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The Wrong Solution: An Examination of Present Bush's Proposed Temporary Worker Program.

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COMMENTS

THE WRONG SOLUTION: AN EXAMINATION OF PRESIDENT BUSH'S PROPOSED TEMPORARY WORKER PROGRAM

TORY A. CRONIN*

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*"Give me your tired, your poor, your huddled masses yearning to breathe free."*¹

The words of poet Emma Lazarus no longer seem to guide the United States' policies regarding immigration. Perhaps a more fitting credo today would be "Give me your eager to work at menial jobs, for low pay,

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1. Emma Lazarus, *THE NEW COLOSSUS*, Nov. 2, 1883.

and then wish to return to the bleak life they chose to leave behind in the first place.” Include limitations on admittance of drug traffickers and potential terrorists, and this would not be far from the mainstream opinion.

On January 7, 2004, President George W. Bush put forth a proposal to provide temporary work permits to undocumented aliens.² President Bush’s reasoning included the statement, “Our Nation needs an immigration system that serves the American economy and reflects the American Dream.”³ However, the President’s plan falls short of both of its goals.

I. INTRODUCTION

The United States, a land once known as a safe haven for people from all over the world to seek freedom and the opportunity to work, now must intensively screen everyone entering the country due to increases in drug trafficking and the now obvious threat of terrorism.⁴ A problematic labor situation in the United States has led the current President to propose this new temporary worker program, which, in theory, will provide labor for positions that Americans are not currently filling.⁵ Many in the President’s own party are quite skeptical of this new policy and there are several reasons for them to harbor these feelings.⁶

This comment will focus on the historical evolution of the current labor and immigration problems in the United States and examine President Bush’s proposed policy to solve them. Part II will begin with an examination of illegal immigrant labor in the United States and the historical progression of the immigrant-labor problem. Further, part III of this comment will examine President Bush’s proposed policy in depth and fully explain the requirements and provisions for participation. Part IV will draw comparisons to similar programs in the United States as well as other parts of the world. Part V will serve as an analysis of the proposed program and will offer both praise and criticism. This comment will put forth the parameters of a better solution in part VI. Finally, part VII will give a conclusion summing up the examination of the program. This comment will advocate that President Bush’s proposed temporary worker

2. Remarks on Immigration Reform, 40 WEEKLY COMP. PRES. DOC. 25 (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

3. *Id.* at 26.

4. Chadwick M. Graham, *Defeating an Invisible Enemy: The Western Superpowers’ Efforts to Combat Terrorism by Fighting Illegal Immigration*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 281, 290 (2004) (pointing out that illegal aliens simply seeking work can be indistinguishable from terrorists seeking to do harm to the United States).

5. Remarks on Immigration Reform, *supra* note 2, at 25.

6. See Clint Williams, *Voters Focus on Porous Border: Wealthiest Wary of Immigration*, ATLANTA J. CONST., July 9, 2004, available at 2004 WL 85896065.

program will not help undocumented immigrant workers, but will in fact harm them in the long term.

II. BORDER HISTORY

As of 2004, the number of undocumented immigrants living in this country sits at approximately 9.3 million.⁷ The Midwest region of the United States currently reflects the reason this number is so high and shows the glaring need for a long-term solution.⁸ In today's economy, illegal immigrants fill crucial low-wage labor demands in an increasing number of industries.⁹ The current labor situation is the result of a hypocritical attitude by much of the nation that depends on the fruits of this low-wage labor, yet harbors negative feelings toward the illegal immigrants performing these jobs.

The immigration system currently in place is one in which "illegal immigrants are, as a matter of course, abused, cheated, and preyed upon."¹⁰ Poverty and unemployment around the world bring millions of people to this country in an effort to obtain employment, satisfying a heavy employer-demand for low-cost labor.¹¹ Recruitment of Mexican nationals on a large scale can be traced as far back as the 1870s.¹²

At the beginning of the twentieth century, railroad companies and the agricultural industries began recruiting substantial numbers of Mexican nationals to the Southwest and were successful in lobbying for a porous U.S.-Mexico border.¹³ The situation changed considerably in 1920 when

7. Michele L. Waslin, *The President's Plan Doesn't Address the Root Causes and Problems of Illegal Immigration*, HISPANIC MAGAZINE, July-Aug., 2004, available at http://www.hispaniconline.com/magazine/2004/jul_aug/Forum/.

8. See generally *More Mexicans, Please – Immigration*, ECONOMIST, June 12, 2004, available at 2004 WL 62018303.

9. Joshua Hoyt, *Why Business Should Speak Out on Immigrant Workers*, CRAIN'S CHICAGO BUS., May 10, 2004, available at 2004 WL 63665870. Cf. *More Mexicans Please – Immigration*, *surpa* note 8 (stating that the Midwest needs Mexican employees).

10. Ruben Navarrette Jr., *Give Mr. Bush Credit: This Guest-Worker Plan is Courageous and Compassionate*, HISPANIC MAGAZINE, July-Aug., 2004, available at http://www.hispaniconline.com/magazine/2004/jul_aug/Forum/; see generally Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95 (2004) (detailing acts of violence against undocumented immigrants).

11. Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 571 (2004).

12. Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. REV. L. & SOC. CHANGE 547, 554 (2003-2004).

13. *Id.* at 554-55.

the Justice Department outlawed unauthorized crossings,¹⁴ and again in 1924 with the creation of the Border Patrol.¹⁵ From the passing of the first immigration laws,¹⁶ to the modern day problems and methods of regulation, the history of alien-entry into the United States has a long and complicated past.

