

AMERICAN BAR ASSOCIATION
COMMISSION ON IMMIGRATION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, that the American Bar Association supports a regulated, orderly and safe system of
2 immigration to the United States that promotes national security, and the creation of sufficient
3 legal channels for the admission of needed workers and their immediate families.
4

5 FURTHER RESOLVED, that the American Bar Association supports a comprehensive approach
6 to immigration reform that fairly and realistically addresses the U.S. undocumented population,
7 the need for immigrant labor, the value of timely family reunification, and the need for an
8 effective and credible immigration enforcement strategy, to include:
9

10 (a) a temporary worker program for undocumented laborers and for necessary future workers
11 that includes: (1) a path to lawful permanent residence and U.S. citizenship; (2) labor
12 protections and job portability; (3) a good moral character requirement and stringent
13 identity and security checks; (4) protections to assure that U.S. workers are not displaced
14 or otherwise disadvantaged;
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16 (b) a path to lawful permanent residence and U.S. citizenship for undocumented persons who
17 entered the United States as minors and have developed significant equitable ties to the
18 United States, subject to a good moral character requirement and security screening;
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20 (c) an immigration enforcement plan that: (1) respects domestic and international legal
21 norms; (2) includes mechanisms to evaluate the effectiveness of enforcement strategies;
22 (3) allows verification of employment eligibility in a simple, secure and effective way;
23 and (4) is cost-effective and adequately resourced; and
24

25 (d) expanded and coordinated government programs to teach immigrants English, prepare
26 them for citizenship, acculturate them in core U.S. civic values, and otherwise promote
27 their integration into their adopted nation.

REPORT

*This is the second report in the Commission's series of seven resolutions and reports, that addresses "Immigration Reform," as explained at the beginning of the first report (107A).

I. Introduction

No goal is more central to the ABA's mission than advancing the rule of law, and no area of the U.S. legal system arguably raises more rule of law concerns than our immigration system. At present, this system is characterized by escalating migrant crossing deaths, multi-year backlogs for immigrants who have been approved for visas, an expanding undocumented population despite significant increases in immigration enforcement funding, divided families, and an overall failure to deliver on its basic promises. This resolution supports a regulated, safe, and orderly immigration system. It supports reducing the large undocumented population and illegal flow of immigrants to the United States in two general ways. First, it would create wider legal channels for needed workers and their immediate family members – both undocumented residents and future immigrants – to fill available jobs. Second, it would couple expanded legal avenues for admission with meaningful enforcement strategies. The resolution supports a comprehensive approach to immigration reform that fairly, humanely and realistically addresses the U.S. undocumented population, the need for immigrant labor, the value of family reunification, and the importance of an effective and humane immigration enforcement strategy.

II. Background on Relevant ABA Policies

The term "immigration reform" could encompass all U.S. immigration laws, policies and practices. For present purposes, it will be used in a slightly more limited sense to cover the U.S. legal immigration system (governing those seeking lawful permanent resident status), temporary worker programs, immigration enforcement measures and other policies that target the growing U.S. undocumented population.

The ABA has adopted diverse policy positions on these issues over the last 30 years. Some of its policies are relevant to the national debate on immigration reform, while others no longer apply. At least two policies appear to conflict. In combination, the policies (which follow) do not provide a coherent set of principles to guide the ABA's evaluation of U.S. immigration reform proposals, or situate it well to assume its traditional leadership role in the debate on the U.S. immigration system.

- In 1976, the ABA supported proposed legislation: (1) to strengthen sanctions for those knowingly employing "illegal aliens"; (2) to adjust to lawful permanent residence Western hemisphere nationals in temporary or "irregular" status, and; (3) to grant "amnesty from expulsion to certain aliens." It opposed a provision that would have denied lawful permanent residence to those who entered as crewmen or who accepted unauthorized employment.
- In 1983, the ABA supported reforming U.S. immigration laws and practices to: (1) increase resources for enforcement of federal immigration and labor laws so that they

might be administered “effectively and fairly”; (2) deal with undocumented immigrants “realistically and humanely” and to provide legal status to “otherwise law-abiding” undocumented persons, and; (3) modify “existing laws and procedures for admission ... to assure an increased flow of economic and cultural benefits to the United States.” Also in 1983, the ABA opposed legislation that would have prevented adjustment to lawful permanent residence to those who failed to maintain continuous legal status since entry or who had been admitted as students. In an apparent conflict with its 1976 policy, it also recommended that employer sanctions be rejected “because they would be an unworkable, ineffective, expensive and discriminatory procedure for controlling undocumented immigration.”

