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A Critique of Proposed Amendments to the Immigration and Nationality Act

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Abstract

Part I of this Note will briefly examine the history of United States immigration policy, highlighting major legislation, to illustrate the increasingly complex and restrictive approach adopted by the United States toward aliens. Part II will focus on the predecessors of the proposed guest worker program, the "Bracero" program and, to a lesser extent, the "H-2" program. Part III will present a critical review of the President's guest worker program and its legislative counterparts in greater detail underscoring their similarities and differences. Finally, Part IV will posit some conclusions concerning the President's program and offer suggestions for improvement.

A CRITIQUE OF PROPOSED
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INTRODUCTION

On June 8 and 9, 1981 President Reagan met with President José Lopez Portillo of Mexico to discuss the mutual concerns of their countries.¹ One topic of importance to both Presidents was the ineffectively controlled immigration of Mexicans into the United States.² Prior to these meetings, President Reagan's White House staff had developed a series of detailed proposals to deal with this problem.³ Although announcement was delayed by the Reagan Administration,⁴ the proposals advocate allowing continually resident illegal aliens⁵ to apply for permanent resident status,⁶ along with establishing a guest worker program that would allow Mexican citizens to work in the United States on a temporary basis.⁷

1. N.Y. Times, June 8, 1981, at A1, col. 3.

2. Clearly, problems other than immigration were important to both countries. Issues such as United States interference in Central American affairs, in general, and United States involvement in El Salvador, in particular, were more pressing than the immigration question. Weisman, *U.S. Expecting Talks to Strengthen Ties with Mexico*, N.Y. Times, June 8, 1981, at A10, col. 1 [hereinafter cited as *Weisman Article*].

3. See Pear, *Plan Would Let Mexicans Work As U.S. Guests*, N.Y. Times, May 10, 1981, at A1, col. 5 [hereinafter cited as *Guest Worker Article*]. See notes 89-163 *infra* and accompanying text.

4. "The Administration has been searching for ways to deal with the immigration problem since President Reagan took office But not wanting to divert attention from its economic recovery program, the Administration delayed an announcement of its immigration policy." Pear, *White House Asks A Law To Bar Jobs For Illegal Aliens*, N.Y. Times, July 31, 1981, at A1, col. 6.

5. *Id.* The terms "illegal alien" and "illegal immigration" will be used throughout this Note. The term "undocumented alien" has also been used in the same sense as the term "illegal alien". See, e.g., Bevilacqua, *Legal Critique Of President Carter's Proposals On Undocumented Aliens*, 23 CATH. LAW. 286 (1978). An illegal alien is described as "[a]ny alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact . . ." 8 U.S.C. § 1325 (1978).

6. See text accompanying notes 104-07 *infra*. The terms "permanent" and "residence" are defined in 8 U.S.C. § 1101(a)(31), (33) (1976).

7. See U.S. DEP'T OF JUSTICE, U.S. IMMIGRATION AND REFUGEE POLICY 4 (July 30, 1981) [hereinafter cited as *President's Program*]. Some have criticized this prong of the proposal as being little more than a thinly disguised revival of the Bracero program. See McQuillan, *Trying an Old Approach on Illegal Aliens*, N.Y. Daily News, June 21, 1981, at 37, col. 1. The Bracero program admitted several million Mexican laborers, or "braceros", into the United States to work directly for domestic employers from 1942 to 1965. *Id.*

Civil penalties would also be imposed against employers who knowingly hire illegal aliens.⁸ The purpose of these proposals⁹ is to allow the United States to regain control over immigration at the Mexican border.¹⁰ Whether the President's proposed program can achieve this purpose is questionable.

Although statistical estimates of the number of illegal aliens in this country are unreliable, it is believed that the granting of permanent resident status to all illegal aliens continually resident in the United States for the past ten years would affect well over one million persons.¹¹ The impact may be even greater when special provisions for Cuban and Haitian refugees and illegal aliens not in this country before January 1, 1980 are considered.¹²

The purpose of this Note is to produce a cogent and concise critique of the President's proposals. Because the entire program must eventually be approved by Congress, reference will also be made to relevant legislation introduced into recent sessions of both the House of Representatives and the Senate. It is hoped that a comparison of these proposals and the Bracero program will facilitate an understanding of the strengths and weakness of the guest worker program. Part I of this Note will briefly examine the history of United States immigration policy, highlighting major legislation, to illustrate the increasingly complex and restrictive approach

8. *President's Program*, *supra* note 7, at 4. The civil fines would be \$500 to \$1,000 for each illegal alien hired. Injunctions would also be imposed upon those employers who take part in a "pattern or practice" of hiring illegal aliens. *Id.* These concepts will be discussed in greater detail at notes 145-52 *infra* and accompanying text.

9. There are other parts to the President's proposal but they are less significant. These provisions will be briefly discussed at notes 164-71 *infra* and accompanying text.

10. As the United States Attorney General William French Smith recognized, "We have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively." Testimony of William French Smith, Attorney General Before the Senate Subcommittee on Immigration and Refugee Policy and the House Subcommittee on Immigration, Refugees and International Law 1 (July 30, 1981) [hereinafter cited as Attorney General's statement].

11. See Note, *Illegal Immigration: Short-Range Solution of Employer Sanctions*, 49 Miss. L.J. 659, 663 (1978) [hereinafter cited as *Employer Sanctions*].

12. See text accompanying note 104 *infra*. The final program may also allow illegal aliens who did not live in this country before January 1, 1980 to remain in the United States under a special temporary status that would allow these persons to eventually gain permanent status. 127 CONG. REC. S1689, S1690 (daily ed. Feb. 27, 1981) (statement of Senator Kennedy on Report of the Select Commission on Immigration and Refugee Policy). The President's proposal does not include such a provision, however, this special status would seem to be justified for the same reasons as the general amnesty provision. See notes 106-07 *infra* and accompanying text.

adopted by the United States toward aliens. Part II will focus on the predecessors of the proposed guest worker program, the "Bracero" program and, to a lesser extent, the "H-2" program.¹³ Part III will present a critical review of the President's guest worker program and its legislative counterparts in greater detail underscoring their similarities and differences. Finally, Part IV will posit some conclusions concerning the President's program and offer suggestions for improvement.

I. LEGISLATIVE RESTRICTIONS UPON IMMIGRATION

A. Early Development

The first law regulating immigration into the United States was the Alien and Sedition Act of 1798.¹⁴ This legislation empowered the President to deport aliens deemed "dangerous" to the United States.¹⁵ The statute was allowed to expire two years later.¹⁶ For the next seventy-five years, no major federal law was passed restricting the flow of immigration.¹⁷ However, this did not mean that the concept was not considered. The large number of Irish Catholics immigrating into this country in the 1830's caused renewed concern for our immigration policy.¹⁸ Although no specific legislation was enacted at that time, the proposals of this period served as models for later legislation.¹⁹

Steadily increasing numbers of immigrants, along with a corresponding clamor from United States citizens for some type of

13. 8 U.S.C. § 1101(a)(15)(H)(ii) (1976).

14. Alien and Sedition Act, ch. 58, § 1, 1 Stat. 570 (1798) (repealed 1800). The statute, in relevant part, states:

That it shall be lawful for the President of the United States at any time during the continuance of this act, to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States

Id.

15. *Id.*

16. The primary reason for this was the unpopularity of the Act. See C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 1.2a (rev. ed. 1981).

17. Legislation was passed during this period facilitating the immigration process. *Id.* At this time, the Immigration Act of 1862, ch. 27, 12 Stat. 340 (1862) (repealed 1882), was also passed. Its purpose was to prohibit the importation of Oriental slave labor. This particular law was only an early part of an attempt to control the importation of cheap foreign labor into this country. The contract labor problem of this period is discussed at note 23 *infra*.

