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Article 1

Towards Comprehensive Immigration Reform: A Consensus Within Emerging Trends

Mark R. von Sternberg

TOWARDS COMPREHENSIVE IMMIGRATION REFORM: A CONSENSUS WITHIN EMERGING TRENDS

Mark R. von Sternberg[*]

I will begin not by describing the proposed solution, but by describing the problem.

Clients come to Catholic Charities each Thursday. Countless times, we have to advise them that they have no remedies. Even if the alien has a potentially petitioning family member, a solution to the need for family unification may prove elusive: the alien may not be able to adjust status and may be naturally reluctant to proceed to a consular interview because of concerns about the three- and ten-year bars.[1] Or the alien may be a preference immigrant having a priority date which is simply many years from becoming current.[2] Each of these situations is not uncommon and has resulted in long delays which run counter to the stated policy of family unity.

A more dramatic problem confronts workers in the U.S. occupying less that skilled positions which U.S. workers do not wish to fill. Because realistic immigrant and non-immigrant visas are largely lacking for this class,[3] these non-citizens constitute the largest human aggregate in need of

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[*] Senior Attorney with Catholic Charities Community Services; adjunct professor, St. John's University School of Law. J.D., Vanderbilt University Law School, 1973; LL.M., New York University School of Law, 1984.

[1] *See, e.g.*, section 212(a)(9)(B) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(9)(B) (2010), making inadmissible for a three- and ten-year period aliens who remain in the United States in "unlawful presence" for in excess 180 days or one year respectively. Importantly, the three- and ten-year bars are not triggered until the alien actually leaves the United States.

[2] Aliens qualifying under a preference category (e.g., as the sons and daughters of lawful permanent residents), as opposed to qualifying as immediate relatives, are subject to a waiting period. *See, e.g*., INA §§ 202–203, 8 U.S.C. §§ 1152–1153 (2010), setting forth per country and worldwide caps on annual immigration to the United States.

[3] The most widely used non-immigrant visa employed by aliens seeking to come to the United States temporarily to work is the H-1B, available to non-citizens qualifying as Specialty Occupation non-immigrants. The coverage of this category relates essentially to "professional" workers, i.e., those needing the equivalent of a U.S. baccalaureate degree to perform the job they are coming here to fill. The visa category covering non-immigrants

relief under the present system. Incorporating these workers into U.S. economy and society constitutes a pubic interest imperative of the first order.

These problems and a host of others have brought about the need for immigration reform. The paucity of remedies is really the problem. And the burning question is: how is this being addressed by policy makers and under legislative proposals?

Three major bills have occupied center stage in this melee of issues. One, a House Bill, was introduced by Representative Luis Gutierrez in 2009.[4] Another, still in the course of being formulated (although its contents have remained non-public), was originally sponsored by Senators Schumer and Graham. This largely inchoate Bill remained the principal Senate initiative under consideration at the time of the Symposium.[5] Although it was expected that the bills would differ widely, those who have actually been privy to the Schumer-Graham Bill say that they contain striking similarities at least in terms of their long-term objectives. As of

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seeking admission for less than "professional" work is the H-2B. Unlike the H-1B visa, which may last for anywhere up to six years and beyond, and enjoys the benefits of dual intent, the H-2B visa lasts only three years, is renewable in annual increments, and is subject to a "double temporariness limitation," i.e., not only must the alien be coming to the U.S. temporarily, but the employment itself must be temporary. *Compare* INA § 101(a)(15)(h)(i)(b), 8 U.S.C. § 1101(a)(15)(h)(1)(b) (2010) *with* INA § 101(h)(ii)(b), 8 U.S.C. § 1101(a)(15)(h)(ii)(b) (2010). *See also* AUSTIN FRAGOMEN & STEVEN BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE §§ 5:9–5:13 (June 2010). Similar limitations "crowd out" the less than skilled worker seeking an immigrant visa under the Immigration Selection System. *See, e.g.*, INA § 203(b)(3)(C), 8 U.S.C. § 1153(b)(3)(C) (2010), limiting "other workers" (i.e., unskilled labor) to a world-wide cap of 10,000 visas per annum, despite the availability of 40,000 visas for professional, skilled and other workers.

[4] Comprehensive Immigration Reform for America's Security and Prosperity Act, H.R. 4321, 111th Cong. (2009) [hereinafter Gutierrez Bill].