A. *The Border Patrol*

The Border Patrol began in 1924 as a small group of mounted agents patrolling unforgiving regions along the United States borders.¹⁷ It has since grown into an organization consisting of over 9,500 men and women, utilizing sophisticated technology, aircraft, vehicles, and other equipment.¹⁸ Today, most of the Border Patrol's work is focused on the United States Mexican border and the illegal immigration of Mexican citizens, but the precursor to the Border Patrol was actually organized to combat immigration from China.¹⁹ Up until 1917, Mexican and Canadian immigrants were allowed to come and go as they pleased without paying the standard "head tax" assessable on all other immigrants.²⁰ However, the Immigration Act of 1917 created an eight-dollar tax per Mexican and Canadian immigrant, as well as subjected these immigrants to a literacy test mandatory for obtaining a visa.²¹ Due to these new requirements, and the Immigration Quota Acts of 1921²² and 1924,²³ many of those who were denied visas, or informed that they would have to wait, began entering the country illegally.²⁴ Congress, recognizing this problem, passed an Act on March 28, 1924, establishing the United States Border Patrol.²⁵

This new Border Patrol was saddled with the responsibility of combating illegal entry by aliens, the burgeoning alien smuggling trade, and the smuggling of contraband.²⁶ In the early days of the Border Patrol's existence, the organization was highly unorganized and in fact did not even

14. MATT S. MEIER & FELICIANO RIBERA, *MEXICAN AMERICANS; AMERICAN MEXICANS: FROM CONQUISTADORS TO CHICANOS* 126 (1993).

15. *U.S. Border Patrol Overview* (Feb. 21, 2003), at http://www.cbp.gov/xp/cgov/enforcement/border_patrol/overview.xml (last visited Mar. 27, 2005).

16. Alien and Sedition Acts of 1798, 1 Stat. 570 (1798).

17. *U.S. Border Patrol Overview*, *supra* note 15.

18. *Id.*

19. *Early History of the Border Patrol*, at <http://uscis.gov/graphics/publicaffairs/factsheets/995BPHistoryFSheet.pdf> (last visited Mar. 27, 2005).

20. *Id.*

21. *Id.*

22. Immigration Quota Act of May 19, 1921, ch. 8, 42 Stat. 5-7.

23. Immigration Quota Act of May 26, 1924, ch. 190, 43 Stat. 153.

24. *Early History of the Border Patrol*, *supra* note 19.

25. *Id.*

26. *Id.*

have uniforms.²⁷ Left with little more than a badge, most illegal immigrants simply ignored the Border Patrol's authority.²⁸ In 1924, the Border Patrol began wearing uniforms.²⁹ Since then, it has consistently increased in size, stature, and complexity.³⁰ Currently, "the Border Patrol is the largest uniformed federal law enforcement organization"³¹ employing over 9,500 well trained and well-equipped officers that patrol over 6,000 miles of international land borders with Mexico and Canada and over 2,000 miles of coastal waters surrounding the Florida Peninsula and Puerto Rico.³²

B. *Immigration and Naturalization History*

In 1875, the Supreme Court determined that the regulation of immigration should be a federal responsibility³³ after several states, following the Civil War, passed immigration laws.³⁴ The Supreme Court reasoned that if individual states were allowed to regulate immigration on their own, their individual policies could potentially bring redress on the country as a whole.³⁵ For this reason, the Court held that Congress alone should have the right to regulate immigration.³⁶

Answering these calls, Congress quickly began passing laws regulating immigration³⁷—specifically, the Chinese Exclusion Act of 1882³⁸ and the Alien Contract Labor Laws of 1885³⁹ and 1887.⁴⁰ The collective effect of these laws was to prohibit laborers from specific countries from gaining access to the United States labor market.⁴¹ Also included in these laws

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *U.S. Border Patrol Overview*, *supra* note 15.

33. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

34. Marian L. Smith, *Immigration and Naturalization Service*, in *A HISTORICAL GUIDE TO THE U.S. GOVERNMENT* 305 (George T. Kurian et al. eds., 1998).

35. *Chy Lung*, 92 U.S. at 279.

36. *Id.* at 275; *see also* *Chae Chan Ping v. United States*, 130 U.S. 581, 600-03 (1889) (establishing that the judicial branch will not interfere with decisions by Congress once authority has been granted); *Galvan v. Press*, 347 U.S. 522, 530 (1954) (reaffirming that "[t]he power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security").

37. Smith, *supra* note 34, at 305.

38. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

39. Alien Contract Labor Laws, ch. 164, 23 Stat. 332 (1885) (making it illegal to "in any way assist or encourage the importation or migration of any alien or aliens. . .").

40. Act of Feb. 23, 1887, ch. 220, 24 Stat. 414.

41. Smith, *supra* note 34, at 305.

was the exclusion of “idiots, lunatics, convicts, and persons likely to become a public charge.”⁴² With the quantity and complexity of the new laws, it quickly became apparent that a federal enforcement agency would be necessary.

Dating back to the 1880’s, the responsibility of enforcing immigration law originally fell on state boards or commissions who were directed by the United States Treasury Department.⁴³ Immigration enforcement was made substantially more complex as Congress continued to expand the number of excludable classes.⁴⁴ In an effort to handle this new complexity, Congress passed the Immigration Act of 1891,⁴⁵ and, in doing so, established the Office of the Superintendent of Immigration.⁴⁶

With the passing of the 1891 Act,⁴⁷ the federal government took responsibility for “inspecting, admitting, rejecting, and processing all immigrants seeking admission to the United States.”⁴⁸ Taking on this new function, the Immigration Service used the 1890’s as an initial attempt to establish and implement a national immigration policy.⁴⁹ In 1909, Congress gave further credibility to the Immigration Service by establishing an annual appropriation to fund the agency’s activities.⁵⁰

After establishing control over immigration, Congress actively began passing new laws and altering the agencies involved.⁵¹ Some of the changes enacted by Congress during this period included changing the Office of Immigration to the more powerful Bureau of Immigration, as well as renaming the agency chief “Commissioner-General of Immigration.”⁵² Further, the Bureau of Immigration was transferred from the Treasury Department to the newly formed Department of Commerce and Labor.⁵³ This served as a further showing that immigration laws passed during this period were done so in an effort to protect American laborers and their wages.⁵⁴

