

AMERICAN BAR ASSOCIATION
COORDINATING COMMITTEE ON IMMIGRATION LAW
REPORT TO THE HOUSE OF DELEGATES
RECOMMENDATION

- 1 RESOLVED, That the American Bar Association supports legislation to provide noncitizens
2 who both reside in the United States and demonstrate significant ties to the United States, such as
3 employment, tax payment, family, length of residence, with an opportunity for them and their
4 immediate relatives to acquire lawful permanent residence.
5
- 6 FURTHER RESOLVED, That a noncitizen residing in the United States who is eligible to
7 immigrate through family-sponsored or other provisions of the Immigration and Nationality Act
8 should be able to adjust to permanent residence in the United States rather than travel abroad for
9 processing.
10
- 11 FURTHER RESOLVED, That any temporary worker or legalization program guarantees basic
12 labor rights with the ability to change employers and provide a realistic opportunity to obtain
13 permanent resident status.

REPORT

Summary

The United States is a nation of immigrants¹ and immigration is a factor that continues to shape and strengthen our country. On a daily basis, immigrants come to reunite with close family members, fill jobs, and find protection from persecution in their homelands. Immigrants contribute significantly to America's cultural and economic prosperity. However, the United States' tightly controlled and highly regulated system of legal immigration, with huge backlogs and long waiting lists, makes it nearly impossible for many individuals to acquire legal status. Yearly immigration is numerically limited by statute. There is a complicated statutory formula that determines the annual category limits on family-sponsored and employment-based immigration. In addition, there is a uniform "per country" limit for annual immigration from each foreign country. Over 3.5 million individuals currently are waiting in the queue for immigrant visas to become available.

Without viable immigration opportunities, the United States has experienced a significant increase in the number of undocumented immigrants arriving and settling here over the past fifteen years. The population of undocumented immigrants is now estimated at 8.5 million.² Undocumented immigrants generally experience severe disadvantages such as exploitation and lack of access to the justice system. As the undocumented immigrant population grows, their disadvantages can only serve to disadvantage the nation as a whole.

Clearly one way of dealing with the problem is to seek out and deport undocumented immigrants. This ignores, however, several realities, the most important being that the United States does not have the resources or desire to do so. It also ignores the fact that undocumented immigrants contribute enormously to the U.S. economy and have significant ties to U.S. citizens and businesses. Rather than relying on unrealistic goals and policies, the United States should provide to otherwise law-abiding, income-producing, tax-paying undocumented immigrants with family ties in the United States the opportunity to legalize their status. Such a policy will benefit not only the undocumented immigrants but the United States as well.

Legal and Policy Considerations

In today's remarkably global society, the United States' national security, economy, politics, and culture are more closely linked to those of other countries than ever before. Thousands of immigrants from Latin America, Europe, Asia and Africa arrive yearly, bringing with them youthful energy, valuable skills, and above all, a dream for a better life. They send home remittances on which their families and communities depend for economic security, and absorb American values and ideals. However, if they do not have opportunities to remain in the United

¹ This report uses the term "immigrant" to denote all noncitizen residents of the United States, including those with permanent and temporary legal status as well as those present without legal status or authorization. This is a departure from the narrower statutory definition of "immigrant". See Immigration and Nationality Act (INA) § 101(15), 8 U.S.C. § 1101(a)(15).

² MICHAEL E. FIX ET AL, THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES 12 (The Urban Institute, 2001) [hereinafter URBAN INSTITUTE REPORT] (citing the 2000 census).

States legally, they live in the shadows where they become prey for unscrupulous employers, dishonest landlords, petty criminals and worse.

The United States is currently faced with a reality of an ever-increasing presence of unauthorized immigrant workers. This workforce fills important jobs in many sectors of our economy and its services are becoming increasingly vital as U.S. birthrates drop and our population ages. While their labor contributes to the wealth of the nation as a whole, their lack of a secure immigration status relegates them to a life of poverty and injustice, and undermines efforts to improve national security.

A. Legalization would serve our national security interests

The September 11th tragedy has raised concerns that terrorists can enter and reside in our country without detection and kill thousands of innocent people. New border security measures are being enacted to prevent this from happening again: technologies are being upgraded, new restrictions are being imposed on visas, border security is being intensified, and intelligence agencies are sharing intelligence information with the INS.³

At the same time, it is necessary to deal realistically with the millions of well-intentioned individuals who come to earn a living, not to harm us. Experience has taught us that a sizable subclass who lives in the shadows and strives to remain undetected provides an ideal environment for terrorists to hide. If, however, this population were given an incentive to come out of the shadows, register their presence, go through a background check and demonstrate their good character and lawful intentions, we would all be more secure. Simply put, we would be safer knowing who is living here among us than not knowing. Moreover, we could then focus our enforcement efforts on those who might do us harm rather than on those who just want to work or rejoin family members already in the United States.

B. Value of immigrants to the U.S. economy

Immigrant workers are vital to the U.S. economy and prosperity. The United States is facing a long-time worker shortage. According to the Bureau of Labor Statistics (BLS), the number of workers ages 25-34 is declining while the labor force age 45 and older is soaring. The BLS projects a shortage of 7 million workers by 2008 and that more than 60 million workers will be retiring in the next three decades. We are producing jobs faster than we can produce workers to fill them. Secretary of Labor Elaine Chao called this phenomenon the “Incredible Shrinking Workforce” in her 2001 Labor Day address and stated that we must look to immigration as part of the solution.⁴ Federal Reserve Chairman Alan Greenspan has also repeatedly extolled the

³The Enhanced Border Security and Visa Entry Reform Act of 2002, H.R. 3525, 107th Cong. (2002) and S. 1749, 107th Cong. (2002) (passed on Mar. 12, 2002 and Apr. 18, 2002 respectively).

