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Help Wanted: Looking for a Visa System the Promotes the U.S. Economy and National Security

Jonathan G. Goodrich

University of Richmond School of Law

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COMMENTS

HELP WANTED: LOOKING FOR A VISA SYSTEM THAT PROMOTES THE U.S. ECONOMY AND NATIONAL SECURITY

Immigration has generated controversy throughout the history of the United States. As the unauthorized population living in this country has escalated from two to twelve million, the past twenty years have proved no exception.¹ During this time, Congress has periodically modified U.S. immigration policy; each time responding to different political and socioeconomic pressures. In 1986, Congress enacted the Immigration Reform and Control Act, which legalized millions of unauthorized migrants and created a system of sanctions for employers that hire unauthorized workers.² After the first World Trade Center bombing in 1996, Congress strengthened punishment for smugglers, unauthorized migrants, and visa overstayers, and created expedited removal proceedings for criminal noncitizens.³ Following 9/11 and the discovery that some of the hijackers had flouted immigration laws,⁴ Congress included immigration reforms within a new and expansive national security plan.⁵ Since then, “secure the border”

1. See JEFFERY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 2 (2006), <http://pewhispanic.org/files/reports/61.pdf>.

2. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

3. See Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009–546 (1996).

4. Diana Jean Schemo & Robert Pear, *A Nation Challenged: Immigration; Suspects in Hijackings Exploited Loopholes in Immigration Policy*, N.Y. TIMES, Sept. 27, 2001, at A1.

5. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Re-

has remained the singular mantra of U.S. immigration policy; the Border Patrol's annual budget has doubled to over \$10 billion,⁶ seven hundred miles of fence will soon divide the United States from Mexico,⁷ and employer raids fill headlines across the country.⁸

Recently, Congress has again sought immigration reforms. The President has also offered his own guest-worker program.⁹ Yet no new law has emerged. As this debate continues and a presidential election nears, the American public and its politicians must scrutinize the fundamental purposes of the immigration system. At its core, the goal of U.S. immigration policy should be to promote the public interest.¹⁰ Or, in other words, it should secure the maximum economic benefits for the American public and at the same time allow all citizens to feel safe in their daily lives. It should supply the United States with the laborers, scientists, consumers, and investors necessary for a strong economy. It should recognize that “[i]mmigration is both a reflection of and a contributor to our economy’s prosperity.”¹¹ And it should promote security by accurately identifying all noncitizens in the country

quired to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (expanding the security related grounds for denying admission to and for removing non-citizens).

6. COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 202 (2007) [hereinafter 2007 ECON. REP. OF THE PRESIDENT], available at http://www.whitehouse.gov/cea/2007_erp.pdf.

7. See Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2638-39.

8. In 2007, Immigration and Customs Enforcement, the agency responsible for finding and deporting illegal immigrants, made nearly four times as many workplace arrests of unauthorized workers as it did in 2006. Devona Walker, *Employers May Pay Price for Not Embracing Changes*, OKLAHOMAN, Jan. 5, 2008, available at 2008 WLNR 276325; see also Sharon Cohen, *Iowa Town Squeezed in Immigration Debate: Newcomers Revitalize the Area, But They Are Still Illegal*, FT. WAYNE J. GAZETTE, Sept. 9, 2007, at A12, available at 2007 WLNR 1858 4449; David Robinson & Renuka Rayasam, *Will the Immigration Crackdown Work?*, CNNMONEY.COM, Sept. 17, 2007, http://money.cnn.com/2007/09/06/smbusiness/immigration_red_tape.fsb/index.htm; Emma Schwartz, *A Bust, and a Blow to a Business: In Immigration Raids, Unwitting Employers Can Be Victims, Too*, U.S. NEWS & WORLD REP., Oct. 1, 2007, at 30, available at 2007 WLNR 18729542.

9. See Merav Lichtenstein, Note, *An Examination of Guest Worker Immigration Reform Policies in the United States*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 689, 689-90 (2007).

10. Discussing the promotion of the public interest through immigration could entail not just the American public interest, but also more global issues such as the United States’s human rights obligations and humanitarian goals. See generally Saby Ghoshray, *Is There a Human-Rights Dimension to Immigration? Seeking Clarity Through the Prism of Morality and Human Survival*, 84 DENV. U. L. REV. 1151, 1154-61 (2007). This comment, however, focuses on how the immigration system can promote American needs.

11. 2007 ECON. REP. OF THE PRESIDENT, *supra* note 6, at 206.

and ensuring that employers hire only those that are work-authorized. The U.S. immigration system can—and must—meet all of these requirements.

Today's immigration policies, however, create an unnecessary clash between economic and security considerations—to the detriment of both. The restrictive visa system leaves employers in sectors ranging from farming and construction to engineering and genetics without workers. As a result, for many employers needing low-skilled workers, current policies actually favor the flexibility and speed of *illegal* immigration. For employers needing high-skilled workers, the visa system remains a black box of confusion and waste—providing what few visas are available on a timetable detached from the needs of those businesses. Indeed, Congress's failure to resolve the clash between economic and security concerns has motivated states, from Virginia to California, to enter the immigration debate.¹² Both New Mexico and Arizona have gone so far as to declare a “state of emergency” because of their inability to deal with immigration.¹³

This comment illustrates the ways in which today's visa system fails to promote American interests, and it offers a more effective approach in its place. Section I.A provides background on the role the visa system plays in providing this country with its labor needs. Section I.B catalogs the negative economic and security consequences that flow from a visa system unable to provide American employers with sufficient high-skilled or low-skilled workers. Section II provides a proposal that pays heed to the failures of prior policies by confronting the root causes of unauthorized immigration. This proposal creates a holistic approach to immigration by offering robust legal channels to enter this country coupled with layered enforcement measures. By establishing a market-based visa system, the United States could create a legal and orderly way willing workers could enter the country to work with willing employers. By establishing security measures, such as a biometric national identification card and a mandatory electronic employment verification system, all foreign workers could

12. In total, forty-six states have enacted immigration-related legislation. See NAT'L CONF. OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 3 (2007), <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>.

13. See *id.* at 30, 33 (listing state legislation that requests national assistance to help fight illegal immigration).

be accurately identified and work-authorized. Moreover, these mechanisms will enable the millions of unauthorized migrants living in anonymity to emerge from the shadows and fully participate in American society. Unlike today's ineffective system, this approach both maximizes American well-being and promotes national security.

I. THE CURRENT VISA SYSTEM FAILS TO PROMOTE THE U.S. ECONOMY OR NATIONAL SECURITY

A. *Background: How the Visa System Operates*

Immigrants primarily influence the U.S. economy by providing a source of labor. To understand the legal options available to noncitizens¹⁴ seeking employment in the United States, one must understand how U.S. law categorizes applicants. The Immigration and Nationality Act ("INA") classifies all noncitizens seeking legal admission into the United States as either immigrants or nonimmigrants.¹⁵ An immigrant is a noncitizen who has been granted the right to live and work permanently in the United States.¹⁶ Nonimmigrants—known for what they are not—are precluded from living in the United States with the full spectrum of rights granted to immigrants.¹⁷ Instead, nonimmigrants, such as tourists and students, are admitted for a temporary time and for a limited purpose.¹⁸ While in the United States, some nonimmigrants are granted the right to work.¹⁹ Despite, those legal channels, however, millions of unauthorized migrants²⁰ illegally work in this country every day.²¹

14. Although government agencies use the term "alien" instead of "noncitizen," see 8 U.S.C. § 1101(a)(3) (2000), this comment employs "noncitizen," like many other academic pieces. See, e.g., Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1377 (2007).

15. 8 U.S.C. § 1101(a)(15), (26).

16. See *id.* § 1101(a)(15). The terms immigrant, lawful permanent resident, and "green card" holder are synonymous. RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 2:24 (2d ed. 2007).

17. B. LINDSAY LOWELL, *FOREIGN TEMPORARY WORKERS IN AMERICA: POLICIES THAT BENEFIT THE U.S. ECONOMY* 1 (1999).

18. See, e.g., 8 U.S.C. § 1101(a)(15)(B), (F), (J).

19. See, e.g., *id.* § 1101(a)(15)(H).

20. This comment uses the term "unauthorized migrant" because the accounting of

1. An Overview of the Immigrant Visa System

A noncitizen seeking an immigrant visa has several options. The majority of legal immigration occurs through two family-based visa preferences granted to noncitizens with a close family relationship to a U.S. citizen or lawful permanent resident ("LPR").²² Based on completely different principles, a third type of immigrant visa aims to promote diversity in the United States.²³ Employing a lottery system, the aptly named "diversity-based" visa category provides 55,000 immigrant visas annually for non-citizens from countries determined to have had low admission numbers for the previous five years.²⁴ A fourth type of immigrant visa is available for refugees and asylees.²⁵ Controlled by the INA as well as international law,²⁶ this visa is offered to individuals that have a "well-founded fear of persecution" in their home country.²⁷ In 2006, the United States authorized over 67,000 individuals to stay in this country as either refugees or asylees.²⁸

Lastly, and most important for this comment, the INA offers an "employment-based" visa, which enables noncitizens to live and work in the United States permanently. An applicant wanting to immigrate for employment purposes is categorized within a preference system divided into five categories, which are: (1) priority

the unauthorized population also includes aliens who have an unresolved status or temporary permission to reside in the United States. *See, e.g.*, PASSEL, *supra* note 1, at i.

21. *See* 8 U.S.C. §§ 1182(a)(6)-(7), 1227(a)(1); RAJEEV GOYLE & DAVID A. JAEGAR, CTR. FOR AM. PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 1 (2005), http://www.americanprogress.org/kf/deporting_the undocumented.pdf.

22. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a). In 2006, sixty-three percent of all immigrant visas granted were issued based on a family relationship with a U.S. citizen or LPR of the United States. KELLY JEFFERYS, U.S. DEPT OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2006, at 1 (2007), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/IS-4496_LPRFlowReport_04vaccessible.pdf.

23. *See* 8 U.S.C. § 1153(c).

24. *Id.* §§ 1151(e), 1153(c). Entry on a diversity-based visa requires a high school education and two years of work experience. *Id.* § 1153(c)(2); 22 C.F.R. § 40.205 (2007). No more than seven percent of diversity visas issued in any one year can come from the same country. 8 U.S.C. § 1153(c)(1)(E)(v).

25. *Id.* §§ 1101(a)(42), 1157–59, 1182(d)(5), 1231(b)(3)(A), 1254(a)(1). *See generally* Marisa Silenzi Cianciarulo, *Counterproductive and Counterintuitive Counterterrorism: The Post-September 11 Treatment of Refugees and Asylum-Seekers*, 84 DENV. U. L. REV. 1121 (2007) (discussing the development of refugee and asylee laws in the United States).

26. 8 U.S.C. § 1157(a)(2); *see also* STEEL, *supra* note 16, § 8:1.

27. 8 U.S.C. § 1101(a)(42).

