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LABOR MIGRATION TO THE UNITED STATES: CHALLENGES AND OPPORTUNITIES

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Introduction

Much of US legal admissions policy was formulated in the 1960s, with some changes in the 1990s to reflect new realities. Foreign workers are admitted through two, inter-connected admissions categories: permanent immigration and temporary work programs. The current system has some strengths in serving as a conduit for employment based admissions, but its many weaknesses reduce its ability to meet labor market needs or to protect adequately either domestic or foreign workers. Its principal strength is to bring to the country talented immigrants who have high levels of employment. Among the problems is the inflexibility of the ceilings applied to various admission categories, processing and administrative complexity and delays, inadequate mechanisms to measure labor-market demand, inadequate protection for temporary workers, failure to recognize the transitional, rather than temporary, nature of many nonimmigrant visa categories, and the very complexity of the current employment-based system. This paper outlines the major permanent and temporary admissions categories, discusses the weaknesses discussed above, and concludes with principles for improving the employment based immigration system.

Background

US employment-based policies are ostensibly demand-driven. In most categories, employers petition for the admission of workers whom they wish to hire. The onus is on them to demonstrate that they have tested the labor market for a domestic hire and/or are taking steps to protect the domestic labor market, particularly by paying foreign workers prevailing wages. A

totally different system chooses foreign workers on a supply side basis. Point systems are a well-known way to attract human capital. Most do not test the labor market, in contrast to demand driven systems, as they tend to be based on the presumption that persons with education or specific skills, knowledge of the local language, youth and other desirable characteristics will benefit the overall economy and society.

Permanent Immigration

During the 1990s, the United States admitted about 825,000 legal immigrants each year, up from about 600,000 a year in the 1980s (not counting those legalized under the 1986 amnesty), 450,000 a year in the 1970s, and 330,000 a year in the 1960s. During the first half of the first decade of the 21st century, admissions grew to an average of 1.082 million per year, despite a short decline in the aftermath of September 11.

Permanent immigrants—“green carders”—are persons who are entitled to live and work permanently in the U.S. and, after five years, to become naturalized U.S. citizens. The four principal bases or doors for admission are family reunification (either sponsored by green carders or naturalized citizens), skills, diversity, and humanitarian interests. By far the largest admissions door is for relatives of U.S. residents. In 2006, the last year for which there is detailed statistics, 66% of the 1.266 million immigrants were granted entry because family members already resident in the U.S. formally petitioned the U.S. government to admit them. The second largest category of immigrants in 2006 (20%) included refugees, asylees and other humanitarian admissions. Immigrants and their family members admitted for economic or employment reasons represented 12.5% of admissions, and about 3.5 percent came under the diversity visa category—immigrants from countries that have not recently sent large numbers of immigrants to the United States.

The employment-based immigration category is divided into five preferences, or groupings, each with its own admission ceiling. The highest priority goes to priority workers or persons of extraordinary ability, outstanding professors and researchers, and executives and managers of multinational corporations. The second group includes professionals with advanced degrees and workers of exceptional ability. The third group is composed of other professionals, skilled workers and a limited number of other workers, with the fourth permitting entry of religious workers and the fifth including entrepreneurs admitted for activities creating employment. Unused numbers in higher priority groups can be passed down to lower priorities. Although there is an overall ceiling of 140,000 employment-based visas, Congress passed legislation in 2005 that recaptured 50,000 visas that had not been used in previous years to augment the number of visas that would be available in 2005 and 2006.

Most employment-based immigrants are sponsored by employers. About 90% of those admitted to permanent residence in the employment-based categories are already in the United States.¹ To hire a foreign worker as a permanent resident, the employer must undertake a recruitment process that meets Department of Labor (DOL) guidelines and demonstrates that no minimally qualified U.S. worker is available. Until recently, the wait for approval took several years, first at DOL and then the Bureau of Citizenship and Immigration Services (CIS) at the Department of Homeland Security (which assumed responsibility from the Immigration and Naturalization Service). During 2007, however, DOL took steps to reduce the backlog of labor certification applications, largely by shifting to a more streamlined process that approved most applications if the information was correct on its face. CIS has also taken steps to reduce processing delays², but applications are still subject to legislative backlogs resulting from category and per country

¹ Other categories include large numbers of persons adjusting status in the United States, including 55% of immediate family of U.S. citizens.