⁴ *U.S.-Mexico Migration Discussions: An Historic Opportunity: Hearing Before the Senate Judiciary Committee*, 107th Cong. (2001) (statement of Thomas J. Donohue, President and CEO, U.S. Chamber of Commerce) [hereinafter Donohue Statement].

virtues of immigrants for our economy and noted that they are willing “to do the types of work that make this economy function.”⁵

In many sectors of the economy, immigrants fill essential jobs. The health care, agriculture, food-processing, meat packing, hotel, hospitality, restaurant and building industries, to name just a few, are dependent on immigrant workers. The American Health Care Association, American Hotel & Lodging Association, National Association of Home Builders, and National Restaurant Association, along with the U.S. Chamber of Commerce, were among the organizations who wrote to President Bush on the eve of his historic meeting with President Vicente Fox of Mexico to emphasize “the critical role that immigrant workers, including those without immigration status, play in our nation's economic growth.” The August 1, 2001 letter recommended that the United States and Mexico agree to include opportunities for adjustment of status for immigrant workers:

The simple reality is that there are undocumented immigrants in the U.S. workforce and the industries in which they work could not function without them. Many have been here for years, are paying taxes, raising families, and contributing to their communities. It is neither in the best interest of the workers nor of their employers for this situation to remain unaddressed during these discussions.

More than two dozen businesses and trade associations belong to the Essential Worker Immigration Coalition (EWIC) which has made immigration reform its unifying principle, including the “regularization” to legal status of certain undocumented workers currently in the United States.

Thomas Donahue, President and CEO of the U.S. Chamber of Commerce and a founding member of the Essential Worker Immigration Coalition, testified before the Senate Judiciary Committee in September 2001, that “[t]he foreign worker, both legal and illegal, has been an integral part of our inflation-free economic growth, and must be valued as a contributor to our strong economy.”⁶ Donahue has also stated: “The reality is, millions of undocumented workers are here who fill an economic need, and we can't afford to send them home. The sooner we fold them into an expanded immigration system the better for all concerned.”

U.S. labor unions also recognize the value of immigrant workers and support legalization efforts because all workers would benefit. In February 2001, the AFL-CIO adopted a resolution recognizing the contributions of undocumented workers to their families, communities and workplaces and calling for a new program to provide them with permanent legal status.

It is essential to the well-being of the U.S. economy that employers be able to address labor shortages that drastically affect their businesses. Employers want the opportunity to hire and retain good workers without violating the immigration laws. Undocumented workers and their

⁵ *Conduct of Monetary Policy: Hearing Before the House Committee on Financial Services*, 107th Cong. (2001) (statement of Hon. Alan Greenspan, Chairman, Board of Governors, Federal Reserve System). *See also*, STEPHEN MOORE, *A FISCAL PORTRAIT OF THE NEWEST AMERICANS* (The National Immigration Forum & the Cato Institute 2002).

⁶ Donohue Statement, *supra* note 4.

families want to make an honest living. They also pay taxes and stimulate the economy as consumers. Recent studies suggest that the current levels of undocumented migration from Mexico contribute somewhere between \$154 billion to \$220 billion to the Gross Domestic Product of the United States.⁷ Legalizing the noncitizen labor force and according full rights and protections of our laws and legal system is a win-win proposition that both labor and business support.

C. Immigrant workers contribute to global stability

Immigrant workers also contribute to the economic security and stability of their home countries through their remittances. Mexican workers have been coming to the United States for more than a century to work in both agriculture and the service sector. The government of Mexico estimates that Mexican workers have sent home an estimated \$45 billion over the last decade. In 2001, Mexicans working in the United States contributed more than \$9 billion in remittances to Mexico.⁸

During the 1980s and 1990s, nationals from El Salvador, Nicaragua, Honduras and Guatemala sought refuge in the United States from the turmoil that embroiled those nations. As those nations began to heal their wounds and rebuild, they discovered that remittances from their nationals working in the United States were vital to keeping their nations afloat. For example, the \$1.7 billion that El Salvador receives in annual remittances represents 14% of that country's gross economic output. Remittances to Latin America totaled approximately \$12 billion in 2001, dwarfing the \$772 million contributed by USAID to the region.⁹

D. Immigrants are members of American families

Immigrants and their families comprise a significant percentage of the U.S. population, as they have throughout this country's history. The foreign-born population of the country is estimated to exceed 28 million, approximately one in every ten U.S. residents. They reside in every state and increasingly settle throughout the nation. Approximately one out of seven married-couple families has at least one foreign-born spouse (14 percent of all married couples or 7.7 million) and one in five children under age 18 (14 million in all) is either an immigrant or a member of an immigrant family. Contrary to popular belief, the overwhelming majority of immigrants are legal. However, the undocumented population may now exceed 8 million and the incidence of "Amixed-status" families with citizen, legal and nonlegal members is extremely high. Immigration policy, therefore, profoundly affects significant numbers of American families.