28. JEFFERYS, *supra* note 22, at 1.

workers,²⁹ (2) professionals with advanced degrees or of exceptional ability;³⁰ (3) skilled workers, professionals (without advanced degrees), and needed unskilled workers;³¹ (4) special immigrants;³² and (5) employment creation immigrants or “investors.”³³ The current limit on employment-based visas is 140,000 per year plus any unused family-based visas.³⁴ But each applicant may face additional constraints. No one country’s immigrants can receive more than seven percent of all employment-based visas issued each year.³⁵ Further reducing the allotment for workers, the quota includes all visas granted to spouses and children of immigrants entering on employment-based visas.³⁶

Beyond the pure numerical limitations, the labor certification process places an important restriction on many applicants seeking an employment-based visa.³⁷ The first, fourth, and fifth preference categories do not need labor certification.³⁸ Noncitizens seeking to enter under the second³⁹ or third employment-based preferences, however, are ineligible to receive a visa unless the Secretary of Labor certifies to the Secretary of State and Attorney General that (1) there are not sufficient workers in the United States “able, willing, [] qualified and . . . available” for the advertised position⁴⁰ and (2) the employment of the noncitizen “will not

29. 8 U.S.C. § 1153(b)(1); 8 C.F.R. § 204.5(h)(2) (2007) (defining “extraordinary ability”).

30. 8 U.S.C. § 1153(b)(2); 8 C.F.R. § 204.5(k) (defining “exceptional ability”).

31. 8 U.S.C. § 1153(b)(3); 8 C.F.R. § 204.5(l)(2). Visas for unskilled laborers are limited to 10,000 per year. 8 U.S.C. § 1153(b)(3)(B).

32. 8 U.S.C. § 1101(a)(27) (e.g., ministers, religious workers, and employees of the U.S. government abroad); *id.* § 1153(b)(4).

33. *Id.* § 1153(b)(5); 8 C.F.R. § 204.6.

34. 8 U.S.C. § 1151(d).

35. *Id.* § 1152(a)(2); COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 60 (2006) [hereinafter 2006 ECON. REP. OF THE PRESIDENT], *available at* http://www.gpoaccess.gov/eop/2006/2006_erp.pdf. This per country quota is also subject to several other overlapping quotas, such as the overall limitation, per category limitation, and rate of distribution limitation. STEEL, *supra* note 16, § 4:13.

36. See 8 U.S.C. §§ 1151(d)(1), 1153(d).

37. See *id.* § 1182(a)(5)(A); 20 C.F.R. § 656.1 (2007); see also Labor Certification for the Permanent Employment of Aliens in the United States, 72 Fed. Reg. 27,904 (May 17, 2007) (providing changes to the labor certification process).

38. 8 C.F.R. § 204.5(h)(5), (i)(3)(iii), (j)(5) (2007); 20 C.F.R. § 656.15(c)(2); STEEL, *supra* note 16, § 6:11.

39. The second preference category permits the Attorney General to waive these requirements when the job is deemed in the “national interest.” See 8 U.S.C. § 1153(b)(2)(B).

40. *Id.* § 1188(a)(1)(A).

adversely affect the wages and working conditions of workers in the United States similarly employed.”⁴¹

Obtaining that certification requires U.S. employers to shoulder several duties.⁴² First, an employer must attempt to recruit American workers by advertising the applicant’s position in a newspaper and other recruitment sources.⁴³ Second, the employer must consider any applications received in response to the advertisement⁴⁴ and certify to the Department of Labor (“DOL”) that none of the U.S. applicants were rejected for unlawful reasons.⁴⁵ Third, an employer may have to address any additional DOL concerns, which often results in lengthy delays.⁴⁶ Even after certification, other hurdles remain. Applicants may still face rejection if they fail to meet other basic admission requirements⁴⁷ or if a quota would be exceeded.⁴⁸

2. An Overview of the Nonimmigrant Visa System

Most noncitizens that legally enter the United States enter for a limited time and purpose, or in other words, are nonimmigrants. There are more than twenty-five types of nonimmigrant visas, most of which are given letter designations that correspond with subdivisions of the INA.⁴⁹ For example, a student nonimmigrant visa is located in INA section 101(a)(15)(F)(i) and is popularly referred to as an F-1 visa.⁵⁰ Other types of nonimmigrant visas are issued for tourists,⁵¹ business professionals,⁵² religious

41. *Id.* § 1188(a)(1)(B); *see also* 20 C.F.R. § 656.40 (requiring that the wage offered the immigrant be the “prevailing wage” for that type of employment in that geographic area).

42. A small number of professions, however, are by statute “pre-certified” and as a result have a less burdensome process. *See* 20 C.F.R. §§ 656.5(a), 656.15(a).

43. *Id.* § 656.17(f).

44. *Id.* § 656.2(e).

45. *Id.* § 656.10(c)(9).

46. *See STEEL, supra* note 16, § 6:32. For example, all applicants must prove that they have the experience or education to perform the potential job. *Id.* All employers must prove that they intend to and are financially able to pay the wage set forth in the labor certification application. *Id.* Any discrepancies found by U.S. Citizenship and Immigration Services often result in formal investigations involving delays of six to twelve months or more. *Id.*

47. *See* 8 U.S.C. § 1182(a) (2000) (providing grounds of inadmissibility).

48. *See id.* §§ 1153–54.

49. *See id.* § 1101(a)(15); 8 C.F.R. § 214.1 (2007).

50. 8 U.S.C. § 1101(a)(15)(F)(i); 8 C.F.R. § 214.2(f).

51. 8 U.S.C. § 1101(a)(15)(B); 8 C.F.R. § 214.2(b).

52. 8 U.S.C. § 1101(a)(15)(B); 8 C.F.R. § 214.2(b).

workers,⁵³ investors,⁵⁴ and diplomats.⁵⁵ Of all nonimmigrants, the majority enter the United States for either tourism or business.⁵⁶ In 2006, those two categories accounted for nearly ninety percent of all nonimmigrant admissions.⁵⁷

Nonimmigrants can also enter the United States for employment.⁵⁸ Of the various types of nonimmigrant visas, the H visa is the primary mechanism enabling nonimmigrants to work.⁵⁹ There are six types: (1) the H-1B for professionals,⁶⁰ (2) the H-1C for nurses,⁶¹ (3) the H-2A for temporary agricultural workers,⁶² (4) the H-2B for temporary workers in non-agricultural jobs,⁶³ (5) the H-3 visa for trainees entering the United States to obtain training unavailable in the noncitizen's home country,⁶⁴ and (6) the H-4 visa for the spouse and children of H-1, H-2, and H-3 visa-holders.⁶⁵

Entry requirements and restrictions vary for each visa type. For example, to receive an H-1B visa, the noncitizen must have specialized knowledge of a specific occupation and have a job offer

53. 8 U.S.C. § 1101(a)(15)(R); 8 C.F.R. § 214.2(r).

54. 8 U.S.C. § 1101(a)(15)(E); 8 C.F.R. § 214.2(e).

55. 8 U.S.C. § 1101(a)(15)(A); 8 C.F.R. § 214.2(a).

56. U.S. DEPT OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: TEMPORARY ADMISSIONS OF NONIMMIGRANTS TO THE UNITED STATES: 2006, at 1 (2007) [hereinafter TEMPORARY ADMISSIONS OF NONIMMIGRANTS], available at http://www.dhs.gov/xlibriry/assets/statistics/publications/NI_FR_2006_508_final.pdf. See LOWELL, *supra* note 17, at 6, for an explanation of the difference between the number of visas issued and number of individuals admitted.

57. TEMPORARY ADMISSIONS OF NONIMMIGRANTS, *supra* note 56, at 1.

58. See, e.g., 8 U.S.C. § 1101(a)(15)(H), (L), (O), (P).

59. See *id.* § 1101(a)(15)(H). A close second is the L visa. See TEMPORARY ADMISSIONS OF NONIMMIGRANTS, *supra* note 56, at 2–3 tbl.3. Other nonimmigrant visas authorize employment, but are small programs. For example, in 2006, slightly over 2,000 individuals received the E-3 visa available for Australian professionals under a free trade agreement. See 8 U.S.C. § 1101(a)(15)(E); TEMPORARY ADMISSIONS OF NONIMMIGRANTS, *supra* note 56, at 2–3 tbl.3. A similar number of visas were also issued for workers in international cultural exchange programs. See TEMPORARY ADMISSIONS OF NONIMMIGRANTS, *supra* note 56, at 2–3 tbl.3.

60. 8 U.S.C. § 1101 (a)(15)(H)(i)(b). In 2006, H-1B visas for certain first-time applicants were limited to 65,000 individuals. TEMPORARY ADMISSIONS OF NONIMMIGRANTS, *supra* note 56, at 4.

61. See 8 U.S.C. § 1101 (a)(15)(H)(i)(c).

62. *Id.* § 1101(a)(15)(H)(ii)(a).

63. *Id.* § 1101(a)(15)(H)(ii)(b). This category is limited to 66,000 per year. 8 C.F.R. § 214.2(h)(8)(i)(C) (2007).

64. 8 U.S.C. § 1101(a)(15)(H)(iii).

65. *Id.*

from an American employer.⁶⁶ Also, the prospective employer must demonstrate, in a Labor Condition Application, that the expected wage equals or exceeds the prevailing or actual wage for that occupation, that hiring the noncitizen will not adversely affect similarly situated American workers, and that no labor dispute currently exists at the place of employment.⁶⁷ This process can cost an employer as much as \$6,000 per visa.⁶⁸ Moreover, only 65,000 are available annually.⁶⁹ Time limits for each H-1B visa differ; for example, an H-1B "specialty occupation" visa is limited to three-year terms, but allows for a maximum extension of an additional three years.⁷⁰

A different process governs the H-2A process for temporary agricultural workers.⁷¹ An H-2A visa application will not be considered unless the noncitizen has a job offer from an employer who can assert he has tried, but failed, to fill the position with an American worker.⁷² Only after the employer obtains a temporary labor certification from the DOL and pays any fees can an H-2A visa be issued.⁷³ H-2A visas remain valid for one year or less.⁷⁴ In 2006, the United States issued approximately 37,000 H-2A visas.⁷⁵

66. See *id.* § 1184(i) (setting forth the requirements for a "specialty occupation").

67. See *id.* § 1184(j); 20 C.F.R. § 656.10(c).

68. See Angelo I. Amador, *What U.S. Business Needs: Market-Based Visa Caps*, *LEGAL TIMES*, Sept. 18, 2006.

69. 8 C.F.R. § 214.2(h)(8)(i)(A)(4); 2006 ECON. REP. OF THE PRESIDENT, *supra* note 35, at 59.

70. 8 C.F.R. § 214.2(h)(9)(iii)(A)(1), (h)(13)(iii). Under certain circumstances the time limit can be extended. See, e.g., *id.* § 214.1(c) (regulating extensions in general); *id.* § 274a.12(b)(20) (permitting an extension of 240 days for an applicant whose status has expired but has filed a timely application for an extension). If a visa expires and is not extended, the nonimmigrant must leave the United States. Nonimmigrants that fail to exit upon the expiration of their visas become unauthorized migrants. See section I.A.3, *infra*, for a discussion of the unauthorized population in the United States.

71. See 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 8 C.F.R. § 214.2(h)(5); 20 C.F.R. § 655.90 (b)(1)(A).

72. See 8 U.S.C. § 1188(a)(1)(A).

73. Camille J. Bosworth, *Guest Worker Policy: A Critical Analysis of President Bush's Proposed Reform*, 56 HASTINGS L.J. 1095, 1107 (2005).

74. 8 C.F.R. § 214.2(h)(5)(iv)(A). Under certain circumstances the time limit can be extended. *Id.* § 214.2(h)(x).