18. E. HARPER, IMMIGRATION LAWS OF THE UNITED STATES, 5 (3d ed. 1975).

19. *Id.*

regulation, caused Congress to pass the Immigration Act of 1875.²⁰ This law, the first qualitative restriction on immigration, excluded prostitutes and alien convicts from admission to this country.²¹ Similar restrictions were enacted by the Immigration Law of 1882²² to exclude lunatics, idiots and those liable to become public charges.²³

The Immigration Law of 1891²⁴ added to the class of inadmissible aliens those suffering from loathsome or contagious diseases, polygamists, paupers, those whose passage was paid by another and aliens convicted of crimes of moral turpitude.²⁵ In 1903,²⁶ persons who were epileptics, idiots, those who had been insane within five years of entry or those who had previously experienced two attacks of insanity, professional beggars and those importing women for prostitution were excluded.²⁷ Anarchists were also excluded from entry by this act.²⁸ In 1907, when immigration was at an all-time

20. Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477 (1875) (current version at 8 U.S.C. § 1182(a) (1976)).

21. *Id.*

22. Immigration Law of 1882, ch. 376, § 2, 22 Stat. 214 (1882) (current version at 8 U.S.C. § 1182(a) (1976)).

23. Despite these restrictions, immigration for the period 1881-90 exceeded 4.7 million persons. American Enterprise Institute for Public Policy Research, *ILLEGAL ALIENS: PROBLEMS AND POLICIES 2* (1978) [hereinafter cited as *ILLEGAL ALIENS*]. At this time a growing practice developed among American employers to import cheap foreign labor. E. HARPER, *supra* note 18, at 6. These laborers performed difficult physical tasks and some complained that this practice lowered the overall standard of American labor. *Id.* Congress, realizing that this was an affront to the human dignity of both foreign and domestic laborers, enacted the Alien Contract Labor Law, ch. 164, 23 Stat. 332 (1885) (current version at 8 U.S.C. § 1182(a)(14) (1976)), which made it illegal to import aliens into the United States under a contract for the performance of labor or service. Exceptions were made for aliens temporarily in the United States, artists, lecturers, servants and skilled laborers working in an industry not yet established in the United States. *Id.* § 5, 23 Stat. at 333. This Act was amended by the Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 566 (1888), which for the first time expelled aliens who violated the contract labor laws. The constitutionality of the Alien Contract Labor Law was specifically upheld in *Lees v. United States*, 150 U.S. 476 (1893).

24. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084 (1891) (current version at 8 U.S.C. § 1182(a) (1976)).

25. *Id.*

26. Immigration Act of 1903, ch. 1012, 32 Stat. 1213 (1903).

27. *Id.* § 2, 32 Stat. at 1214.

28. *Id.* The language of the statute makes "anarchists, or persons who believe in or advocate the overthrow by force or violence of the government . . . or of all forms of law, or the assassination of public officials . . ." subject to exclusion. This provision is noteworthy because it was the first statute permitting exclusion of an individual on the grounds of his or her opinions. The Anarchist Act of 1918, ch. 186, § 2, 40 Stat. 1012 (1918) further provided for the deportation of alien anarchists and radicals.

high,²⁹ further restrictions were enacted by Congress excluding imbeciles, feeble-minded persons, tubercular aliens, those suffering from physical or mental defects affecting their ability to earn a living, those admitting crimes involving moral turpitude, women coming into this country for an immoral purpose and children under sixteen unaccompanied by their parents.³⁰

All of the aforementioned restrictions were codified by the Immigration Act of 1917,³¹ which also contained a literacy requirement and established a barred zone. The literacy requirement prohibited from admission aliens over the age of 16 who could not read.³² The "barred zone" provision excluded from admission persons from almost all of the Asian Continent.³³

After the First World War, far more people wished to enter the United States than the government was willing to allow. As a result, Congress enacted the First Quota Law of 1921.³⁴ This act restricted annual immigration to three per cent of the number of foreign born persons of that nationality living in the United States in 1910.

In 1924, the First Quota Law was supplanted by the National Origins Act,³⁵ a permanent quota restriction which reduced the annual quota of immigrants to two per cent of the number of foreign born persons of such nationality resident in the United States in 1890.³⁶ By its provisions, this quota was to remain in

29. The total number of immigrants coming into the United States from 1901-10 was almost 9 million persons. *ILLEGAL ALIENS*, *supra* note 23, at 2.

30. Immigration Act of 1907, ch. 1134, 34 Stat. 898 (1907) (current version at 8 U.S.C. § 1182(a) (1976)).

31. Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917) (repealed 1952).

32. *Id.* § 3, 39 Stat. at 875-76.

33. Section 3 of this Act state:

That the following classes of aliens shall be excluded from admission into the United States: . . . persons . . . who are natives of any country, province, or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north. . . .

Id. See E. HARPER, *supra* note 18, at 10.

34. Immigration Act of 1921, ch. 8, § 2(a), 42 Stat. 5 (1921) (repealed 1952). The ceiling on total immigration under this Act was approximately 350,000 persons. E. HARPER, *supra* note 18, at 11. Previous legislation concerning qualitative restrictions also remained in effect. *Id.*

35. Immigration Act of May 26, 1924, ch. 190, 43 Stat. 153 (1924).

36. *Id.* § 11(b), 43 Stat. at 159. The total number of persons permitted to immigrate annually under this Act was reduced to 165,000. E. HARPER, *supra* note 18, at 13.

effect until 1929 when a national origins quota system would be used to regulate immigration.³⁷ This later provision remained in effect through 1952.³⁸

B. Present Statutory Framework

The Immigration and Nationality Act of June 27, 1952³⁹ was the product of an extensive re-evaluation of immigration law and policy.⁴⁰ This act remains the cornerstone of United States immigration law. While recodifying much of the 1917 and 1924 acts, the Immigration and Nationality Act significantly modified several provisions as well. First, the national origins quota was modified to admit aliens at a rate of $\frac{1}{6}$ of one per cent of the number of inhabitants in the United States in 1920 whose national origin was attributable to that area.⁴¹ Second, a preference system was established giving priority to skilled aliens whose services were urgently needed in the United States.⁴² Third, it eliminated race and sex as a criteria for exclusion.⁴³ Interestingly, the quota restrictions did not apply to Western Hemisphere immigration.⁴⁴

The provisions of the 1952 act remained largely unchanged until amended by Congress in 1965.⁴⁵ The 1965 amendments abolished the national origins quota system, eliminated the last vestiges of racial discrimination from immigration law, altered the selection system to give greater weight to family reunification⁴⁶ and, for the first time, established a numerical ceiling of 120,000 persons on Western Hemisphere immigration.⁴⁷ Also, an annual limitation on Eastern Hemisphere immigration was set at 170,000 persons with a

37. See *Congressional Research Service, U.S. Immigration Law And Policy: 1952-79* at 7 (1979) [hereinafter cited as *Congressional Research Service*]. Under this system, the annual quota for any country or nationality had the same relation to 150,000 as the number of inhabitants in the United States in 1920 having that national origin had to have the total number of inhabitants in 1920. *Id.*

38. E. HARPER, *supra* note 18, at 13.

39. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1101-1551 (1976)).

40. *Congressional Research Service, supra* note 37, at 5.

41. § 201(a), 66 Stat. at 175 (current version at 8 U.S.C. § 1152(a) (1976)).

42. *Id.* § 203(a), 66 Stat. at 178-79.

43. See E. HARPER, *supra* note 18, at 21. 8 U.S.C. § 1152(a) (1976).

44. *Congressional Research Service, supra* note 37, at 7.

45. Immigration and Nationality Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

46. *Id.* § 201(e), 79 Stat. at 911.