Family reunification has been a cornerstone of U.S. immigration policy but the system of family-based immigration has broken down in recent years. Immigration law imposes many onerous requirements and numerical limitations that make it difficult for foreign nationals to join U.S.

⁷U.S.-Mexican Relations: Unfinished Agenda: Hearing Before the Senate Subcommittee on the Western Hemisphere, Peace Corps, and Narcotics, Comm. On Foreign Relations, 107th Cong. (2002) (statement of Steven Ladik, President, American Immigration Lawyers Association).

⁸ Kevin G. Hall and James Kuhnhenh, *Border shapes summit Bush embarks on Latin American tour*, THE FORT WORTH STAR-TELEGRAM, Mar. 22, 2002.

⁹ Chris Kraul, *Mexican Immigrants Sending More Money Home Latin America*, L.A. TIMES, Sept. 24, 2001, at C3.

citizen or lawful permanent resident family members in the United States. Numerical allocations are not keeping pace with the demand for visas. For example, to receive an immigrant visa in May 2002 as the husband, wife or minor child of a lawful permanent resident, the petitioner must have filed before January 15, 1997. If the spouse or child is a national of Mexico, the petitioner must have filed before October 22, 1994, almost eight years ago. A U.S. citizen must have applied at least three years ago to bring his or her adult son or daughter, and at least four years ago to bring his or her married son or daughter. A permanent resident had to have applied before September 1993 – nearly a decade ago – to be able to sponsor his or her adult son or daughter in May 2002. No visas are being issued at this time if the adult son or daughter is emigrating from Mexico.¹⁰ Moreover, these delays tend to increase every month.

Furthermore, many immigrants who live and work legally in the United States are not eligible to bring their family members. Individuals who come to the United States fleeing civil unrest and natural disasters have been granted temporary nationality-specific protection, such as Temporary Protected Status (TPS) or Deferred Enforced Departure (DED), that permits them to remain and work in the United States but not to sponsor their spouse, children or other family members. As the programs expire, individuals find themselves with jobs, homes and even U.S. citizen children but no secure status themselves. Programs subsequently enacted by Congress to help some of these groups often have processing backlogs that exceed 10 years and do not confer status on immediate family members.

The cold hard facts belie the U.S. commitment to family unification. The cumulative effect is that families become disillusioned with the legal immigration process as they face the dilemma of either being separated from their loved ones for years while the process drags on or breaking the law to stay together. Many families live in a distressing limbo status in which some members reside in the United States lawfully while others are undocumented. This is particularly damaging in the case of U.S. citizen children of undocumented parents who are vulnerable, poor, and fearful of accessing benefits to which their children are entitled, such as nutrition programs, health care and social services.

Political Consensus

There is an emerging consensus that the status quo is unacceptable and that a legalization program would benefit U.S. employers, workers, families and our nation as a whole. Interest in a legalization mechanism is being seriously discussed between the U.S. and Mexican governments, within Congress, the business community, labor unions, and civil rights organizations. Religious institutions, legal groups, and think tanks also are actively involved in the dialogue.

In 2001 President Bush and President Fox to begin a series of discussions about how to make migration between the two countries mutually beneficial, culminating in a joint statement calling for “safe, legal, orderly, and dignified migration flow between our countries.”¹¹ President Bush

¹⁰ Intending immigrants from India, Mexico and the Phillipines are subject to even stricter numerical caps and longer waiting periods.

¹¹ Joint Statement by the Presidents of the United States and Mexico (Mar. 22, 2002).

is said to support recommendations made by a task force headed by Secretary of State Colin L. Powell and Attorney General John Ashcroft to “allow some three million Mexicans who are here illegally to apply for permanent status.”¹² The President has stated:

We ought not to penalize an employer who’s trying to get a job done, who hires somebody who’s willing to do that kind of work, . . . there are many in our country who are undocumented and we want to make sure that their labor is legal. And so part of the issue is how do we match a willing employer with a willing employee, to recognize the value of the work, and to legalize that part of the process.¹³

In an August 2, 2001 letter to Presidents Bush and Fox, Senate Majority Leader Thomas A. Daschle and House Democratic Leader Richard A. Gephardt wrote:

No migration proposal can be complete without an earned adjustment program. Our economy depends on the undocumented immigrants in our workforce and it is neither in the best interest of the workers nor their employers for the workers to remain undocumented. . . . They came to this country with a strong love of freedom, a strong commitment to democracy, and the desire to work hard and offer their families a better life. They have made lasting contributions to the economic vitality of our communities and our nation. Adjusting the status of these long-time residents will provide employers with a more stable workforce and serve to improve the wages and working conditions of all workers.

Hispanic civil rights organizations, including the National Council of La Raza and the Mexican American Legal Defense and Educational Fund, consider resolving this issue to be a top priority. The American Immigration Lawyers Association (AILA) and National Immigration Forum (NIF) endorse a regularization program to legalize people in the United States without authorization.

Thomas Donahue, president of the U.S. Chamber of Commerce, testified that:

those who have already demonstrated their commitment to the United States by living here, working and paying taxes, should have a means by which they can earn permanent residence. There are many possible ways to accomplish this that are being discussed by the policy makers; but we simply want to ensure that some of our best workers can stay and continue their contributions to their employers.¹⁴

In testimony before the Senate immigration subcommittee, John J. Sweeney, President of the AFL-CIO, observed that “Our current immigration policy ignores the fact that many undocumented workers contribute to the national economy, have children who are U.S. citizens,

¹² Eric Schmitt, *Bush Says Plan for Immigrants Could Expand*, N.Y. TIMES, July 27, 2001.