- In 1989, the ABA supported “further reform” so that lawful permanent residence would be granted on a “humane and equitable basis that reflects the historic emphasis on both family reunification and the economic and cultural interests on the United States.” In particular, it proposed retention of the “basic structure of present preference categories for family members of U.S. citizens and lawful permanent residents, and for prospective employees ... who have proved the unavailability of qualified U.S. workers.” However, it favored: (1) increased visa numbers for both the family- and employment-related visas, and increased visa numbers for the dependents of lawful permanent residents or other relief for the dependents of those legalized under the Immigration Reform and Control Act of 1986, and; (2) an additional visa allotment for unsponsored immigrants.
- In 1999, the ABA supported efforts: (1) to improve wages, working conditions and housing for farmworkers; (2) to enhance enforcement of laws regulating their rights and; (3) to provide legal status to farmworkers living in the United States. However, it opposed expanding and easing the standards for the H-2A non-immigrant visa program (for temporary agricultural workers).
- In 2002, the ABA supported legislation to provide non-citizens who had significant ties to the United States (and their close family members) with the opportunity to acquire lawful permanent resident status. It also supported allowing eligible persons to complete this process in the United States. Finally, it resolved that any temporary worker or legalization program should guarantee basic labor rights, including job portability and a path to lawful permanent residence.

III. The Problem

In his call for immigration reform in the 2005 State of the Union address, President Bush declared: “We should not be content with laws that punish hardworking people who want only to provide for their families and deny businesses willing workers and invite chaos at our border.”¹ This strong criticism may, in fact, understate the need for reform.²

¹The White House, “The State of the Union Address,” (Feb. 2, 2005), available at http://www.whitehouse.gov/news/releases/2005/02/20050202_11.html.

²See Douglas S. Massey, “Backfire at the Border: Why Enforcement without Legalization Cannot Stop Illegal Immigration,” (Cato Institute, June 13, 2005) at 12 [hereinafter “Why Enforcement without Legalization Cannot

The evidence of a broken system abounds. According to the Department of Homeland Security, at least 460 migrants – a record number – died trying to cross the U.S.-Mexico border in 2005.³ Mexican officials estimate that 3,600 migrants have perished since 1994.⁴ During roughly the same period, U.S. border control funding has more than quadrupled. Increased border enforcement has pushed migrants to more perilous crossing routes, but it has not stemmed the flow of illegal entries to the United States. According to the Pew Hispanic Center, since 1995 the number of unauthorized immigrants coming to the United States has exceeded the number of legal immigrants admitted.⁵ By March 2005, the U.S. undocumented population had swelled to roughly 11 million persons, with no end in sight.⁶

Few would argue that a growing population of second-class non-citizens – without rights, status, security, or stability – furthers the rule of law. The undocumented largely live outside the law’s protections; due to their lack of status, they face crime, exploitation, and abuse. Furthermore, the deaths of so many migrants – persons who are typically trying only to support themselves or to reunite with their families – should offend anybody concerned with basic human rights.

Paradoxically, U.S. laws governing legal immigration contribute significantly to the “illegality” that characterizes our immigration system. Under U.S. law, the foreign-born can obtain (permanent) visas based on: (1) specified family relationships to a U.S. citizen or lawful permanent resident; (2) certain types of employment, and; (3) a lottery designed to promote the diversity of immigration to the United States. With the exception of the spouse or minor children of U.S. citizens, all family-based visas are subject to two sets of numerical caps. The interplay between caps based on category of family relationship and on nationality has led to multi-years backlogs in the issuance of family-based visas to persons who have been approved for them. For example, a minor child of a lawful permanent resident from Mexico faces roughly an eight-year backlog. Others face decade-long backlogs. In 1997, the U.S. Department of State reported that roughly 3.5 million persons approved for family-based visas had not yet received them.⁷ This figure – which has not been updated since 1997 – has certainly increased in the interim. These persons must either live abroad and apart from their families or live in undocumented status in the United States. Many understandably chose family reunification over legal status, although this choice can negatively impact their ability ever to obtain legal status.

U.S. laws present a similar scenario for many immigrant laborers. At a time when globalization has reduced barriers to the free flow of goods, services, and information, the United

Stop Illegal Migration”] (“If the United States had set out to design a dysfunctional immigration policy, it could hardly have done a better job ...”)

³B. Coyne, “U.S. Immigration Policy Shift Causes Record Deaths,” *The New Standard* (Oct. 4, 2005).

