Immigration and Customs Enforcement (ICE) investigators or the legacy Immigration and Naturalization Service) as a purposeful way to retaliate against “troublesome” employees. In order to prevent such unintended consequences, temporary worker regulations should be treated as *labor* regulations, and enforced by the Department of Labor rather than ICE investigators. Immigration agents should play no a role in workplace oversight because tasking them with these enforcement duties deters immigrants from coming forward with complaints and undermines the effectiveness of wage and standards rules.

Regardless of how worksite enforcement duties are assigned, improving wages and standards at the worksite would require substantial additional worksite enforcement. Funds for additional oversight could be generated from immigrants’ visa fees and from employer licensing fees. Countries of origin should also be invited to survey worksites in immigrant-dependent regions and sectors and to bring forward complaints when violations are detected (see below).

### **III Immigration Enforcement and National security**

A third set of core questions about US immigration policy regards the relationship among a selective immigration system, control of undocumented migration, and US national security in a period of economic globalization. For many, this complex bundle of issues boils down to one observation: that the United States has lost control of the U.S.-Mexican border, a problem which has come to dominate the national debate about migration and immigration policy reform. States have a fundamental responsibility to control access to their sovereign territory, and the 9/11 attacks highlight the necessity of preventing entry by would-be terrorists. Yet the overwhelming majority of undocumented immigrants enter the United States in search of work opportunities and better lives for their families; and these immigrants represent no inherent threat to US national security. More generally, ensuring that immigration policy enhances national security requires a mixture of recruitment and controls; and immigration control policies should be designed to maximize effectiveness while also protecting US relations with its regional allies and broader foreign policy interests.

In general, the United States must distinguish more clearly between the benefits of migration control—i.e., the social and economic gains associated with ensuring that immigrants to the United States have legal status—and the benefits of preventing infiltration by would-be terrorists and others who would harm the United States. Conflating migration control with national security has undermined the system’s ability to achieve either of these goals, which require two distinct sets of policy tools; and the United States must improve its efforts in both areas.

## 1. Improving Enforcement against Undocumented Immigration

Roughly 11 million immigrants now live in the United States without legal status, and 500,000-700,000 new undocumented immigrants enter the United States each year. Undocumented immigrants now represent almost a third of the US foreign-born population, and about 5 percent of the US workforce.

These statistics hint at a crisis with grave human and economic costs, and a solution to the problem of undocumented immigration is rightly at the center of the current policy debate. Undocumented immigrants and their families particularly suffer from their status, including through the rising death toll at the border and hardships endured within the United States as a result of undocumented immigrants limited access to social and political services. Undocumented immigration is also highly inefficient, as immigrants pay \$2,000 or more to smugglers, or *coyotes*, for assistance crossing into the United States, and their uncertainty about the future prevents undocumented immigrants from purchasing houses, investing in their own education, or otherwise maximizing their economic contributions to the United States. Undocumented immigrants are also four times more likely than legal immigrants to work off the books, limiting their economic contribution and driving down wages for all Americans. Finally, undocumented immigration undermines the rule of law and the credibility of the legal migration regime; and the success of any reform effort depends in a fundamental way on the country's ability to gain control of its migration system.

US migration enforcement now relies overwhelmingly on border control, including an ever increasing deployment of military equipment and military-style techniques. Even before the 9/11 attacks, the militarization of the U.S.-Mexican border was accompanied by the criminalization of undocumented immigration; and the last decade has seen a steady expansion in the number of immigrants subject to mandatory detention and expedited removal along with an erosion of migrants' rights to judicial review. These blunt enforcement techniques fail to grapple with immigration as a product of international labor markets, and have proven ineffective at controlling undocumented inflows. Thus, changes to the legal visa system and immigrant integration and regulation discussed above should be accompanied by major reforms to the system of worksite enforcement, as well as by changes at the border, by a program to move existing undocumented immigrants into legal status, and by additional enforcement reforms.