Congress then focused its attention on naturalization.⁵⁵ The administration of naturalization is a duty expressly granted to Congress by the

42. *Id.*

43. *Id.*

44. *Id.*

45. Immigration Act of 1891, ch. 551, § 26 Stat. 1084.

46. Smith, *supra* note 34, at 305.

47. Immigration Act of 1891 § 1-13.

48. Smith, *supra* note 34, at 305.

49. *Id.*

50. *Id.*

51. *Id.* at 306.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

Constitution.⁵⁶ Noting that the existing naturalization courts lacked any signs of uniformity,⁵⁷ Congress passed the Basic Naturalization Act of 1906.⁵⁸ According to George T. Kurian, in his book, *A HISTORICAL GUIDE TO THE UNITED STATES GOVERNMENT*, “The 1906 law also proscribed standard naturalization forms, encouraged state and local courts to relinquish their naturalization jurisdiction to federal courts, and expanded the Bureau of Immigration into the Bureau of Immigration and Naturalization.”⁵⁹

With the goal of standardization, the new Bureau of Immigration and Naturalization collected copies of all naturalization records issued by each naturalization court, and verified that each applicant was lawfully permitted to reside the United States.⁶⁰ This effort toward standardization and the crackdown on fraud directly led to the framework of rules currently in place today.

Following the end of World War I, a new flood of immigrants sought entry to the United States, leading Congress to enact the “national origins quota system.”⁶¹ This quota system was established with the passing of the Immigration Acts of 1921⁶² and 1924,⁶³ and “limited immigration by assigning each nationality a quota based on its representation in past United States census figures.”⁶⁴ Those seeking entry to the United States were required to obtain a visa from the limited number being distributed through United States embassies.⁶⁵ However, the natural reaction to extremely restricted immigration laws was a noticeable increase in illegal immigration.⁶⁶ This increase in illegal immigration logically meant a greater demand for the Border Patrol and its border enforcement efforts.⁶⁷ This led to the merging of the Border Patrol with Immigration Services by the enactment of Executive Order 6166 of June 10, 1933.⁶⁸

56. U.S. CONST. art. I, § 8, cl. 4.

57. Smith, *supra* note 34, at 306.

58. Act of June 29, 1906, ch. 3592, § 1-4, 34 Stat. 596 (establishing an Immigration and Naturalization Bureau, and providing a uniform rule for the naturalization of aliens throughout the United States), *amended by* Act of May 9, 1918, ch. 69, 40 Stat. 542.

59. Smith, *supra* note 34, at 306.

60. *Id.*

61. *Id.*

62. Immigration Quota Act of May 19, 1921, ch. 8, 42 Stat. 5, *amended by* Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952).

63. Immigration Act of 1924, ch. 190, 43 Stat. 153 (distinguishing quota immigrants from non-quota immigrants).

64. Smith, *supra* note 34, at 306.

65. *Id.* at 306-07.

66. *See id.* at 307.

67. *Id.*

68. Exec. Order No. 6166 (1933), *reprinted in* 5 U.S.C. § 901 (1994).

The new agency was named the Immigration and Naturalization Service (“INS”), and still holds that title today. However, following the tragedies of September 11, 2001, the agency was placed under the umbrella of the newly formed Department of Homeland Security.⁶⁹

During World War II, the INS workforce doubled from 4,000 to 8,000 employees.⁷⁰ The increase in INS personnel was likely spurred by the misguided belief of an agricultural labor shortage during World War II and the implementation of programs to bring in foreign labor to replace Americans who refused to work for low wages.⁷¹ Immigration was also seen as a method of stimulating the wartime economy by meeting the perceived manual labor shortage in the manufacturing sector.⁷²

Following World War II, immigration remained somewhat low “because the 1920s national origins system remained in place after Congress re-codified and combined all previous immigration and naturalization law into the Immigration and Nationality Act of 1952.”⁷³ The American agricultural sector began to import seasonal labor from Mexico during the war, which culminated into a formal agreement between Mexico and the United States⁷⁴—the guest worker Bracero Program.⁷⁵

Citizens of the United States became increasingly alarmed over the presence of illegal aliens.⁷⁶ This caused the INS to enhance border controls and begin targeted deportation programs.⁷⁷ The most well known of which was “Operation Wetback,”⁷⁸ which led to the deportation of thousands of undocumented Mexican laborers, as well as Mexican-American citizens who were unable to verify their citizenship.⁷⁹

69. See Homeland Security Act of 2002, tit. 4, §402, Pub. L. No. 107-296, 116 Stat. 2135, 2178.

70. Smith, *supra* note 34, at 307.

71. Cindy Hahamovitch, *The Politics of Labor Scarcity: Expediency and the Birth of the Agricultural “Guestworkers” Program* (Dec. 1999), at <http://www.cis.org/articles/1999/back1299.htm> (last visited Mar. 27, 2005).

72. Graham, *supra* note 4, at 291.

73. Smith, *supra* note 34, at 307.

74. *Id.*

75. See *The Bracero Program*, at <http://www.farmworkers.org/bracerop.html> (last visited Mar. 27, 2005) (explaining the details of the agreement between the United States and Mexico regarding seasonal, immigrant, agricultural workers known as *Braceros*).

76. Smith, *supra* note 34, at 308.

77. *Id.*

78. Fred L. Koestler, *Handbook of Texas Online: Operation Wetback*, at <http://www.tsha.utexas.edu/handbook/online/articles/view/OO/pqo1.html> (last visited Mar. 27, 2005) (detailing the most famous deportation program initiated by the Immigration Service).

79. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L. J. 111, 138-39 (1998).