¹³ Bill Sammon, *Bush urges legalizing aliens, ending employer sanctions*, WASH. TIMES, Sept. 7, 2001.

¹⁴ Donohue Statement, *supra* note 4.

and are long-term, law-abiding members of their communities.”¹⁵ He too recommended that “[a]s a matter of fundamental justice, undocumented immigrant workers who have worked hard, paid taxes and contributed to their workplaces and communities should be allowed to adjust their status to legal, permanent resident.” This represented a notable departure from the AFL-CIO’s previous positions.

Those who oppose legalization raise the same concerns that have been raised against immigrants for centuries. Organizations such as the Federation for American Immigration Reform (FAIR), which advocate reducing immigration, claim that legalization would reward law breakers and create a magnet for further undocumented immigration. They also claim that immigrants take jobs from U.S. workers, suppress U.S. wages and do not learn English or assimilate.

These claims, however, fail to take into account several important factors. First, illegal immigration occurs as a result of several complex and forceful motivations, and U.S. immigration policies alone cannot prevent it.¹⁶ Second, rather than harm the U.S. economy, immigrants provide a vital source of labor, particularly in certain labor-intensive industries.¹⁷ Finally, immigrants assimilate at about the same rate as previous generations. There are some immigrants who for one reason or another may not learn fluent English or adopt American culture; however, there is also an entire generation of children who will attend American schools, learn English as well as their native language, and be fully into integrated mainstream American life.¹⁸

¹⁵ *U.S.-Mexico Migration Discussions: An Historic Opportunity: Hearing Before the Senate Judiciary Committee*, 107th Cong. (2001) (statement of John J. Sweeney, President, AFL-CIO).

¹⁶ U.S. COMMISSION ON IMMIGRATION REFORM, *BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY* 121-122 (1997) (hereinafter CIR REPORT).

¹⁷ *Id.* at 15. See also CATO HANDBOOK FOR 107TH CONGRESS 640-641 (CATO Institute, 2001) (“A comprehensive study in 1997 by the National Research Council determined that immigrants and their children, over their lifetimes, contributed an average of \$80,000 more in taxes than they consume in government services.”); MICHAEL FIX & JEFFREY S. PASSEL, *IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT* (The Urban Institute, 1994) (“Contrary to the public’s perception, when all levels of government are considered together, immigrants generate significantly more in taxes paid than they cost in services received.”); Daniel Griswold, *Immigrants Have Enriched American Culture and Enhanced Our Influence in the World*, INSIGHT ON THE NEWS, Feb. 18, 2002 (citing a 1997 study by the National Academy of Sciences concluding that immigration delivered a “significant positive gain” to the U.S. economy and 2001 testimony of Federal Reserve Board Chairman Alan Greenspan before Congress in which he said, “I’ve always argued that this country has benefited immensely from the fact that we draw people from all over the world.”); LINDSAY LOWELL & ROBERTO SURO, *HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS* (The Pew Hispanic Center, 2002).

¹⁸ URBAN INSTITUTE REPORT, *supra* note 2, at 18 (“Despite recent concerns about a decline in immigrant quality and slowing incorporation rates, our analyses suggest that the immigrant family integration story remains a largely successful one.”) See generally GREGORY RODRIGUEZ, *FROM NEWCOMERS TO NEW AMERICANS: THE SUCCESSFUL INTEGRATION OF IMMIGRANTS INTO AMERICAN SOCIETY* (National Immigration Forum, 1999); AMERICAN IMMIGRATION LAW FOUNDATION, *EMBRACING AMERICAN SOCIETY: MIAMI’S IMMIGRANTS ARE ANXIOUS TO IMMIGRATE* (April 2002) (citing THOMAS D. BOSWELL ET AL, *FACTS ABOUT IMMIGRATION: ASKING “SIX BIG QUESTIONS” FOR FLORIDA AND MIAMI-DADE COUNTY* (Univ. of Florida, 2001).

Addressing Today's Immigration Challenges

Various groups, including senators, immigration groups, and the Bush administration, have put forth their proposed plans for dealing with unauthorized workers currently in the country. These proposals vary in scope and approach. What they have in common is recognition that the status quo is unacceptable.

A. Current Proposals

President Bush supports a temporary worker program for Mexican workers but has not ruled out extending the program to workers regardless of nationality or a permanent residency program. Congressional Democratic leaders are challenging the president to consider a permanent “earned adjustment” program for workers of all nationalities.¹⁹ They also have urged Bush to support an increase in visas and numerical limits for family reunification; restoration of due process protections eroded by the Immigration Reform and Immigrant Responsibility Act of 1996; and an enhanced temporary worker program that provides for job portability and legal protection of wages, hours and working conditions.