² Although much improved, processing delays still exist, particularly at the CIS Texas Processing Center, which announced in June 2007 that it was reviewing applications for I-140 immigrant petitions for skilled workers and professionals that were filed on August 01, 2003.

limits. Each month, the State Department issues a bulletin describing the availability of visas, based on these numerical limits. In October 2008, visas were available for applicants from India in the EB-2 category (that is, those with an advanced degree) who had applied in April 2003, more than a four year delay. Similar delays exist for applicants from the Philippines and China. In the EB-3 category (other professionals), applicants who had applied prior to January 2005, but Indian and Chinese applicants were backlogged to 2001. Employers and immigrants have been frustrated by the delays, and tend to use temporary visa categories to bridge the gap between the decision to hire the worker and the government's grant of permanent resident status.

Temporary Workers

The 1990s saw a large increase in the demand for foreign workers as the US economy grew sharply, but there were no increases after the 1990 legislation in the permanent admission categories for employer sponsored workers. Instead, temporary worker categories are increasingly important as the vehicle for admission of foreign workers, particularly professionals, executives and managers. Over time, a large number of different temporary admission visa categories have emerged, each referred to by the letter of the alphabet under which it is described in the Immigration and Nationality Act. The visa categories now encompass almost the entire alphabet (A-V). The principal sections under which temporary workers enter are the E visa for traders and investors entering under bilateral treaties, H1-B for specialty workers, H-2A for agricultural workers, H2-B for other seasonal workers, L for intracompany transfers, and J for exchange scholars among others. Smaller numbers enter under the O visa (extraordinary ability in the sciences, arts, education, business, or athletics), P (artist or entertainer), Q (cultural exchange and training), and R (religious workers). In addition, there are visa categories for officials of foreign governments, foreign journalists, and officials of the United Nations and other

intergovernmental organizations. Professionals, managers and executives may also enter under the North American Free Trade Agreement.

In the Immigration Act of 1990 Congress imposed restrictions on the growing use of the H visa, intended to protect the domestic worker. Originally, the visa had no numerical limitations and few labor protections. In 1990 numerical caps of 65,000 new H-1Bs and 66,000 new H-2Bs per year were imposed. Demand for the H-1B particularly continued to grow, however, largely reflecting demand for the visa by the rapidly expanding information technology (IT) sector. It reflects too, the growth in supply of foreign-born IT graduates from U.S. colleges, the changed nature and appeal of the visa, and procedural backlogs faced by those who would prefer admission via the permanent system that make the H-1B an easier alternative. In recent years employer demand for H-1Bs has been such that the numerical cap was exceeded before the year ran out.

In response, Congress raised the cap twice since 1998. Primarily as the result of lobbying by the information technology industry, the U.S. Congress passed the "American Competitiveness and Work Force Improvement Act (ACWIA)." That legislation beginning in October of 1998 provided an increase in the number of available H-1B visas from 65,000 per year to 115,000 per year in 1999 and 2000, and 107,500 in 2001. While employers welcomed the increase in the H-1B cap in ACWIA, the numbers proved to be insufficient given backlogs carried over from prior fiscal years and ever-growing demand. In response, Congress once more passed legislation, the American Competitiveness in the Twenty-first Century Act of 2000 (ACTFA), which increased the ceiling to 195,000 and exempted certain categories of employers, particularly universities and research centers, from numerical limits.

Of course, subsequently, there was a sharp downturn in the fortunes of information technology and large layoffs in the “dot.com” industries and elsewhere. When the legislative sunset occurred, Congress did not extend the higher numbers under the cap. As of this writing, the number has reverted to 65,000. The Department of Homeland Security announced it had received 150,000 applications in April 2007 for FY 2008, which began on October 1, 2007.

Movement of foreign workers for temporary reasons, at today's levels, is a new phenomenon for the United States. Statistics on temporary admission count every entry into the United States and, hence, are a multiple count of oftentimes the same individual. Nonetheless, only 770,000 temporary admissions were counted in the first decade of the twentieth century, a number that went on to increase to 7 million in the 1950s, and by the last decade of the century, there were some 230 million temporary admissions. Because these are multiple counts they reflect both a stupendous increase in the number of individuals involved, as well as a significant increase in back and forth mobility.

Revolutions in transportation, tourism, and the global economy are driving a level of temporary international mobility not prefigured by past experience. To be sure, a substantial fraction of the supposedly “permanent” international flows of yesteryear was actually temporary migrants or “birds of passage.” That dynamic exists today as well. It is common for “permanent” immigrants to circulate regularly to their original homeland and many immigrants end up returning home for good. However, the temporary movement that exists today is fundamentally different because it is not a by-product of otherwise permanent visa holders. More precisely, policy mechanisms explicitly define it as “temporary” at the outset. The only major precedent for such policies in the United States is the Bracero Program under which Mexican seasonal workers entered the country from its inception during World War II until its end in the 1960s.