75. U.S. DEP'T. OF STATE, REPORT OF THE VISA OFFICE 2006, NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION tbl.XVI(B), available at <http://travel.state.gov/pdf/FY06AnnualReportTableXVIB.pdf>.

3. The Entry of Unauthorized Migrants

An estimated twelve million unauthorized migrants live in the United States.⁷⁶ Of that population, about one-half overstayed a validly obtained visa.⁷⁷ The other half entered the United States by illegally crossing the border.⁷⁸ Overall, the unauthorized population grows by approximately 500,000 per year.⁷⁹ Rather than decreasing this flow, increased border patrols have pushed illegal crossings to more remote regions and raised the price smugglers can charge.⁸⁰

Ninety-six percent of unauthorized male migrants present in the United States are believed to be employed.⁸¹ The majority of these unauthorized migrants work in occupations that require little education or lack licensing requirements.⁸² Nationally, twelve percent of food preparers, fourteen percent of construction workers, and seventeen percent of cleaning workers are unauthorized migrants.⁸³ Depending on the geographic region and type of crop, anywhere from fifty to seventy percent of agricultural workers are unauthorized to work in the United States.⁸⁴

76. PASSEL, *supra* note 1, at 1–2. Other groups offer various competing estimates of the number of unauthorized migrants in the United States, ranging from seven to twenty million. See Brad Knickerbocker, *Illegal Immigrants in the U.S.: How Many Are There?*, CHRISTIAN SCI. MONITOR, May 16, 2006, at USA1.

77. PEW HISPANIC CTR., MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 1 (2006), available at <http://pewhispanic.org/files/factsheets/19.pdf>; see also 2007 ECON. REP. OF THE PRESIDENT, *supra* note 6, at 198; Eric Lipton, *Report Finds U.S. Failing on Overstays of Visas*, N.Y. TIMES, Oct. 22, 2005, at A6 (describing how the Department of Homeland Security fails to follow up on leads that foreign visitors have overstayed their visas).

78. PASSEL, *supra* note 1, at i.

79. *Id.*

80. DOUGLAS S. MASSEY, IMMIGRATION POL'Y CTR., BEYOND THE BORDER BUILDUP: TOWARDS A NEW APPROACH TO MEXICO-U.S. MIGRATION 1 (2005), available at <http://www.immigrationpolicy.org/images/File/infocus/Beyond%20Border%20Buildup.pdf>. Increased border enforcement, without any other change in immigration policy, has paradoxically encouraged unauthorized migrants to stay longer in order to recoup the higher cost of illegal entry. *See id.*

81. COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 100 (2005) [hereinafter 2005 ECON. REP. OF THE PRESIDENT], available at www.gpoaccess.gov/eop/2005/2005_erp.pdf.

82. PASSEL, *supra* note 1, at 10–11.

83. *Id.* at 11 fig.10.

84. See Julia Preston, *Short on Labor, Farmers in U.S. Shift to Mexico*, N.Y. TIMES, Sept. 5, 2007, at A1.

Working conditions for unauthorized migrants within these jobs vary. Some unauthorized workers are employed “off-the-books,” which creates opportunity for exploitation and abuse.⁸⁵ Additionally, “off-the-books” employment depresses federal and state tax revenues.⁸⁶ Fake social security numbers and driver’s licenses enable unauthorized migrants to work “on-the-books” under improved conditions.⁸⁷ But at the same time, use of such documents has spawned an industry of document and identity-theft.⁸⁸

The flow of unauthorized migrants into the United States, and its attendant complications, is far from a new problem.⁸⁹ But the influx has increased in recent years.⁹⁰ While a third of unauthorized migrants have been living in the United States for over ten years,⁹¹ most have arrived since 1990.⁹² Unauthorized migrants from Mexico have largely contributed to this increase.⁹³ In 2005, fifty-six percent of unauthorized migrants hailed from our southern neighbor.⁹⁴

B. *The Current Visa System Hurts the U.S. Economy and National Security*

Current U.S. immigration policies mistakenly create an all-or-nothing dichotomy between economic and security decisions.⁹⁵

85. See Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL’Y 79, 100–03 (2004).

86. See I.R.C. §§ 3101(a), 3102(a) (2000) (detailing the calculation and deduction of employment taxes).

87. Baker, *supra* note 85, at 100–03. While using fraudulent identification may prevent physical exploitation, these unauthorized workers are still unable to be credited with the social security they earn.

88. *All Things Considered, Series of Immigration Raids Hits Identity-Theft Ring* (NPR radio broadcast Dec. 13, 2006).

89. See PASSEL, *supra* note 1, at 2 fig.1 (detailing unauthorized migrant arrivals since March 2005).

90. *See id.*

91. *See id.*

92. *Id.*

93. *Id.* at 4.

94. *Id.*

95. See, e.g., *Impact of Visa Processing Delays on the Arts, Education, and American Innovation: Hearing Before the H. Comm. on Gov. Reform*, 109th Cong. 98 (2006) (statement of Kevin Schofield, General Manager, Microsoft Research) (“While this vigilance is necessary to protect our national security, we at the same time must protect the competitiveness of our national economy. Maintaining national security and ensuring that those who have legitimate reasons to come to the United States can do so without unreasonable

Tight visa restrictions, lengthy screening processes, augmented border controls, and employer crackdowns are perceived as necessary during the “war on terror.” Forgotten is the strong correlation between a vibrant economy and a secure homeland. As a result, the current approach leaves American companies without workers and all Americans less safe.⁹⁶

In multiple ways, immigration, whether temporary or permanent, provides for economic growth. Economists estimate that at a minimum America’s foreign-born population adds \$12 billion to the economy by working, consuming, investing, and paying taxes.⁹⁷ Despite claims to the contrary, the costs associated with immigration do not outweigh these economic benefits.⁹⁸ Moreover,

delays are not mutually exclusive goals.”); Coalition for Immigration Sec., *Statement of the Coalition for Immigration Security*, in AM. IMMIGRATION LAWYERS ASSOC., MAKING THE CASE FOR COMPREHENSIVE IMMIGRATION REFORM 80, <http://www.aila.org/issues/issue.aspx?docid=18635> (“As the Congress considers immigration legislation, some have portrayed the debate as one between those who advocate secure borders and those who advocate liberalized employment opportunities. This is a false dichotomy.”); ASSOC. OF AM. UNIVS., STATEMENT AND RECOMMENDATIONS ON VISA PROBLEMS HARMING AMERICA’S SCIENTIFIC, ECONOMIC, AND SECURITY INTERESTS 1 (May 12, 2004), <http://www.aau.edu/homeland/jointvisastatement.pdf> (“It is not a question of balancing science and security, as some have suggested. These priorities are not mutually exclusive; to the contrary, they complement each other, and each is vital to the other. Indeed, in the near term, some international scientists and engineers are directly contributing towards helping to win the war on terrorism.”).

96. See 2005 ECON. REP. OF THE PRESIDENT, *supra* note 81, at 109–10 (“[E]xisting employment-based programs suffer from many problems, including outdated processes for labor certification and inflexible numerical caps. Immigration systems are also strained by the need for security measures, such as more extensive background checks on applicants. At the same time, immigration continues to occur outside official channels in the form of undocumented immigration.”); see also RICHARD FLORIDA, THE FLIGHT OF THE CREATIVE CLASS 122 (2005) (stating that visa delays cost the United States \$30 billion per year).

97. See 2005 ECON. REP. OF THE PRESIDENT, *supra* note 81, at 106–07 (“Immigrants contribute money to public coffers by paying sales and property taxes (the latter are implicit in apartment rents.”); Angela M. Kelley, *The Economic Impact of Immigration*, IMMIGRATION DAILY, Jan. 7, 2008, <http://www.ilw.com/articles/2008/0107-kelley.shtml>; John N. Paden & Peter W. Singer, *America Slams the Door (On Its Foot)*, 82 FOREIGN AFF. May-June 2003, at 8, 9; Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security With Billions*, N.Y. TIMES, Apr. 5, 2005, at A1.

98. See, e.g., FISCAL POL’Y INST., WORKING FOR A BETTER LIFE: A PROFILE OF IMMIGRANTS IN THE NEW YORK STATE ECONOMY, Nov. 2007, http://www.fiscalpolicy.org/publications2007/FPI_ImmReport_WorkingforaBetterLife.pdf; N.C. Aizeman, *Illegal Immigrants in Md. and Va. Out-Earn U.S. Peers, Study Says*, WASH. POST, Nov. 29, 2007, at A10; Mary Engel, *Latino’s Use of Health Services Studies*; L.A. TIMES, Nov. 27, 2007, at B1; Patrick McGeehan, *Immigrants Pull Weight in Economy, Study Finds*, N.Y. TIMES, Nov. 26, 2007, at B3; Bill Turque, *Illegal Immigration Cost Is Hard To Nail Down, Fairfax County Says*, WASH. POST, Nov. 27, 2007, at B4; see also IMMIGRATION POL’Y CTR., ASSESSING THE ECONOMIC IMPACT OF IMMIGRATION AT THE STATE AND LOCAL LEVEL 1–2 (2008), available at <http://www.ailf.org/ ipc/factchecks/StateLocal07.pdf> (providing a summary of state and local studies demonstrating the net contribution immigrants make to

immigration enhances the competitiveness of the United States in today's global economy by allowing multinational corporations to integrate their operations and recruit skills from a global labor force.⁹⁹ At both ends of the occupational spectrum, however, family-focused, security-centric immigration laws prevent U.S. businesses from hiring necessary workers.¹⁰⁰ For cashiers and computer scientists, for those that build homes and for those that build robots, U.S immigration policies are an impediment to, rather than a facilitator of, economic progress.

Several factors influence economic growth, including labor force expansion, technology, education, entrepreneurship, and research.¹⁰¹ Two closely watched factors are a country's productivity rate and its labor growth.¹⁰² Due to a baby-boomer generation on the verge of mass retirement,¹⁰³ a declining U.S. fertility rate,¹⁰⁴ and a country at near full employment, economists predict that satisfactory economic expansion will not come from increased productivity.¹⁰⁵ Thus, continued economic success must rely upon a growing labor force.¹⁰⁶ The immigration polices that are now in place, however, prevent that growth from occurring.

In addition to immigration's economic implications, living in a post-9/11 world means that security concerns are now also intertwined with immigration policy. But overly broad security measures disregard important economic considerations and result in

the economy).

99. Susan F. Martin, *Setting Priorities in Immigration Policy*, in CTR. FOR IMMIGRATION STUDIES, BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY 59, 59 (Richard D. Lamm & Alan Simpson eds., 2001), available at <http://www.cis.org/articles/2001/blueprints/blueprints.pdf>.

100. See ROB PARAL, IMMIGRATION POLY CTR., NO WAY IN: U.S. IMMIGRATION POLICY LEAVES FEW LEGAL OPTIONS FOR MEXICAN WORKERS 5 (2005), [http://immigration.server263.com/images/File/infocus/IPC%20No%20Way%20In\(1\).pdf](http://immigration.server263.com/images/File/infocus/IPC%20No%20Way%20In(1).pdf).

101. NAT'L FOUND. FOR AM. POLY, H-1B PROFESSIONALS AND WAGES: SETTING THE RECORD STRAIGHT 3–4, (2006) [hereinafter SETTING THE RECORD STRAIGHT], <http://www.nfap.com/researchactivities/articles/NFAPPolicyBriefH1BProfessionalsAndWages0306.pdf>.