47. *Id.* § 21(e), 79 Stat. at 921.

per country limitation of 20,000.⁴⁸ In 1976, the act was further amended so that the preference system and per country limitation applied equally to both Eastern and Western Hemisphere immigration.⁴⁹

More recently, Congress passed the Immigration and Nationality Act of 1978.⁵⁰ This law combined the Eastern and Western Hemisphere ceilings into one world-wide quota of 290,000 persons.⁵¹ It also applied the preference system equally to all persons admissible under this ceiling.⁵² Furthermore, it established a Select Commission on Immigration and Refugee Policy.⁵³

48. *Id.* §§ 1(a), 2(a), 79 Stat. at 911-12.

49. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 907 (1976).

50. Immigration and Nationality Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (1978).

51. *Id.* § 201(a), 92 Stat. at 907.

52. *Id.*

53. *Id.* § 4(a), 92 Stat. at 907. The act states in part:

(c) It shall be the duty of the Commission to study and evaluate, in accordance with subsection (d), existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and to the Congress as are appropriate.

(d) In particular, the Commission shall—

(1) conduct a study and analysis of the effect of the provisions of the Immigration and Nationality Act (and administrative interpretations thereof) on (A) social, economic, and political conditions in the United States; (B) demographic trends; (C) present and projected unemployment in the United States; and (D) the conduct of foreign policy;

(2) conduct a study and analysis of whether and to what extent the Immigration and Nationality Act should apply to the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the other territories and possessions of the United States;

(3) review, and make recommendations with respect to the numerical limitations (and exemptions therefrom) of the Immigration and Nationality Act of the admission of permanent resident aliens;

(4) assess the social, economic, political, and demographic impact of previous refugee programs and review the criteria for, and numerical limitations on, the admission of refugees to the United States;

(5) conduct a comprehensive review of the provisions of the Immigration and Nationality Act and make legislative recommendations to simplify and clarify such provisions;

(6) make semiannual reports to each House of Congress during the period before publication of its final report described in paragraph (7); and

(7) make a final report of its findings and recommendations to the President and each House of Congress, which report shall be published not later than September 30, 1980.

Id. § 4(c)-4(d), 92 Stat. at 908.

The most recent legislation enacted by Congress which has a significant effect on immigration is the Refugee Act of 1980.⁵⁴ This law establishes an annual allocation for the admission of 50,000 refugees in the years 1980, 1981, and 1982.⁵⁵ It also authorizes the President to make additional admissions in emergency situations, after consultation with Congress.⁵⁶ While there are other changes affecting refugees,⁵⁷ the only modification pertaining to general immigration law is the reduction, from 290,000 to 270,000, of the total annual quota for immigration.⁵⁸

It is hoped that this brief summary of the history of this country's immigration policy illustrates the intricate nature of its development. This field of law is often marred by fear and prejudice and is frequently affected by private interests.⁵⁹ No clearer example exists than our policies toward Mexican immigration. Mexico continues to be a profitable source of labor for American business interests and this is the primary reason for the renewed concern about statutory limitations upon this resource.

II. THE BRACERO PROGRAM AND RELATED TEMPORARY GUEST WORKER LEGISLATION

Regulated admission of temporary workers into the United States began during World War II under the Bracero program primarily as an emergency measure to replace manpower lost due to the war.⁶⁰ This "state of emergency" lasted for 22 years. The Bracero program, initially negotiated by treaty, admitted Mexican

54. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 107 (codified at 8 U.S.C. § 1156 (Supp. 1980)).

55. *Id.* § 207(a)(1), 94 Stat. at 103.

56. *Id.* § 207(a)(2), 94 Stat. at 103-05.

57. C. GORDON & H. ROSENFELD, *supra* note 16, § 1.4g.

58. *Id.*

59. The best example of private interests directly affecting immigration law is found in the controversial "Texas Proviso" discussed at notes 145-46 *infra* and accompanying text. See generally notes 136-37 *infra* and accompanying text. One commentator has noted that "[e]fforts to control illegal immigration have corresponded to the United States' ability to absorb and profit from the efficient utilization and exploitation of undocumented aliens. The transition from a relatively open to a closed border policy occurs in cycles depending on the demands of the United States economy." See Comment, *Employer Sanctions: The "New Solution" To The Illegal Alien Problems*, 1979 ARIZ. ST. L.J. 439, 441 (footnote omitted) [hereinafter cited as *New Solution*].

60. Agreement between the United States of America and Mexico respecting the temporary migration of Mexican agricultural workers, 56 Stat. 1759 (1942). *New Solution, supra* note 59, at 441.

“braceros”⁶¹ to do farm work. The provisions of this treaty exempted Mexican laborers from selective service registration and certain requirements of immigration laws.⁶² Under the treaty, the United States government provided round-trip transportation for the laborers and insured that hours of work and wages were commensurate with those of domestic workers.⁶³ It was agreed that Bracero workers would not be used to displace domestic laborers but only to fill in during genuine shortages.⁶⁴

In April of 1943, Congress enacted the first of the Farm Labor Supply Appropriations Acts.⁶⁵ The 1943 act, while replacing the treaty, continued the Bracero program and empowered the United States to temporarily admit “native born residents of North America, South America, and Central America, and the islands adjacent thereto, desiring to perform agricultural labor in the United States”⁶⁶ It also provided government funds for recruitment, transportation, medical expenses, subsistence, shelter, and placement of agricultural workers.⁶⁷ During the war period the federal government was the prime contractor of bracero laborers.⁶⁸ Exemptions for Mexicans from our immigration laws instituted under the Bracero program continued in effect under this act.⁶⁹

After the war, the Bracero program was continued in a modified form through a series of treaties exclusively with Mexico.⁷⁰

61. “Bracero” was the term used to refer to Mexican temporary laborers. P. EHRLICH, L. BILDERBACK & A. EHRLICH, *THE GOLDEN DOOR* 212 (1979).

62. 56 Stat. 1759, 1766. The Mexican laborers were exempted from literacy requirements as well as payment of head taxes or other admission charges. S. REP. No. 1515, 81st Cong., 2nd Sess. 579 (1950).

63. *Id.* at 1767-68. *Congressional Research Service, supra* note 37, at 27.

64. *Id.* at 1766-68. The provision initiating the admission of Mexican laborers under the Bracero program was the ninth proviso of section 3 of the Immigration Act of 1917. See *Congressional Research Service, supra* note 37, at 27. The relationship between this section and the Bracero program is at best tenuous because the proviso as drafted pertained only to alien attendants working at expositions in this country. Immigration Act of 1917, 39 Stat. at 878.

65. *Congressional Research Service, supra* note 37, at 28. The Farm Labor Supply Appropriations Acts ran from 1943-47. The other acts were: Act of June 30, 1947, ch. 165, 61 Stat. 202 (1947); Act of Dec. 28, 1945, ch. 589, title I, 59 Stat. 632 (1945); Act of Feb. 14, 1944, ch. 16, 58 Stat. 11 (1944). During these years, approximately \$120 million in federal funds was appropriated for the Bracero program. P. EHRLICH, L. BILDERBACK & A. EHRLICH, *supra* note 61, at 213.

66. Act of Apr. 29, 1943, ch. 82, § 5(g), 57 Stat. 70, 73 (1943).

67. *Id.*

68. *Id.* at 71. P. EHRLICH, L. BILDERBACK & A. EHRLICH, *supra* note 61, at 212.

69. 56 Stat. 1759, 1766.

70. 57 Stat. at 73. The program was continued under international agreement specifically at the request of the Mexican government. *Congressional Research Service, supra* note 37, at 28.

