

Sanity for the Southwest Border

By Stanley Mailman and Stephen Yale-Loehr

In focusing attention on the Mexican workers who risk death in the desert to find jobs in the United States, and on the millions of undocumented immigrants who already work in the shadows of our economy, President Bush has re-set the immigration agenda. However imperfect, his proposal has given the green light to the process of immigration reform. On January 21, Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD) responded with S. 2010, a comprehensive bill that usefully addresses the two major issues: how to funnel Mexican immigration efforts into legal channels, and how to lure our undocumented population into a monitored system.

In his January 7th speech, President Bush said that although our nation "values immigration, and depends on immigration," our immigration laws don't work: "we see many employers turning to the illegal labor market . . . and millions of hardworking men and women condemned to fear and insecurity in a massive, undocumented economy." Immigration reform should begin, according to the President, by confronting the fact that "some of the jobs being generated in America's growing economy are jobs American citizens are not filling," and that these jobs "represent a tremendous opportunity for workers from abroad."

Guest-Worker Program

More specifically, the President's answer is a guest-worker program – one that would give a temporary legal status to a foreign national willing to take a job that Americans don't want. Once in the program, the worker could go home to visit without fear of losing his status, and even bring his family to stay with him. But the status would terminate in time, and the worker obliged to leave the United States. The President believes in incentives to that end, and has proposed a tax-preferred savings account from which the worker could withdraw only when he left. As to permanent residence, the President favors an increase in legal immigration, but rejects an amnesty program for those illegally here. And he does not offer to facilitate green card status for those who complete the guest-worker program.

Some have criticized the President's proposal for failing to include a path toward permanent residence.

Unless potential applicants can count on that possibility, the New York Times sees the program doomed to failure: "There must be some workable option for such immigrants, especially those who have been here for years, working, raising families and paying taxes. Without an optional path to a green card and ultimately citizenship, many of these illegal immigrants simply won't come forward." *Temporary Immigration* (editorial), Jan. 12, 2004, at A18. In a Jan. 26 article in the New Republic, *Why We Can't Stop Illegal Immigration*, Tamar Jacoby, a senior fellow at the Manhattan Institute, agrees with this analysis, otherwise praising the President's proposal as freeing up valuable law enforcement resources to defend our security.

Pointing to the disastrous "bracero" program following World War II, The Times also warns of the need to protect guest workers from exploitation. It refers approvingly to several pending bills, notably S. 1645 and its House counterpart, H.R. 3142. This "AgJOBS" bill would create an agricultural program that gives undocumented workers an opportunity to "earn" permanent residence by prospective farm work, crediting them for their prior agricultural experience in the United States. The bill enjoys widespread support from agricultural employers, immigrant-worker groups, and labor unions. But even with 50 Senate and 80 House co-sponsors, the bill is stalled in subcommittee.

Following the AgJOBS prototype, but broader in scope, the Hagel-Daschle bill seeks to accomplish three goals: reunify families, provide willing workers, and establish earned adjustment.

Goals of Hagel-Daschle Bill

1. Reunification of Families. Title I of the Hagel-Daschle bill would somewhat redo the formulae for family immigration. The chief change would expand the present composition of "immediate relative," a category permitted immigration without limitation in number. It now includes only these family members of U.S. citizens: spouses and unmarried children under 21, and parents (but in the case of parents the sponsoring U.S. citizen must be at least 21). The change would add to this category the spouses and unmarried children under 21 of lawful permanent residents. Such relatives are

already permitted to immigrate, but only in a category that is limited and so heavily oversubscribed that they must wait five years or more for a visa number. The bill would treat such spouses and children the same as the spouse of a U.S. citizen and spared the need for a visa number. However worthy this feature of the bill, it doesn't go to the heart of the border problem.

2. The H-2C Temporary Worker. Title II introduces a new nonimmigrant classification. Called the H-2C, this classification is designed for foreign nationals who would work temporarily for a U.S. employer when no qualified U.S. workers come forward for the job. Unlike the current H-2A category, it would not be limited to agricultural labor. And unlike the current H-2B category, which S. 2010 would modify somewhat, the H-2C would not require the job itself to be temporary. The spouse and children could accompany the H-2C nonimmigrant in a corresponding status, but not work.

- ! **Procedure.** The first step in the H-2C process would be like the application for labor certification in permanent resident cases. The sponsor would have to establish to the Department of Labor (DOL), after extensive recruiting, that there are no qualified U.S. workers available for the job offered to the foreign applicant. To obtain the temporary labor certification, the sponsor would also have to attest that U.S. workers were not and will not be fired to create the vacancy and that it is proffering at least the prevailing wage. An enforcement regime would discourage abuses of the certification system or unfair employment practices. Only with the certification could the employer file the H-2C visa petition.

Time Limits

- ! **Time Limits.** DOL would have only 21 days to act on the labor certification, and the Department of Homeland Security (DHS) 60 days to adjudicate the visa petition. The foreign worker could be admitted in H-2C for up to two years, renewable for another two years. The four-year cap wouldn't apply to a worker for whom a permanent labor certification or employment-based (EB) immigrant visa petition has been pending at least a year. But for this safety valve to operate, the worker would need a pending application to adjust

status to permanent residence or have an EB visa petition filed on her behalf. And DOL often takes years to issue permanent certifications. Without one, neither the visa petition, in most cases, nor the adjustment application could be filed. Congress made the same mistake in legislating a similar provision for H-1Bs and had to fix it.