Congress changed the national origins system in 1965 by replacing it with a preference system intended to reunite immigrant families and to bring skilled immigrant laborers to the United States.⁸⁰ This change in national policy was a response to obvious changes in the countries supplying the United States with immigrants.⁸¹ Europe was no longer the dominant region sending people to the United States as most applications for immigration visas were now coming from Asia, South America, and Central America.⁸² The quantity of immigration visas issued each year was still limited by the preference system.⁸³

The next major change to immigration policies came with the passage of the Immigration Reform and Control Act of 1986.⁸⁴ The Act clearly stated that the hiring or continued employment of any undocumented alien was illegal and that employers who violated the Act could suffer civil and criminal penalties.⁸⁵ However, the new enforcement guidelines under the 1986 Act were hardly used.⁸⁶ Also, the 1986 Act allowed certain aliens, in the United States illegally, to legalize their status through procedures administered by the INS.⁸⁷

III. EXPLANATION OF THE PROGRAM

In a speech given in the East Room of the White house on January 7, 2004, President Bush outlined his plan for a new Temporary Worker Program.⁸⁸ His proposed policy was a call to Congress to write legislation that would fundamentally change how immigrants will obtain temporary work in this country.⁸⁹ Essentially, the President's proposed policy seeks to alleviate pressure on American employers who wish to fill low-demand jobs with foreign laborers.⁹⁰ For one reason or another, Americans, including Mexican-Americans, are unwilling to be employed in certain jobs, even though these jobs are readily available.⁹¹

The President's proposed program will grant legal status, albeit as temporary workers, to "the millions of undocumented men and women now

80. Smith, *supra* note 34, at 308.

81. *Id.*

82. *Id.*

83. *Id.*

84. Immigration Reform and Control Act Of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

85. *Id.* at §101.

86. Stewart Verdery, *Keynote Address: Changing the Face of Immigration: A Year in Transition*, 19 ST. JOHN'S J. LEGAL COMMENT. 59, 69-70 (2004).

87. Smith, *supra* note 34, at 308.

88. *See generally* Remarks on Immigration Reform, *supra* note 2, at 25.

89. *Id.*

90. *Id.*

91. *Id.*

employed in the United States and to those in foreign countries who seek to participate in the program and have been offered employment here.”⁹² The President ambitiously calls for a new system that will be clear and efficient in an effort to match employers with needed workers, quickly and simply.⁹³

For a foreign worker not currently living in the United States to participate in the President’s proposed temporary worker program, the worker must already have a job, or a job offer.⁹⁴ Immigrant workers participating in this program will be granted legal status for a period of three years.⁹⁵ However, President Bush states, without further explanation, that the permits “will be renewable – but [they] will have an end.”⁹⁶ To continue in the program, foreign workers will be required to remain employed, follow the program rules, and refrain from breaking any laws.⁹⁷ If any of these stipulations are not met, the worker will have his eligibility for the program revoked and he will be forced to return to his country of origin.⁹⁸

This new program, if initiated, will place key burdens on employers. To begin with, employers seeking to hire foreign workers to fill positions “must first make every reasonable effort to find an American worker for the job. . . .”⁹⁹ The President does not elaborate as to what constitutes “reasonable effort,” therefore leaving the door open for serious debate in both the legislature, and potentially by the judiciary in the event that employer actions are challenged. The President also makes the ambitious, albeit vague, claim that the government will “develop a quick and simple system for employers to search for American workers.”¹⁰⁰ Employers will be forbidden from hiring undocumented aliens or participants in the program whose legal status as temporary workers has expired.¹⁰¹ Further, employers will be required to report all hired temporary workers to the government, as well as any program participants that leave their company.¹⁰² According to the President, this will aid the government in

92. *Id.* at 27.

93. *Id.*; see also Michael D. Patrick, *Business Immigration Becomes More Difficult*, 19 ST. JOHN’S J. LEGAL COMMENT. 9, 9-10 (2004) (suggesting that current immigration procedures are much more time consuming and difficult than they were in the past and showing a need for simplification).

94. Remarks on Immigration Reform, *supra* note 2, at 27.

95. *Id.*

96. *Id.*

97. *Id.* at 27.

98. *Id.* at 25.

99. *Id.* at 27.

100. *Id.*

101. *Id.*

102. *Id.*

tracking the people in the program.¹⁰³ The new program will supposedly include tough penalties for any employer who is found to be in violation of any of the program's requirements.¹⁰⁴ However, the President does not elaborate on the types or severity of the potential penalties that offending employers will face.

The President's plan attempts to solve the problem of undocumented workers who are already in this country by encouraging them to come forward and participate in the program;¹⁰⁵ workers currently in the country will have to submit a one-time fee for registration in the program.¹⁰⁶ Further, under the President's plan, foreign workers currently in other countries who seek to come to the United States through this program will not be required to pay a fee if they lawfully comply with United States immigration laws.¹⁰⁷ Each person participating in the program will be issued a card designating him or her as a temporary worker.¹⁰⁸ This card will enable workers to travel freely between their home country and the United States, thus relieving them of the anxiety of being denied re-entry.¹⁰⁹

Nevertheless, this program will expect foreign workers admitted to return permanently to their countries of origin upon the expiration of their permits.¹¹⁰ In an effort to facilitate this return, the proposed program includes financial incentives.¹¹¹ The President makes the lofty claim that he will make agreements with foreign governments to allow these temporary workers to receive credit for the payroll they have deducted for Social Security during the time spent in the United States upon their entrance into their home county's retirement system.¹¹²

In addition, the President's plan calls for allowing "temporary workers to contribute a portion of their wages into tax-preferred savings accounts," money they can collect when they return to their native countries.¹¹³ However, this hardly seems like an incentive considering that

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*; see also Michelle Mittelstadt, *Mexican ID Cards Face Value Questioned with Varying Policies on Whether to Accept Consulates' Matricula Cards: State and Local Jurisdictions Look to Washington for Guidance*, DALLAS MORNING NEWS, Mar. 14, 2004, at 1H (reporting that the cards issued under President Bush's plan would make the matricula consular obsolete).