Under the modified program the United States employer was the primary contractor and it was the United States employer who paid all transportation and related expenses.⁷¹ It was about this time that problems inherent in the program were first discovered. Charges were raised that American employers were not treating the Mexican workers in accord with the terms of this agreement. The quality of the living conditions and the level of wages were the primary focus of the complaints.⁷² Simultaneously, concern was expressed in this country regarding the protection afforded domestic farm workers under the terms of the program.⁷³

In response to these problems,⁷⁴ Public Law 78 (P.L.-78) was enacted.⁷⁵ This statute and subsequent agreements with Mexico established rigorous guidelines for employers of Mexican laborers.⁷⁶ Under P.L.-78 the United States government and employers shared the costs of transporting the workers to this country.⁷⁷ The employer was required by the law to pay the Mexican worker not less than the prevailing wage rate paid to domestic farm workers.⁷⁸ Finally, and possibly most importantly, P.L.-78 also provided that the United States government would guarantee the performance by

71. Spradlin, *The Mexican Farm Labor Important Program—Review and Reform*, 30 GEO. WASH. L. REV. 84, 84 (1961).

72. *Congressional Research Service, supra* note 37, at 28.

73. *Id.* There were also reports that Mexican workers were leaving their places of employment in violation of their employment contracts. Spradlin, *supra* note 71, at 85.

74. *Congressional Research Service, supra* note 37, at 29.

75. Agricultural Act of 1949 Amendments, 65 Stat. 119 (1951). Note that Bracero workers were limited by P.L.-78 to agricultural labor.

76. Section 503 of the Act states:

No workers recruited under this title shall be available for employment in any area unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers who are able, willing, and qualified are not available at the time and place needed to perform the work for which such workers are to be employed, (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed, and (3) reasonable efforts have been made to attract domestic workers for such employment at wages and standard hours of work comparable to those offered to foreign workers.

Id. The significance of this terminology will be discussed at notes 120-134 *infra* and accompanying text. For additional requirements *see* 2 U.S.T. 1940, 1987-95.

77. The United States government was to pay the cost of transportation from recruitment centers in the United States. The employer was to pay the cost of transportation from the reception center to the work site. 65 Stat. at 119.

78. International Executive Agreement Covering the Employment of Mexican Agricultural Workers, and Individual Work Contracts, Aug. 1, 1949, 2 U.S.T. 1048, 1056 T.I.A.S. No. 2260.

employers of the provisions of the agreement.⁷⁹ P.L.-78 was the basic law that was applied to the admission of Mexican labor for the duration of the Bracero program. P.L.-78 continued largely unchanged throughout the 1950's,⁸⁰ until the end of the decade when opposition to the program increased. It was felt that the Bracero program adversely affected domestic workers who were competing with Mexican labor for jobs.⁸¹ Subsequent extensions of P.L.-78 attempted to remedy this problem by establishing "adverse-effect rates" for foreign workers.⁸² "Adverse-effect rates" set minimum wages that could be paid by employers to Mexican workers.⁸³ Nevertheless, the problem continued and may have worsened as admission of braceros for the period of the late 1950's to early 1960's averaged about 400,000 persons.⁸⁴

The Bracero program was allowed to lapse in 1964⁸⁵ because of the effect it had on domestic labor in general and, more specifically, upon migrant agricultural workers.⁸⁶ The Bracero program was also suspected of being a significant cause of illegal immigration. Many more Mexicans wanted to come into this country than could be admitted under the program.⁸⁷ Thus, in the minds of its critics, the program took jobs away from willing citizens while also exacerbating illegal immigration.⁸⁸

79. Section 501 of the Act states, in pertinent part:

For the purpose of assisting in such production of agricultural commodities and products as the Secretary of Agriculture deems necessary, by supplying agricultural workers from the Republic of Mexico . . . the Secretary of Labor is authorized . . .

(6) to guarantee the performance by employers of provisions of such contracts relating to the payment of wages or the furnishing of transportation.

65 Stat. at 119.

80. *Congressional Research Service, supra* note 37, at 36-40.

81. *Id.* at 40-41.

82. *Id.* at 41.

83. *Id.*

84. M. BARRERA, *RACE AND CLASS IN THE SOUTHWEST* 117 (1979).

85. "The Bracero program was terminated in 1964 because of farmers' dissatisfaction with the management of the program and pressure by labor unions that claimed imported labor was taking jobs away from their members." *New Solution, supra* note 59, at 442. Indeed, the pressure exerted by labor unions is a factor mentioned by those involved in the currently proposed guest worker program. Joseph Ghougassian, a senior policy adviser at the White House, has noted the considerable pressure brought against the Bracero program by labor unions and has stated that, "a sound public relations program could deal effectively with any initial opposition". *Guest Worker Article, supra* note 3.

86. The poor living conditions, working conditions, low pay and high unemployment experienced by migrant farm workers are vividly detailed in Spradlin, *supra* note 71, 97.

87. *See New Solution, supra* note 59, at 441-43.

88. For additional information on the Bracero program, see R. CRAIG, *THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY* (1971).

With the lapse of the Bracero program, Mexican citizens wishing to work in the United States were, for the most part, denied a legal method of entry.⁸⁹ Currently, the only provision permitting admission of temporary workers into the United States is the H-2 program. The H-2 program grants admission to "[a]n alien having a residence in a foreign country which he has no intention of abandoning . . . who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country. . . ."⁹⁰ Before an alien may be admitted under this section, the Secretary of Labor must certify that there is a shortage of similar laborers in the United States and that employment of the alien would have no adverse effect on working conditions in the United States.⁹¹ The H-2 program was initially designed to parallel the Bracero program.⁹² Indeed, the H-2 program was designed to and still does exclude, with few exceptions, Mexicans from its provisions.⁹³ Since the termination of the Bracero program in 1965, no viable legal channel of immigration has been available for Mexican workers living in the United States for an extended period of time. Despite the lack of legal authorization, thousands of Mexicans continue to enter the United States to seek temporary employment. This is precisely the problem that the President's proposals on immigration are designed to control.

III. EXECUTIVE AND LEGISLATIVE PROPOSALS

A. Introduction

If enacted, President Reagan's proposals would effectuate the most extensive revision of United States immigration law since 1978 and quite probably since 1965. The component of the program, which would potentially have the greatest impact in terms of the number of persons affected, would be that part which would grant

89. With few exceptions, all nonimmigrants are precluded from seeking employment in the United States unless specifically granted permission to engage in employment. Permission may be granted by a district director of the Immigration and Naturalization Service. The exceptions to the rule prohibiting employment of nonimmigrants are listed in C. GORDON & E. GORDON, *IMMIGRATION AND NATIONAL LAW* § 6.16(a) (abr. ed. 1979).

90. 8 U.S.C. § 1101(a)(15)(H)(ii) (1976).

91. E. HARPER, *supra* note 18, at 299.

92. *Congressional Research Service, supra* note 37, at 42.

93. *Id.*

legal status to all illegal aliens living in the United States before January 1, 1980.⁹⁴ This provision would grant permanent resident alien status to Cuban and Haitian aliens residing in the United States for a period of five years.⁹⁵ For all other illegal aliens, the applicable waiting period would be ten years.⁹⁶ Permanent resident aliens are eligible to apply for citizenship after living in the United States for five years.⁹⁷

The two other controversial provisions of the President's proposal would provide for the establishment of a guest worker program and the imposition of sanctions against employers who knowingly hire illegal aliens.⁹⁸ Under the guest worker program, a maximum of 50,000 Mexican citizens who have no intention of renouncing their Mexican citizenship would be allowed to enter and work in this country during each year of the two year program. These guest workers would work only in areas where domestic labor was in short supply, and like the Bracero program, the Mexican guest workers would be located only in those states and industries where their labor was needed.⁹⁹ While sanctions against employers for hiring illegal aliens in the form of fines are not new,¹⁰⁰ such penalties would be novel to federal immigration law.

94. See text accompanying notes 11 and 12 *supra*.

95. *President's Program*, *supra* note 7, at 4.