- ! **Portability.** The H-2C worker could change jobs without forfeiting status as soon as the new employer filed an H-2C petition on her behalf, but not before she was initially in H-2C status for three months. (Except for the three-month brake, this is the same regime that governs H-1Bs.) Even this limitation could be waived in case of the employer's fault or because of disability or family, medical, or humanitarian reasons.
- ! **Numerical Cap and Sunset.** The H-2C program would be limited to 250,000 workers annually for five years. It would then sunset unless earlier renewed after Congress considered recommendations by an Immigration Study Commission.
- ! **Relief from Certain Grounds of Inadmissibility; Change of Status; Violation.** The bill would necessarily disarm the grounds of inadmissibility for both H-2B and H-2C that would otherwise inevitably bar the millions of workers already in the United States and others that it seeks to benefit. These grounds and the subparagraphs in INA § 212(a), 8 U.S.C. § 1182(a) in which they appear are: unlawful presence in the United States (6)(A); failure to attend a removal proceeding (6)(B); misrepresentation in seeking U.S. admission (6)(C); abuse of the student visa provisions (6)(G); lack of proper immigration documents (7); and prior order of removal or voluntary departure after prolonged unlawful presence (9). (Subparagraphs (5) and (10)(B) are also included for technical reasons.) But the relief is only retroactive. It would apply only if the ground existed both before the bill was introduced (Jan. 21, 2004) and before the worker sought admission in H-2B or H-2C classification or obtained a change to that status. (The latter would seem superfluous in the case of the H-2C, which would not exist

before the Act.) And any noncitizen that enters the United States without inspection after the enactment of the Hagel-Daschle bill or who violates H-2B or H-2C status will thereafter be barred from such status. Note finally that dispensation from the grounds of inadmissibility discussed above seems available only for the purpose of qualifying for H-2B or H-2C status; it wouldn't eliminate those grounds. However, the individual could shed precisely such inadmissibility by becoming a lawful permanent resident under Title III of the Act, called Access to Earned Adjustment, and discussed immediately below.

Earned Adjustment

3. Access to Earned Adjustment. Title III would provide for adjustment of status to permanent residence for those who satisfy the following requirements:

- ! **File an Application and Pay Fees.** In addition to filing an application and paying fees prescribed by the immigration agency, applicants over the age of 18 would pay an additional fee of \$1000 and would be subject to fingerprinting, photographs, and biometric identification. Applicants who file under this provision would be spared the need to qualify for a visa number under one of the family-related or employment-based preferences and would not take visa numbers from the regular allocation.
- ! **Establish Continuous Physical Presence.** The U.S. physical presence needed is for at least five years before S. 2010 was introduced (Jan. 21, 2004) without interruption, except for "brief, casual, and innocent departures." And the applicant would have to show that, on the given date, she "was not legally present." (Given the context this must mean that the applicant's presence here was not legal, not that she wasn't here at all.) Presence would not be legal under this provision if the applicant violated any condition of her visa.
- ! **Establish Admissibility.** In showing they are not inadmissible under § 212(a) of the Immigration and Nationality Act (INA), applicants would be exempted some grounds of inadmissibility and qualify for discretionary

waiver of others.

- ! **Establish Employment in the U.S.** The applicant would need to work in the United States for an aggregate of three of the five years immediately before the bill was introduced and one year after its enactment. There is an exception for those who were then under twenty or unable to work because of a physical or mental disability or pregnancy.
- ! **Pay income Taxes.** By the time the applicant's status is adjusted, she would have to show that she has paid any federal income taxes owed for the period for which physical presence is needed, or has entered into an agreement to with the Internal Revenue Service to pay.
- ! **Establish Basic Citizenship Skills.** With certain exceptions, applicants would have to show that they meet the same level of skill in ordinary English and in U.S. history and government as is required of naturalization applicants, or that they were pursuing a prescribed course in those subjects.
- ! **Adjustment for Spouses and Children.** The applicant's spouse and unmarried child under 21 could also adjust under a similar regime. There also are adjustment provisions for battered spouses and former spouses of eligible applicants and their children similar to those that apply under the general selection system.
- ! **Treatment Pending Approval.** Like adjustment applicants generally, applicants here could obtain work authorization and a travel document that would allow them to travel outside the United States and return to resume their application. Moreover, pending decision on their adjustment application, they could not be detained or deported unless they committed an act that rendered them ineligible for adjustment.
- ! **Transitional Workers.** A noncitizen physically present in the United States when the bill was introduced, who was eligible for adjustment under its provisions except for the periods of physical presence and employment required, could come forward and seek status as a transitional worker for three years. With that

status, the individual could get work authorization and travel permission. She could later apply for adjustment by showing lawful employment for more than two but less than three of the five years immediately before the introduction of S. 2010 and two years immediately after its enactment. She would also have to have remained in the country, except for "brief, casual, and innocent departures." Here too there are exceptions for those who were under twenty when the bill was introduced or who were prevented from employment by disability or pregnancy.

Conclusion

President Bush's January 7 speech was a useful wake-up call. The money our federal government annually spends on border enforcement has quintupled from \$740 million in 1993 to \$3.8 billion last year, much of it concentrated on a southwest border strategy that has failed. See Walter A. Ewing, *The Cost of Doing Nothing*, Jan. 2004, available at www.aifl.org/ipc/CostOfDoingNothingPrint.asp (last visited Feb. 24, 2004). Funneling the flow of Mexicans into a temporary work program would help us to regain control of our borders and provide willing workers for jobs that now go

begging, as the President reminds us. But as Tamar Jacoby argues, "[w]ithout an adequate bridge from [that program] to a full-fledged citizenship track, the president's proposal cannot hope to eliminate the underground economy and will only perpetuate a permanent foreign-born underclass." Tamar Jacoby, *Why We Can't Stop Illegal Immigration*, *New Republic*, Jan. 26, 2004. The Hagel-Daschle bill would build that bridge.

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