109. Remarks on Immigration Reform, *supra* note 2, at 27.

110. *Id.*

111. *Id.*

112. *See id.*

113. *Id.*

temporary workers will likely occupy low-wage jobs (like current undocumented immigrants). Moreover, the interest accruing from those short-term jobs will surely be negligible at best. For most immigrant workers in this country, sending home wages so their families can eat is of the utmost priority, not establishing a nest egg.

The President acknowledges that some of the temporary workers registered under this program will seek permanent residence and American citizenship.¹¹⁴ However, successful participation in the program will not be considered an advantage for obtaining citizenship.¹¹⁵ The President opposes an amnesty program that would enable undocumented workers to receive preferential treatment in achieving citizenship.¹¹⁶ His argument that “granting amnesty encourages the violation of our laws and perpetuates illegal immigration,”¹¹⁷ is not without merit. Still, it seems that by not integrating the possibility of permanent citizenship into the program, he has ignored an incredible incentive for the undocumented workers presently residing in the United States to come forward and participate in the program. This is likely a concession to conservative lawmakers opposed to any expansion of immigration. However, the President does claim that he will attempt to increase the number of green cards available to immigrants in an effort to increase the possibility of citizenship.¹¹⁸

IV. SIMILAR PROGRAMS

The notion of a temporary worker program is not a novel idea. There were similar programs instituted in Europe following World War II. Moreover, the United States currently administers several small temporary worker programs.¹¹⁹ There are important lessons that can be learned from these other temporary worker programs; policy makers in this country would be foolish to ignore them.

A. *Current United States Temporary Worker Programs*

There are four main guest worker programs currently in effect in the United States. Each of them serves to provide foreign labor for particu-

114. *Id.*

115. *Id.*

116. *See id.* at 25.

117. *Id.*

118. *Id.* at 27.

119. U.S. Citizenship and Immigration Services, *Employment Categories and Required Documentation*, at <http://uscis.gov/graphics/services/tempbenefits/ecrd.htm> (last visited Mar. 27, 2005).

lar industries and to allow employers an adequate labor market to meet company goals.

The H-1B employment category is probably the most well known of the programs currently implemented by the United States government.¹²⁰ The H-1B category applies to aliens entering the country temporarily for the purpose of performing services in a specialty occupation.¹²¹ Highly educated and specially trained foreign laborers are the focus of this program, as evidenced by requirements that foreign workers have at least a bachelor's degree in the specialty field before a visa is granted.¹²² With the extraordinary rise of the information technology field, highly trained foreign talent has become a much sought after commodity under this program. In fact, this year it took only one day for eager employers to snatch all 65,000 H1-B visas allowed for foreign workers.¹²³

The H-2 visa program is the most similar of the current programs to President Bush's proposed temporary worker program.¹²⁴ For United States employers to hire foreign workers under the H-2 program, they must show that the job will be temporary or seasonal, and that they are unable to fill the positions with qualified workers from the United States.¹²⁵ The key to this program is that the work itself must be deemed temporary, not just the time the laborer is allowed to be in the United States.¹²⁶

Another program in place allowing foreign workers to enter and remain in the United States for a temporary period is the L-1 program.¹²⁷ L-1 visas are granted to all aliens working for an organization that has a parent, subsidiary, affiliate, or branch in the United States.¹²⁸ L-1 workers enter the United States labeled as intra-company transferees.¹²⁹ To garner this label, the worker must be entering temporarily to perform either managerial or executive services, or services that require specialized knowledge.¹³⁰ The work must be done for a parent, branch, subsidi-

120. Yan Chen, *An Examination on Regulating the Employment of Foreign Skilled Workers in the United States*, 6 U. PA. J. LAB. & EMP. L. 179, 179 (2003).

121. *Id.* at 180-81.

122. *Id.* at 181.

123. Victor Godinez, *Battle Lines are Drawn Over Worker Visas H-1Bs Gone in a Day: Reigniting Debate Over Tech Job Opportunities*, DALLAS MORNING NEWS, Oct. 6, 2004, available at 2004 WL 94632737.

124. See generally U.S. Citizenship and Immigration Services, *supra* note 119 (describing the different employment categories).

125. *Id.*

126. See *id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

ary, or affiliate of the same employer that employed the professional abroad.¹³¹ Further, the employee must have been employed abroad by the organization “on a full-time basis for at least one continuous year out of the last three-year period to qualify.”¹³²

The last major program available to foreign workers attempting to obtain employment in the United States is the O-1 visa program.¹³³ The O-1 visa is aimed at aliens showing an extraordinary capacity in the sciences, education, business, or athletics.¹³⁴ Obviously, the great bulk of individuals at which President Bush’s program is aimed would not qualify for this visa.

The aforementioned programs have allowed foreign laborers to come to this country on a temporary basis to fill needs deemed necessary by United States policy makers. Nonetheless, these programs have not been without their flaws. Not all of the illegal immigrants in this country, blamed for much of today’s immigration crisis, obtained entry through late night border crossings or clandestine operations by human smugglers. A substantial number of undocumented workers who will be sought for participation in the proposed program entered this country on one of these approved visas. Upon the completion of their legal time period to be in the country, they merely retreated into the shadows of American life and became illegal aliens. This occurrence will not disappear under the proposed program and is, in fact, one of the biggest problems with it.

B. *European Temporary Worker Programs*

President Bush’s proposed solution to combat the burgeoning labor shortage is not a novel one. France, Switzerland, and West Germany all implemented some form of guest worker program following World War II.¹³⁵ There are valuable lessons that can be learned from these attempts to combat labor shortages. President Bush would be wise to take a history lesson before encouraging Congress to implement the program he has proposed without major changes.

In particular, West Germany’s *Gastarbeiter* program (created before Germany’s reunification) sheds meaningful light on the negative effects such a program can have over the long-term.¹³⁶ West Germany estab-

131. *Id.*

132. *Id.*

133. *See id.*

134. *Id.*

135. Philip L. Martin & Mark J. Miller, *Guestworkers: Lessons from Western Europe*, 33 *INDUS. & LAB. REL. REV.* 315, 316 (1980).