96. *Id.*

97. 8 U.S.C. § 1427(a) (1976) states:

No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

98. See notes 7 and 8 *supra* and accompanying text. Recall that the initial treaty between the United States and Mexico for the admission of temporary workers expressly provided that such workers should not displace domestic workers. See notes 60-64 *supra* and accompanying text.

99. *President's Program*, *supra* note 7, at 5.

100. Some states, most notably California, have had similar statutes for several years. See CAL. LAB. CODE § 2805 (West Supp. 1981).

The remaining provisions of the President's proposed program are less significant. They include spending \$40 million on improvement of border patrol facilities¹⁰¹ and doubling the present per country immigration quota for Canada and Mexico of 20,000 persons.¹⁰² Finally, the President has also proposed improving procedures for determining the eligibility for asylum so that the increased number of asylum petitions might be processed quickly.¹⁰³

The general grant of legal status is little more than a grant of amnesty. It is not a wholly acceptable solution because in effect it sanctions illegal immigration. It may also provide an incentive for illegal immigration because many Mexicans may decide to immigrate before the President's proposals become effective.¹⁰⁴ It is, however, a practical solution to the problem of illegal immigration by Mexicans.¹⁰⁵ Detection and deportation of the millions of illegal aliens in this country are virtually impossible.¹⁰⁶ These persons are dispersed throughout our country in such numbers as to preclude deportation as a viable option.¹⁰⁷ Furthermore, despite complaints that illegal aliens hurt the economy by taking jobs from American citizens, they are also consumers who contribute to the economy.¹⁰⁸ Finally, Cuban and Haitian refugees are treated differently under

101. Attorney General's statement, *supra* note 10, at 5.

102. *Id.*

103. *Id.*

104. It has been recommended that those aliens who do not meet the January 1, 1980 residence requirement be granted a special temporary status which would eventually allow these persons to adjust to permanent resident status. 127 CONG. REC. S1689, S1690 (daily ed. Feb. 27, 1981) (statement of Sen. Edward M. Kennedy on Report of the Select Commission on Immigration Policy).

105. Comprehensive recommendations for the control of Mexican illegal immigration can be found in W. TONEY, A DESCRIPTIVE STUDY OF THE CONTROL OF ILLEGAL MEXICAN MIGRATION IN THE SOUTHWESTERN U.S. at 69-78 (1977).

106. The government's inability to even estimate the number of illegal aliens presently in this country underscores the difficulty of the problem. See Manulkin & Maghame, *A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker*, 13 SAN DIEGO L. REV. 42, 45 (1975).

107. Go to New York City or to Los Angeles and you will find these people working in sweat shops like those not seen in this country since the 1920s. [Illegal aliens] are not working in the fields anymore. These 6 to 8 million people are competing today across the spectrum of skills. They are in railroads, they are in the hotels, they are in restaurants, they are in the garment industry, but very few are in agriculture.

American Enterprise Institute for Public Policy Research, SHOULD U.S. IMMIGRATION POLICY BE CHANGED? 8 (1980) (remarks of Mr. Otero).

108. *New Solution*, *supra* note 59, at 454.

this provision primarily because of the circumstances of their migration to the United States.

B. *The Mexican Guest Worker Program*

The guest worker program is comparatively minor in scope yet it is the focal point of much of the criticism directed at the President's proposals. Questions have been raised regarding the means of determining where domestic labor is in short supply and by what means a shortage is to be determined.¹⁰⁹ There have also been questions about the size and duration of the program and the government's ability to measure its impact upon domestic employees.¹¹⁰ The last and possibly most important shortcoming noted by critics of the program is the lack of a viable procedure for distinguishing guest worker aliens, legal resident aliens and citizens from illegal aliens.¹¹¹

The admission of Mexican guest workers under the President's proposal only when domestic labor is in short supply implies some form of governmental determination that a shortage exists. Presumably, the procedure will be somewhat similar to that used in related legislation.¹¹² Several bills introduced into the present session of Congress address this issue of "labor certification"¹¹³ in different ways. For example, Senate Bill 47 (Schmitt Bill) allows the Attorney General to control the certification process.¹¹⁴ The Schmitt Bill also places the power to establish restrictions upon the employment of guest worker aliens in the hands of the Attorney General. Under this proposal an employer or employee may show the Attorney General that the use of Mexican guest workers will displace domestic labor.¹¹⁵ In determining the number of Mexicans to be

109. See text accompanying notes 112-34 *infra*.

110. See text accompanying notes 142-44 *infra*.

111. See text accompanying notes 152-62 *infra*.

112. See text accompanying notes 90-92 *supra*.

113. This is the term generally used in reference to the process which determines the availability of domestic labor. See, e.g., Rubin & Mancini, *An Overview of the Labor Certification Requirement for Intending Immigrants*, 14 SAN DIEGO L. REV. 76 (1976).

114. The Attorney General, upon request from the Secretary of Labor, shall place specific restrictions on employment of aliens holding temporary work visas under this program at a specific business or agricultural site if employees or employers demonstrate that such aliens will displace available, qualified, and willing domestic workers. The Secretary of Labor shall establish the criteria under which such restrictions may be requested. S. 47, 97th Cong., 1st Sess. § 3(f) (1981),

115. *Id.*

admitted as temporary workers, the Attorney General may seek help from the Secretaries of Labor, Agriculture and Commerce.¹¹⁶ The Attorney General may also consider the historical needs of a particular market.¹¹⁷ The bill also uses terminology employed in the labor certification process.¹¹⁸ It allows the Attorney General to "place specific restrictions on employment of aliens . . . at a specific business or agricultural site if employees or employers demonstrate that such aliens will displace *available, qualified, and willing* domestic workers."¹¹⁹ This language is important because it requires other factors, including desire to work and desirability for employment, be considered in determining whether a shortage of domestic labor exists.

In the House of Representatives, H.R. 156 (Burgener Bill) is one bill that most closely resembles what the final labor certification procedure should be.¹²⁰ The Burgener Bill provides that the Secretary of Labor shall make all required certifications.¹²¹ Again, it must be certified that insufficient domestic workers are "able, willing, and qualified."¹²² However, the Secretary must also certify that the admission of guest worker aliens will have no adverse affect on the wage rate of domestic workers.¹²³ Similar certification procedures are found in H.R. 619 (Shumway Bill), in which it is the Secretary of Agriculture who is authorized to certify that employment of guest workers in a particular area will not affect wages for domestic labor in that area.¹²⁴

116. "When appropriate, the Attorney General shall seek the assistance of the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor . . . in computing the annual and monthly numerical quotas for temporary worker visas. . . ." *Id.* § 3(g).

117. "In computing such quotas, the Attorney General shall also consider historical needs, availability of domestic labor, and the projected needs of prospective employers." *Id.*

118. See note 113 *supra* and accompanying text.

119. See note 114 *supra* (emphasis added). Another bill, S. 930, 97th Cong., 1st Sess. (1981) (Hayakawa Bill), uses essentially the same approach.

120. H.R. 156, 97th Cong., 1st Sess. (1981).

121. *Id.* § 3(a).

122. *Id.*

123. It is required that the Secretary of labor certify that "the employment of such alien will not adversely affect the wages and working conditions of workers similarly employed. . . ." *Id.*

124. H.R. 619, 97th Cong., 1st Sess. § (a) (1981). Another piece of legislation, H.R. 1073, 97th Cong., 1st Sess. § 3(a) (1981) (Hinson Bill), sets forth basically the same procedure. It requires the Secretary of Labor to certify:

That (I) sufficient domestic workers who are able, willing, and qualified are not available at the time and place needed to perform the work for which such worker is to be employed, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers similarly employed. . . .

