

Illegal Immigration: A World-Class Solution

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ABSTRACT

The problem of illegal or undocumented immigrants has become a large one in the United States, and the intensity of emotions involved make finding a solution more difficult. The extreme polarization divides even those who are otherwise of the same or similar political persuasion. This paper reviews the legal issues involved at each point in the process of dealing with undocumented or illegal immigrants, examines workable solutions in place in other countries to identify alternatives, analyzes those alternative solutions, and proposes what the authors believe to be a practical and reasonable approach to addressing the problem.

Keywords: Illegal Immigration; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”); Birthright Citizenship; Bracero Program, Foreign Worker, H-2A Visa, Undocumented Worker

INTRODUCTION

*A*t a time when talent is the key to economic success, it makes no sense to educate people in our universities, often subsidized by U.S. taxpayers, and then insist that they return home.
--Bill Gates, CEO, Microsoft, testimony before Congress, 12 March 2008

In the United States of America (US) today, the term foreign worker refers to two specific categories:

- Green card workers are individuals who have received legal permanent residence in the United States and who intend to work in the US on a permanent basis.
- Guest workers are persons who have travelled (legally or illegally) to the US because job prospects are better in the US than in the country where they previously resided. They reside, or intend to reside, temporarily in the US, and typically send most or all of their earnings back to their country of origin.

Section 1 of the 14th Amendment to the United States Constitution, adopted in 1868, provides, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The provisions of the 14th Amendment, and prior Constitutional provisions, have been amplified by legislation including, *inter alia*, several Naturalization Acts (1790, 1795, 1870, and 1906), Immigration Acts (1924 and 1990), and INS Acts (1952 and 1965), plus the Page Act (1875), Emergency Quota Act (1921), Tydings–McDuffie Act (1934), Filipino Repatriation Act (1935), Magnuson Act (1943), IRCA (1986), IIRIRA (1996), NACARA (1997), REAL ID Act (2005), and Secure Fence Act (2006). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Division C of Pub.L. 104-208, 110 Stat. 3009-546, enacted September 30, 1996, changed the immigration laws of the United States in the following ways:

- Immigrants unlawfully present in the United States for 180 days but less than 365 days must remain outside the United States for three years unless they obtain a pardon.

- If they are in the United States for 365 days or more, they must stay outside the United States for ten years unless they obtain a waiver.
- If they return to the United States without the pardon, they may not apply for a waiver for a period of ten years.
- Previously, immediate deportation was triggered only for offenses that could lead to five years or more in jail. Minor offenses such as shoplifting may make individuals eligible for deportation.

Initially, IIRIRA was applied retroactively to all persons convicted of deportable offenses. However, in *Immigration and Naturalization Service v. St. Cyr* (2001), the U.S. Supreme Court held that IIRIRA could not be applied retroactively to those who pleaded guilty to a crime prior to the enactment of IIRIRA, if those persons would not have been deportable at the time that they pleaded guilty. IIRIRA's mandatory detention provisions have also been challenged, with less success. Deportees may be held in jail for up to two years before being brought before an immigration board. The Supreme Court curtailed the Immigration Service's ability to hold deportees indefinitely in *Zadvydas v. Davis* (2001).

Numerous recent efforts to reform our immigration laws and processes have foundered:

- In July 1998, the U.S. Senate approved on a 68-31 vote the Agricultural Job Opportunity Benefits and Security Act of 1998, or AgJOBS program, which would have created a new guest worker program for farm workers. The House did not act (Martin, 2000).
- In 2001, US President George W. Bush and Mexican President Vicente Fox wanted immigration reform but were unable to get it through Congress. The events of 11 September 2001 halted this effort, and it could not be revived in Bush's second term.
- In 2006 the House of Representatives passed that Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005, and the Senate passed the Comprehensive Immigration Reform Act, but the two houses were unable to reconcile their differences.
- In 2008 President Barack Obama promised immigration reform but has yet to deliver.
- Meanwhile, certain states have taken action to strengthen enforcement of existing immigration laws, triggering litigation
 - The Arizona law has been upheld in part and denied in part.
 - Similarly the Alabama law has been upheld in part and denied in part.