The class of so-defined temporary movement has reached levels that easily surpass the past or present return movements of legal permanent residents, as well as exceeding the level of permanent immigration itself. The only available estimate of "person years" suggests that the temporary admissions programs generated a year-round presence equivalent to at least 1.4 million persons as of 1994.³ What is clear is that the temporary *worker* classes have grown significantly and exceed the number of employment-based permanent admissions.

Unauthorized Migration

While the United States continues to admit large numbers of legal immigrants and temporary workers, the fastest growth in immigration is now coming from those without authorization to be in the country. An estimated 12 million unauthorized migrants were in the United States in 2007, with an estimated 500,000 net new entries each year. As a net number, it reflects the difference between new entries and those who return home or who adjust their status and become legal immigrants.

Unauthorized entry occurs in a number of different ways. About 55 percent of those illegally in the United States are believed to have entered clandestinely, largely across the land border with Mexico although others arrive by sea, often in makeshift boats or rafts. About 45 percent enter through recognized ports of entry. Some do so with fraudulent documents; counterfeit passports, visas and other identity documents may be used. Others use impostor documents of people who bear superficial likeness to their own appearance. These may be documents possessed by family or friends, or they may be purchased for the specific purpose of gaining admission.

³ Unfortunately, statistics that are more recent do not exist. For technical reasons, this person-year figure is likely to be substantially too low (see B. Lindsay Lowell 1999).

Still others enter having obtained legitimate visas, often as tourists, and then overstay the period that the visa covers. Or, they obtain a longer-term visa that does not permit employment, such as a foreign student visa, and then work in contravention of the terms of their admission. In still other cases, the migrants enter as temporary workers but fail to leave when their period of work authorization ends. In some cases, migrants seek the visa knowing that they plan to violate its terms. As with those who come clandestinely, they may seek the visa on their own or obtain it through the assistance of smugglers. In other cases, the migrants have no intention of overstaying or working illegally, but circumstances change and they enter into irregular status.

Most unauthorized migrants come from Mexico (about 56%) and Central America, but they represent a wide array of countries. The majority is concentrated in about seven states within the United States. During the past decade, however, there has been a significant dispersal throughout the country, with large numbers of irregular migrants now living in new settlement areas. Many live in mixed households, with legal permanent resident spouses/parents and U.S. citizen children. On average, the unauthorized migrants are less educated than natives or legal immigrants. They work primarily in services, building cleaning, perishable crop agriculture, food processing, construction, landscaping and gardening, light manufacturing

Efforts to prevent unauthorized migration largely failed in the 1990s and early 2000s. The Immigration Reform and Control Act of 1986 ostensibly tried a three track approach that introduced new border enforcement measures, sanctions against employers who hired unauthorized workers and a legalization program for those who were already illegally in the country. To address prevention at the source, IRCA authorized a commission to recommend ways to reduce emigration pressures. A notable recommendation was adopted in the 1990s as the North American Free Trade Agreement.

The provisions did not succeed in slowing down unauthorized migration, as had been promised in IRCA. In fact, the mechanisms for determining work authorization, needed to have an enforceable system of employer sanctions, were so faulty that it was no more difficult for irregular migrants to find jobs post IRCA than it had been before its passage. A proliferation of fraudulent documents allowed employers to hire unauthorized workers with little risk of sanction. Employers were not expected to weed out the counterfeits if the documents looked valid on their face. In fact, if an employer requested additional documentation, he or she faced penalties imposed to ensure that employers did not discriminate against foreign-looking or sounding workers.

In the early 1990s, when public outcry about the loss of control of the southern border erupted in California, in particular, the Clinton Administration adopted new border strategies to try to halt unauthorized entries. Operations Hold the Line in El Paso and Gatekeeper in San Diego succeeded in slowing movements in these locations, but the illegal crossings just moved to other parts of the border. Crossings became more expensive and, in some locations, more dangerous, but most of those who were serious about entering the United States succeeded in doing so. Moreover, the border enforcement did nothing about visa overstayers. Calls for new employment verification systems to strengthen the employer sanctions regime were largely ignored although Congress passed legislation in 1996 to pilot test electronic verification.ⁱ

During the second half of the 1990s, with an economic boom that produced record number of new jobs, unauthorized migration increased still further. As long as the economic boom continued, little was done to curb the growth in irregular migration. In fact, the Immigration and Naturalization Service suspended most worksite raids because of complaints that these enforcement actions were too disruptive of business. By the time of the economic recession of the early 2000s, the stock of unauthorized migrants had grown to an estimated 8 million, and

though there appeared to be some slowing of new admissions, the stock continued to grow, leading to today's record numbers.

