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## Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: The Time for Immigration Reform Is Now

### Keywords

Immigrants, Immigration Law, Law Enforcement, Education Law, Children, Politics

# **Perspectives on the Bush Administration's New Immigrant Guestworker Proposal:**

## **The Time For Immigration Reform Is Now**

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President Bush did something quite remarkable on January 7th, 2004 when he proposed dramatic changes to our immigration system.<sup>1</sup> His proposal has been attacked as too generous by some<sup>2</sup> and not generous enough by others.<sup>3</sup> The main group backing the proposal has been the U.S. business community.<sup>4</sup> The American public is split on this issue<sup>5</sup> as I would imagine the people in this room are, as well. Today you'll have the opportunity to hear about the proposal and perhaps some other proposals in the works. Before we dive in, I want to tell you a short story about my first experience in the practice of immigration law and the lessons I learned from the last time the U.S. attempted comprehensive immigration reform.

I have been an immigration lawyer for 14 years, in many different capacities—as an associate in a large law firm, as the sole lawyer in a small non-profit, as a Senior Legal Counselor for the United Nations refugee agency and as a clinical teacher both at Georgetown University and here, at the University of Denver. My very first experience with immigration law occurred during law school and it is that experience which probably sealed my fate and caused me to dedicate my legal career to serving immigrants. After my first year of law school, I accepted a summer position as a legal intern with the Illinois Migrant Legal Assistance Project.

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1. White House Office of the Press Secretary, Fact Sheet: Fair and Secure Immigration Reform (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/print/20040107-1.html> (last visited Mar. 30, 2004).

2. See, e.g., *Border Agents Assail Bush Plan to Bring in Guest Workers*, L.A. TIMES, Jan. 23, 2004.

3. See, e.g., *Proposal is Not All Good News*, SEATTLE POST INTELLIGENCER, Jan. 14, 2004; *Farmworkers Seek Greater Protections under Bush's Plan*, OAKLAND TRIBUNE, Jan. 14, 2004.

4. See, e.g., *Immigrant Realities: President Bush's Proposal Helps America's Security and Economy*, WALL STREET JOURNAL, Jan. 9, 2004, available at <http://www.opinionjournal.com/editorial/feature.html?id=110004532>.

5. A nationwide Gallup poll conducted shortly after President Bush's announcement of his proposal for a guestworker program found that 55% of Americans opposed it.

It was the summer of 1987 Ronald Reagan was President of the United States and it was an exciting time to be practicing immigration law. Congress had just passed a law that allowed farm workers and other undocumented immigrants who had resided in the United States for five years to obtain legal status.<sup>6</sup> About 3 million did so. The quid pro quo was that from that point on all employers had to request documents from employees that demonstrate they are authorized to work in the United States.<sup>7</sup> For me, it was a baptism by fire into immigration practice. There were millions of immigrants who needed legal help; there were new regulations being issued which even experienced lawyers had difficulty comprehending (and which sometimes misapplied the law<sup>8</sup>); and there were bewildered employers who wanted to follow the new law, but did not know how

I learned three important lessons that summer:

1. The practice of immigration law can be extremely rewarding. Hardworking, law abiding individuals and families who had lived in the United States for many years could finally legalize their status and improve their lives.
2. Every immigration benefit has a cost attached and often unintended consequences, too. Requiring employers to check identity documents created a tremendous amount of paperwork for U.S. businesses, but, as we know, it did not actually deter undocumented immigrants from working in the United States. What it certainly did do was create a booming black market for false documents.
3. I saw firsthand how vital immigrants are to our country, especially the agricultural sector. Our nation would grind to a halt without immigrants willing to do the least desirable jobs in our society

Today we have between 9 and 10 million<sup>9</sup> undocumented immigrants in our country. Most are from Mexico (about 55%).<sup>10</sup> About a quarter are from Central America (22%).<sup>11</sup> They make up 26% of the total foreign born population.<sup>12</sup> Interestingly, they are almost 40% of the foreign born population in Colorado.<sup>13</sup>

What have we done about the influx of undocumented immigrants? Since

6. See generally, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

7. 8 U.S.C. 1324(a). Legislative history available at H.R. Rep. No. 99-682 (I), *reprinted in* 1986 U.S. Code Cong. & Admin. News 55649.