⁴T. Hendricks, “Record number died crossing border in ‘05: Remote routes, hot summer, economic upturn called factors,” *San Francisco Chronicle* (Oct. 1, 2005).

⁵Jeffrey Passel, “Unauthorized Migrants: Numbers and Characteristics” (Pew Hispanic Center, June 14, 2005) at 6 [hereinafter “Unauthorized Migrants.”].

⁶Jeffrey Passel, “Estimates of the Size and Characteristics of the Undocumented Population” (Pew Hispanic Center, Mar. 21, 2005) at 1 [hereinafter “The Undocumented Population.”]

⁷U.S. Department of State, Bureau of Consular Affairs, “Immigrant Visa Waiting List in the Family-Sponsored and Employment-Based Preferences as of January 1997” (Mar. 1997).

States has tightened its policies related to the corresponding flow of immigrant labor. For many, this anomaly explains, in large part, the growing U.S. population of undocumented laborers.⁸ As the Global Commission on International Migration – an independent body established by 35 nations to make recommendations on international migration to the UN Secretary-General – put it, the global economy is characterized by “the increasing ease with which goods, capital, services, information and ideas flow across international borders,” but “the same cannot be said for people, who are still confronted with a wide range of official controls when moving from one country to another.”⁹

Whatever the reason, the U.S. economy heavily depends on foreign-born workers, including the undocumented.¹⁰ The undocumented constitute 5 percent of the U.S. workforce,¹¹ but a far higher percentage of workers in many industries. For example, they represent 25 percent of meat and poultry workers, 22 percent of maids, 20 percent of construction workers and 18 percent of sewing machine operators. These industries would collapse without them. According to the U.S. Department of Labor, the U.S. economy is projected to create 21.3 million jobs between 2002 and 2012, with some of the fastest growth occurring in jobs that immigrants occupy at high rates.¹²

Simply put, the U.S. immigration system does not offer sufficient legal avenues for these needed workers to enter the country. U.S. employment-based visas overwhelmingly go to highly skilled and professional workers. Not more than 5,000 visas per year are available to workers with less than two years training. This is a wholly inadequate number, as evidenced by a multi-year backlog in this visa category and the hundreds of thousands of undocumented migrants who are finding work each year in the United States. Nor do non-immigrant (temporary) visas come close to meeting the demand for foreign-born labor. In the circumstances, the United States needs to create wider legal avenues for the foreign-born to work in the United States.

IV. Options for Reform

It would not be feasible to deport the nation’s 11 million undocumented immigrants. In 2004, the United States removed 202,842 immigrants,¹³ a record number but one that represents less than two percent of the undocumented population. Furthermore, even if the resources and political will existed, massive deportations would raise grave civil liberties issues. They would also devastate immigrant families, including the 3.2 million U.S. citizen children of

⁸See “Why Enforcement without Legalization Cannot Stop Illegal Immigration,” *supra* note 2 at 5 (“[E]verything that occurs in the course of integrating the North American market makes the cross-border movement of people – including workers – more rather than less likely in the short and medium run.”)

⁹Global Commission on International Migration, “Migration in an interconnected world: New directions for action” (Oct. 2005), p. 9 [hereinafter “Migration in an interconnected world”].

¹⁰The foreign-born constitute 15 percent of U.S. workers, and filled 47 percent of the new jobs created in the 1990s. A. Sum, N. Fogg, I. Khatiwada, S. Palma, “Foreign Immigration and the Labor Force of the U.S.: The Contributions to New Foreign Immigration to the Growth of the Nation’s Labor Force and its Employed Population, 200 to 2004 (Center for Labor Market Studies, Northeastern University, July 2004), pp. 2, 7.

¹¹See “The Undocumented Population,” *supra* note 6, at 4.

¹²D. Hecker, “Occupational Employment Projections to 2012,” *Bureau of Labor Statistics, Monthly Labor Review* (Feb. 2004) at 80-81, 87 and 91.

¹³U.S. Department of Homeland Security, “2004 Yearbook of Immigration Statistics,” available at <http://uscis.gov/graphics/shared/statistics/yearbook/>.

undocumented parents.¹⁴ In addition, the loss of 5 percent of the U.S. workforce would devastate the U.S. economy and eviscerate entire industries. It would not be tolerated by U.S. business or labor.

As the U.S. experience reveals, immigration enforcement measures alone will not staunch the flow of undocumented immigrants or stem the high rate of crossing deaths. Enforcement must be coupled with reform of the legal immigration system. Critics of “legalization” of the undocumented dislike the idea of “rewarding” those who have violated our immigration laws, and pending “temporary worker” and “earned legalization” bills would appropriately fine the undocumented. More significantly though, as the Bush Administration recognizes, expanding the legal avenues to immigration – to reflect labor and family realities – will reduce illegal migration, a result that enhanced immigration enforcement cannot achieve on its own.¹⁵ Commentators from a broad range of perspectives agree.