Policy Issues

There are a number of policy issues surrounding both the permanent and temporary systems of employment-based admissions.

Inflexible Ceilings

Ceilings on both permanent and temporary admission categories limit flexibility to address changes in labor market demand. In the permanent admission categories, two types of ceilings are imposed: ceilings on overall and subcategory numbers and per country ceilings. By legislation, there are 140,000 numbers available for employment based permanent admissions plus any unused family based visas from the previous year. Ceilings are set for each subcategory although unused visas can flow down to other categories. There are also per country limits that ensure that no more than 7 percent of visas go to any one country.

Inflexible ceilings have also created difficulties in the temporary worker programs. The H1-B program is capped at 65,000 visas per year. Although the ceiling was raised in the late 1990s following the dot.com boom, the numbers reverted to the original level during the dot.com bust. They were not raised again as the economy recovered.

Congress has considered short-term fixes to the problem but it has not gotten to the fundamental problem—that ceilings set in stone in legislation are too inflexible to respond in a timely manner to changes in the economy and labor market demand. If the concern is with abuse of the visa categories, market tests can be used to weed out inappropriate use of the visas. The US Commission on Immigration Reform recommended that fees be set at a level that

makes it somewhat more expensive for an employer to bring in a foreign worker rather than recruit and train a domestic person for the position. As discussed, labor certification provisions have been used to test the market for some categories, but these procedures pose problems of their own.

Few Incentives for Compliance

At present, there are few incentives for employers to use legal foreign worker programs, particularly to hire unskilled workers, and no effective sanctions against employers who hire unauthorized foreign workers. Most temporary and permanent foreign worker programs involve costs to the employer in time and money. Given the highly inefficient systems in place, many employers prefer to use existing networks of employees to refer and vet job seekers. Even if they are not looking for unauthorized workers, the employers may well hire them through these networks, which are highly efficient in filling shortages. The current system of employer sanctions requires the employer to check documents but not to verify the authorization of any given employee to work in the US. As long as the employer has fulfilled the paperwork requirements and has not knowingly hired an unauthorized worker, the employer need not fear penalties. Without an efficient and effective system for verifying work authorization and sanctioning non-compliance, employers are left with few incentives to use government-regulated programs. Moreover, if these programs are as inefficient as demonstrated by current practice, the incentives are even fewer.

At the same time, workers have few incentives to enter legally if they are able to obtain employment via their networks and face little prospect of apprehension or removal once they make it into the interior of the country. The growth in unauthorized migration is testament to the ease with which people who enter without inspection or overstay their visas have been able to circumvent US immigration policy.

Inadequate and Inappropriate Mechanisms to Protect the Rights of Workers

In immigration policy, there often appears to be a trade-off between the numbers who will be admitted and the rights of those who are allowed to enter. At one extreme is the large and rapidly growing number of foreign nationals without authorization to work in the United States who are nevertheless gainfully employed. They have few rights in the workplace, are vulnerable to exploitation and have very restricted eligibility for social welfare programs. In the middle are temporary workers who have more rights in the workplace but are often tied to a particular employer and may remain in a limbo status for many years while awaiting a green card. Legal permanent residents have the same workplace rights as US citizens but their access to certain safety net programs (including those designed for low-income workers) is restricted. Naturalized citizens have full rights and obligations as US citizens.

As with other immigration matters, there are trade offs in using temporary admission categories to meet labor market needs. While they may help increase business productivity and even generate job growth, they also render even highly skilled foreign workers more vulnerable to exploitation and may, thereby, depress wages and undermine working conditions for US workers. Generally, the foreign worker is tied to a specific employer who has requested the visa. Loss of employment may also mean the threat of deportation. Moreover, because the temporary visa is so often a testing period, the foreign worker may put up with any conditions imposed by the employer, fearing loss otherwise of the chance at permanent resident status.

Policy debates during the past few years have focused on expanded temporary or so-called guestworker programs. In some proposals, the numbers to be admitted are very large. An issue is the rights to be accorded to workers who enter through such mechanisms. Also at issue are provisions to protect already resident workers against unfair competition from new arrivals. Current programs, especially for lesser skilled workers, require employers to pay the higher of

prevailing or adverse effect wage rates; attest that there is no strike or lockout; provide housing, meals, transportation, worker's compensation or equivalent insurance and guarantees that the worker will have work on at least three-quarters of the work days within the contract period, and fulfill other similar requirements, depending on the visa category. While these provisions provide protections for workers, employers find them too burdensome and often inappropriate for the type of positions for which they wish to hire foreign workers. As a result, they claim, they are unable to use the existing programs to fill all of the jobs for which they need workers.