Americans clearly want something done, but are fairly well divided as to exactly what:

- The most recent Gallup polling in each area indicates that (Gallup, 2012)
 - 42% favor immigration at its current level, 35% favor a decrease, and 21% an increase
 - 66% think immigration is a good thing, compared to 29% who think it is bad
 - 55% think it is more important to deal with immigrants here illegally, 42% think halting the flow of illegal immigrants is more important
 - 34% worry about immigration a good deal, versus 17% not at all
 - 39% are very dissatisfied with the current level of immigration, 25% are somewhat dissatisfied
 - 53% rate controlling the borders extremely important, while 29% consider it very important
 - 43% think developing a plan to deal with illegal immigrants already here is extremely important
 - 43% favor or strongly favor passing a bill to give illegal immigrants a path to legal status, while 55% oppose or strongly oppose
 - 32% think illegal immigrants pay a fair share of taxes, while 62% do not
- The Benenson Strategy Group reports polling showing that 86% support comprehensive immigration reform and 68% agree that after securing the borders, cracking down on employers who hire illegally, and deporting illegal immigrants who have committed other crimes, the remaining illegal immigrants should be required to register, meet certain conditions, and eventually be allowed to pursue citizenship (Brodnitz, 2 June 2009)
- Recent Rasmussen polls indicate that 59% favor a welcoming immigration policy, while 53% favor police questioning immigration status at routine traffic stops (Rasmussen, 2012)

- A Politico/George Washington University Battleground survey released 10 December 2012 indicates that 62% of registered voters say they back an immigration reform proposal that would allow illegal or undocumented immigrants to earn citizenship over a period of several years, with 35% opposed (CNN, 10 December 2012).

The difficulty comes when political parties pander to their special interests. Interestingly, each party must deal with two sets of special interests with opposite objectives:

| Republicans | | Party | Democrats | |
|---|--------------------------|---------------------|--|----------------------------------|
| Law-and-order | Businesses/ Employers | Constituency | Hispanic/Other Minorities | Labor unions |
| Political | Economic | Motivation | Political | Economic |
| Oppose | Favor | Position | Favor | Oppose |
| Do not want to allow lawbreakers to profit from their lawlessness | Want cheap labor | Rationale | Want open borders as a human rights/civil rights principle | Do not want low-wage competition |

At this point there seem to be two extreme proposed solutions:

- Make them all citizens
 - This is the ultimate in rewarding bad behavior – amnesty and voting rights for people whose only qualification is breaking law
 - Disregard for rule of law – bad consequences later?
 - Not every worker wants citizenship – some just want to come here, make money, go back home
- Send them all home
 - Probably not possible
 - Some unintended consequences, including higher prices here and instability in Mexico

The arguments against immigration reform, and their counter-arguments, may be summarized as follows:

- Providing a path to citizenship for people who come here illegally sets a bad precedent and undermines the rule of law
 - Situation can be handled in ways that do not invoke these concerns
- Immigration reform will harm taxpayers
 - Legalizing both the flow of workers and the workers already here will help taxpayers by raising the newly legalized workers’ productivity, earnings, and taxes paid
- Newly legalized immigrants will burden the welfare rolls
 - Immigrants are not heavy users of welfare, and additional limits can be placed on legalized workers
- Another “amnesty” will beget more amnesties
 - Legalization is not necessarily amnesty; it can include fines and other conditions; the 1986 act failed because it did not include a well-designed temporary worker visa program
- Legalizing or admitting more unskilled workers will undermine US culture and English language
 - Immigrants and their children are learning English
- Letting in more temporary visa holders and legalizing current illegal immigrants will increase the unemployment rate
 - Immigrants generally make Americans more productive and do not increase the unemployment rate

Peter Dixon and Maureen Rimmer (2009) have quantified the estimated economic impact of tighter border controls versus a liberated work visa program, concluding that tighter border enforcement results in an annual loss to US households of \$80 billion, while liberalized entry with the optimal visa charge results in an annual gain of \$180 billion, a difference of \$260 billion.