Business groups, led by the U.S. Chamber of Commerce, support both a permanent legalization and new temporary worker program. The AFL-CIO has called for a broad legalization for undocumented people from all countries, but is adamantly opposed to expanding temporary worker programs. The AFL-CIO also wants an immediate “amnesty” for the Salvadorans, Guatemalans, Hondurans, Haitians and Liberians who fled their countries in the 1980s and 1990s and have been denied refugee status, and for 350,000 long-term resident immigrants who claim were denied legal status because of INS improprieties in the 1986 legalization program.²⁰

Senators and representatives have been putting forth legalization bills for several years. The Latino and Immigrant Fairness Act, introduced in July 2000, would have extended the “registry” qualifying date from January 1, 1972 to January 1, 1986, thereby allowing the Attorney General to grant permanent residence to persons of good moral character who have resided in the United States since 1985.²¹ A bill introduced by Senators Harry Reid (D-NV) and Edward Kennedy (D-MA) in April 2000 would have updated the “registry date” to 1986 and also created a “rolling registry” beginning with 1986 and advancing one year until the registry deadline reached 1991 in 2006.²² In 1999 and again in 2001, Rep. Luis Gutierrez (D-IL) introduced bills to provide

¹⁹ Letter from Thomas A. Daschle, Senate Majority Leader, and Richard A. Gephardt, House Democratic Leader, to President George W. Bush and Mexican President Vicente Fox (Aug. 2, 2001) [hereinafter Daschle/Gephardt letter] (“Disparate treatment in our immigration laws should be eliminated. *All similarly situated, long-time, hard-working residents should be provided with the same opportunity to become permanent members of our community.* We should create a fair, uniform set of procedures for all qualified immigrants. Many of today’s undocumented workers are Mexican, but many others are from Canada, Central and South America, Asia, the Caribbean, Africa, and Europe. We should seize the opportunity before us to create an earned adjustment program that benefits all immigrants regardless of their country of origin.”) (Emphasis added.)

²⁰ See *Newman v. INS*, Nos. 99-56544 and 99-56950, slip op. at 1(9th Cir. Apr. 3, 2002) (finding in favor of long-term immigrants who challenged INS’s denial of or refusal to adjudicate their legalization applications).

²¹ S. 2912, H.R. 4172, 106th Cong. (2000).

²² Date of Registry Act of 2000, S. 2407, 106th Cong. (2000).

nationals of El Salvador, Guatemala, Honduras and Haiti an opportunity to apply for permanent residence under provisions that pertain only to Nicaraguans and Cubans.²³ He also introduced legislation to grant permanent legal status to persons in the United States before February 6, 1996 and temporary legal status to persons in the United States before February 6, 2000.²⁴

AILA proposes that tax-paying, law-abiding undocumented immigrants with ties to U.S. citizens, permanent residents, and/or businesses be given the opportunity to apply for permanent residence. AILA also supports a new temporary worker program more respectful of labor needs and workers' rights than the current system. The Migration Policy Institute (MPI) proposes a registration program (a "census") for all undocumented immigrants living in the United States. Those who register may then advance to the second step, earned permanent residence based on a points system rewarding attributes such as paying taxes, maintaining employment, engaging in civic activities, and having family equities. MPI suggests giving Mexicans priority and creating a new Mexican-only temporary worker program.²⁵ A panel of U.S. and Mexican experts convened by the Carnegie Endowment for International Peace recommended making work visas more widely available, ensuring equitable labor rights and social services, and providing a meaningful mechanism to secure permanent residence.²⁶

B. Past Legislation

The Congress passed the Immigration Reform and Control Act of 1986 (IRCA)²⁷ in order to address the problem of a large undocumented noncitizen population similar to that which faces the nation today. IRCA presented an alternative to intensifying enforcement and engaging in mass deportation which, like today, was considered to be impractical and inconsistent with the country's immigration heritage.²⁸ IRCA provided a one-year opportunity to apply for temporary lawful residence to undocumented immigrants who had resided continuously in the United States in unlawful status since January 1, 1982, were self-supporting, had not been convicted of a felony or three misdemeanors, and were not otherwise inadmissible to the United States.²⁹ After one year in temporary lawful status, the immigrant was permitted to apply for permanent residence. IRCA protected legalization applicants who applied for benefits but were later not found to be eligible from any enforcement action by INS absent fraud or willful misrepresentation. IRCA contained another legalization program for Seasonal Agricultural

²³ Central American and Caribbean Adjustment Act of 1999, H.R. 36, 106th Cong. (1999); Central American and Haitian Adjustment Act of 1999, H.R. 348, 107th Cong. (2001).

²⁴ U.S. Employee, Family Unity and Legalization Act, H.R. 500, 107th Cong. (2001).

²⁵ MIGRATION POLICY INSTITUTE, AN IMMIGRATION AND SECURITY GRAND BARGAIN WITH MEXICO (2002).

²⁶ CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, MEXICO-U.S. MIGRATION: A SHARED RESPONSIBILITY (2001).

²⁷ Pub. L. No. 99-603, 100 Stat. 3359.

²⁸ 4 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 52.03 (rev. ed. 1999).

²⁹ INA § 245A, 8 U.S.C. § 1255a.

Workers (SAW).³⁰ IRCA also updated the “registry” date from June 30, 1948 to January 1, 1972, allowing the Attorney General to grant permanent residence to any qualified person who had arrived in the United States prior to that date.³¹

Although more than 3 million individuals legalized under IRCA, many individuals were left out. First, individuals who came before the legislation was enacted but after the January 1, 1982 cut-off date were automatically disqualified from legalizing. Also, individuals who were in legal immigration status at any point after January 1, 1982, were ineligible. As a result, individuals who have made the United States their home for decades have never had a chance to obtain legal status. Second, each individual had to meet all of the eligibility requirements in order to legalize. That is, an applicant could not bring a spouse, child or parent who did not independently qualify. The combination of these factors left many families split – some members legal and other illegal – an unhealthy situation that unfortunately has continued until today. Finally, the two-step process was difficult and costly for the applicants, service providers and the INS.