One other noteworthy piece of legislation introduced during the current session of Congress is H.R. 1650 (Lungren Bill).¹²⁵ This bill amends the Immigration and Nationality Act to provide for a guest worker program whose size would be based upon the number of workers sought by employers.¹²⁶ In regulating the flow of guestworkers into the United States, the Attorney General would consider historical needs, domestic availability and employer needs.¹²⁷ The Attorney General, along with the Secretary of Labor, could then impose restrictions on the employment of Mexican guest workers if employers or employees demonstrated that these aliens would displace domestic labor.¹²⁸ Because it is not wise to leave control over the admission of guest workers to those who will employ them,¹²⁹ it is not likely that this bill will be enacted.

The law codifying the President's program is likely to incorporate elements of one or more of these legislative proposals. However, the use of the terminology, "able, willing, and qualified", or words to that effect, may cause problems in implementation. For example, the Department of Labor has rarely looked past its unemployment files in determining whether domestic labor was able, willing and qualified under the basic statute determining the admissibility of alien temporary workers.¹³⁰ This in effect created a

125. H.R. 1650, 97th Cong., 1st Sess. (1981).

126. *Id.* § 4(e)(2).

127. *Id.*

128. *Id.* § 4(e)(3).

129. History indicates that unscrupulous employers will exploit guest workers as much as possible to gain the maximum benefit from their employment. *See* text accompanying note 72 *supra*.

130. 8 U.S.C. § 1182(a)(14) (1976) which lists the general classes of excludable aliens states:

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States.

.....
Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are *able, willing, qualified* (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in The sciences or the arts), *and available* at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. . . .

(emphasis added). Analysis of this statute indicates little concern for the willingness of domestic labor to perform the job. *See* Rodino, *The Impact of Immigration on the American Labor Market*, 27 RUTGERS L. REV. 245, 245-46 (1974).

policy on the part of the Department to concentrate upon the availability of similar workers while ignoring the willingness issue.¹³¹ If this type of language is used in the President's program, a similar problem may result in making an accurate estimate of domestic labor resources.

Regardless of the terminology used, a problem exists in accurately determining the total number of domestic workers "available" in a given area at a given time. Certainly, an areawide standard is preferable to a nationwide or statewide standard in that it simplifies whatever procedure is used to determine "availability".¹³² Discrepancies arising regarding the "availability" of domestic workers could best be resolved by the courts.¹³³ Given the difficulty in determining "availability" of domestic workers,¹³⁴ it would seem that the burden of proof should be placed on those alleging the existence of sufficient domestic labor.

The functional portion of the guest worker program permits 50,000 Mexican citizens who have no intention of relinquishing their Mexican citizenship to live and work in the United States each year for a period of two years.¹³⁵ This part of the guest worker

131. Construed this way, the statute fails to accomplish the purpose for which it was enacted. The statute is not concerned with any worker in this country who may be adversely affected. The statute was aimed at protecting those United States workers who live and work in the same community as the alien intends to live and work in, and further, to those United States workers who are "able," "willing," "qualified" and "available" for that particular job. MANULKIN & MACHAME, *supra* note 106, at 53.

132. H.R. 620, 97th Cong., 1st Sess. (1981), would amend 8 U.S.C. § 1101(a)(15)(H)(ii) (1976) to provide explicitly for an areawide standard.

133. Courts have a pattern of involvement in review of labor certification denials. C. GORDON & H. ROSENFELD, *supra* note 16, § 3.6i.

134. See notes 130-33 *supra* and accompanying text.

135. *President's Program*, *supra* note 7, at 5. The size of the program would seem primarily a concession to those political interests, such as organized labor, that oppose the idea of a guest worker program. It is believed that the Mexican government wanted a much larger program. *Weisman Article*, *supra* note 2, at A10, col. 1. President Reagan, while campaign for election, called for a guest worker program in the hundreds of thousands. *Guest Worker Article*, *supra* note 3, at A1.

The President's proposal makes of mention of the length of time that Mexican aliens may remain in the United States during the pendency of the program. Presumably, each guest worker would be allowed to stay and work in this country for an entire year. Several of the previously mentioned pieces of legislation deal specifically with the legal duration of a guest worker's stay in this country. S. 47, 97th Cong., 1st Sess. § 3(e)(1) (1981) would allow Mexican guest workers to stay in the United States 240 days per year. S. 930, 97th Cong., 1st Sess. § 5(a) (1981) would only allow guest workers to stay 180 days per year while H.R. 944, 97th Cong., 1st Sess. § 102(m)(i) (1981) (White Bill) would allow them to stay for the entire year.

program has aroused strong criticism from organized labor. Labor leaders argue that the program will take jobs from domestic workers and weaken the power of unions in those areas where guest workers are employed.¹³⁶ These arguments ignore the fact that the certification procedure, whatever form it ultimately takes, will be designed specifically to prevent the program from adversely affecting the domestic labor market.¹³⁷ As to the allegation that the guest worker program is anti-union, there are insufficient facts available to substantiate this claim.¹³⁸

Mexican-Americans have criticized the Reagan program as being tantamount to "institutionalized serfdom".¹³⁹ They fear that participants in the guest worker program would be subject to the abuses and exploitation of unscrupulous employers.¹⁴⁰ It has also been noted that guest workers in programs in other countries have decided to stay on in the host country after termination of the program.¹⁴¹ While this criticism may be well-founded in some isolated circumstances, the overall thrust of the President's program is to eliminate the far greater problem of exploitation of illegal aliens throughout the United States.

136. It has been established that the Bracero program was used to undermine attempts at farm unionization. M. BARRERA, *supra* note 84, at 118. The purpose of the guest worker program, however, is not to compete with union laborers but rather to supplement them when there are more jobs available than there are domestic union workers to fill them. See generally 127 CONG. REC. 560 (daily ed. Jan. 5, 1981) (remarks of Sen. Schmitt).

137. The certification procedure, along with sanctions on employers knowingly hiring illegal aliens, are measures created to protect domestic labor. See generally 127 CONG. REC. S59 (daily ed. Jan. 5, 1981) (remarks of Sen. Schmitt).

138. To argue that the guest worker program will be used, as was the Bracero program, to thwart union organizing efforts is to make an assumption without a sufficient basis in fact. It also ignores federal labor law which makes it an unfair labor practice for an employer to interfere in union organizing efforts. 29 U.S.C. § 158(a)(1) (1976).

139. NEWSWEEK, August 3, 1981, at 25.

140. The [present] law is not enforceable, and a substantial number of people enter without inspection, without documents, and live to some extent in an underground economy. To some degree, they become an underclass. They are not only exploited at the work place, . . . but criminals also prey upon them. Some do not report their health problems or even send their children to school, which is a very bad thing for the United States of America. American Enterprise Institute for Public Policy Research, SHOULD U.S. IMMIGRATION POLICY BE CHANGED?, *supra* note 107, at 4.

141. *Guest Worker Article*, *supra* note 3, at B8. Switzerland, Germany, France and Sweden have had guest worker programs and in those countries guest workers have tended to become permanent. Martin & Miller, *Guestworkers: Lessons From Western Europe*, 33 INDUS. & LAB. REL. 315, 329 (1980).

The proposed guest worker program can also be criticized as being too small to have a measurable effect upon illegal immigration. The history of the Bracero program indicates that only after many years and the admission of hundreds of thousands of Bracero laborers did its inadequacies become clear.¹⁴² Obviously, the admission of 50,000 Mexicans each year for a period of two years will do little to diminish the flow of illegal aliens.¹⁴³ Therefore it is doubtful that the program as it is now planned will truly be an effective and reasonable program for the economic benefit of Mexican citizens.¹⁴⁴ The guest worker program will do little to resolve the problem of hundreds of thousands of illegal immigrants coming into this country from Mexico each year. There will probably be few claims that employers are subjecting the guest workers to substandard wages and working hours but, in light of all of the program's other problems, the importance of this factor is suspect.