102. IMMIGRATION POLY CTR., ECONOMIC GROWTH & IMMIGRATION: BRIDGING THE DEMOGRAPHIC DIVIDE 3–5 (2005) [hereinafter BRIDGING THE DIVIDE], available at <http://www.immigrationpolicy.org/index.php?content=SRFall05>.

103. *Id.*

104. *Id.* at 3, 5.

105. See *id.* at 4; see also Howard Fischer, *Business Leader: U.S. Needs Foreign Workers*, ARIZ. DAILY STAR, Oct. 11, 2007, available at <http://www.astarnet.com/business/205691> (stating that the low employment rate of 4.7% includes 3% of individuals who are “unemployable”).

106. BRIDGING THE DIVIDE, *supra* note 102, at 3.

unintended and negative consequences on actual security. Millions of low-skilled workers illegally come to the United States and live in near anonymity in order to fill available jobs—many of which are both vital to the economy and the country’s infrastructure. Millions of high-skilled workers cannot come to the United States; yet, as President Bush explained, “[s]cience and technology [are] essential to the defense of the Nation and the health of our economy.”¹⁰⁷ Increasingly, American companies have to rely on foreign businesses in key technological areas.¹⁰⁸ Moreover, the remittances that noncitizens send back to their native countries create strategic ties for the United States and provide an indirect form of international aid.¹⁰⁹ This benefits American security by reducing the lack of education and poverty that often breeds terrorism.¹¹⁰ Full of rhetoric, however, Congress’s current black and white approach to immigration fails to promote either the economy or security of the United States.

1. The Immigration System Fails To Provide Essential Low-Skilled Workers

a. The Economic Implications

Despite continuing technological advancements, some sectors of the economy will always require human bodies, rather than machines, to do the work. Technology can aid, but not replace the farmers, builders, janitors, mechanics, or innumerable other jobs essential to the American economy.¹¹¹ With that reality comes others. Americans are getting older. Now that the first baby-boomers have filed for Social Security, the “graying” of the American workforce is no longer conjecture.¹¹² As the population ages, experts predict a stark decline in U.S. fertility rate, which is ex-

107. President’s Remarks in a Meeting with Technology Industry Leaders, 37 WEEKLY COMP. PRES. DOC. 531, 532–33 (Mar. 28, 2001).

108. See, e.g., COMM. ON CRITICAL TECH. ACCESSIBILITY, NAT’L RES. COUNCIL, CRITICAL TECHNOLOGY ACCESSIBILITY 1–5 (2006), available at http://www.nap.edu/cata_log.php?record_id=11658.

109. Jason DeParle, *Migrant Money Flow: A \$300 Billion Current*, N.Y. TIMES, Nov. 18, 2007, available at 2007 WLNR 22824059; see FLORIDA, *supra* note 96, at 15.

110. See FLORIDA, *supra* note 96, at 14–15.

111. See 2005 ECON. REP. OF THE PRESIDENT, *supra* note 81, at 94.

112. Mitra Toossi, *Labor Force Projections to 2012: The Graying of the U.S. Workforce*, 127 MONTHLY LAB. REV. Feb. 2004, at 37, 48 (2004); see also Stephen Ohlemacher, *The First Baby Boomer Applies for Social Security*, SEATTLE TIMES, Oct. 16, 2007, at A1.

pected to fall below replacement level in the next fifteen years.¹¹³ In addition, Americans are becoming more educated.¹¹⁴ Today, American adults are more than twice as likely as foreign-born adults to have a high school education.¹¹⁵ Yet, over the next five years the U.S. economy will create forty-two million new jobs, almost half of which will open for workers with a high school education or less.¹¹⁶ Because American workers are now less likely to seek these jobs, another labor source is needed.¹¹⁷

Unfortunately, rather than aid American business, current immigration policies inhibit vital American industries from hiring the workers they need to compete. The employment-based immigrant visa system offers only one option for low-skilled workers. That sole preference category furnishes visas for a paltry five thousand workers.¹¹⁸ But the U.S. economy may need as many as five hundred thousand low-skilled workers.¹¹⁹

Different weaknesses hamper the temporary visa system available to agricultural and other seasonal workers.¹²⁰ While available for an unlimited number of temporary agricultural workers, the bureaucratic H-2A visa process requires confusing certifications and long waits.¹²¹ The H-2B visa, available to temporary workers in non-agricultural sectors, is arbitrarily capped at

113. BRIDGING THE DIVIDE, *supra* note 102, at 5.

114. 2006 ECON. REP. OF THE PRESIDENT, *supra* note 35, at 57 ("As U.S. workers have become more educated and increasingly work in jobs requiring higher education levels, many low-skilled jobs continue to be filled by immigrants.").

115. See BRIDGING THE DIVIDE, *supra* note 102, at 9–10.

116. PARAL, *supra* note 100, at 2.

117. *The Need for Comprehensive Immigration Reform: Serving Our National Economy: Hearing Before the Subcomm. on Immigration, Border Sec. and Citizenship of the S. Comm. on the Judiciary*, 108th Cong. (2005) (statement of Daniel T. Griswold, Director, Ctr. for Trade Pol'y Studies, Cato Inst.) [hereinafter Griswold Testimony], available at http://judiciary.senate.gov/testimony.cfm?id=1517&wit_id=4381; ROB PARAL, THE GROWTH AND REACH OF IMMIGRATION: NEW CENSUS BUREAU DATA underscore IMPORTANCE OF IMMIGRANTS IN THE U.S. LABOR FORCE (2006), <http://www.immigrationpolicy.org/index.php?content=pr0608> ("The primary reason that immigrants don't have a negative impact on the majority of native-born workers is that they aren't competing for the same jobs.").

118. See 8 U.S.C. § 1153(b)(3)(B) (2000). While the cap is set at ten thousand visas per year, five thousand of these are reserved for beneficiaries of the Nicaraguan Adjustment and Central American Relief Act of 1997. See Pub. L. No. 105-100, § 203, 111 Stat. 2160, 2199–2200 (1997); PARAL, *supra* note 100, at 4 n.7.

119. See Frank Sharry, *Immigration Demystified*, AM. PROSPECT, Oct. 23, 2005, available at <http://www.prospect.org/cs/articles?articleId=10481>.

120. See Preston, *supra* note 84, at A1.

121. Samuel Loewenberg, *Immigration Laws Dry up Farming Work Force*, POLITICO.COM, Oct. 24, 2007, <http://www.politico.com/news/stories/1007/6531.html>.

66,000 per year.¹²² Worse still, the “temporary” work available under an H-2B visa is defined so restrictively as to prohibit these visas for many employers.¹²³

This system ignores the needs of the American economy. “For [essential] workers, legal channels for migration are narrow while the economic incentives, underpinned by labor demand from U.S. employers and consumers, remain strong. Consequently, many seek employment through illegal channels.”¹²⁴ In direct conflict with the American approach to the flow of goods and investments, “policy restrictions on the international movement of labor are tight.”¹²⁵ The absence of a stable legal workforce stunts the efficiency and growth of the U.S. economy. Businesses employing unauthorized migrants are less likely to invest in training that could improve productivity and create a more highly skilled workforce.¹²⁶ Depressing the upward mobility of millions of workers precludes these hard workers from joining in the entrepreneurial spirit that has historically distinguished the U.S. economy.¹²⁷

Government revenues are also taking a hit. The absence of legal channels for the migration of low-skilled workers decreases sales, property, income, and payroll taxes due to either fewer authorized workers in the country or to more unauthorized workers employed off-the-books.¹²⁸ The massive and ineffective expenditures on border patrols and fences¹²⁹ also depletes money available for economically productive uses, such as loans to recently

122. See 8 U.S.C. § 1101(a)(15)(H)(ii); PARAL, *supra* note 100, at 4.

123. See 8 U.S.C. § 1101(a)(15)(H)(ii); PARAL, *supra* note 100, at 4. For example, an H-2B visa would not suffice for a builder looking for employees to start and finish a building that would take longer to construct than the visa remains available.

124. 2007 ECON. REP. OF THE PRESIDENT, *supra* note 6, at 192.

125. *Id.* at 190.

126. DANIEL T. GRISWOLD, CATO INST., WILLING WORKERS: FIXING THE PROBLEM OF ILLEGAL MEXICAN MIGRATION TO THE UNITED STATES 1 (2002), available at <http://www.freetrade.org/pubs/pas/tpa-019.pdf>.

127. See WALTER A. EWING & BENJAMIN JOHNSON, IMMIGRATION POL'Y CTR., DOLLARS WITHOUT SENSE: UNDERESTIMATING THE VALUE OF LESS-EDUCATED WORKERS 6–7 (2007), available at http://www.aifl.org/ipc/policybrief/policybrief_050807.pdf.

128. See 2005 ECON. REP. OF THE PRESIDENT, *supra* note 81, at 106.

129. See GORDON H. HANSON, COUNCIL ON FOREIGN REL., THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 24 (2007) (“President George W. Bush’s budget proposal for 2008 calls for spending \$13 billion to strengthen border security and immigration enforcement, including \$1 billion to construct fences and undertake other security measures on the border with Mexico. Since 2001, Congress has increased funding for border security by 145 percent and immigration enforcement by 118 percent.”).

arrived immigrants or the creation of a more effective immigrant tracking system.

Left unaddressed, today's shortcomings will also place the future needs of the U.S. economy in jeopardy. Alan Greenspan once noted that a tight labor market is the *greatest* threat to the health of the American economy.¹³⁰ A lack of farm workers to pick lettuce or builders to frame homes results in higher prices.¹³¹ As the price of food and homes escalates, the ripple created by a labor shortage quickly influences other prices. And inflation sets in. As Americans age and become better educated, immigrant labor is the best way to solve the labor shortage and ensure economic growth.¹³²

130. Dave Shellock, *Markets Unfazed After Bernanke's Debut*, FIN. TIMES, Feb. 15, 2006, available at 2006 WLNR 2690690.

131. See, e.g., Eric Graf, *Groups: Employer Sanctions Law Will Hurt Agriculture, Consumers*, CRONKITE NEWS SERV., Nov. 19, 2007; *Morning Edition, Calif. Tree Farmer Concerned About Immigration* (NPR radio broadcast Nov. 20, 2007). Some farms are either moving to Mexico or are no longer growing crops that require unattainable labor. See Nicole Gaouette, *U.S. Working To Let in More Immigrants: The Administration Is Quietly Relaxing Visa Regulations Because Farm Laborers Are in Critically Short Supply*, L.A. TIMES, Oct. 7, 2007, at 1; Preston, *supra* note 84, at A1. Immigration critics argue that although there are sufficient native-born workers to fill these low-skilled positions, the presence of immigrants depresses wages to a level unacceptable to native workers. See, e.g., ROBERT RECTOR, CHRISTINE KIM & SHANEA WATKINS, *THE FISCAL COST OF LOW-SKILL HOUSEHOLDS TO THE U.S. TAXPAYER 2* (2007), available at http://www.heritage.org/Research/Welfare/upload/sr_12.pdf (arguing that the cost of low-skilled immigrants outweighs the benefits immigrants add to the economy); George J. Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 Q. J. ECON. 1335, 1336 (2003) (arguing that immigration has harmed the employment opportunities of native workers). More encompassing studies, however, reveal that wage levels have "remained nearly constant" between low-skilled immigrants and competing native workers. See, e.g., BRIDGING THE DIVIDE, *supra* note 102, at 7 (citing DAVID CARD, CENTRE FOR RESEARCH AND ANALYSIS OF MIGRATION, *IS THE NEW IMMIGRATION REALLY SO BAD?* 23 (2004), available at <http://econpapers.repec.org/crmwpa/per/0402.htm>). Moreover, the fiscal burden of low-skilled immigrants quickly disappear once the analysis accounts for the many roles immigrants play in the American economy. See *id.* ("For instance, under the static model [used by immigration critics], the 125 million native-born workers in the United States in 1997 would have earned an average of \$13 per hour if not for the presence of immigrants. However, the 15 million immigrant workers who were actually in the country increased the labor force to 140 million and, under the static scenario, thereby lowered average wages by 3 percent to \$12.60 per hour. Yet the net benefit to the U.S. economy of this decline in wages would have amounted to about \$8 billion in *added* national income in 1997.").