### A) The Challenge of Employer Sanctions

The US Congress first passed legislation imposing sanctions on individuals harboring or abetting undocumented immigrants in 1952, but the so-called Texas Proviso exempted immigrant *employers* from punishment under the statute; and it was only in 1986 that the United States joined other industrialized states by banning such employment. Yet employer sanctions provisions have been notoriously ineffective in the United States for three main reasons:

- 1) The United States lacks secure documents for identification (i.e., proving card-holders are who they say they are) and eligibility verification (i.e., coding card holders as work authorized or not). On one hand, most existing documents are easily counterfeited, and fake ID's are a booming business across America. On the other hand, even secure documents are vulnerable to being borrowed or stolen; and technological solutions to this form of identity fraud (e.g., embedding documents with biometric identification data) are only useful in combination with sophisticated scanning hardware that can compare cards to card-holders' physical features. These problems are exacerbated by that fact that document

issuance is based on easily counterfeited “breeder” documents like paper birth certificates and utility bills, and by the fact that the decentralized US system accepts a total of 27 different documents as proof of identity and/or work eligibility.

- 2) Hiring procedures at the worksite are inaccurate screening mechanisms. For 99.95 percent of all US employers, eligibility screening consists of a visual review of one or two of these 27 possible documents. Employers are required to record the results of their inspection on the DHS’s I-9 form, but anti-discrimination provisions of the IRCA require them to accept documents at face value as long as they appear genuine. In these cases, faulty documents produce an unacceptably high level of *false positive* responses, or the wrongful authorization of undocumented immigrants. The weak screening system means that well-intentioned employers lack the tools to properly reject unauthorized workers, and that other employers can credibly go through the motions of compliance while still willingly hiring unauthorized workers.

About 7,000 employers around the country now participate in a voluntary electronic screening program which is characterized by the opposite problem: an unacceptably high level of *false negatives*, or cases in which legitimately work-authorized individuals are wrongfully denied employment. In this system, the Basic Pilot program, employers submit new employees’ identification data via the internet, and program officials seek to confirm that the name and numbers on workers’ documents show up in Social Security Administration or Citizenship and Immigration Service databases of work-authorized individuals. This system does an excellent job of detecting fake ID’s, which do not turn up in the databases, but it fails to detect the fraudulent use of borrowed or stolen documents, which are found in the databases. More importantly, a number of problems can lead to false non-confirmations, including delayed data entry reflecting status changes, data entry errors, alternate spellings or word order of foreign names—all problems which are especially likely to affect immigrants—and as a result of name changes. Thus, thirty percent of all non-citizens and ten percent of US citizens are initially identified by the Basic Pilot as ineligible to work, even though only about one in a thousand names submitted to the system are ultimately confirmed as unauthorized. While most false negatives eventually are favorably resolved, resolution often requires costly and time-consuming manual reviews; and an unknown number of work-authorized immigrants abandon their employment plans rather than going through the uncertain appeals process.

- 3) Enforcement of employer sanctions has little deterrent effect. Sanctions enforcement was fundamentally undermined before the 9/11 attacks by the fact that no agency, office, or division made a priority of worksite enforcement; and sanctions enforcement was essentially abandoned altogether when responsibility for interior investigations passed from the INS to the security-oriented Department of Homeland Security. The limited resources devoted to worksite enforcement prior have also been put to poor use as enforcement agents mainly rely on tips to target non-compliant employers, a practice more appropriate in wage and standards disputes in which workers may have an incentive to report non-compliant employers. In addition, given the false positive problems identified above, investigations have rarely led to convictions. And even in these cases, fines range from \$100 to \$1,000 per undocumented immigrant for paperwork errors and from \$250 to \$10,000 for substantive violations—a statutory range that has not changed since 1986, and which may be well below the cost savings from employing undocumented labor.

*Recommendation: Phase in employer sanctions reforms gradually in accordance with strict oversight mechanisms*

Fixing the employer sanctions system requires policymakers to balance the demand for migration control (prevention of false positives) against America's interest in robust economic growth and the rights of employers and job applicants (prevention of false negatives). The value of enforcement must also be weighed against Americans' privacy rights and the benefits of limited government. And finally, immigrants and people of color are often the victims of workplace discrimination, and undocumented immigrants are particularly vulnerable to exploitation when employers use the threat of migration enforcement as a weapon during wage negotiations and to disrupt union organizing efforts. Thus, sanctions rules should avoid discriminating among different classes of work-authorized job applicants, and should not give employers new opportunities to exploit undocumented immigrants.

To ensure that immigration reform strikes the right balance, changes to the employer sanctions system should proceed in stages under the oversight of an independent sanctions advisory board established to monitor these reforms. While the first set of reforms identified below should begin immediately, a medium-term reform strategy should be chosen by the advisory board on the basis of observed experience with this first round of reforms, and should be implemented only after the board confirms that strict targets for database reform and worker and privacy protection measures have been met.