The next major piece of legislation to grant substantial benefits to immigrants was the Nicaraguan and Central American Relief Act (NACARA).³² Enacted in 1997, NACARA allows Nicaraguans and Cubans who have lived in the United States since December 1995 and their dependents to apply for permanent residence. It also allows Salvadorans, Guatemalans, and nationals of some former Soviet states who filed for certain immigration benefits prior to 1991 and meet other requirements to apply for permanent residency through a more cumbersome process called suspension of deportation. However, many dependents of NACARA beneficiaries are not covered. In addition, suspension applicants face a 10-year processing backlog. NACARA also left out many nationalities who felt they should have similar benefits. In response to calls for NACARA parity, in 1998 Congress passed the Haitian Refugee Immigration Fairness Act (HRIFA)³³ providing for permanent residence for nearly 50,000 Haitians who entered by December 31, 1995, and met other requirements. Immigrants of other nationalities, especially Liberians, Hondurans, and Mexicans, continue to feel unfairly excluded.

C. Addressing today’s immigration challenges

The successes and shortcomings of current and past immigration legislation provide excellent guidance for developing a legalization program that can adequately address the immigration challenges facing the United States today. Nationality-specific legislation, arbitrary cut-off dates, the exclusion of family members, and otherwise prohibitive criteria create a feeling of exclusion and unfairness. Temporary workers, especially agricultural workers, were often under-

³⁰ INA § 210, 8 U.S.C. § 1160.

³¹ INA § 249, 8 U.S.C. § 1259.

³² Pub. L. No. 105-100, 111 Stat. 2160 (1997) *as amended* by the Nicaraguan and Central American Relief Act – Technical Corrections (NACARATC), Pub. L. No. 105-139 (Dec. 2, 1997), *and amended further* by the LIFE Act Amendments of 2000 (enacted at tit. XV, Division B, Consolidated Appropriations Act, 2001) Pub. L. No. 106-554 § 1505 (a), 114 Stat. 2763 (Dec. 21, 2000) effective on enactment, *id.* at § 1506.

³³ HRIFA, Division B, Title IX, Fiscal Year 1999 Omnibus Appropriations Act, Pub. L. No. 105-277, § 902, 112 Stat. 2681 (Oct. 21, 1998) *amended* by the LIFE Act, *supra* note 32 at § 1505(b).

paid and denied labor protections.³⁴ Legislation geared solely towards illegal immigrants will create disillusionment and animosity among noncitizens who have maintained legal status.

1. Legalization of status

IRCA benefited undocumented immigrants by providing them with an opportunity to legalize their status regardless of nationality. However, it in effect penalized persons who had maintained lawful status and rewarded those who had not by granting far greater benefits to the latter. IRCA also contained qualifying dates and deadlines that prohibited many otherwise eligible noncitizens from legalizing their status. The dependents of those who did qualify were not eligible for derivative benefits.

NACARA and HRIFA have helped thousands of people but also left out a significant portion of the undocumented community. Salvadorans, Guatemalans, and citizens of former Soviet states face a number of physical presence and filing requirements as well as a complicated application and adjudication procedure. Haitians, Nicaraguans and Cubans, as well as their immediate relatives, had the ability to apply directly for permanent residence until April of 2000 but in addition to that deadline faced numerous physical presence and other requirements that varied among the different nationalities.

The goals of any new legalization program should be: (1) enhance national security by eradicating the underground undocumented immigrant population; (2) keep families together and provide noncitizen workers with an opportunity obtain permanent status; (3) respect labor rights; and (4) provide to noncitizens who reside in the United States and demonstrate significant equities (such as employment, tax payment, family ties, length of residence) with an opportunity for them and their immediate relatives to acquire lawful permanent residence. In order to achieve these goals, a legalization initiative should be nationality- and status-neutral as well as have reasonable entry and physical presence requirements.³⁵ If it includes pre-registration, it should also prohibit INS from using such registration to deport those who do not later qualify unless a registrant commits fraud or engages in terrorist activity. Legalization also should be extended to immediate family members present in the United States regardless of whether they meet all of the entry, employment, and continuous physical presence requirements on their own. All workers, both citizen and noncitizen, should enjoy the same wage, hour and workplace health and safety protections. This will achieve legalization's overarching goal of allowing hard-working, law-abiding individuals to participate openly in a society in which they have become financially, familiarly, and culturally invested.

³⁴ CIR REPORT, *supra* note 16, at 95. (“Historically, guestworker programs have depressed the wages and working conditions of U.S. workers. Of particular concern is competition with unskilled American workers, including recent immigrants who may have originally entered to perform the needed labor but who can be displaced by newly entering guestworkers. Foreign guestworkers often are more exploitable than lawful U.S. workers, particularly when an employer threatens deportation if the workers complain about wages or working conditions.”)

³⁵ Any such proposal should provide a waiver of relevant provisions of the INA that bar lawful reentry to the United States of undocumented persons who resided unlawfully in the United States for more than 180 days. INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B). The Senate adopted such a provision in 1998 as part of its H-2A reform bill. Any such proposal should also eliminate the 125 percent income requirement for sponsoring family members. INA § 213A, 8 U.S.C. § 1183a. Spouses and unmarried sons and daughters also should be accorded derivative status as provided for other employment-based immigrants. INA § 203(d), 8 U.S.C. § 1153(d).