136. *See* Nicole Jacoby, Comment, *America’s De Facto Guest Workers: Lessons from Germany’s Gastarbeiter for U.S. Immigration Reform*, 27 *FORDHAM INT’L L.J.* 1569, 1578-

lished Gastarbeiter (Guest Worker Program) agreements with Turkey in 1961 and 1964.¹³⁷ However, the guest workers were only welcome as long as employers required their labor.¹³⁸ Like the proposed program in the United States, the guest workers in West Germany were primarily placed in the low-paying jobs rejected by local laborers.¹³⁹ Just like in this country, foreign workers in West Germany became targets for criticism from other groups who had previously suffered discrimination.¹⁴⁰ The perilous problems with guest worker programs surface during the termination of the program, due to workers' subsequent choice to stay in the country as undocumented people.

This phenomenon leads to permanent settlement by the temporary workers and, inevitably, racial discrimination.¹⁴¹ Unemployed local citizens often blame both undocumented and documented foreign laborers for their inability to find gainful employment.¹⁴² The local citizens develop a hatred for the immigrant workers because the immigrants will accept lower wages, thereby lowering wages across the labor market.¹⁴³

Discrimination against the workers themselves is not the only discrimination that takes place. The situation that developed in West Germany is strikingly familiar to ongoing struggles here in the United States. When temporary workers begin to permanently settle, naturally their families settle as well. In West Germany, Turkish children found themselves in a school system with no language programs in place to help them assimilate.¹⁴⁴ Encumbered by their inability to graduate from German schools, Turkish children were limited to low paying, blue collar jobs upon entering the workforce.¹⁴⁵

This is not at all unlike the current situation facing the children of undocumented, as well as documented, laborers in the United States from Latin American countries. While a bilingual education program is in place in many regions of the United States, the children are usually inte-

79 (2004) (stressing that "guest worker programs inevitably result in the permanent settlement of foreigners in the host county" and "[i]f not properly anticipated and planned for, this settlement leads to social stratification and political divisiveness").

137. *Id.* at 1581.

138. *Id.*

139. Stephen Castles, *The Guest Who Stayed-The Debate on "Foreigners Policy" in the German Federal Republic*, 19 INT'L MIGRATION REV. 517, 518 (1985).

140. See Jacoby, *supra* note 136, at 1591.

141. See Jacoby, *supra* note 136, at 1574-75.

142. *Id.* at 1591.

143. See Steve Sailer, *Analysis: Bush Temp Worker Plan Open-Ended*, UNITED PRESS INT'L, Jan. 9, 2004, at <http://www.upi.com/view.cfm?StoryID=20040109-105925-2373r> (last visited Mar. 27, 2005).

144. Jacoby, *supra* note 136, at 1594 (2004).

145. *Id.*

grated into an English-only classroom environment following fourth grade.¹⁴⁶ Older children are forced to sit in English-only classrooms immediately upon entering the school system, although they are unable to comprehend most of what is being taught. The foreign students that are able to somehow graduate from the school system have no hopes of attending an institution of higher learning. Like the Turkish children in West Germany, their futures plateau with low-paying and difficult blue-collar jobs.¹⁴⁷

The West German guest worker programs ended over thirty years ago but some seven million foreigners still live in Germany.¹⁴⁸ Even though these workers have persevered for over three decades, wide spread discrimination still exists.¹⁴⁹ Latin American immigrants in this country continue to experience discrimination on a daily basis as well.¹⁵⁰ The influx of temporary workers combined with their seemingly inevitable permanent settlement will only exacerbate the problem.

V. PRAISE & CRITICISM

Anytime a major societal problem is identified, the proposed solutions inevitably have their strengths and flaws. President Bush's proposed Temporary Worker Program is no different. He was correct to identify the glaring problems with our current immigration system, as well as the apparent labor shortage for low wage jobs. While this program is a step in the right direction, simply because it acknowledges the issue,¹⁵¹ it is littered with flaws. The plan seems like a workable solution on paper, but it relies on too many assumptions.

A. Praise

Among the many cliché statements used by politicians and business leaders, one always seems to ring true: "The first step is identifying the problem." The major achievement embedded in President Bush's proposed policy is simply his acknowledgment that a problem does in fact

146. Texas Education Agency, *Curriculum: Bilingual Education*, at <http://www.tea.state.tx.us/curriculum/biling/> (last visited Mar. 27, 2005) (explaining bilingual education program in the state of Texas).

147. Jacoby, *supra* note 136, at 1594.

148. WILLIAM A. BARBIERI, JR, *ETHICS OF CITIZENSHIP: IMMIGRATION AND GROUP RIGHTS IN GERMANY* 27 (1998).

149. *See id.* at 21-22 (addressing the "Inlander-Auslander" [Native-Foreigner] model of rights set up in Germany and the limited rights available to the foreigners as opposed to the natives).

150. *See* U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 18 (1980).

151. *See* Patrick, *supra* note 93, at 14-15.

exist. If nothing else, the President's announcement of this new program will open up the channels of communication between the Whitehouse and Congress¹⁵² and hopefully lead to a solution that is satisfactory to everyone involved, and accomplish the goals set out.

In fact, Senators Tom Daschle of South Dakota and Chuck Hagel of Nebraska introduced a bill to the Senate on January 21, 2004 in response to the President's proposed plan.¹⁵³ While this bill has gone on to the Judiciary Committee and been stalled indefinitely, it shows that the announcement of President Bush's plan brought the issue into the spotlight. This is not an issue that will simply go away; and the fact that competing plans are circulating in Washington ensures debate and, in time, a solution. In fact, Senator Saxby Chambliss of Georgia has stated, "Next to the issue of terrorism, immigration is the number one issue that America faces."¹⁵⁴

A major issue dealt with by this program is the immigration liberals' fear that undocumented aliens fall victim to unscrupulous employers not following labor laws.¹⁵⁵ It is their contention that working for these employers will result in unsafe working conditions and artificially depressed wages.¹⁵⁶ Under the proposed program, participating undocumented workers will be able to notify authorities of unsafe working conditions or unfair pay because they will no longer need to fear deportation by the authorities to which they report. By allowing the millions of undocumented workers to come out of the shadows of society, they will naturally be better protected. This holds true for reporting crimes such as assault and rape, as well as in landlord disputes. All in all, the participants in this program will be more secure during their time in the program.