*Recommendation: Near-term reforms to the employer sanctions system*

Regardless of the final form taken by a reformed employer sanctions system, the following changes are necessary to lay the groundwork for a successful system:

- Repair the SSA and CIS databases. Most errors result from delayed changes to the databases when immigrants enter the United States or change their work status or when US citizens change their names. A procedure should be established to allow customs and border personnel, consular officers, county clerks, and others empowered to admit legal immigrants or to process changes in status or name changes to submit forms via the internet to allow real-time or same-day updating of the eligibility database. In addition, the eligibility database should receive a dedicated source of funding and staffing to ensure reductions in the tentative non-confirmation rate and to ensure rapid resolution of manual investigations.
- Develop a secure system of documentation. To be effective, an eligibility documentation system must contain anti-fraud measures which make it prohibitively expensive to mass produce phony cards, must unambiguously indicate whether the bearer is work eligible, and must be easily distributed to work-authorized individuals. Recently-issued immigration documents (green cards and work authorization cards) already include biometrics and strong anti-fraud technology, and the passage of the REAL ID Act means more secure documents for US citizens are also now being developed. Yet REAL ID driver's licenses are an imperfect solution to the problem since one in ten working Americans does not drive, since not everyone who is eligible for a REAL ID license is also work-authorized, and since the cards still leave 51 different state-level designs in place. Thus, work should also begin on the issuance of a fraud-resistant universal photo-based work authorization card or on a new Social Security card which includes a photograph and anti-fraud technology. Like REAL ID licenses and immigration documents, these cards should include a machine-readable strip of encrypted identification information.
- Strengthen workplace screening. Mandatory electronic verification should not be implemented until the sanctions advisory board confirms that required database reforms have been successfully implemented. In the near-term, employers who choose not to participate in the voluntary Basic Pilot should document their review of employees' eligibility



documents by retaining photocopies of all documents and making them available for review—a change which would deter some employers from accepting brazenly phony ID cards. As secure cards become universally available, all non-secure documents should be eliminated from the eligibility verification process, eventually limiting the list of acceptable screening documents to green cards, employment authorization cards, US passports, REAL ID licenses, secure social security cards with photos, and a new universal work authorization card.

- Strengthen enforcement. Worksite immigration enforcement will never be a top priority for ICE or DOL investigators until a dedicated sanctions enforcement office is established. Such an office must have an independent source of funding and sufficient staffing levels to make real the threat of enforcement. Until more sophisticated targeting methods can be implemented (see below), some worksites should be investigated on the basis of random sampling, possibly weighted to focus on industries with a known pattern of undocumented employment practices. Penalties for paperwork and substantive fines should be substantially increased as most congressional bills already propose; and the culture of a new sanctions enforcement office should place an emphasis on obtaining convictions and collecting fines wherever possible, not on reaching negotiated settlements. Sanctions enforcement should learn from the experience of the Environmental Protection Act: the collection of a few high profile fines can go a long way toward reshaping employer perceptions of the costs and benefits of non-compliance.
- Protect employment and privacy rights. Individuals must have the right to review their own records in the eligibility database and to initiate corrections outside of the actual employment verification process. Strong protections should be established against wrongful termination on the basis of citizenship status, including automatic compensation for lost wages as well as punitive damages in cases of discrimination on the basis of immigration status or in cases in which employers initiate eligibility verification in response to workers' support for union organizing campaigns, complaints about working conditions, or demands for higher wages. In addition, strong security measures must be established to ensure that the eligibility database is not used for other types of law enforcement practices and that the data are protected from unauthorized users.

*Recommendation: Longer-term reforms to the employer sanctions system*

The short-term reforms discussed above are necessary to lay the groundwork for a successful employer sanctions regime. In the medium-term, the success of any sanctions regime depends foremost on the ease of employer compliance. Just as the majority of Americans pay their taxes and comply with professional licensing requirements voluntarily because doing so is straightforward, so too must compliance with effective eligibility screening become a course of action which employers take without a second thought.