With regard to assimilation, Shirin Hakimzadeh and D’Vera Cohn (2007) found the following that respect to the speaking of English by first, second, and third generation Hispanic immigrant families, that in the first generation the percentage who can speak English very well is 23% and the percentage who can speak at least pretty well is 35% (terms defined in study), increasing to 84%/91% respectively for the second generation and 94%/97% respectively for the third.

With respect to immigrants and unemployment, the following are important:

- Mark Perry Mark J. Perry, professor of economics and finance at the Flint campus of the University of Michigan, has stated, “There is no fixed pie or fixed number of jobs, so there is no way for immigrants to take jobs away from Americans. Immigrants expand the economic pie” (Anderson, 2010, p. 169)
- Vedder, Gallaway, and Moore (1996, cited in Anderson 1996, p. 2) found that:
 - Immigrants expand demand for goods and services, may invest savings they bring with them, have high rates of entrepreneurship, may fill vital niches in job market, and may contribute to economies of scale
 - From 1960-1991
 - Unemployment averaged 5.9% in the 10 highest-immigrant states v. 6.6% in the 10 lowest-immigrant states
 - The median population that was foreign-born was 1.56% in 10 highest-unemployment states, and 3.84% in the 10 lowest-unemployment states

Because of their illegal status, guest workers are at a severe disadvantage in attempting to enforce basic human rights. The legal system is essentially closed to them, and abuses have been chronicled by many sources. A large part of the problem appears to stem from the existence currently of so many non-citizen workers here illegally. Removing the legal stigma would make great strides to level the legal playing field substantially.

The Southern Poverty Law Center (SPLC) came up with set of specific changes to prevent abuses (SPLC 2007). Some are probably not cost-effective. Many would become at least somewhat moot once the legal stigma was removed and workers had access to the legal system. But many would definitely help protect rights of non-citizen workers while remaining cost-effective. The SPLC recommendations are outlined as follows:

- Strengthen laws and regulations protecting guest workers
 - Guest workers should be able to obtain visas not tied to a specific employer
 - Provide a process for guest workers to gain permanent residency
 - Employers should bear all costs of recruiting and transporting guest workers
 - Entities acting as labor brokers for employers who actually use the workers should not be certified by DOL to bring them in
 - Make labor regulations for H-2B workers comparable to the H-2A regulations
 - Require employers to pay at least the “adverse effect wage rate” to guest workers.
 - Eliminate barriers that prevent guest workers from receiving workers’ compensation benefits.
 - Protect guest workers from discrimination on the same basis as other US workers
- Strengthen federal agency enforcement of guest worker protections
 - Require all employers to report to the Department of Labor at the end of the guest worker’s term of employment on their compliance with law
 - Employers using guest workers should be required to post a bond at least sufficient to cover the guest workers’ legal wages
 - Increase funding for federal agency enforcement of guest worker protections
 - The DOL should be authorized to enforce all guest worker agreements
 - The DOL should create a streamlined process to deny guest worker applications from employers that have violated guest worker rights
- Provide guest workers with meaningful access to courts
 - Make guest workers eligible for federally funded legal services
 - Remove restriction against class action representation for guest workers

- Provide a civil cause of action and criminal penalties for persons who hold or confiscate guest worker documents
- Provide a federal cause of action allowing guest workers to enforce contracts

Perhaps the problem is too little legal immigration. Consider the testimony of Bill Gates, CEO of Microsoft, before Congress on 12 March 2008:

Today, our university computer science and engineering programs include large numbers of foreign students. In fact the science and engineering indicators report showed that 59 percent of doctoral degrees and 43 percent of all higher ed[ucation] degrees in engineering and computer science are awarded to temporary residents. But our current immigration policies make it increasingly difficult for these students to remain in the United States. At a time when talent is the key to economic success, it makes no sense to educate people in our universities, often subsidized by U.S. taxpayers, and then insist that they return home.