132. See Griswold Testimony, *supra* note 117; *Special Reports, Open Up*, ECONOMIST, Jan. 3, 2008 ("Without migrants, the greying and increasingly choosy populations in much of the rich world would already be on the decline today. That matters for their fast-changing economies, which increasingly demand either highly skilled workers or people willing to do unpleasant and tiring jobs."). But see RECTOR, KIM & WATKINS, *supra* note 131, at 2.

Despite these well-understood economic principles, the policy changes in Washington continue to fail. Recently, the Department of Homeland Security (“DHS”) unsuccessfully sought to promulgate a rule that cracked down on illegal labor by imposing severe penalties on employers that fail to fire a worker if informed that the worker’s social security number and name do not match.¹³³ The rule would have required employers to resolve any mismatches within ninety days or face potential prosecution for knowingly hiring an illegal immigrant.¹³⁴ Although U.S. businesses should hire only legal labor, the current visa system fails to provide enough workers. At the behest of both U.S. business interests and immigrant rights advocates, a federal court temporarily enjoined the rule for several reasons, including DHS’s failure to calculate the effect the rule would have on small businesses.¹³⁵

b. The Security Implications

In the age of the “war on terror,” security is and will remain an essential element of any immigration policy. Even when confronting fences, deserts, and the Rio Grande, noncitizens are still attracted to the available employment opportunities in the United States and cross our borders accordingly.¹³⁶ The Border Patrol’s budget has quintupled over the past decade, but the entry of unauthorized migrants has stayed virtually the same.¹³⁷ Most unauthorized migrants enter the United States for jobs, not jihad.¹³⁸ The sheer number of the undocumented population, however, complicates separating the workers from the drug smugglers and terrorists. Without legal channels available for the millions of

133. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,621 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

134. See 8 U.S.C. § 1324a(a)(1)(A) (2000).

135. See AFL-CIO v. Chertoff, No. C07-04472 (N.D. Cal. Oct. 10, 2007) (order granting motion for preliminary injunction).

136. See Griswold Testimony, *supra* note 117.

137. Tamar Jacoby, *Immigration Nation*, FOREIGN AFF., Nov.-Dec. 2006, at 50, 59.

138. See RUBÉN G. RUMBAUT & WALTER A. EWING, THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 1–3 (2007), available at http://www.ailf.org/ipc/special_report/sr_022_107.pdf; ROB PARAL, IMMIGRATION POL’Y CTR., THE GROWTH AND REACH OF IMMIGRATION NEW CENSUS BUREAU DATA underscore IMPORTANCE OF IMMIGRANTS IN THE U.S. LABOR FORCE (2006), <http://www.immigrationpolicy.org/index.php?content=pr0608>; Cynthia Tucker, *Democrats Must Lead Way on Immigration*, ATLANTA J.-CONST., Nov. 11, 2007, at D6.

workers entering the United States to fill available jobs, the immigration system generates a shadow population of unauthorized migrants whose existence undermines national and local security.

The security implications of so many undocumented individuals has various permutations. Unauthorized workers have unnerving access to vital and vulnerable American infrastructure. The building of our bridges, picking of our crops, and cleaning of many of our workplaces are done by a population unknown to the police. Additionally, if current trends continue, many American farmers—unable to grow certain crops—will begin to import more food, leaving our food supply more susceptible to tampering.

Maintaining a large undocumented population also hinders the inability of foreign workers to assimilate into American society. To date, the United States has not had a large problem of home-grown terrorism like many European countries, largely because America is seen as a multicultural country accepting of newcomers.¹³⁹ But that opinion can change. Requiring needed workers to live on the fringe of society fails to promote national security. Likewise, it fails to promote local security; unauthorized migrants are far less likely to report crimes or work with police when they are here unlawfully.¹⁴⁰ That implication is especially salient as police try to fight the influx of drugs and fraudulent documents into border communities.¹⁴¹

2. The Immigration System Fails to Provide Necessary High-Skilled Workers

a. The Economic Implications

U.S. economic growth depends on maintaining a competitive advantage in science and technology. While the basic jobs that flow from our daily lives will always demand low-skilled workers, it is the highly skilled scientists, engineers, and physicists that have historically delivered economic success to the United States

139. See Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383, 421–22 (2007).

140. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1115 (2004).

141. See GRISWOLD, *supra* note 117, at 3.

and that drive innovation today.¹⁴² During the latter half of the twentieth century—an era less technologically dependent than today—American dominance in science and technology stemmed from American public schools motivating enough students to commit to math and science careers¹⁴³ as well as American research institutions and universities drawing the brightest workers from around the globe.¹⁴⁴ The Theory of Relativity, the telephone, and Google were all conceived in the United States by foreign-born inventors.¹⁴⁵ Indeed, between 1901 and 2005, one-third of Nobel Prize winners in the United States were foreign-born.¹⁴⁶ And each innovation has reaped enormous economic benefits for this country. U.S. dominance remains, however, only as a residue of past generations' investment in vital industries, because the United States has fallen critically low in native scientists and engineers.¹⁴⁷ Today, more than one-fifth of America's scientists and engineers hail from abroad.¹⁴⁸ Businesses and scientists alike are "deeply concerned that the scientific and technological building blocks critical to our economic leadership are eroding at a time when many other nations are gathering strength."¹⁴⁹ An aging American population on the verge of mass retirement magnifies

142. FLORIDA, *supra* note 96, at 16 ("Talent is the 'biggest magnet' for globalized innovation . . .").

143. See Fred M. Hechinger, *About Education*, N.Y. TIMES, Sept. 22, 1981, at C6. In addition to the barriers immigration law creates for American scientific advancement, the public school curriculum no longer meets the needs of today's digital age. See, e.g., Barnaby J. Feder, *Education Leads Silicon Valley Wish List*, N.Y. TIMES, Jan. 22, 2001, at C4 ("We need to keep our economy growing smarter by investing in the skills of our children. In spite of the wealth of new opportunities, the number of graduates in computer science and engineering continues to be inadequate.").

144. See FLORIDA, *supra* note 96, at 11.

145. *Id.* at 15; ROB PARAL & BENJAMIN JOHNSON, IMMIGRATION POL'Y CTR., MAINTAINING A COMPETITIVE EDGE: THE ROLE OF THE FOREIGN BORN AND U.S. IMMIGRATION POLICIES IN SCIENCE AND ENGINEERING 2 (2004).

146. 2007 ECON. REP. OF THE PRESIDENT, *supra* note 6, at 201.

147. See Robert L. Paarlberg, *Knowledge as Power: Science, Military Dominance, and U.S. Security*, 29 INT'L SEC. 122, 143–44 (2004); William J. Broad, *U.S. Is Losing Its Dominance in the Sciences*, N.Y. TIMES, May 3, 2004, at A1; see also Steve Lohr, *Hello, India? I Need Help With My Math*, N.Y. TIMES, Oct. 31, 2007, at C1 (describing how online services in India help math students in the United States).

148. 2006 ECON. REP. OF THE PRESIDENT, *supra* note 35, at 57.

149. COMM. ON PROSPERING IN THE GLOBAL ECON. OF THE 21ST CENTURY: AN AGENDA FOR AM. SCI. AND TECH., NAT'L ACAD. OF SCIENCES, RISING ABOVE THE GATHERING STORM: ENERGIZING AND EMPLOYING AMERICA FOR A BRIGHTER ECONOMIC FUTURE 3 (2007) [hereinafter RISING ABOVE THE STORM].

this concern. So it is of increasing import that the United States welcome highly skilled foreign professionals to fill the void.¹⁵⁰

For several reasons, however, the needed welcome mat has been removed from America's doorstep. First, the employment-based ("EB") visa system available for immigrants is slow and unrealistic; the current average wait is two to five years.¹⁵¹ University and government grants have fixed deadlines unable to be met while integral researchers await their visas abroad. The multilayered labor certification process requires navigating several government agencies and proving that applicants will only work in their field of expertise, despite an ever-increasing interdisciplinary world.

Second, the EB-immigration system provides too few visas. Although four of the five preference-categories are geared to high-skilled workers, the total number of EB-visas is capped at 140,000.¹⁵² Moreover, due to an inefficient processing system, no more than 100,000 of those visas per year have been utilized since the inception of that quota in 1990.¹⁵³ Worse still, only 35,000 of the visas issued are actually for high-skilled professionals; the rest go to the professionals' family members.¹⁵⁴ And as many of today's top programmers and engineers come from India and China, the seven percent per country cap locks out many talented professionals.¹⁵⁵

Due to those constraints, significant pressure has been placed on the nonimmigrant system, especially the H-1B visa.¹⁵⁶ But this system also fails to promote economic growth. The current attestation requirements are costly and ignorant of the fast pace at which science and technology fields progress. Even after a U.S. employer has complied with the certification process, the current

150. Some groups argue that foreign born professionals displace qualified American workers and also depress wages. Several studies have refuted this notion directly. See, e.g., *SETTING THE RECORD STRAIGHT*, *supra* note 101, at 1. Moreover, even a small dip in wages is outweighed by the total gain high-skilled immigrants and temporary workers add to the U.S. economy. *Id.* at 2.

151. *Id.* at 3; 2005 ECON. REP. OF THE PRESIDENT, *supra* note 81, at 112; PARAL & JOHNSON, *supra* note 145, at 9.

152. See 8 U.S.C. § 1151(d) (2000).

153. Susan F. Martin, B. Lindsay Lowell & Phillip Martin, *U.S. Immigration Policy: Admission of High Skilled Workers*, 16 GEO. IMMIGR. L.J. 619, 623 (2002).

154. *Id.*

155. See 8 U.S.C. § 1152(a)(2); PARAL & JOHNSON, *supra* note 145, at 6.

156. Martin et al., *supra* note 153, at 627; PARAL & JOHNSON, *supra* note 145, at 7.

numerical limits on H-1B visas impede many employers from obtaining necessary help. While the American Competitiveness and Work Force Improvement Act significantly raised the cap for the years 1998-2001, the law mandated that the cap fall back to its current level of 65,000 in 2003.¹⁵⁷ There are some exceptions for individuals gaining advanced degrees from U.S. universities or working for U.S. universities or government research outfits.¹⁵⁸ But even with those exceptions, the quota has been filled almost as soon as the visas become available. For example, in 2005, the H-1B application cap was reached the first day visas were available.¹⁵⁹ In 2006, it was reached two months before visas were actually available.¹⁶⁰ And in 2007, the cap was reached five months ahead of time.¹⁶¹ Moreover, the full economic potential of H-1B nonimmigrants remains stunted because no clear path to permanent residency exists.¹⁶² Temporary workers are needed for short-term needs, but even when businesses would rather keep the worker and not lose the investment in training and institutional knowledge, the current system disallows that option and fails to promote wise economic policy.