With this constraint in mind, policymakers face three fundamental choices about the eventual structure of the verification process: whether to require electronic verification at the point of hire, whether to assemble a database of employment decisions, and whether to establish separate procedures for citizens and non-citizens. How to answer these questions depends in part on how successfully near-term database and documentation reforms can be implemented. And the answers also depend on tradeoffs identified above: the value placed on blocking undocumented employment (preventing false positives) vs. facilitating legal employment (preventing false negatives), the value placed on universal employer compliance vs. Americans' privacy rights, and the value placed on preventing discrimination. Based on these considerations and in consultation with the independent sanctions review board, policymakers should choose among one of the following end-points for sanctions reform:

- Purely document-based system. This system requires that document reforms discussed above make it prohibitively expensive for undocumented immigrants to obtain fake ID's, and easy for employers to make accurate judgments about work eligibility on the basis of applicants' documents. At the point of hire, employers would review and retain photocopies of documents. Employers would be prosecuted for failing to produce copies of apparently valid documents for every worker in their employment. The advantages of this system are that it would require minimal improvements to the eligibility database (only enough improvements as are required to facilitate document issuance), it would impose a minimal burden on employers, and it would have no negative impact on privacy rights. The system would err on the side of protecting applicants' right to work (preventing false negatives) rather than definitively preventing all unauthorized employment. An important weakness of this system is its vulnerability to identity fraud, as job applicants would be able to present borrowed or stolen documents—with or without the employer's knowledge—to satisfy documentation requirements. In addition, by relying on employer discretion, this system would create opportunities for workplace discrimination and for employers to use migration enforcement as a weapon during wage negotiations.
- Document-based system with employment database. This system would make the same document-based requirements of employers at the point of hire, but also require employers subsequently to submit information (by phone, website, or mail) about hiring decisions to an employment database. Enforcement agents would analyze the employment database to identify likely cases of identity fraud (i.e., cases where the same documentation information appears at multiple worksites) and other suspicious hiring patterns (e.g., employers who make too few hires relative to their industry norms). This system would continue to err on the side of preventing false negatives at the point of hire and would leave in place a streamlined hiring process, but the analysis of employment data would substantially strengthen the capacity to detect and punish substantive non-compliance. While this system would require the development of a new employment database, by eliminating the need to conduct real-time queries at the point of hire this system would greatly simplify the technology and reduce maintenance expenses. The National Do Not Call Registry, for example, accumulates a comparable amount of data and was developed from scratch and maintained in its first two years for \$20 million per year. Improved enforcement would come at the cost of significant threats to privacy, however: regardless of what protections are put in place, some risk will remain that employment data would be misused by government or private actors.
- Universal electronic verification. This system would be a universal version of the existing Basic Pilot program: employers would query the eligibility database at the point of hire and would be required to dismiss workers who cannot be proven to be work-authorized. The advantages of this system are its greater capacity to detect document fraud and—assuming some important changes to the structure of the eligibility database—its capacity to detect identity fraud and other suspicious hiring patterns. These enforcement gains would come with similar—or possibly greater—threats to privacy rights as would an employment database. Universal participation in an electronic verification program would also impose a significant strain on the existing eligibility database infrastructure; and ensuring that the system is efficient and accurate would require substantial additional expenditure for database construction and maintenance. Even so, the system would always produce *some* false negatives, with serious consequences for the workers denied employment as a result. Non-citizens and citizens of non-European descent are disproportionately likely to be victims of these errors. While existing congressional proposals have focused on an electronic verification system, database experts disagree about the feasibility of producing and

maintaining a “clean” eligibility database; and universal implementation should not be considered until pilot programs produce error rates in the low single digits at worst. Given these dangers, a universal verification system should be accompanied by particularly strong worker protections, including against employer abuse of the verification system (e.g., only verifying workers’ status in response to support for organizing campaigns or similar demands) and strict prohibition against firing a worker prior to allowing exhaustive appeals of non-confirmation findings.

- Two-track system. A document-based and electronic-verification system could be combined by requiring employers to simply photocopy the documents of US citizens and check non-citizen data against the eligibility database as in the electronic verification system. While this system seems attractive because it reserves the greatest enforcement for the most problematic population, it would inevitably promote discrimination on the basis of ethnicity, rather than citizenship; and it would also encourage undocumented immigrants to consistently claim US citizenship in order to game the system. A two track system seems unworkable for these reasons.