The Microsoft response to this situation has been to create a campus in Vancouver, BC, roughly 100 miles from Microsoft headquarters in Seattle. Such an easy solution is not always possible.

The alternatives proposed by various parties are as diverse as one would expect given the political positioning on this issue.

Juan Osuna, then Associate Deputy Attorney General in charge of Immigration Litigation, has expressed his (and presumably the current administration's) position that "comprehensive" immigration reform would likely address four points (Turner 2010):

- Greater enforcement at the borders and in the interior,
- Employment verification system similar to E-Verify,
- Committee to address the question of future legal immigration flows, and
- Amnesty (a "path to citizenship") for those who are illegally in the country

The libertarian Cato Foundation has proposed the following solution (Cato 2009, p. 625):

- Expand current legal immigration quotas, especially for employment-based visas
- Repeal the cap on H-1B visas for highly skilled workers
- Create a temporary worker program for lower-skilled workers to meet long-term labor demand and reduce incentives for illegal immigration
- Refocus border-control resources to keep criminals and terrorists out of the country

Helen K. Kriebble and the Kriebble Foundation have proposed what is called the "Red Card Solution," which would have the following key elements (Kriebble 2009):

- Non-citizen workers put on a different track from those seeking citizenship
- Issue smart card to non-citizen workers that can be swiped
- Secure border by providing easy method for workers to go through a background check and enter the country legally
- Allow private sector employment agencies, licensed by the U.S. Government, to open offices in foreign countries and issue non-citizen work permits following an extensive background check
- Employers and law enforcement would be able to check legal status of temporary workers by swiping card
- Instead of fighting the principle of human self-interest, apply it to create a system that will increase legal immigration, reduce illegal immigration, control the borders, and strengthen the economy.

So what do other countries do? Most deal with the issue by having extensive guest worker programs. For example, there are:

- 5 million foreign workers in Northwestern Europe
- Half a million foreign workers in Japan,
- Half a million foreign workers in UAE (Dubai)
- Around 5 million foreign workers in Saudi Arabia

The European guest worker programs have had mixed success. In many cases guest workers haven't assimilated into the host country culture. Guest workers have tended to become permanent, not temporary.

The authors propose the following:

- Increase legal immigration by greatly expanding guest worker program
 - Make everyone here today eligible for guest worker status
 - Develop and implement procedures governing future eligibility
 - Make it easier to deal with many of the problems if they are in the system legally
 - Protect rights of guest workers, and provide ways for them to assimilate better into society, by implementing some of the SPLC recommendations
- Separate immigrants who want to become citizens from those who simply want to work here
 - Immigrants who are here illegally could receive guest worker (non-citizenship path) with employer sponsorship
 - Individuals would have to return home and go through the proper process to be eligible for citizenship on a normal time track
 - A longer path to citizenship would be available for those here illegally than for those who came and have remained legally
- With better legal options, crack down on illegal immigration
 - Better enforcement of borders, but not a fence
 - Children do not become citizens at birth if parents are not here legally
 - Stricter standards for obtaining citizenship for all, including standards to ensure greater assimilation into US society
 - A more accurate and comprehensive and easily accessible system for determining eligibility for employment, with stricter enforcement against employers once such a system is in place

There is one other point that needs to be made but is usually ignored. The only permanent solution to relieve the pressure of illegal immigration is to improve the economies of Mexico and Latin America. Consider the following hypothetical, regardless of the reader's position on the issue: If the US economy collapsed but Canada's did not (and there are any number of considerations, starting with water and/or energy, that could cause precisely that result), so that you could not feed your family in the USA but could provide for them by working in Toronto and sending money home, how big a fence would Canada have to build to keep you out? The ultimate solution to the problem, therefore, requires assisting the development of economic opportunities in our neighbors to the south. Any long-term solution must include steps to help those economies. The bottom line is that we need to do a better job in our own backyard and in relations with our neighbors.

CONCLUSION

Clearly, the status quo is unacceptable. This paper outlines one proposal which the authors believe balances the equities in a way that is fair and beneficial to all parties. We would encourage further discussion of these ideas and presentation of alternatives.

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