Demetrios Papademetriou, Executive Director of the non-partisan Migration Policy Institute, argues that “law and order measures alone are ineffective throughout the world.”¹⁶ The Global Commission on International Migration has determined that the growth in illegal migration is, in part, “linked to a lack of regular migration opportunities.”¹⁷ The Commission recommended that states make “more regular migration opportunities available” for necessary workers, and offer “regularization” on a “case-by-case” basis for undocumented persons who have achieved “a substantial degree of integration in society.”¹⁸

Stuart Anderson, Executive Director of the National Foundation for American Policy and a former Bush Administration official, has concluded that “the absence of avenues to work legally in the United States is a primary reason for the current levels of illegal immigration.”¹⁹ Anderson’s research reveals that the “bracero” program – a “guest worker” program for agricultural laborers from Mexico from 1942 to 1964 – significantly diminished illegal migration to the United States.²⁰ Although this program has been discredited for its gross mistreatment of agricultural laborers, it highlights the relationship between sufficient legal opportunities for entry and decreased illegal migration.

¹⁴See “Unauthorized Migrants,” *supra* note 5 at 20.

¹⁵Statement of Michael Chertoff, Secretary of the U.S. Department of Homeland Security before the U.S. Senate Judiciary Committee (Oct. 18, 2005)http://www.dhs.gov/dhspublic/interapp/speech/speech_0255.xml (“The effectiveness of our border security and interior enforcement initiatives is closely tied to creating a workable and enforceable TWP [temporary worker program] the TWP seeks to address two huge strains on the current immigration system: high U.S. employer demand for workers and active participation of an estimated eight million undocumented workers in the U.S. economy. A well-designed TWP will provide legal channels for U.S. employers and foreign born workers to meet the needs of a vibrant and successful U.S. economy without disadvantaging American workers.”)

¹⁶Demetrios Papademetriou, “The Global Struggle with Illegal Migration: No End in Sight,” *Migration Information Source* (Sept. 1, 2005).

¹⁷See “Migration in an interconnected world,” *supra* note 9 at 33.

¹⁸*Id.* at 38-39.

¹⁹Stuart Anderson, “Making the Transition from Illegal to Legal Migration,” *The National Foundation for American Policy* (Nov. 2003) at 5.

²⁰Stuart Anderson, “The Impact of Agricultural Guest Worker Programs on Illegal Immigration,” *The National Foundation for American Policy* (Nov. 2003) at 1-3.

The Heritage Foundation has argued that:

Rather than diverting exorbitant resources to the task of attempting to guard every mile of the border, why not make it in the interest of those seeking legitimate employment to enter this country through lawful means? This would make the task of policing borders and coastline more manageable. When the only individuals seeking to enter the United States illicitly are terrorists and transnational criminals, meeting the challenge of securing our borders will be more realistic. Under these conditions, everyone benefits – except the lawbreakers.²¹

Tamar Jacoby of the Manhattan Institute writes:

No one wants to reward lawbreaking or encourage future transgression The conundrum is how to reassert the law – how to retake control of the border and restore legality to the American workplace – given the fact that several sectors of our economy now depend on 11 million unauthorized workers Immigration naysayers don't like to admit it, but the fact is that today's immigration reformers – the president and conservatives like Sen. Cornyn, but also, increasingly, liberals once concerned primarily with immigrant rights – are driven by a desire to restore order to this broken system. Their goal is to replace the old “nudge-nudge wink-wink” arrangement of unrealistic laws, intermittently enforced, with an honest, airtight system: realistic laws, enforced to the letter. The problem is we can't build this new structure on a rotten foundation. We must first eliminate the underground economy and find a way to deal with illegal immigrants already here.²²

As Douglas Massey, a professor of sociology and public affairs at Princeton University, concludes:

Current law itself is fundamentally at odds with the reality of the North American economy and labor market. As long as that remains true, enforcement alone will fail to stem the flow and growth of illegal immigration to the United States.²³

V. Pending Legislation and Proposed ABA Resolution

Congress is considering various immigration reform proposals regarding the undocumented, the U.S. legal immigration system, temporary worker programs, and immigration enforcement strategies. Pending and anticipated bills vary significantly. Some would establish new temporary worker programs for current undocumented workers and for prospective workers. Some temporary worker proposals would provide a path to lawful permanent residence and U.S. citizenship, others would not. Some would extend significant labor protections to temporary workers, others would not. Some proposals would expand the number of visas available under

²¹Edwin Meese III, James Jay Carafano, Ph.D., Matthew Spaulding, Ph.D., and Paul Rosenzweig, “Alternatives to Amnesty: Proposals for Fair and Effective Immigration Reform,” Backgrounder #1858 (Jun. 2, 2005). <http://www.heritage.org/research/legalissues/bg1858.cfm>.