## B) Border Enforcement

Border enforcement is an attractive policy tool because it provides policymakers and bureaucrats with easily-understood metrics for measuring success: how many agents are on line watch duty? How many immigrants have been interdicted? Partly for this reason, the last two decades have seen traditional border enforcement spending/staffing increase by a factor of five. Yet the benefits of expanded border enforcement are uncertain: despite these extraordinary efforts, estimated undocumented inflows have increased by a factor of ten in the same period, as immigrants have increasingly turned to smugglers, fraudulent documents, and new entry routes.

These fiscal costs only scratch the surface. Human rights groups estimate that over 4,000 migrants have died crossing the border since Operation Gatekeeper was initiated in 1994—a rate which is up from just 10 per year during the 1980s. Nor is the impact limited to non-citizens: US immigration policy has transformed the border region into a militarized zone where the US constitution and international law are selectively applied. Border fencing, the use of high-tech equipment, and increased enforcement personnel contribute to noise and light pollution, degrade the environment, and threaten to destroy the region’s quality of life. At the same time, the larger US footprint has contributed to border-area violence and strained US relations with Mexico and other regional allies.

The current policy debate places great emphasis on strengthening border security—and taking real steps to bring border flows under control should clearly be a priority. Yet the current debate tends to ignore the costs and risks of border enforcement for communities on both sides of the border. A policy debate that focuses on increasing the security of the US-Mexico border must therefore be based on a strong commitment to accountability, human rights, and civil rights; and the debate must consider the perspectives of those who live in border communities.

*Recommendation: Border enforcement must be balanced by more systematic protection of the human and civil rights of immigrants and members of border communities*

Enforcement agencies and personnel must be held accountable for their actions and operations. Mechanisms to accomplish this include: the creation of an Independent Review Commission to oversee the activities of federal agencies at the border with legal authority to hold these

agencies accountable; establishment of human and civil rights training procedures for all personnel engaged in border enforcement; development of a revised complaint process for those who believe their rights have been violated, and a clear, transparent, closely monitored policy to prevent racial and ethnic profiling.

The current border enforcement strategy pushes migrants toward the most dangerous sectors of the border; and the resulting death toll, which averages more than one death every day, is unacceptable. Recent enforcement efforts have also fostered the creation of immigrant smuggling networks, exposing immigrants to additional dangers. Immediate attention must focus on developing new strategies that would prevent fatalities, and provide for orderly crossing of legal migrants. Local and regional authorities must take effective steps to disband border vigilante groups and disrupt smuggling networks; and border enforcement operations should be guided by criteria that minimize the loss of life and protect immigrants' rights.

*Recommendation: The United States should emphasize innovative approaches to border control, rather than additional equipment and personnel at the US-Mexican border*

The rising investment in border enforcement combined with still-increasing undocumented inflows suggest that the marginal costs of "more of the same" enforcement techniques exceed their marginal benefits. The United States should consider new strategies for border control, while reviewing its current focus:

- Border control should be strengthened by extend the border outward to include tougher and more sophisticated screening procedures at US consulates. Increased consular staffing, greater use of biometric consular screening, and smart links between consulates and inspectors at ports of entry could ensure that every legal entrant is thoroughly vetted while still speeding border processing.
- The use of military personnel and technology at the border along with border fencing are especially problematic. Placing military personnel at the border should be unnecessary if border enforcement agencies are properly equipped and trained; and only personnel with comprehensive training in immigration law, ethics, civil and human rights should be enforcing U.S. immigration and customs laws at the border. The prospect of additional border fences has great potential to disrupt communities, the environment, and international relationships. No new fencing projects should move forward without an independent analysis of the effectiveness, environmental impact and community impact of existing fences. If such a project were to proceed, it must respect the environment and the rights of indigenous people, and must be done in consultation with border communities.

*Recommendation: Increase staffing and technology to speed legal entries at ports of entry*

Increased cross-border traffic along with heightened scrutiny of legal entrants has caused dramatic increases in the length of time that migrants, workers, visitors, and those engaging in commerce must wait in order to enter the United States. According to a recent study by the San Diego Association of Governments, over three million potential working hours in San Diego County are spent in delays at the border, resulting in \$42 million in lost wages in that county alone.

- Legal traffic across the US-Mexican border will continue to increase in the future, and the Department of Homeland Security must invest in improving infrastructure at ports of entry in order to expedite border crossings.