Another strength of this program is the requirement that employers must first prove that there is not a willing American citizen to fill the job. While the President has not shed any light on how employers will prove that they have sought American citizens to fill the positions, the mere fact that a verification process is intended for the program is a step in the right direction. While it will be very difficult to develop a process to ensure that these employers are in fact attempting to first hire American

152. Scott McClellan, White House Regular News Briefing, Jan. 23, 2004, *available at* 2004 WL 110393 (F.D.C.H.) (mentioning a competing plan proposed in Congress and being considered by the Whitehouse).

153. The Immigration Reform Act of 2004, S.2010, 108th Cong. The Act has, however, been stalled in the Senate Judiciary Committee since the date of its introduction. *Id.*

154. *Frist, Chambliss Applaud President's Speech On Immigration*, THE CHATTANOOGAN, Jan. 7, 2004, *available at* http://www.chattanooga.com/articles/article_45251.asp.

155. Sandra Stempel, *Will There Be Relief for Illegal Workers?*, 8 No. 12 VT. EMP. L. LETTER 6 (Feb. 2004).

156. *Id.*

citizens, this portion of the program will be critical to winning support from conservative lawmakers who fear that employers will simply bypass Americans for immigrant labor.

B. *Criticism*

The major problem inherent with any temporary or guest worker program is in the name itself. “Guest” and “temporary” seem to assume that the worker will return to his home country upon completion of the job or after some fixed term. History has shown that temporary worker programs inevitably lead to permanent settlement.¹⁵⁷ With this permanent settlement comes widespread discrimination and racial polarization. Not only are the temporary foreign workers discriminated against, but all people of the same nationality, whether documented or undocumented, are lumped in the same group. Further, when temporary workers settle permanently, they attract further immigration as their families attempt to join them.¹⁵⁸

There seems to be a fundamentally logical explanation for this inevitable permanent settlement. Most immigrants that are willing to move to a foreign country must do so because the prospects of securing employment are better than they would be in their home country. They seek employment in an effort to better support their families and tend to send most of their income home for that exact purpose.¹⁵⁹ The same dismal employment outlook likely still awaits the foreign laborer upon his return. Why then, would a guest worker not simply recede into the shadows of the United States economy like so many undocumented workers before him? This seems to be elementary logic.

This thought process is most applicable to the enormous number of current undocumented workers residing in the United States. Many of them have been contently eking out an existence for a number of years without any program in place. It is probable that these individuals registering for the program, diligently working within the program for the maximum amount of time allowed, and taking advantage of the right to travel freely to and from their home country during the term, will then return to an underground existence upon completion of the program. It certainly seems that those with experience living in the recesses of society would have no problem returning when necessary. Again, if there were

157. See generally Phillip Martin, *There is Nothing More Permanent than Temporary Foreign Workers*, Apr. 2001, at www.cis.org/articles/2001/back501.html.

158. Mark Krikorian, *Flawed Assumptions Underlying Guest Worker Programs*, Feb. 2004, at 9, at www.cis.org/articles/2004/back204.html.

159. DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 11 (2002).

jobs in their home country offering anywhere near the same return, why would these immigrants not have stayed there?

The monetary rewards offered through this program also seem to be fundamentally misguided. The program calls for a portion of the wages earned by the temporary worker to be deposited in that worker's home country's pension system upon his return.¹⁶⁰ The plan also will allow the temporary workers to contribute income to tax-friendly savings plans.¹⁶¹ The workers most likely to enter this program are those in low-paying industries. Again, most of them are willing to leave their families and travel all the way to the United States because it allows them to send money home to support their families.¹⁶² These two characteristics of foreign laborers make these particular financial incentives unattractive to them.

First, due to the low wages they are likely to be earning, combined with the limited time they will be participating in the program, the total amount per individual will probably not be enough to serve as any real incentive to the worker. Second, the fact that their main goal is to send home as much money as quickly as possible to their families makes them very reluctant to forgo any portion of their wages. This includes both the pension program and the savings plan. The money is more valuable to them upon receipt, rather than at the termination of the program. The simple economic fact is that the interest accumulated on such a small amount of money over such a short amount of time, in reality, serves as no incentive at all.

During a House Immigration Subcommittee hearing, Mark Krikorian, Executive Director of the Center for Immigration Studies, was asked by Representative Lamar Smith of Texas, "[W]ho gets hurt the most by guest worker programs. . .[?]"¹⁶³ The answer given was African Americans and Hispanic Americans.¹⁶⁴ These two traditionally disadvantaged groups would find themselves competing with possibly millions of new temporary workers for employment.

Further, testimony has been given in Congress that a guest worker program would guarantee falling wages in the United States.¹⁶⁵ This would affect not only African Americans and Mexican Americans, but all Americans employed in low-wage positions. Critics feel there is an

160. Remarks on Immigration Reform, *supra* note 2, at 27.

161. *Id.*

162. See MASSEY, *supra* note 159, at 11.

163. *House Immigration Subcommittee Evaluates Guest Worker Program's Impact on U.S. Workers*, 81 NO. 14 INTERPRETER RELEASES 449, 451.