²²T. Jacoby, “Getting Beyond the ‘A-Word,’” *Wall Street Journal* (Jun. 20, 2005).

²³See “Why Enforcement without Legalization Cannot Stop Illegal Immigration,” *supra* note 8 at 12.

the U.S. legal immigration system based on family ties and employment. Some would provide a path to lawful permanent residence for particular groups, like agricultural laborers and undocumented high school graduates. Most proposals provide for increased enforcement of U.S. immigration laws, with enforcement measures running the gamut from more severe sanctions on U.S. employers who hire the undocumented, to increased border control efforts.

The proposed resolution does not take a position on specific legislation, but sets forth principles (consistent with existing ABA policies) that should guide immigration reform legislation. In broad strokes, the resolution supports the creation of a regulated, orderly and safe system of admission of immigrants to the United States. It also supports a comprehensive approach to reform that addresses the undocumented population, the need for future laborers, the importance of family reunification, and the need for immigration enforcement. It starts from the premise that immigration reform cannot be successful if it does not comprehensively address these issues.

The proposed resolution does not support an “amnesty” in the sense of an across-the-board legalization program for all undocumented persons. It supports instead a program to provide temporary visas to undocumented laborers and to necessary future workers. Recipients of these visas would be able to earn (primarily through their labor) the right to remain in the United States permanently. Many commentators believe that a system of legal immigration will lead more immigrants to return more frequently to their home countries. Conversely, “return” migration has significantly diminished as enhanced U.S. border enforcement policies have effectively “locked in” the undocumented.²⁴ In supporting a path to lawful permanent residence, the resolution also recognizes that many participants in the program will build significant equitable ties to the United States. As the ABA’s 2002 immigration resolution recognized, it would be unrealistic to expect and impractical to require these persons to return.

The resolution supports a temporary worker program that would extend labor protections and job portability to all participants. This will protect participants from the kinds of labor abuses that have characterized past temporary worker programs. Additionally, the program will only be available to persons with good moral character and who have passed stringent identity and security checks. In this way, it will promote national security. It will also be open only to workers who currently work or who wish to fill jobs that U.S. citizens will not fill at the prevailing wage(s). In this way, the program will assure that U.S. workers are not displaced, that their wages and benefits are not reduced, and that they are not otherwise disadvantaged.

The resolution also supports a separate path to legal status for undocumented persons who entered the United States as minors and who have developed significant equitable ties to the United States. This would include, but not be limited to undocumented persons who have graduated from high school, received a GED, or served in the U.S. military. This part of the resolution recognizes that many young people have done nothing wrong in entering and staying, typically “belong” to no other country, and, in every way except for legal status, are permanent residents. As Massey explains: “Among the undocumented population are some 2 to 3 million children of undocumented migrants who entered as minors and are guilty of nothing more than

²⁴*Id.* at 8-9.

obeying their parents and remaining loyal to their families. The overwhelming majority of these people have grown up in the United States, attended U.S. schools, and stayed out of trouble.”²⁵

The resolution supports a multi-faceted approach to immigration enforcement that respects domestic and international legal norms; builds in clear mechanisms to evaluate success; allows for verification of employment eligibility in a simple, secure and foolproof way; and is both cost-effective and adequately resourced.

Finally, the resolution recognizes that legal status does not, by itself, create integrated and productive citizens. For this reason, it supports a coordinated government program to teach immigrants English, to prepare them for citizenship, to acculturate them in core U.S. civic values, and otherwise to promote their integration into their new country.

VI. Conclusion

At present, the U.S. immigration system raises significant “rule of law” concerns. The proposed resolution supports a regulated and orderly immigration system. It would allow essential workers (and their families) to earn legal status through work; provide legal status to undocumented persons of good moral character who entered the United States as children; support a multi-faceted and credible immigration enforcement system; and support a coordinated effort to integrate the nation’s record number of newcomers.

Respectfully Submitted,

Richard Peña
Chair
Commission on Immigration
February 2006

²⁵*Id.* at 11.