- Poor service at ports of entry has also been accompanied by growing complaints of abuses by Customs and Border Protection Agents. Enforcement personnel must respect current policies regarding the types of documents that US citizens must present to return to the United States, and should establish stronger and more accessible complaint procedures.

#### C) Regularization of existing undocumented immigrants

*Recommendation: Create opportunities for existing undocumented immigrants to earn legal status without returning to their countries of origin*

Roughly 11 million undocumented immigrants now reside within the United States, and any reform effort which fails to substantially reduce the undocumented population within the United States would be incomplete in a fundamental way. While some reform proposals would delay a decision on undocumented immigrants by granting them temporary legal status, ultimately the United States must choose between forcing or coercing the departure of most undocumented immigrants, or allowing them to remain in the United States and eventually to obtain legal status. For both practical and ethical reasons, a program of eventual legalization is preferable to one of coercive return migration.

On a practical level, the Department of Homeland Security concedes that the United States lacks the enforcement capacity to ensure the departure of millions of undocumented immigrants now resident within the United States. And the cost—in dollars and social peace—of developing such enforcement capacity is entirely disproportionate to the benefits of removing undocumented immigrants. Thus, the only realistic strategy for widespread removal is a program of coercive departure, or making the lives of undocumented immigrants in the United States so unpleasant that most will choose to leave “of their own free will.”

In practice, these costs will be borne not just—or even primarily—by undocumented immigrants, but also by their US citizen families and communities and by the employers of the estimated 8 million undocumented US workers. A removal campaign is likely to drive many undocumented immigrants deeper underground, exacerbating economic and security problems associated with undocumented immigration, and threatening the rights and livelihoods of all immigrants and ethnic minorities. A large-scale removal campaign would also put an enormous strain on US relations with Mexico and other Caribbean Basin states. Thus, even though a legalization program *would* reward individuals who entered out of status and attract some new immigrants, an enforcement-only alternative would be very costly and unlikely to succeed in any meaningful sense.

## 2. Immigration and national security

Beyond their failure to successfully control undocumented immigration, the existing US approach to migration control which focuses on militarization of the border and criminalization of undocumented immigration have undermined US security in a variety of ways. First, enhanced border enforcement has produced a humanitarian crisis on the border, as an average of over 500 immigrants die each year while attempting undocumented entry (up from just 10 per year during the 1980s). The mixture of desperate border crossers and (in many cases) poorly-trained border guards is often explosive, and generalized conflict at the border has limited enforcement agents’ ability to distinguish among immigrants seeking work in the United States and smugglers or potential terrorists seeking to harm the United States. Along with abusive conditions endured by undocumented immigrants within the United States, these conditions

have been a diplomatic disaster and now rank as the single most contentious issue between the United States and its Latin American neighbors.

Second, on the most basic level, treating the U.S.-Mexican border as a central front in the war on terror has diverted scarce resources away from more pressing security priorities. The southern border is the one US frontier already under constant surveillance, and arguably the least likely point of entry for would-be terrorist infiltration. Thus, US migration control efforts and US national security would both be enhanced if policymakers draw clear distinctions between migration control, counterterrorism, and the broader national security implications of immigration policy. Changes should be considered in each of these three areas.

Restrictions on immigrants' rights passed in 1996, along with new immigration security measures and long delays in visa issuance introduced after 9/11, have also undermined US security by making the United States an unattractive destination for the world's best and brightest students, workers, and entrepreneurs. Given lagging domestic production of scientists and engineers, US strategic industries and economic leadership are fundamentally dependent on these high-end immigrants; yet both the quantity and the quality of international students entering the United States have fallen sharply since 2001, while first- and second-preference LPR visas issued to the most-skilled workers have fallen by three-quarters. New barriers to immigration also have high economic costs: B1/B2 tourist and business visas have fallen by over a third since 2001, with particularly important consequences for US firms seeking to do business with partners based in important emerging markets exempted from the visa waiver program, like India, China, and Russia.

*Recommendation: Focus counterterrorism efforts on reducing terrorist mobility and the infrastructure of undocumented immigration, not the U.S.-Mexican border*

Proponents of increased border enforcement link these efforts to the possible interdiction of terrorists attempting clandestine entry across the US-Mexican border. Yet this border is already among the most heavily surveilled frontiers in the world, and stands in sharp contrast to the thousands of miles of unguarded coastline and US-Canadian frontier, which are exponentially greater points of vulnerability. In any case, if attempting to locate terrorist infiltrators is analogous to finding a needle in a haystack, the odds of finding the needle greatly increase as searchers are given clues about its size and shape, in which particular haystack it is likely to be hidden, and when it might be found there.