C. Employer Sanctions

The concept of sanctions for employers who knowingly and willfully hire illegal aliens is not new. Such a provision was proposed in one version of the Immigration and Nationality Act of 1952.¹⁴⁵ However, an extensive lobbying campaign conducted by business interests resulted in the addition of a proviso exempting employers from sanctions imposed against those who "harbored" illegal aliens.¹⁴⁶ Additionally, Congress has debated the concept in

142. See notes 80-88 *supra* and accompanying text. See generally Hadley, *A Critical Analysis of the Wetback Problems*, 21 LAW & CONTEMP. PROB. 334, 344 (1956); *Congressional Research Service*, *supra* note 37, at 40.

143. By its own estimate, the Reagan Administration admits that illegal immigration into this country is at least ten times the size of the proposed program. Crewdson, *Plan on Immigration: Lack of a Way to Detect Illegal Aliens May Hamper New Reagan Proposals*, N.Y. Times, July 31, 1981, at A12, col. 1 [hereinafter cited as *Immigration Plan*].

144. In his official statement on immigration and refugee policy, President Reagan noted that "[w]e must also recognize that both the United States and Mexico have historically benefited from Mexicans obtaining employment in the United States." 17 WEEKLY COMP. OF PRES. DOC. 829, 830 (July 30, 1981). It is not clear how this limited program can meaningfully diminish Mexican unemployment. Surely, the Mexican government does not perceive this program as being much help since they lobbied strongly for a much larger program. N.Y. Times, June 8, 1981, at A10, col. 6.

145. 98 CONG. REC. 802-13 (1952) (remarks of Sen. Douglas). See *New Solution*, *supra* note 59, at 441-42; *Congressional Research Service*, *supra* note 37, at 36.

146. Commonly known as the "Texas Proviso", it was codified into 8 U.S.C. § 1324a (1976) which states, in relevant part, "Provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

one form or another for over ten years.¹⁴⁷ President Reagan's proposal would impose fines of five hundred to one thousand dollars for each illegal alien hired.¹⁴⁸ Injunctions could also be imposed against those employers who show a "pattern or practice"¹⁴⁹ of hiring illegal aliens.

The President's proposal eschews criminal penalties for the employment of illegal aliens premised on the belief that criminal penalties are less likely to be enforced and would result in lengthy and expensive court cases.¹⁵⁰ Two bills introduced into the present session of Congress, however, advocate imprisonment for employers who knowingly hire illegal aliens.¹⁵¹ Although somewhat impractical, criminal penalties may be the only way to substantially decrease the flow of illegal aliens from Mexico. A policy favoring enforcement of criminal penalties would clarify to employers the consequences of employing illegal aliens. It would also effectively diminish the "push-pull" factor¹⁵² of illegal Mexican immigration because there would be fewer jobs to attract illegal immigrants to this country.

D. National Identification Cards

To succeed, it is essential that the President's proposal include some procedure for distinguishing legal Mexican aliens and citizens from illegal aliens. During the preparation of this program, the White House staff considered and subsequently ruled out establish-

147. *Employer Sanctions*, *supra* note 11, at 680.

148. See note 8 *supra* and accompanying text. Again for the purpose of comparison, the sanctions proposed are similar to those mentioned in S. 930, 97th Cong., 1st Sess. § 10(d)(2) (1981), which fines an employer \$500 for each violation.

149. *Id.*

150. *Employer Sanctions*, *supra* note 11, at 684-85.

151. H.R. 1073, 97th Cong., 1st Sess. § 5 (1981) states, "(c) Any person who employs an alien and who knows that the alien is not permitted to be employed in the United States shall be fined not less than \$1,000 and not more than \$25,000, or imprisoned for not more than five years, or both, for each such alien so employed." H.R. 1965, 97th Cong., 1st Sess. (1981) provides:

(c) Whoever knowingly employs for compensation any individual the employing person knows is an alien not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens shall be fined not more than \$5,000 or imprisoned not more than one year.

152. "The basic theory used to explain why Mexicans come to the United States illegally is the push-pull theory. The theory is simple: Depressed economic conditions at home push Mexicans toward the border, and the lure of jobs and high wages pulls them toward the United States." *New Solution*, *supra* note 59, at 450-51 (footnote omitted).

ment of a national identity card system.¹⁵³ The primary reason stated for this decision was that the total cost of the development and implementation of such a system would be prohibitive.¹⁵⁴ However, the Reagan Administration's concern about public fears of over-regulation and the potential for abuse may have also been factors which militated against adopting such a system.¹⁵⁵

Most arguments for the establishment of a national identity card call for what is merely a modified Social Security card.¹⁵⁶ Such a card would require little more information than that found on the average driver's license.¹⁵⁷ The card would be made of "forge-proof" paper similar to that used in printing currency.¹⁵⁸ Civil libertarians oppose a national identity card because they fear that the card will lead to over-regulation which in turn will lead to some form of police state.¹⁵⁹ Such critics ignore the fact that the govern-

153. See *Immigration Plan*, *supra* note 143, at A12.

154. *Id.*

155. The President, in his official statement on the topic, stressed that no part of the proposal should conflict with individual privacy and freedom. 17 WEEKLY COMP. OF PRES. DOC. at 829 (July 30, 1981). Senator Kennedy has also expressed opposition to the national identification card, perceiving this document as a threat to personal privacy and civil liberties. 127 CONG. REC. S1690 (daily ed. Feb. 27, 1981).

156. See H.R. 156, 97th Cong., 1st Sess. (1981). As Rep. Don Bonker has noted that "[t]he Social Security Act has always required that all gainfully employed people have a social security number and that this number be given to the employer. Thus, the basic system for controlling employment eligibility through a single document is already in place." 127 CONG. REC. E1000 (daily ed. March 11, 1981) (remarks of Rep. Bonker). See generally W. FOGEL, MEXICAN ILLEGAL ALIENS IN THE UNITED STATES 112-75 (INSTITUTE OF INDUSTRIAL RELATIONS Monograph No. 20, 1979).

157. Actually, little information about the individual is required. H.R. 156, 97th Cong., 1st Sess. § 4(a)(2) (1981), would have the modified Social Security Card contain the individual's name, signature, date of issuance of the card, and the expiration date of the card.

158. The solution to discrimination against Hispanics and to the enforcement of a ban on hiring illegal aliens generally would seem to be the use of a work card which would establish the holder's legal eligibility for employment. Because all workers would be required to have a card, and because the possession of the card would establish work eligibility, there could be no discrimination against Hispanics who are citizens or legal resident aliens. It would be logical to adapt the existing social security card for this purpose, because almost all workers must now have one and almost all employers are required to record its number for their employee's social security account. The new social security card would have to be counterfeit-proof, non-transferable, and it could not be issued to illegal aliens. Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives*, 15 SAN DIEGO L. REV. 63, 77 (1977).

159. "Arguments against a standardized national ID [include] beliefs that such documentation is in opposition to American tradition and would represent an invasion of personal privacy, and that data required for citizen identification could be abused by government or private interests." STAFF OF SENATE COMMITTEE ON THE JUDICIARY, 96th Cong., 2nd Sess., REPORT ON THE CRIMINAL USE OF FALSE IDENTIFICATION at 75 (Comm. Print 1980) [hereinafter cited as FACFI]. See *New Solution*, *supra* note 59, at 463.

ment already has most of the information which would be needed to enforce the program.

Without the national identification card, employers hiring Hispanic laborers would have to rely upon traditional methods of identification to determine whether a particular individual is in this country legally.¹⁶⁰ The problem with these forms of identification is that they are easily forged.¹⁶¹ Under the Reagan proposal, employers would have to certify that they had no reason to doubt a prospective employee's representations that he is lawfully in the United States.¹⁶² Unfortunately, all this may mean is that the employer is certifying that he cannot detect a forger.