U.S. immigration policy simply fails to keep pace with today's fast-paced, information-based economy. Any scientific or technological advantages currently enjoyed by the United States are in no way guaranteed in the future.¹⁶³ Countries that marshal their resources and talent toward nanotechnology, computer science, and fighting disease will be the ones to prosper in the twenty-first century.¹⁶⁴ Unlike prior decades, talented scientists seeking cut-

157. See American Competitiveness and Workforce Improvement Act, Pub. L. No. 105-277, § 411, 112 Stat. 2681 (1998). It should be noted that unlike EB-immigrant visas, spouses of H-1B visa holders are not deducted from the H-1B quota. See 8 U.S.C. § 1101(a)(15)(H)(iii) (2000). There is also a special H-1B1 visa created by the Chile and Singapore Free Trade Agreement. See *id.* § 1101(a)(15)(H)(i)(b).

158. 2006 ECON. REP. OF THE PRESIDENT, *supra* note 35, at 59.

159. *Id.*

160. *Id.*

161. 2007 ECON. REP. OF THE PRESIDENT, *supra* note 6, at 197.

162. Salil Pradhan, *Dude, Where's My Green Card?*, OKLAHOMAN, Sept. 13, 2006, at 11A.

163. See FLORIDA, *supra* note 96, at 110-11.

164. See 2007 ECON. REP. OF THE PRESIDENT, *supra* note 6, at 201; see also 147 CONG. REC. S6301-02 (daily ed. June 14, 2001) (statement of Sen. Warner) ("It is estimated that the technology driven economy of the 21st century will add approximately 2 million science and engineering jobs to the American economy between [2001] and 2008. For example, in one sector of America today, in Northern Virginia, there are over 20,000 high-tech jobs going unfilled month to month. The Senate Judiciary Committee has issued a report

ting-edge research can now find opportunities in many countries besides the United States. The European Union, China, and India, are now investing impressive amounts of capital in technology research as well as opening their doors to the best talent in the world.¹⁶⁵ Confronted with unavailable visas or prohibitive waiting-periods, many high-skilled professionals are choosing to go elsewhere.¹⁶⁶ The reality is that along with the rapid change in technology comes the “abruptness with which a lead in science and technology can be lost—and the difficulty of recovering a lead once lost, if indeed it can be regained at all.”¹⁶⁷

b. The Security Implications

After 9/11, Congress implemented strict immigration and border policies in order to prevent subsequent attacks and reduce the fear and anger that flowed from the attack on American soil.¹⁶⁸ It remains clear that terrorists will continue to plot against the United States and that as a result immigration policy will continue to play a crucial role in this country’s national security plan. With the passage of time and increased openness to discussing the 2001 attacks, how immigration and security policies intersect demands a hard look. Military generals, scientists, and computer analysts concur that a United States without a global advantage in science and technology is a grave threat to national security—more serious than “any potential conventional war that we might imagine.”¹⁶⁹ But today’s narrow, short-sighted immigra-

that clearly demonstrates America’s crisis in meeting the demand in our economy for persons trained in the high-tech field. The report quotes Cato Institute economist Daniel Griswold stating that, ‘Americans are not earning specialized degrees fast enough to fill the 1.3 million high-tech jobs the Labor Department estimates will be created during the next decade.’ In addition, the Judiciary Committee report refers to a Hudson Institute estimate that states that the unaddressed shortage of skilled workers throughout the U.S. economy could result in a 5 percent drop in the growth of the GDP. That translates into approximately \$200 billion in lost output, nearly \$1,000 for every American.”).

165. Alison Abbott, *Europe Revamps Visa Rules To Attract World’s Best Minds*, NATURE, Oct. 27, 2005; Laura Dixon, *Brussels Plans Financial Incentives To Woo Skilled Migrants*, FIN. TIMES , Oct. 24, 2007; Kathryn Wallace, *America’s Brain Drain Crisis*, READER’S DIG., Dec. 2005.

166. Dana Wilkie, *Foreign Scientists Steer Away from States*, SCIENTIST, Mar. 24, 2003.

167. RISING ABOVE THE STORM, *supra* note 149, at 3.

168. Kerwin & Stock, *supra* note 139, at 389–90.

169. See NAT’L RES. COUNCIL, SCIENCE AND SECURITY IN A POST 9/11 WORLD: A REPORT BASED ON REGIONAL DISCUSSIONS BETWEEN THE SCIENCE AND SECURITY COMMUNITIES 2 (2007); U.S. COMM. ON NAT’L SEC./21ST CENTURY, ROAD MAP FOR NATIONAL SECURITY: IMPERATIVE FOR CHANGE ix (2001).

tion system keeps high-skilled foreign workers and students out of the country and prevents the United States from developing the science and technology that will enhance American security.

The over-due hard look at the immigration system reveals several weaknesses. Prior to 9/11 the immigration system was audaciously lax; however, now the approach is chokingly cautious.¹⁷⁰ The science and technology advantage the United States maintains over other countries keeps this country secure. So, while security will remain an important aspect of today's immigration policies, preventing high-skilled foreign workers from promoting that advantage will have negative and unintended consequences.¹⁷¹

Many of the enforcement policies and screening tools used to evaluate students and other high-skilled professionals entering the country are conceptually sound. The trouble stems from insufficient resources and inadequate guidance.¹⁷² Students can wait over a year to get a visa¹⁷³ or foreign scientists can be invited by the U.S. State Department, but still fail to hurdle the Homeland Security Department's procedures.¹⁷⁴ In 2002, the Technology Alert List, a list of technologies deemed sensitive to national security, was expanded to include nearly all skills associated with chemistry, biology, and engineering.¹⁷⁵ The State Department lacks clear guidance on when to request additional background on the applicant and because U.S. Consular Officers are vulnerable to criminal liability for permitting the entrance of an individual that commits a terrorist attack, nearly all science and engineer-

170. See Paarlberg, *supra* note 147, at 147.

171. See, e.g., Sylvia H. Kless, *We Threaten National Security by Discouraging the Best and Brightest Students from Abroad*, CHRON. OF HIGHER ED., Oct. 8, 2004.

172. PARAL & JOHNSON, *supra* note 145, at 2-3.

173. Paarlberg, *supra* note 147, at 149 (citing Diane Jean Schemo, *Decline Seen in Science Applications Overseas*, N.Y. TIMES, Feb. 26, 2004, at A18).

174. PARAL & JOHNSON, *supra* note 145, at 9; see Paden & Singer, *supra* note 97, at 8-9.

175. PARAL & JOHNSON, *supra* note 145, at 10 ("In August 2002 the TAL was vastly expanded to include areas of study and research with little apparent relevance to security, such as architecture, housing, community development, environmental planning, landscape architecture, and urban design. The expanded list also includes the fields of chemical engineering, biomedical engineering and biotechnology, which are so broadly defined as to include almost every technology or skill associated with chemistry, biochemistry, immunology, microbiology, pharmacology, or genetic engineering, to name just a few.").

ing professionals or students are subjected to lengthy background checks on multiple government systems.¹⁷⁶

Lacking clear goals and long-term vision, the immigration policies aimed at students and professionals working in science and technology are backfiring.¹⁷⁷ Technology is the “linchpin” of U.S. military success.¹⁷⁸ Using science and technology, inventors have unleashed radar, GPS, stealth aircraft, and nuclear submarines—all of which keep this country secure.¹⁷⁹ Future developments will enable better homeland protection, such as with the use of “smart” cameras able to continuously observe “soft [] targets” around the country.¹⁸⁰ Such technological advancements are the “big advantage the West has over [terrorists] who would throw us back to the Stone Age.”¹⁸¹

Science and technology play an enormous role not just in the reactive protection of U.S. borders, but also in the proactive protection of American interests. As the price of oil climbs, innovation in energy production and the reduction of greenhouse gases will become security imperatives.¹⁸² The less the United States relies on foreign countries for its energy, the stronger our strategic footing remains.¹⁸³ Development of, for example, hydrogen fuel

176. Paarlberg, *supra* note 147, at 148 (“Following the September 11 attacks, U.S. consular officers have become subject to criminal penalties if they grant a visa to someone who subsequently commits a terrorist act in the United States, so as a consequence larger numbers of visa requests are either denied or delayed. Foreign scientists were among the first to be squeezed out by such new policies.”).

177. FLORIDA, *supra* note 96, at 115–19; Bernard Wysocki, *Foreign Scientists Are Stranded by War on Terror*, WALL ST. J., Jan. 20, 2003, at A1. Specifically, the Patriot Act and the Border Security and Visa Reform Act of 2002, have significantly harmed the ability of U.S. schools to attract foreign talent. FLORIDA, *supra* note 96, at 116. An electronic surveillance system called the Student Exchange and Visitor Information Service (“SEVIS”), and a review process called “Visa Mantis” are opaque procedures designed to screen foreign visitors to the United States. The delays and lack of guidelines for officials that process visas, however, are the result of a short-cited view of security. *See id.* at 116–17. The delays and maltreatment engender resentment within the talent pool the United States needs to remain secure. *Id.* at 119.

178. *See* Kerwin & Stock, *supra* note 139, at 418.

179. Paarlberg, *supra* note 147, at 122.

180. *Id.* at 126.

181. *Id.* at 151 (citing Ralph Vartabedian, *U.S. Funnel Billions to Science To Defend Against Terrorism*, L.A. TIMES, Mar. 7, 2004, at 1).

182. *See* Ken Spencer Brown, *A Lack of Tech-Friendly Policies Means U.S. Could Lose Its Lead*, INVESTOR'S BUS. DAILY, Oct. 11, 2007.

183. *Id.* (“Much of [a recent meeting of U.S. tech leaders] centered around energy innovation, which participants called key to national security, economic growth and environmental health.”).

cells to replace fossil fuels will demand the most talented chemists, physicists, and engineers in the world.¹⁸⁴

High-skilled workers also bring language skills and cultural knowledge that are imperative for military intelligence and homeland protection.¹⁸⁵ The current self-defeating approach ignores the goodwill and connections the United States makes by permitting the best and brightest to live in this country.

What Washington seems not to recognize is that these guests are important not just for the nearly \$12 billion they pump into the U.S. economy each year. They also provide bridges of knowledge and understanding that greatly improve the strategic position of the United States in the world. Consider this: Kofi Annan, the UN's secretary-general; Prince Saud Faisal, Saudi Arabia's minister of foreign affairs; Gloria Macapagal Arroyo, president of the Philippines; and Vicente Fox, president of Mexico, are just a few of the many current foreign leaders who studied at U.S. universities. As students at American schools, they developed strong ties to the country, laying the foundation for the productive relationships they have relied on later in their careers. American security has greatly profited as a result.¹⁸⁶

Science and technology are big advantages the United States has over the rest of the world.¹⁸⁷ Without a thoughtful and more open approach that welcomes foreign workers, talented professionals will live elsewhere and American security (and its economy) will suffer.