164. *Id.*

165. See *id.* at 450.

“oversupply of lower-educated American workers” who would directly be harmed by these falling wages.¹⁶⁶

The President needs to take notice of the growing sentiment around the country in regards to illegal immigrants and their place in society. While he is advocating for the guest worker program and the enormous influx of immigrants it is expected to bring to the United States, some states are passing measures to limit the rights of undocumented workers already here. For example, Arizona recently passed a proposition limiting the government services undocumented immigrants can receive without showing proof of their immigration status.¹⁶⁷ California passed the controversial Proposition 187 in 1994, although it never actually took effect.¹⁶⁸ Still, California, as well as Colorado, Georgia, and Idaho are pushing for measures similar to Arizona's.¹⁶⁹ The sentiment behind these measures is that many people are fed up with illegal immigrants breaking the United States' immigration laws without being penalized.¹⁷⁰ The logical outcome from its implementation would be to bring a natural reduction in illegal immigration to these states as immigrants are no longer able to receive government services and health care.¹⁷¹ There is no way to tell if this will be the actual effect of the measures but the sentiment behind them appears to be very real.

VI. A BETTER PROPOSAL

As discussed above, there have been multiple proposals to combat the immigration and labor problems in this country. However, certain items need to be addressed for the plan to be successful. As Mr. Krikorian explains, “[C]omprehensive immigration reform must have three parts: (1) squarely address the existing dilemma of the undocumented population; (2) include a highly regulated program to regulate future flows of immigrants; and (3) improve the conditions of U.S. workers.”¹⁷²

166. *Id.*

167. Ananda Shorey, *Other States Study Arizona Measure*, CORPUS CHRISTI CALLER TIMES, Nov. 12, 2004, at 3A.

168. *Id.*

169. *Id.*; see also Ignacio Ibarra & Mary Vadeveire, “Minuteman” Expands Watch, *Desert Morning News*, Apr. 20, 2005, at A10, available at 2005 WLNR 612726 (reporting that the Minuteman Project created to patrol the Arizona border in an effort to inform Board Patrol Agents of illegal crossings would be expanding to include California, Texas, New Mexico, Michigan, and Idaho, as well as the interior of the county to pressure businesses that hire illegal aliens).

170. *Id.*

171. Teresa Borden, *Immigration Fight Buoyed by Ariz.: Vote Georgia Group Pushes for Limits*, ATL. J. CONST., Nov. 17, 2004, available at 2004 WL 97165051.

172. *House Immigration Subcommittee Evaluates Guest Worker Program's Impact on U.S. Workers*, *supra* note 163, at 450.

The first part, the dilemma of undocumented workers, could potentially be addressed by simply enforcing existing laws in place for the regulation of undocumented workers, including punishing offending employers who actively hire these workers. Further, the United States government needs to be prepared for massive deportation of those undocumented workers who are unwilling to adhere to United States immigration laws, including any new temporary or permanent worker programs. Unless the government shows that it is serious about enforcing its own laws, it will be next to impossible to curb the flow of illegal immigrants into the United States.¹⁷³

The second portion of this plan is where the most thought and creativity will be required. One of the underlying assumptions of President Bush's proposal "is that the federal government has the ability to manage such a program."¹⁷⁴ A highly regulated program put in place to control future flows of immigrants will be an overwhelming endeavor for the government. Not only will serious manpower be necessary to enforce the program, but the government will need to apply high technology tactics to the admission of immigrants as well as the tracking of those immigrants once they are admitted. The government has already made strides in this area with the US-VISIT program.¹⁷⁵ With national security currently in the forefront of our government's collective conscience and the obvious relationship between immigration and security, any proposed plan must be comprehensive in its ability to account for the status of all immigrants admitted.

Finally, any new immigration plan must set as a goal the improvement of conditions for United States workers. As long as the government continues to ignore the flow of undocumented workers into the country and employers push for the ability to hire foreign workers at cheaper wages, United States citizens will be negatively affected by lower wages and unsafe work conditions. Businesses that depend primarily on foreign labor are less likely to make technological improvements that can increase productivity as well as workplace safety.¹⁷⁶ It is imperative that our own

173. See Verdery, *supra* note 86, at 70.

174. *House Immigration Subcommittee Evaluates Guest Worker Program's Impact on U.S. Workers*, *supra* note 163, at 450.

175. See generally Department of Homeland Security, *US-VISIT*, at http://www.dhs.gov/dhspublic/interapp/content_multi_image/content_multi_image_0006.xml (last visited Mar. 27, 2005) (explaining the US-VISIT program and the plans to expand it to all United States points of entry); Pricilla J. Krebs, *New Program Tracks Foreign Travelers*, 14 NO. 11 MICH. EMP. L. LETTER 7 (Jan. 2004) (answering numerous questions regarding the US-VISIT program).

176. *House Immigration Subcommittee Evaluates Guest Worker Program's Impact on U.S. Workers*, *supra* note 163, at 450.

citizens not be harmed by any immigrant labor proposal, or the same historical divides will continually resurface as United States citizens blame incoming immigrants for their negative conditions, leading to further discrimination.

VII. CONCLUSION

President Bush should be both lauded and cautioned for his proposal to create a temporary worker program in the United States. While his proposal serves as a great first step to addressing the problems with our current immigration systems and labor shortages, it is littered with flaws that make it unlikely to be passed in its current form. The issues raised in his proposal will be debated feverishly over the next four years; therefore, it is imperative that a plan agreeable to all parties be reached.

There are several key issues the temporary worker plan should address. These include consideration for undocumented workers currently in the United States, those who will likely enter in the future, and current citizens of the United States. Moreover, the current fear of terrorism will likely play a role in any immigration plan, as border security is a highly volatile and important issue. As a country founded on the backs of immigrants, it is only fitting that the United States exhaust as much energy as necessary to ensure that this country is a welcome destination for those seeking work and willing to do all that is asked of them to enter the country legally. Like most hot-button issues, it is unlikely that there will ever be a solution that makes each and every faction completely happy. However, we owe it to those that put this economy on their back and do the dirty work to come up with a plan that will keep the wheels of the economy spinning while simultaneously rewarding them for their hard work.