The effect of this failure to provide for an identification procedure is that the entire sanction concept, along with the guest worker program, may be rendered wholly ineffective as a means of controlling illegal immigration. There would seem to be few instances where an employer would have to resort to knowingly hiring illegal aliens. Even then, the Attorney General has made it clear that these sanctions will be used only against those who hire significant numbers of illegal aliens.¹⁶³ Thus, the President's program seems designed to catch not those who are foolish enough to hire illegal aliens, but rather only those who are foolish enough to do so several times.

E. Miscellaneous Provisions

The other, less controversial changes in immigration policy proposed by the President are likely to be of little help in controlling illegal immigration. The \$40 million proposed allocation to improve the Border Patrol is really more of a symbol than a solution.

160. The Administration said that employers could meet their legal responsibility in this respect by examining any two of the following documents: a birth certificate, a driver's license, a Social Security Card or a draft registration certificate issued by the Selective Service System. *President's Program*, *supra* note 4, at A12.

161. See, e.g., FACFI, *supra* note 159, at 79-83; *New Solution*, *supra* note 59, at 463. "While the administration has sought to diminish fears of potential violations of privacy that could accompany the transformation of the social security card into a national identification card, the government may find this spectre less threatening than the consequences of the continued influx of illegal aliens." *Employer Sanctions*, *supra* note 11, at 685-86 (footnote omitted).

162. *President's Program*, *supra* note 7, at 5.

163. Under the President's proposal, the sanctions would not apply to businesses with three or fewer employees. *President's Program*, *supra* note 4, at A1. More importantly, the Attorney General has given assurances that sanctions would be imposed only against those who hire significant numbers of illegal aliens. *Immigration Plan*, *supra* note 143, at A12.

Past attempts to halt illegal immigrants at the border met with only temporary success.¹⁶⁴ It has been noted that the only truly effective method to police our border with Mexico is to place soldiers shoulder to shoulder along its entire 2,000 mile length.¹⁶⁵ More Border Patrol guards and facilities may delay but will not deter the average illegal immigrant from entering this country undetected.¹⁶⁶ A more logical alternative would be to remove any motive for illegal immigration, thus removing the need for a large and expensive Border Patrol.¹⁶⁷

The President's proposal for increasing the quota for Mexico and Canada would also create a special exception to the worldwide limit of 20,000 persons per country.¹⁶⁸ This proposal would double the quotas for both countries, creating a total immigration "pool" of 80,000 persons.¹⁶⁹ Since Canada traditionally has not used all of its allotment, Mexico would be allowed to "borrow" from the unused Canadian allocation.¹⁷⁰ Although this part of the Reagan proposal would have an impact upon illegal immigration, it would be too small to markedly diminish illegal immigration.¹⁷¹

IV. CONCLUSIONS AND RECOMMENDATIONS

Though significant structural differences exist,¹⁷² the results of the President's proposal may not vary greatly from those obtained under the Bracero program. The guest worker program, like the Bracero program, may provide an impetus for illegal immigration

164. P. EHRLICH, L. BILDERBACK & A. EHRLICH, *supra* note 61, at 214-17. The operation to shut down the Mexican border, called "Operation Wetback," turned the Border Patrol of the 1950s into a small army. *New Solution*, *supra* note 59, at 441. However, critics note that "Operation Wetback" alone could not have caused the dramatic reduction in illegal immigration. *Congressional Research Service*, *supra* note 37, at 37-39.

165. *Immigration Plan*, *supra* note 143, at A12.

166. See C. HALSELL, *THE ILLEGALS* 18 (1978).

167. "By removing the lure of jobs in the United States, the incentive for illegal immigration would be greatly diminished." 127 CONG. REC. E1001 (daily ed. March 11, 1981) (remarks of Rep. Bonker).

168. See text accompanying notes 50 and 51 *supra*.

169. *President's Program*, *supra* note 7, at 6.

170. *Id.*

171. See note 143 *supra* and accompanying text.

172. The most important difference is that the President's proposal would not tie Mexican workers to a specific employer, as was done in the Bracero program. Temporary guest workers would be allowed to move into those industries in which they are needed. As extensive comparison of the Bracero program to the President's program is beyond the purpose of this note. However, such a comparison may be initiated by examining Spradlin, *supra* note 71, at 87-95.

by permitting 100,000 Mexicans to live in the United States and develop both relationships and a general affinity for life in this country.¹⁷³ Because the number of Mexican immigrants allowed into this country is comparatively small and the methods for illegal entry are easier than those of legal entry.¹⁷⁴ It would not be surprising that most would opt for illegal immigration.

The President's proposal is, however, a sincere attempt to deal with the problem of illegal Mexican immigration. The crucial flaw in the proposal is that its provisions are too timid to alter established patterns of illegal immigration. For the guest worker program not to adversely affect domestic labor it must be small in scope.¹⁷⁵ However, this means that the program will be too small to affect illegal immigration. Thus, even if the President's program is enacted it is likely to have minimal impact upon illegal immigration.

The Reagan proposal is also seriously flawed because it does not provide for an effective identification procedure. Employer sanctions are established under the proposal but are applied only if the employer has reason to believe the prospective employee is an illegal alien.¹⁷⁶ However, it is all too easy for illegal aliens to dispel any lingering doubts as to the legality of their presence by purchasing cheap and accessible forged identification.¹⁷⁷ Consequently, the program may in fact prove a greater catalyst for illegal immigration than even the Bracero program.

This is not to say that the President's proposal is totally lacking in worthwhile qualities. The establishment of civil penalties on

173. As noted earlier, history illustrates that guest workers will develop social and economic ties that lead them to prefer life in the United States. See note 141 *supra* and accompanying text.

174. Presently, Mexico is still subject to the per country limitation of 20,000 persons. Even if this limitation is doubled, as the President suggests, this would still not dramatically affect the illegal immigration problem. As to the ease of illegal entry, it is only necessary to note that the maximum amount of Border Patrol officers on duty on the 2,000 mile Mexican Border at any one time is 350, or about one for every 5.7 miles. The Select Commission on Immigration and Refugee Policy conducted extensive research on this entire area and developed conclusions and proposals similar to those of President Reagan. See EXECUTIVE SUMMARY—RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, reprinted in 127 CONG. REC. S1686 (daily ed. Feb. 27, 1981).

175. "Adverse effect" in this instance may be more properly termed as "perceived adverse effect" on the part of labor unions. Although there seems to be a consensus as to the effect of the Bracero program on domestic labor, disagreement exists as to the impact of illegal immigration today on wages and job displacement. *Employer Sanctions*, *supra* note 11, at 665-67.

176. See text accompany note 162 *supra*.

177. See note 161 *supra* and accompanying text.

employers who knowingly hire illegal aliens has been long overdue. Unfortunately, the method of enforcement proposed by the Attorney General fails to give employer sanctions their proper effect.¹⁷⁸ The President's proposal would be highly effective if the method for identification of illegal aliens was improved and if sanctions were strongly enforced. Mexican citizens would then know, prior to immigrating illegally that their chances of finding the "good life" in the United States were slim. Also, if the sanctions were more costly, employers would not risk hiring illegal aliens under most circumstances, much less establish a pattern or practice of doing so.¹⁷⁹ Although it is true that no program can eliminate all illegal immigration,¹⁸⁰ the President's proposal is likely to do little, if anything, to change the trends of illegal Mexican immigration established over the past forty years.

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178. See note 163 *supra* and accompanying text.

179. See note 148 *supra* and accompanying text.

180. Rev. Theodore M. Hesburgh, head of the Select Commission on Immigration and Refugee Policy, has stated:

No one on this Commission expects to stop illegal migration totally or believes that new enforcement measures can be instituted without cost. But we do believe that we can reduce illegal entries sharply, and that the social costs of not doing so may be grave. What is a serious problem today, could become a monumental crisis as migration pressures increase.

127 CONG. REC. S1685 (daily ed. Feb. 27, 1981).