2. Facilitate acquisition of lawful permanent residence through the legal immigration system

Many thousands of undocumented immigrants are legally qualified for immigrant visas but cannot obtain them in the United States. A statutory provision that would allow them to do so expired last year. In addition, because of a re-entry bar enacted in 1996, these individuals are prohibited from returning to the United States for up to ten years if they leave the country to retrieve their immigrant visa from a U.S. consulate abroad. The practical effect is that many undocumented individuals who are eligible to become legal permanent residents through a family relationship or other provisions of the Immigration and Nationality Act cannot resolve their immigration situations.³⁶ One solution is to allow these individuals to “adjust” their immigration status in the United States.

The Legal Immigration Family Equity Act³⁷ (LIFE Act), sponsored by Sen. Hatch (R-UT) and signed into law on December 21, 2000, provided a number of immigration benefits including an extension of “section 245(i)”, a provision of law that allows some individuals (for whom visa petitions or labor certifications were filed before April 30, 2001) to adjust their status to lawful permanent resident without leaving the United States. Section 245(i) allows such individuals to pay a \$1,000 penalty in lieu of departing the United States and triggering the re-entry bar. Since then, the House of Representatives has voted twice to extend 245(i) temporarily, but only making 245(i) a permanent feature of the immigration law would effectively resolve this matter.³⁸

Any legalization program also should waive or repeal the re-entry bars to ensure that beneficiaries who travel to their home countries can return to the United States without penalty. The Senate adopted such a provision in 1998 as part of its reform bill of the temporary agricultural workers program.³⁹

3. Labor protections

As the United States considers legalizing the undocumented workforce or possibly implementing a new temporary worker program, it is important that labor protections be a significant part of the discussion. Any legislation targeting the immigrant workforce must guarantee equitable labor rights, including job portability and wage, hour, health and safety protections that can be meaningfully enforced, as well as reasonable mechanisms for securing permanent residence for immigrants who qualify for it and choose to do so.

There is a long history of mistreatment of immigrant workers, particularly workers who are undocumented or come on temporary visas. Immigrant workers, particularly those who do not

³⁶ A discretionary waiver is technically available for some applicants, but rather than risk a decade-long separation from their loved ones, most applicants remain in the United States undocumented, but with their families. *See* INA § 212; 8 U.S.C. 1182. *See also* 8 C.F.R. § 212.

³⁷ Title XV of Pub. Law 106-554 § 1502, 114 Stat. 2764.

³⁸ Recent attempts to restore a limited version of 245(i) have not yet been successful. In March 2002 the House of Representatives passed the Enhanced Border Security and Visa Entry Reform Act (H.R. 3525), which contained a very limited, temporary extension of section 245(i), but the final version, passed by the Senate on April 18, 2002, did not contain the 245(i) extension. Section 245(i), however, continues to be a subject of congressional debate.

³⁹ Agricultural Job Opportunity Benefits and Security Act of 1998 § 218A(a)(1)(A)(iii), S. 2337, 105th Cong. (1998).

speak English, are less likely to know their labor rights or how to enforce them. Temporary worker programs that tie a worker to a single employer make the worker even more vulnerable to exploitation because the worker will be deported if discharged by the employer. Moreover, in the face of lax labor law enforcement, even legal workers often feel compelled to accept low wages and declining working conditions because they know their employer can and will replace them with undocumented immigrants.

Senator Thomas Daschle and Representative Richard Gephardt emphasized in their August 2, 2001 letter to Presidents Bush and Fox that any temporary worker program “must be carefully crafted to avoid the troubling legacy of exploitation and abuse that have marred so many temporary worker programs.”⁴⁰ Even the U.S. Chamber of Commerce has acknowledged that essential to any new temporary worker program are “protections to prevent possible abuses and to help ensure that the interests of American workers are protected.”⁴¹

All participants in the U.S. workforce must enjoy the right to change jobs freely, to organize, and to the fully enforced legal protection of their wages, hours and working conditions. Anything less would not only subject immigrant workers to abuse, but could also undermine the wages and working conditions of U.S. workers.

ABA Policy

The ABA has adopted a large number of policy recommendations addressing the substantive and procedural rights of immigrants and refugees.

In February 1983, the American Bar Association called for “enactment of legislation recognizing that unlawful aliens now in the United States should be dealt with realistically and humanely, and those who are otherwise law-abiding should be accorded legal status.”⁴² This policy preceded the 1986 IRCA legalization program discussed above and made it possible for the ABA to be actively involved in the debates leading up to its enactment. The ABA later adopted policy urging Congress to extend the IRCA application deadline beyond its May 1988 expiration date in order to make sure that eligible people had sufficient time to apply.⁴³

The ABA has also supported legislation that upholds principles of family unity as well as humane treatment of immigrants. In February 1989, the ABA adopted the following policy:

[T]he American Bar Association supports amendments to the Immigration and Nationality Act of 1952. . .in order to further reform the basis upon which foreign nationals may seek lawful permanent resident status in the United States on a humane and equitable basis that reflects the historic emphasis on both family reunification and the economic and cultural interest of the United States.

⁴⁰ Daschle/Gephardt letter, *supra* note 19.