II. A MARKET BASED VISA SYSTEM SUPPORTED BY LAYERED ENFORCEMENT MECHANISMS WILL PROMOTE THE U.S. ECONOMY AND NATIONAL SECURITY

The modern visa system impedes economic growth and homeland security. Without a sufficient supply of low-skilled workers, American businesses must choose between rotting crops or hiring unauthorized migrants. Without a sufficient supply of high-skilled workers, American businesses are unable to remain on the

184. *Id.* The push for energy innovation has been labeled bigger than the push for the Internet, the first atomic bomb, or the Apollo space missions. *Id.*

185. Kerwin & Stock, *supra* note 139, at 400–01.

186. Paden & Singer, *supra* note 97, at 9.

187. See Paarlberg, *supra* note 147, at 151 (citing Vartabedian, *supra* note 181, at 1).

cutting edge of scientific research. Because immigration is the primary vehicle for providing those workers, state and federal legislators have predictably put forth a flurry of immigration proposals over the last few years.¹⁸⁸ Yet, many of these ideas have created a false choice between economic and security considerations—between workers and war, between money and murder. The truth of the matter is that the economic and security interests of the United States are inextricably linked. Any solution to immigration must recognize that truth.

Since 2005, Congress has offered a handful of proposals, but no new law has emerged. The House continues to endorse enforcement-only tactics.¹⁸⁹ In contrast, the Senate has twice offered comprehensive bills that confronted the need for high- and low-skilled workers and the normalization of the existing unauthorized population—all combined with smart enforcement measures.¹⁹⁰ Neither chamber, however, has produced results. This failure suggests that the members of Congress misunderstand the actual economic and security consequences of U.S. immigration policies.

Based more on frustration than sound public policy, federal administrative agencies and many state governments have un-

188. See, e.g., Editorial, *Enter McCain-Kennedy*, WASH. POST, May 14, 2005, at A20 (“Border state politicians are clamoring for change, because smuggling and trafficking have contributed to lawlessness and a real sense of crisis along the border. Politicians from states that never had major immigration issues in the past, including Maryland and Virginia, have lately struggled with everything from the question of driver’s licenses for illegals to the need for seasonal workers on the Chesapeake Bay: They want change, too. Most of all, though, pressure is coming from security agencies and law enforcement. The illegal immigrants’ underworld is a source of illegal documentation and criminality, and the de facto open borders are an invitation to terrorists.”); see also *supra* notes 12–13 and accompanying text (discussing immigration-related state legislation).

189. See Secure Borders FIRST Act of 2007, H.R. 2954, 110th Cong. (2007); Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). Supporters of this myopic approach fail to mention that removing all unauthorized migrants from the country would cost at least \$200 billion. See RAJEEV GOYLE & DAVID A. JAEGAR, CTR. FOR AM. PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 1 (2005), available at <http://www.americanprogress.org/issues/2005/07/b913099.html>.

190. See Secure Border, Economic Opportunity and Immigration Reform Act of 2007, S.1639, 110th Cong. (2007); Comprehensive Immigration Reform Act of 2006, S.2611, 109th Cong. (2006). Portions of these bills dealing with high and low-skilled workers as well as the children of unauthorized migrants have been advanced as stand alone provisions, but all have failed. See Posting of Kevin R. Johnson to Immigration Prof Blog, <http://lawprofessors.typepad.com/immigration/2007/10/senate-to-vote-.html> (Oct. 31, 2007) (discussing two bills that were part of the Senate’s comprehensive proposal now advancing as standalone bills).

successfully attempted to fill the void created by Congress's inaction.¹⁹¹ But the most discouraging aspect of this inertia is that no one—not Democrats, not Republicans, not Libertarians, not local politicians, not average citizens—disagrees that the immigration system demands bold, comprehensive change.¹⁹² President Bush has stated that “enforcement cannot work unless it’s part of a comprehensive immigration reform.”¹⁹³ Homeland Security Secretary Michael Chertoff has pleaded with Congress “to come back to the table and talk about a way we might resolve this problem comprehensively and in an enduring fashion, so that we can leave our children a legacy of a well-regulated border and a sound economy.”¹⁹⁴ Immigrant rights advocates have affirmed that “Congressional leaders face a choice. We can beef up failed enforcement strategies for the umpteenth time, or we can do the hard work of passing comprehensive reforms that stand a chance of making a difference.”¹⁹⁵ Senator Edward Kennedy (D-MA) believes that immigration reform “will strengthen our national security by protecting our borders more effectively” and that it is about “our economic growth.”¹⁹⁶ Additionally, more than three-quarters of the American public have stated that they favor a plan allowing undocumented immigrants who have paid a fine and any back taxes they owe, have been in the United States for at least five years, can speak English, and have no criminal record, to stay and work in the United States.¹⁹⁷ Yet, oddly what remains are timid ideas that starkly ignore the economic and security realties facing this country in the twenty-first century.

Without an overhaul of the immigration system, Congress's inaction will continue to undermine the security and economy of the

191. See, e.g., *supra* notes 133–35 and accompanying text.

192. See Griswold Testimony, *supra* note 117.

193. President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1574 (Oct. 31, 2005).

194. Press Release, Sec'y of Homeland Sec., Remarks By Homeland Security Secretary Michael Chertoff on the State of Immigration (Nov. 6, 2007), available at http://www.dhs.gov/xnews/releases/pr_1194447755019.shtml.

195. Janet Murguia, Op-Ed, *The Debate on Immigration Has Begun in Earnest*, HISPANIC LINK, Oct. 30, 2005, <http://www.hispaniclink.org/newservice/columns/2005/4142e.htm>.

196. Press Release, Sen. Edward Kennedy, Kennedy's Bipartisan Plan for Comprehensive Immigration Reform Wins Passage In Senate Judiciary Committee (Mar. 27, 2006), available at http://Kennedy-Senate-gov/NEWSroom/Press_release.cfm?id=40b7a881-6796-4bb0-9916-5acacf34d86.

197. See NAT'L IMMIGRATION FORUM, POLLING SUMMARY: PUBLIC SUPPORT FOR COMPREHENSIVE IMMIGRATION REFORM 1–2 (2006), available at <http://immigrationforum.org/documents/PressRoom/PublicOpinion/PollingSummary706.pdf>.

United States. If the debate moves beyond rhetoric and confronts the question of what is in the best interest of the United States, the foundation of an effective immigration policy becomes clear. Congress must create expansive, market-based legal channels for foreign workers. Part of these new channels must be dedicated to legalizing the hardworking unauthorized migrants already in the country. At the same time, Congress must institute smart enforcement mechanisms that simultaneously promote security and economic growth. These steps are important because they build on one another and recognize the connection between wealth and safety. They provide a solid structure for comprehensive immigration reform that should replace the confused rhetoric of today's enforcement-only morass.

A. *Market-Based Legal Channels*

Abandoning the static visa system in favor of generous, market-based legal entry channels for noncitizens who want to work in the United States would significantly enhance the American economy and national security. Despite the negative impact illegal immigration has on American welfare, the current approach actually favors illegal immigration because it "responds to market forces in ways that legal immigration does not. Illegal migrants tend to arrive in larger numbers when the U.S. economy is booming . . . and move to regions where job growth is strong."¹⁹⁸ In contrast, legal immigration "is subject to arbitrary selection criteria and bureaucratic delays, which tend to disassociate legal inflows from U.S. labor-market conditions."¹⁹⁹ Fences, fines, and raids will not, and have not, prevented willing low-skilled workers essential to the economy from finding employment with willing employers. Equally devastating to American welfare, quotas and queues have prevented American employers from hiring essential high-skilled workers. Congress should abandon this dysfunctional system for one that assists, rather than impedes, this country's economic and security needs.²⁰⁰

Instead of sealing off the border, opening up more legal channels into the United States will paradoxically enable this country

198. HANSON, *supra* note 129, at 5.

199. *Id.*

200. See Griswold Testimony, *supra* note 117.

to regain control over its borders. This policy will take place on several fronts. First, it would be senseless to begin a new immigration policy built on an illegal foundation; thus, Congress will need to address the status of the twelve million unauthorized migrants already here.²⁰¹ This enormous shadow population should be given a means to fully participate in American society by paying a fine and any back taxes they owe as well as demonstrating the ability to speak English and the absence of a criminal record. Critics call this amnesty, but the status quo is amnesty by default.²⁰²

Second, Congress must combine legalization of the existent unauthorized population with enhanced legal channels for the entry of future temporary and permanent workers. Moreover, the reformed visa system should be sufficiently large and market-based, or in other words, should mimic the current beneficial aspects of *illegal* immigration.²⁰³ Employers should have the flexibility to quickly hire the workers they need and the workers should be free to leave a job if a better opportunity arises.²⁰⁴ A floating cap on the number of available visas would eliminate the need for unauthorized workers. If the cap is met one year, it should automatically go up the next. If the cap is not met, it could be reduced. In either event, businesses will have the workers needed to keep the economy not just alive, but strong. Sufficient protections for American workers should remain in place to ensure that domestic workers are not indiscriminately displaced by noncitizens.

Enhanced legal channels based on labor-market conditions would create many benefits. Legalization would provide vital sectors of the U.S. economy with the workers they demand.²⁰⁵ It "would raise [immigrants'] wages, benefits and working conditions by giving them more bargaining power in the marketplace . . . They would be more likely to qualify for health insurance . . . They could put their savings in the bank."²⁰⁶ American employers would be more apt to invest in their workers, who in turn would

201. *Id.*

202. See Tom Ridge, Op-Ed, *Immigration and Security*, WASH. TIMES, Sept. 10, 2006, at B03.

203. HANSON, *supra* note 129, at 33; Amador, *supra* note 68, at 40.

204. HANSON, *supra* note 129, at 29.

205. Griswold Testimony, *supra* note 117.

206. *Id.*

be more apt to invest in their American lives by learning English and integrating into mainstream society.²⁰⁷ Because the system would be market-based, this would increase predictability, enabling businesses to invest and know that they will have legal workers when they need them. "The result is a more efficient economy that can achieve a higher rate of sustainable growth without encountering bottlenecks or stoking inflation."²⁰⁸ If those benefits fail to convert the disbelievers, here are the numbers: "Hispanic buying power totaled \$798 billion in 2006 and is expected to increase to \$1.2 trillion by 2011. Moreover, the U.S. Census Bureau estimates that in 2002, 1.6 million Hispanic-owned firms provided jobs to 1.5 million employees, had receipts of \$222 billion, and generated payroll of \$36.7 billion."²⁰⁹

More specifically, Congress should consider an increased focus on *permanent* immigration. Unlike temporary workers, permanent immigrants "are far more likely to acquire new job skills, achieve upward mobility, . . . buy homes, create businesses, [and] revitalize urban areas."²¹⁰ A stable immigrant work force would increase the production of goods and services, raise gross domestic product, enable private and public saving, reduce the federal deficit, and free more money for investment.²¹¹ Permanent immigration will allow immigrants to fully realize their "economic potential as workers, taxpayers, entrepreneurs, and consumers."²¹²

207. WALTER A. EWING, IMMIGRATION POL'Y CTR., MORE THAN A TEMPORARY FIX: THE ROLE OF PERMANENT IMMIGRATION IN COMPREHENSIVE REFORM 4–5 (2006), available at <http://www.immigrationpolicy.org/index.php?content=f2061201>. See also Anna Gorman, *Immigrants' Children Grow Fluent in English, Study Says; Latinos See the Language as the Key to Success, Pew Research Shows*, L.A. TIMES, Nov. 30, 2007, at B1.