Thus, rather than emphasize the militarization of the U.S.-Mexican border, the United States should focus its efforts with respect to terrorist infiltration on gathering detailed intelligence about terrorist mobility. While technological changes in the modern era have created new forms of global interconnectedness, the ability of terrorists to establish new cells and inflict damage on US assets still depends fundamentally on the physical movement of human resources from strongholds in the Middle East and elsewhere into western nations and eventually the United States. These international movements channel terrorist agents into ports of entry where they make formal contact with enforcement personnel, and therefore represent points of vulnerability for terror networks and opportunities for US counterterrorism efforts. Thus, just as the United States spent tens of billions of dollars and devoted thousands of staffing hours to gathering intelligence on troop movements and tracking the deployment of weapons systems, so too should a massive intelligence operation be directed at tracking the movement of terrorist agents and the infrastructure upon which such travel depends, including fraudulent documents, modes of travel, safe houses, etc. Careful observation of terrorist mobility networks will allow counterterrorism personnel not only to describe patterns which make terrorist interdiction at

ports of entry more likely, but also to use illegal travel infrastructure as a point of access for penetration into broader terrorist support networks.

*Recommendation: Take additional steps to recruit the world's best and brightest minds, especially in strategically important industries*

From highly celebrated cases like Albert Einstein and Werner von Braun to thousands of quieter success stories during the 1990s—when a third of Silicon Valley start-ups were initiated by immigrants—migration has always made a crucial contribution to strategic American industries. American dependence on these resources has never been greater, as foreign students now represent over 50 percent of all engineering PhD's and over 40 percent of all PhD's in the natural sciences. Yet aggressive recruitment of high-end immigrants by other wealthy states as well as by countries of origin like China and India had eroded the United States' traditional advantage in attracting the world's brightest students; and US access to the highest quality students is further threatened by visa restrictions and processing delays which make US universities unattractive destinations.

International education is also a valuable form of public diplomacy, and recruitment of students from the Middle East and other strategic areas enhances US security; yet delays are longer still in these cases as potential students are subjected to a security clearance process which typically adds one to two months to visa application times. Additional clearance delays of three months or more are typically required before international students are permitted to enroll in a wide range of technologically sensitive fields. Policymakers should therefore consider the following reforms to increase US educational competitiveness:

- Make international students automatically eligible to work off campus in order to supplement their incomes and support their studies.
- Allow international students on F and J visas completing science or engineering degrees to adjust automatically to a non-quota transitional visa status which would put them on a clear path to permanent residency.
- Increase staffing at US consulates in Asia and the Middle East dedicated to screening student and high-skilled visa applications, and increase global staffing dedicated to security clearances associated with technologically sensitive fields.

*Recommendation: Collaborate with countries of origin on regional approaches to managing immigration flows*

Eighty percent of unauthorized and half of all legal immigrants to the United States come from Latin America. And while these figures are striking from the US perspective, the numbers are equally dramatic when viewed from the other side of the border. Thus, while the US policy debate focuses overwhelmingly on the domestic consequences of immigration, US foreign policy concerns demand that policymakers take account of how policy choices affect countries of origin. At the same time, emigration is an important safety valve for the relatively weak Caribbean Basin economies, and any threat to emigrant jobs and income streams has the potential to be highly stabilizing. The effect of large-scale removals can be even more damaging. After the United States spent some \$5 billion to defeat communism and support democratic stability in Central America during the 1980s, it is sadly ironic that post-1996 forced removal policies have fostered transnational drug gangs which now threaten to turn much of the region into failed narco-states. Perhaps most importantly, immigration is the ultimate form of public diplomacy in relations with countries of origin; and unilateralism in US immigration policy plays into a broader critique of America as hypocritical and eager to exploit its economic advantages rather than to work cooperatively with its allies.