8. On January 23, 2004 and February 18, 2004, federal courts approved settlements in two class action lawsuits initially filed in 1987 regarding eligibility for legalization. See USCIS Settlement Agreements and Notices, *available at* <http://uscis.gov/graphics/lawsregs/settlement.htm>.

9. Urban Institute Immigration Studies Program, Undocumented Immigrants: Facts and Figures (Jan. 12, 2004) states that there are 9.3 million undocumented immigrants in the US. This number varies from 9 to 10 million.

10. American Immigration Law Foundation, Immigration Policy Brief: The Cost of Doing Nothing, *available at* <http://www.aifl.org/ipc/CostofDoingNothingPrint.asp>.

11. *Id.*

12. *Id.*

13. Undocumented Immigrants, *supra* note 10.

1993, the amount of money spent on border enforcement has more than quintupled.<sup>14</sup> The FY 2005 budget for the two immigration enforcement agencies is over \$10 billion.<sup>15</sup>

Despite increased border enforcement and increased risks in traveling to the United States, undocumented immigration has continued at a rate of 500,000 immigrants per year. As a result there has been a dramatic increase in human smuggling and also an increase in the number of people who die while attempting to cross the border—1,896 people have died over last 5 years trying to cross the South West U.S. border.<sup>16</sup> Undocumented workers in this country continue to fill millions of jobs in various sectors of our economy that American workers cannot or will not fill.

What has the federal government done to address this issue besides increasing border enforcement? Not much. As a result, officials at the state and local level have been filling the void with piecemeal approaches, including:

- allowing for acceptance of Mexican consular IDs as valid IDs
- granting drivers licenses to undocumented immigrants
- allowing undocumented high school students in-state college tuition rates

President Bush's proposal was bold and politically risky. It took political courage and a willingness to think outside the box. This proposal was the result of two separate but overriding concerns: one, economic (we really do need these workers) and the other involving national security (we need to know who these 9 to 10 million people are). He proposed a program that allows undocumented workers with jobs in the United States to obtain temporary legal status here, which would allow U.S. employers with unfilled jobs to hire foreign workers. As President Bush described it, his proposed reforms have four main goals<sup>17</sup>

1. To protect our country through better control of U.S. borders.
2. To serve the economic needs of United States.
3. To ensure no unfair rewards to undocumented immigrants; they must wait in line for citizenship like everyone else.
4. To encourage immigrants to return home after their period of work in U.S. has expired through a retirement savings plan and credit to their home country's pension plan.

The proposal was and still is vague. The President and his advisors were

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14. *Id.*

15. *Evaluating Temporary Guest Worker Proposal Before the Senate Judiciary Comm.'s Subcomm. On Immigration, Border Security and Citizenship*, (2004) (Testimony of Asa Hutchinson, Under Secretary for Border and Transportation Security, Department of Homeland Security) (noting FY2005 seeks \$4 billion for ICE and \$6.2 billion for CBP) *available at* <http://www.aila.org/contentViewer.aspx?bc=9,576,4682,4685> (last visited July 6, 2004).

16. Cost of Doing Nothing, *supra* note 10.

17. Set forth in President Bush's Jan. 7, 2004 remarks (transcript on file with author).

careful to avoid any mention of the A word or "Amnesty"<sup>18</sup> This word is taboo for anyone proposing any sort of immigration reform, so it is often referred to using other names. The President did, however, say the program will have an end, although he did not say when.<sup>19</sup> Here are some key elements of the program mentioned by the President or his spokespersons:

1. Even though it has an end, the proposal envisions that some of the participants will remain in the United States and will be able to obtain permanent status. However, they just cannot jump in front of others in line.<sup>20</sup>
2. Those applying for the program will probably have to pay a one-time fee to register.<sup>21</sup> The fee will probably be a hefty, \$1,000 or more.
3. Those who qualify would be protected by U.S. labor laws, will have the right to change jobs, and enjoy the same working conditions as U.S. citizens.<sup>22</sup>
4. Those who qualify will be given a tamper-proof; fraud-proof identity document,<sup>23</sup>
5. The proposal envisions increasing the number of green cards available each year and improving the process to obtaining citizenship—such as changes to the citizenship test.