208. Griswold Testimony, *supra* note 117.

209. EWING & JOHNSON, *supra* note 127, at 3 (citation omitted). Although Hispanic immigrants are not the only immigrant group adding to the U.S. economy, they maintain a majority of the foreign-born work force. See BRIDGING THE DIVIDE, *supra* note 102, at App. B. Factoring in all other immigrant groups into the economic calculation would of course provide even stronger signals of economic power. *See id.*

210. *Impact of Immigration Policies on Small Business Workforce: Hearing Before the H. Comm. on Small Business*, 110th Cong. (2007) (testimony of Benjamin Johnson, Director, Am. Immigration Law Found.), available at 2007 WLNR 8961605; see Daniel Weintraub, *Linking Immigration, Job Growth*, SACRAMENTO BEE, Dec. 4, 2005, at E1 ("[T]here is a direct correlation between immigrant populations and job growth in inner cities.").

211. U.S. CONG. BUDGET OFFICE, ADDITIONAL INFORMATION ON THE ESTIMATED BUDGETARY AND ECONOMIC EFFECTS OF S. 2611, at 6 (2006), available at <http://www.cbo.gov/ftpdocs/72xx/doc7208/s2611.pdf>.

212. EWING, *supra* note 207, at 6.

Along with the economy, American security would benefit. It is only natural that families with roots in a community have a more vested interest in creating safe neighborhoods with good schools and efficient public services. Legalization would improve local security by removing the attraction of crime or gang activity.²¹³ Legalization would also enhance security by removing unauthorized immigrants from the border-security equation. Today's enforcement-only strategy "lumps together terrorists and jobseekers from abroad as groups to be kept out, decreas[ing] the chances that a foreign terrorist will be caught."²¹⁴ Money now spent on border patrols can be more productively spent by focusing resources on those that want to commit crimes or terrorist attacks.²¹⁵ Moreover, "the U.S. stands to rapidly lose not only the competitive economic edge generations of Americans have worked so hard to achieve, but also its global preeminence in science and technology—areas vital to our prosperity and national security."²¹⁶ Security "has as much to do with admitting certain immigrants as it does with denying entry to others."²¹⁷ Now more than ever, Congress must prevent the United States from losing access to highly trained scientists from across the globe or risk leaving this country rudderless in a society searching for energy alternatives and better health care in the twenty-first century.

B. *Layered Enforcement Mechanisms*

Only after we identify the unauthorized migrants that are here and reduce the need for illegal immigration can enforcement measures efficiently focus on criminals and terrorists. Finding a balance between security and openness calls for difficult decisions—"not only must these programs deter and detect those who would commit acts of terrorism or crime, or violate our im-

213. Andres Oppenheimer, *Who's Crazy, Me or Bill O'Reilly?*, ORLANDO SENTINEL, Nov. 19, 2007, at A21.

214. WALTER EWING, BORDER INSECURITY: U.S. BORDER-ENFORCEMENT POLICIES AND NATIONAL SECURITY, <http://www.ilw.com/articles/2006,0828-ewing.shtm#bio> (last visited Feb. 26, 2008).

215. GRISWOLD, *supra* note 126, at 18 ("A system that allows Mexican workers to enter the United States legally would free up thousands of government personnel and save an estimated \$3 billion a year—resources that would then be available to fight terrorism.").

216. AM. IMMIGRATION LAWYERS ASSOC., ELIMINATING THE EMPLOYMENT-BASED VISA BACKLOG: VITAL TO AMERICA'S ECONOMIC COMPETITIVENESS 1 (2006), available at <http://www.geda.org/conference/2006/presentations/vbpp.pdf>.

217. Kerwin & Stock, *supra* note 139, at 418.

migration laws, they must also welcome those who contribute to our economic livelihood and maintain our diplomatic position in the world.”²¹⁸ But such a balance is possible with layered enforcement mechanisms that utilize intelligence gathering, technology, and focused law enforcement activities.

Upon entry into the United States, border agents should issue a federally approved national identification (“ID”) card to all foreign workers. Just as the federal government has an obligation to control who comes in and out of the country, it also has an obligation to have a secure and accurate mechanism for identifying those visitors. As the 9/11 Commission stated, “sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists.”²¹⁹ In our security conscious society, maneuvering within society while undocumented is increasingly problematic, making “travel documents [] as important as weapons.”²²⁰ Accordingly, for a national ID card to be useful it must be issued by trained immigration officials only after a robust screening process. Also, the ID itself, should be made using tamper resistant materials and contain the individual’s name, address, social security number (“SSN”), photo, and fingerprint or other biometric.²²¹

In addition to the benefits foreign workers will have from day to day use, this ID ought to be mandatory at two important points within the immigration system. At the time of hire, the ID should be used in conjunction with a secure national computer verification system that will enable employers to quickly and accurately verify an applicant’s work-eligibility. The current DHS E-Verify system attempts to provide this option, but fails because it is not mandatory for all U.S. employers and is based on the inaccurate

218. *Terrorism, Technology, and Homeland Security: Hearing Before the Subcomm. on Terrorism, Tech., and Homeland Sec. of the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of C. Stewart Verdery, President, Monument Pol’y Group); see also SECURE BORDERS AND OPEN DOORS ADVISORY COMM., SECURE BORDERS AND OPEN DOORS: PRESERVING OUR WELCOME TO THE WORLD IN AN AGE OF TERRORISM 7–10 (2008), available at http://www.migrationpolicy.org/pubs/MPI_SBODAC_011608.pdf (providing recommendations on how to maintain both a welcoming and a secure country).

219. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMM’N REPORT 390 (2004).

220. *Id.* at 384.

221. That information should also be available electronically via magnetic strip on the card.

SSN database.²²² Instead of using inaccurate data or an easily forged SSN, person-centric information, such as a photo and biometric, ought to form the foundation for identification during the work authorization process.²²³ This system would eliminate employers' ability to deny knowledge of initially hiring unauthorized workers or of continuing to employ workers who become unauthorized.²²⁴

In addition to efficient and secure work-authorization, the ID should be presented to border agents upon exiting the country. Amazingly, the United States does not know in real time who leaves our borders.²²⁵ In fact, nearly forty percent of the current unauthorized population are visa overstayers.²²⁶ Knowing who enters as well as who exits the United States will enable law enforcement to focus attention on noncitizens that abuse the system. Policy makers could also implement tighter visa procedures for countries that are frequently the source of overstayers.

An immigration system that securely identifies all foreign workers and punishes those workers and employers that refuse to comply would greatly enhance American welfare. Businesses could gain approval for essential workers more quickly and have the ability to prevent fraud involving credit card purchases, check-cashing, and securities transfers. Foreign workers present in the country legally with a valid, secure ID are even more likely to fully integrate themselves into the economy by investing, putting money in the bank, and buying homes. With a national for-

222. See U.S. Dept. of Homeland Sec., U.S. Citizenship and Immigration Servs., E-Verify, <http://www.uscis.gov/E-Verify> (last visited Feb. 26, 2008).

223. See *Visa Overstays: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Int'l Affairs*, 109th Cong. (2006) (statement of Margaret D. Stock, Associate Professor of Law, U.S. Mil. Acad.).

224. See 8 U.S.C. § 1324a(a)(1), (2) (2000).

225. Since 2004, DHS has been developing a system called the United States Visitor and Immigrant Status Indicator Technology ("US-VISIT"), which is an immigration and border management system designed to collect biometric information from foreign visitors upon entering the country. See U.S. Dept. of Homeland Sec., Fact Sheet: U.S. Visit, http://www.dhs.gov/xnews/releases/pr_1160495895724.shtm (last visited Feb. 26, 2008). The system, however, has been plagued by inaccuracies and setbacks. See U.S. Gov. ACCOUNTABILITY OFF., SOME PROGRESS MADE, BUT MANY CHALLENGES REMAIN ON U.S. VISITOR AND IMMIGRANT STATUS INDICATOR TECHNOLOGY PROGRAM 11 (2005), available at <http://www.gao.gov/new.items/d05202.pdf>. Moreover, US-VISIT is only used upon entering the country and not when foreign visitors leave. See *id.* at 9.

226. *Visa Overstays: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Int'l Affairs*, 109th Cong. (2006) (statement of Mark Krikorian, Exec. Dir., Ctr. for Immigration Studies).

eign-worker identification system, officials could more easily focus on real threats—those undocumented workers who have no benign reason to remain in the shadows any longer. Properly implemented, this ID would also reduce the market for fraudulent documents and identity theft. Moreover, a secure, complete database of foreign workers would upgrade the ability of federal and state law enforcement officials to investigate criminals or terrorists that may have entered under false pretenses. A national ID for foreign workers creates privacy concerns, but “[t]he understandable fear of the slippery slope is a reason for setting clear limits and drawing reasonable distinctions, not an excuse for inaction.”²²⁷ In contrast to the harassment and abuse ID-less foreign workers face today, a national ID for these individuals would reduce instances of racial and ethnic profiling.²²⁸ The benefits of these focused enforcement measures would inhere to all law abiding foreign workers as well as American citizens and businesses. And at the same time terrorists and criminals would be identified among an ever shrinking haystack.

III. CONCLUSION

In the last few years, there has been an impressive legislative focus on immigration. Impressive for its rhetoric rather than concrete results. This inaction indicates “that members of Congress and the Executive Branch either do not recognize any basic principles governing immigration policy beyond clichés and sentimentality, or they cower at the thought of tinkering with a politically sensitive issue, despite its profound role in shaping America’s future.”²²⁹ What remains is a broken immigration system divorced from the needs of twenty-first century America.

Today’s needs stem from significant shifts in the demographic, economic, and security realities facing this country. The visa system, however, is plagued by quotas and backlogs, and creates an unnecessary clash between promoting the economy and securing the borders. By failing to account for the essential high- and low-

227. Alan M. Dershowitz, *Identification, Please*, BOSTON GLOBE, Aug. 11, 2002, at 14.

228. *Id.* Even if foreign workers are asked to present their ID more than domestic workers, the ID would enable these workers to present the ID and then swiftly continue about their business. *See id.*

229. RICHARD D. LAMM & ALAN SIMPSON, *Foreword*, to CTR. FOR IMMIGRATION STUDIES, BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY, *supra* note 99, at 3.

skilled workers that U.S. businesses need, the visa system causes illegal immigration, hinders effective law enforcement, and prevents the U.S. from developing technology integral to national security.

For foreign workers, the welcome mat at the coveted entrance to this country has been conspicuously removed. Absent significant changes in immigration policy, the next moniker to adorn America's doorway will be a "Help Wanted" sign. Rather than remain passive, Congress should create robust and flexible legal channels to supply the American economy with essential workers. These legal channels should also permit the unauthorized population already here to earn their way out of the shadows. Moreover, making legality the norm should be combined with smart and accurate enforcement measures. A national identification system and mandatory electronic employment verification system would elevate security and could be properly balanced with privacy concerns. These reforms will enable the nation's immigration system once again to serve the needs of American businesses and advance national security.

Jonathan G. Goodrich