Yet concentrated migration networks between the United States and the Caribbean Basin also represent an important opportunity to ground migration policy within a foreign policy framework. High stakes for countries of origin means that immigration reform is a policy area that offers significant diplomatic bang for the buck: and liberalizing reform would be enormously well received in Mexico and other neighboring states. These linkages also reflect the fact that migration is an inherently regional phenomenon, yet regional economic institutions have been far more visionary about removing barriers to flows of goods, services, and capital than they have been about finding collaborative ways to regulate regional labor markets and migration. Indeed, liberalizing all types of international flows *other* than immigration has almost certainly contributed to undocumented migration in the NAFTA era. Finally, the disproportionate role of Caribbean Basin states as countries of origin also means they are uniquely positioned to assist US enforcement efforts, and collaborative immigration policies arguably offer the most cost-effective strategy for enhancing migration control.

- The United States should promote economic development in Caribbean Basin communities of origin as a way to reduce emigration pressures and promote regional trade. US development funds could take the form of matching grants bundled with migrant remittances, as in Mexico's existing "Tres por Uno" program, or direct technical and financial assistance to Mexican entrepreneurs, as in the existing bilateral Partnership for Prosperity. In either case, strict oversight should ensure that investment goes toward job-creating endeavors, and that it is accompanied by appropriate infrastructure (including educational services) to ensure that new industries are economically viable.
- High-density countries of origin could be invited to play a role in the protection of migrants' rights at the border and within the United States. At the border, the United States and Mexico should work together to combat people smuggling and other criminals who take advantage of vulnerable immigrants, and the two countries should also coordinate efforts to educate would-be migrants about the dangers associated with crossing the border outside normal ports of entry. Within the United States, Mexican and Caribbean Basin consular networks should work with the US Department of Labor and private groups to educate migrants about their labor rights. In addition, consular officials should have full access to worksites where immigrants are employed, and institutions should be created to facilitate communication between consular officials and US enforcement personnel when violations of immigrant working conditions are observed.
- Just as many European states distribute temporary work visas on a bilateral basis to specific countries of origin, the United States should steer new legal visas to Mexico and the Caribbean Basin. Targeting Caribbean Basin states for a disproportionate share of new visas makes it more likely that legal flows will replace existing undocumented flows, most of which are regional. And the density of existing migration networks also makes the Caribbean Basin the one region of the world in which the creation of additional legal visas would not create significant new migration demand. Expanded access to legal visas could be linked to improved labor standards in countries of origin as part of the NAFTA/CAFTA framework, or to greater cooperation on US counterterrorism and migration enforcement efforts, a role which these states are uniquely positioned to play.



## Conclusion

The US Immigration policy regime is clearly out of alignment with the structural factors which motivate immigrants in countries of origin and within the United States, and poorly designed to advance the US national interest in immigrant recruitment, retention, and integration. While managing migration flows is notoriously difficult—immigrants are far more resourceful than many others targets of regulation—the effectiveness of US immigration regulations has been undermined by over four decades of muddling through, as Congress and the president have systematically avoided fundamental immigration reforms. Yet the stakes are high, and ample evidence exists that the US public is coming around to the position that the development of workable immigration policies should be a top priority for the federal government at this time.

Still, the risks of engaging in fundamental reform efforts likely outweigh the potential gains in the minds of most legislators, and prospects for fundamental reform in the 109<sup>th</sup> Congress—or even for comprehensive reform as defined in the US Senate—appear dim. The House of Representatives has already passed legislation (HR 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005) which would not only fail to consider fundamental reforms in the spirit of proactive recruitment and retention, but would also exacerbate existing flaws in the US approach to migration control and the use of immigration as a tool of foreign policy.

Presidential leadership has always played a critical role in the final stages of previous comparative reform efforts, yet the Bush administration appears to be retreating from any such role and from its previous support for a comprehensive approach to reform (e.g., rhetoric prior to the 9/11 attacks and during the 2004 campaign). With the president confronting continued low poll numbers, his support for HR 4437 signals his apparent desire to shore up support among social conservatives opposed to immigration flows, rather than fixing the problem or addressing the concerns of his business supporters, whose support is viewed as less problematic in 2006 congressional races.

With many Democrats believing that a tough position on immigration control enhances their electoral prospects, it appears unlikely that House negotiators will feel any pressure to make significant concessions in negotiations with the Senate—assuming such negotiations even occur. Thus, while the House bill has little prospect for passage into law, its establishment of such an extreme restrictionist position as a point of departure for future negotiations likely guarantees that inaction is now the best that can be hoped for during the current session of Congress.