The Bush Proposal is not alone; other examples include:

1. The AgJobs bill,<sup>24</sup> addressed further by Attorney Pat Medige in her remarks.
2. Senators Hagel and Daschle's Immigration Reform Act of 2004 has the aim of strengthening border security and increasing the number of visas available.<sup>25</sup>

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18. *Id.* (stating "I oppose amnesty, placing undocumented workers on an automatic path to citizenship. Granting Amnesty encourages the violation of our laws, and perpetuates illegal immigration."); Press Briefing by Scott McClellan, Jan. 10, 2004, *available at* <http://www.ilw.com/cgi-shl/pr.pl>. (Q. You keep saying this is not an amnesty. Yet clearly you are going to forgive these people, you're not going to prosecute them. How is that not an amnesty? A[n] amnesty rewards undocumented workers, or undocumented immigrants with an automatic path to citizenship. The President's plan would not give the temporary workers any unfair advantage. They would have to go through the normal existing process.")

19. Bush Remarks, *supra* note 17.

20. *Id.*

21. *Id.*

22. Hutchinson Testimony, *supra* note 15. *Evaluating Temporary Guest Worker Proposal Before the Senate Judiciary Comm.'s Subcomm. On Immigration, Border Security and Citizenship*, (2004) (Testimony of Eduardo Aguirre, Director, U.S. Citizenship and Immigration Services, Dept. of Homeland Security) *available at* <http://www.aila.org/contentViewer.aspx?bc=9,576,4682,4688> (last visited July 6, 2004).

23. Bush Remarks, *supra* note 17.

24. Agricultural Job Opportunity, Benefits, and Security (AgJobs) Act, S. 1645, 108th Cong. (2003).

25. The Immigration Reform Act, S.2010, 108th Cong. (2004).

3. Representative Tom Tancredo even has his own bill. It is called the BE REAL Act (Border Enforcement and Revolving Employment to Assist Laborers Act), which also proposes a temporary worker program and calls for increased border security, including the use of U.S. armed forces along the border.<sup>26</sup>

The question we should be asking now is how do we avoid the mistakes of the last immigration reform that took place back in 1986? The administration should consider the following proposals<sup>27</sup>

1. To ensure full participation by the undocumented population and to decrease the incidence of fraud, we need to avoid arbitrary cut-off dates, and other restrictions on eligibility. We should certainly keep out dangerous criminals and people who are a risk to national security. But if we really want all ten million immigrants to come forward, we should not impose restrictions such as lengthy residency requirements.
2. We need to recognize that a temporary worker program, in and of itself, won't be a cure-all. Any immigration reform proposal needs to incorporate a plan for addressing future needs for legal immigration. The most important aspects should be a mechanism for addressing labor shortages in the future and ensuring the family reunification process is not a lengthy one.
3. Once these reforms are implemented, how do we avoid the continuation of illegal immigration into the United States? One way, is to work with our neighbors, Canada and Mexico, to strengthen entry controls and to combat human smuggling. Another way is to ensure that there are economic opportunities and continuing development in the countries that send immigrants to the United States.

A comprehensive immigration reform bill will be enacted in the near future. The question is not *if* there will be a new law, but *when* it will pass. Not before the November 2004 election; that's almost certain. But soon after, is quite likely. But at what cost? We need to ask ourselves, what are we, as a country, willing to give up in exchange for immigration reform?

Is it acceptable to militarize our borders as proposed in Representative Tancredo's BE REAL Act<sup>28</sup>?

Will we reinterpret laws we took for granted—like the 14<sup>th</sup> Amendment so that we don't automatically grant citizenship

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26. BE REAL Act, H.R. 3534, 108<sup>th</sup> Cong. (2003).

27. See, e.g. *Evaluating a Temporary Guest Worker Proposal Before the Senate Judiciary Comm.'s Subcomm. On Immigration, Border Security and Citizenship* (2004) (Testimony of Dr. Demetrios Papa demetrious, President, Migration Policy Institute) .available at <http://www.aila.org/contentViewer.aspx?bc=9,576,4682,4683> (last visited July 6, 2004).

28. BE REAL Act, *supra* note 26, at § 102.

to undocumented or temporary immigrants<sup>29</sup>?

We will be one step closer to a national identification card for all citizens?

I urge lawmakers and advocates to carefully consider any compromises in an immigration reform package. There is a danger that the cure may be worse than the ailment.

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29. *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003) (J. Posner, concurring) (“[O]ne rule that Congress should rethink is awarding citizenship to everyone born in the United States including the children of illegal immigrants”).