⁴¹ Donohue Statement, *supra* note 4.

⁴² Adopted by the ABA House of Delegates in February 1983.

⁴³ Adopted by the ABA House of Delegates in February 1988.

The policy specifically supported an increase of visa numbers for immediate relatives of persons who legalized under IRCA.

In August 1999, the ABA examined the plight of immigrant farmworkers and resolved that noncitizen farmworkers in the United States should be accorded legal resident status. That policy also opposed expansion of the existing H-2A program for admitting temporary agricultural workers and called for efforts to improve wages, working conditions and housing for farmworkers and for enhanced enforcement of laws regulating the rights of farmworkers.

Conclusion

The United States has a long history of ambivalent attitudes towards immigrants. On the one hand, most Americans recognize that the United States has been a nation of immigrants since its inception. On the other hand, fear and ignorance lead many Americans to argue that immigration threatens the cohesiveness of the nation. The realities of today's world necessitate striking a compromise between permissive and restrictive views on immigration.

There are compelling circumstances in favor of adopting a legalization program. The Bush administration maintains a close, friendly relationship with President Vicente Fox of Mexico, and immigration is a priority on their agendas. Harsh immigration laws passed in 1996⁴⁴ have made the public increasingly aware of immigration issues and the tendency of immigration laws to tear asunder, rather than unite, families (many of which are comprised primarily of citizens and lawful permanent residents). Most importantly, the United States is more keenly aware than ever of the need to know who is residing within its borders and the need to regulate who is entering the country.

Consensus is growing that breaking the cycle of continuing unauthorized migration must entail both legalizing the immigration status of undocumented noncitizens already in the United States, and assuring that noncitizen workers have the same basic rights as U.S. workers. The national security, continued economic growth, and social soundness of the country require that unauthorized migration be dealt with realistically, humanely and fairly.

Respectfully submitted,

August 2002

Esther F. Lardent
Chair

⁴⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. Law 104-208, 110 Stat. 3009-1820.

GENERAL INFORMATION FORM

Submitting Entity: **Coordinating Committee on Immigration Law**

Submitted By: **Esther F. Lardent, Chair**

1. Summary of Recommendation(s).

This recommendation supports legislation providing noncitizens who reside in the U.S. and demonstrate significant equities, and their dependents, with an opportunity to acquire lawful permanent residence. The recommendation also supports allowing noncitizens who are eligible to apply for permanent residence through family or other means to do so in the United States. Finally, the recommendation encourages that any temporary worker or legalization program guarantee basic labor rights with job portability, and provide a realistic opportunity to obtain permanent resident status.

2. Approval by Submitting Entity.

The Coordinating Committee on Immigration Law endorsed filing a recommendation on August 4, 2001, and reaffirmed that decision on December 7-8, 2001 and on February 2, 2002. The Committee has approved filing this recommendation by e-mail ballot on May 8, 2002.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The ABA has adopted a number of policies addressing the substantive and procedural rights of immigrants and refugees and this recommendation is consistent with those. In February 1983, the ABA called for enactment of legislation to deal humanely and realistically with law-abiding, long-term resident noncitizens who otherwise would not have the opportunity to receive lawful permanent resident status. The ABA also supports legislation that upholds a legal immigration system based on family reunification and employer needs, and increasing visas for these purposes (February 1989). The ABA has also adopted policy expanding and protecting the rights of immigrant workers, particularly agricultural workers. (August 1999).

5. What urgency exists that requires action at this meeting of the House?

The issues of legalization, temporary workers and "adjustment" to permanent residence have been gaining considerable momentum recently. President George W. Bush and Mexican President Vicente Fox have stated their commitment to developing a migration program to benefit Mexican workers and U.S. employers. Business and labor groups have joined to call on President Bush to support legislation to legalize foreign workers. Congresspersons and immigrant advocacy

groups are also deeply involved in the effort to bring about legislation recognizing the contributions that immigrants make to the cultural and economic wealth of the United States. Moreover, legalization addresses issues of immediate importance such as national security and and global economic stability.

6. Status of Legislation.

Legislation has been introduced on related immigration matters and could provide an opportunity to enact legislation this year consistent with the recommendation.

7. Cost to the Association.

None

8. Disclosure of Interest.

Not Applicable

9. Referrals.

This Recommendation and Report was referred on May 1, 2002, to the ABA sections which are the constituent members of the Coordinating Committee on Immigration Law through their committee representatives. These sections, namely, the Sections of Administrative Law, Criminal Justice, General Practice, Solo and Small Firm, Individual Rights and Responsibilities, International Law and Practice, Labor and Employment Law, and Litigation, the Young Lawyers Division, and the American Immigration Lawyers Association (an ABA-affiliated organization), are, by definition, the ABA entities with any interest in immigration law. All were initially notified through their designated representatives at the Committee business meetings at which the policy was discussed on August 4, 2001, December 7-8, 2001, and February 2, 2002, and through subsequent communications to representatives who did not attend those meetings.

The recommendation and report will also be distributed to additional ABA entities, including the Section of Business Law, Commission on Homelessness and Poverty, and to the Hispanic National Bar Association and Asian Pacific American Bar Association, prior to the Annual Meeting.

10. Contact Persons (Prior to the meeting)

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11. Contact Person. (Who will present the report to the House)

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12. Contact Person Regarding Amendments to This Recommendation.

There are no known proposed amendments at this time.