Another approach to protecting worker rights would provide greater mobility within the labor market so foreign workers would not be indebted to a single employer who holds sway over their wages and working conditions. Current policies allow for little mobility until a foreign worker receives a green card. Even when mobility is permitted, foreign workers are often unwilling to change jobs if it will adversely affect their ability to obtain permanent residence, as discussed above.

Is Temporary Ever Temporary?

The existing notions of temporary and permanent admissions do not reflect adequately the nature of today's job market or the realities of immigration. The old adage that "there is nothing more permanent than a temporary worker" is often born out. When temporary workers are hired to fill year-round, permanent jobs, it is not surprising that many employers do not want them to leave at the end of the term of employment and many foreign workers gain equities and interests in remaining beyond the period of stay. Since some statuses allow for extended stays of more than six years, it is not surprising that many temporary workers accrue such equities and ties to this country. Children are born in the United States, houses are bought, and roots are set in American communities. At the other end of the continuum, some immigrants seek permanent residence not because they plan to remain permanently but because a green card

affords them opportunities denied to temporary workers (for example, work authorization for their spouses). In an increasingly transnational world in which people maintain ties in more than one country, there is not a clear, bright line between the two categories of permanent and temporary admissions.

This is not to deny the value of a system of permanent residency that leads to citizenship; in fact, the notion that immigrants are presumptive citizens is one of the reasons that immigration has served the national interest for so long. Rather, it is to suggest that there needs to be more flexibility in the definitions used and a recognition that for some, temporary migration may be a transition to permanent status whereas in other cases, temporary migrants (and permanent residents) will return to their home countries or move to a third country.

Some temporary work statuses do take these patterns into account. The H-1B and L visas allow for “dual intent.” At the time of admission, a person seeking admission in these categories can admit to being an intending immigrant—someone who hopes to remain in the United States. Most temporary categories, including foreign students, require the foreign national to demonstrate that they have strong enough ties to their home country to overcome the presumption they are an intending immigrant. Even in the categories in which dual intent is allowed, the route to permanent residence may require the exceedingly long waits that were described above, leaving them in limbo until their number comes up in the immigration system.

Complexity in the Immigration System

A final problem in the employment-based immigration system is its very complexity. With dozens of nonimmigrant visa categories for temporary workers and difficult to define distinctions in the permanent system (for example, EB-1 is for “foreign nationals of extraordinary ability in the sciences, arts, education, business or athletics” whereas EB-2 is for those with merely

exceptional ability). Given the proliferation of visa categories and the often-nuanced differences, applying for any immigration benefit has become an excessively difficult process requiring professional assistance.

Conclusion

Despite, not because of its immigration policies, the United States remains the largest country of immigration in the world, able to attract both the ‘best and brightest’ and the many other immigrants who perform a wide range of economic activities. Yet, the U.S. system also suffers from high levels of unauthorized migration as well as barriers for employers to obtain needed labor and for workers to obtain needed protection of their rights. Reforming the employment-based immigration system should follow a number of principles:

- Policies should be flexible enough to respond to changing market conditions. Statutory ceilings tend to be too inflexible to permit rapid adjustment to economic cycles and needs. Market mechanisms to regulate flows—such as fees that make the cost of hiring foreign workers equal to or greater than US workers or auctions—would constitute one way to manage numbers without ceilings. Another would be to assign a commission or taskforce the responsibility for setting numbers and priorities each year based on their assessment of supply and demand.
- Requirements placed on workers and employers should be reasonable and consistent with the way in which labor markets function. This is particularly the case when workers are admitted for temporary periods to perform jobs that are themselves indefinite in length. Provisions to permit transition into permanent status would be appropriate in these cases.
- The government apparatus for managing the system should be efficient and funded sufficiently to carry out its responsibilities for adjudicating applications and monitoring compliance.

- Workers should have true mobility within a system that protects them from abusive employment practices. While some provisions in current law meet this standard and are likely to protect workers from sub-standard wages and working conditions, others create burdens on employers with little or no corresponding benefits for either domestic or foreign workers.
- Policies should be transparent, understandable to employers and workers, and clear in their definitions and requirements. By contrast, current policies are complex and often indecipherable even to those who have worked many years in the immigration field.

ⁱ The U.S. Commission on Immigration Reform recommended adoption of an electronic verification system in its 1994 report to Congress. The author of this paper served as the Executive Director of the Commission.