[5] *See, e.g.,* Press Release, Senator Charles Schumer, Schumer Announces Principles for Comprehensive Immigration Reform Bill in Works in Senate (June 24, 2009), *available at* http://schumer.senate.gov/new_website/record.cfm?id=314990. Some time has passed since the Symposium took place, and there have been significant movements with respect to the sponsorship of proposed Senate legislation affecting immigration, including Senator Graham's dropping on and off as a sponsor. Today (September 29, 2010), a chief architect of immigration reform in the Senate is Senator Robert Menendez, who just last week was pushing for needed remedial legislation. *See, e.g.*, Scott Wong, *Senator Menendez Pushes for Immigration Reform in Tough Climate*, POLITICO, Sept. 15, 2010, http://www.politico.com/news/stories/0910/42232.html.

today (September 28, 2010), a new Senate Bill has been introduced by Senators Menendez and Leahy, which may well serve as the Senate's model.[6] Finally, there is a seminal study prepared by an independent task force sponsored by the Council on Foreign Relations ("CFR").[7] The broad question raised by these initiatives is: what are the ongoing problems with the current immigration system which the Congress is attempting to fix?

When the Schumer group first set to work in the fall of 2009, it accepted recommendations from pro bono publico groups and others concerning what was needed. This is a brief summary of some of these recommendations and how they have been responded to in the Gutierrez Bill, in the CFR Task Force Study, and finally in the recently announced Menendez Bill.

Creating a current priority date for immediate family member beneficiaries in the second preference category. In the field of family unity, separation of immediate family members exists in the second preference category by the long waiting periods involved when lawful permanent residents petition their spouses and children.[8] The CFR Task Force Study, the Gutierrez Bill and the recently introduced Menendez Bill would lift the worldwide cap for spouses and unmarried children of lawful permanent residents thus making them, for all practical purposes, immediate relatives.[9]

Creation of meaningful waivers for intending immigrants by reforming the notion of "extreme hardship" to family members. The current state of the case law seems to disallow family separation as a dispositive factor, thus

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[6] Indeed, Senator Menendez has, as of today, introduced a version of comprehensive immigration reform in the Senate. *See generally* Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. (2010) [hereinafter Menendez Bill]. *See also* Immigration Policy Center, *The Comprehensive Immigration Reform Act of 2010: A Summary*, *available at* http://www.immigrationpolicy.org/just-facts/comprehensive-immigration-reform-act-2010-summary. For purposes of completeness, this proposed legislation will be analyzed as well.

[7] COUNCIL ON FOREIGN REL., U.S. IMMIGRATION POLICY: INDEPENDENT TASK FORCE REPORT NO. 63 (2009), *available at* http://www.cfr.org/publication/20030/us_immigration_policy.html.

[8] INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (2010).

[9] *Compare* the Gutierrez Bill, H.R. 4321, 111th Cong. § 302 (2009); the CFR Report at 90; *and* the Menendez Bill, S. 3932 111th Cong. § 412 (2010).

contributing to extremely harsh results when immediate family members who have lived together all their lives are forced to separate.[10]

Elimination of the three- and ten-year bars for intending immigrants.[11] These bars have virtually resulted in the all but complete curtailment of aliens coming to the U.S. based on an offer of employment where the job is less than professional in nature. There is no meaningful non-immigrant visa for non-professional temporary workers with the result that when the alien proceeds abroad she subjects herself to the three- or ten- years bars having spent more than 180 days or one year respectively in the U.S. in "unlawful presence."[12] Proponents of immigration reform were of the view that, at the very least, the waivers currently existing should be expanded so as to provide for relief based on family unity, public interest or humanitarian concerns. The Menendez Bill contains specific provisions revising the unlawful presence bars.[13]

Creation of a meaningful non-immigrant visa for the unskilled worker and elimination of the 10,000 per annum visa restriction which applies to this class in the immigrant visa category. This is an area on which the Gutierrez Bill, the CFR Report and the Menendez Bill are in complete agreement, although they differ in their details.[14] The Gutierrez Bill, in fact, provides for a prevention of unauthorized migration ("PUM") visa to be granted to nationals of States which generate substantial undocumented migration to the United States.[15] As concerns immigrant visas, there appears to be a growing recognition that excessive restrictions serve no public interest [e.g., protection of U.S. workers] and interfere with market demand for the services these migrants can provide.

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[10] *Cf.* Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).

[11] INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (2010).

[12] *See* 8 U.S.C. § 1182(a)(9)(B)(iii) (declaring that an alien who departs following an unlawful presence of more than 180 days is barred from returning to the U.S. for 3 years and that departure following more than 12 months of unlawful presence bars the alien from returning for 10 years).

[13] Menendez Bill, S. 3932, 111th Cong. § 413 (2010).

[14] *See* Gutierrez Bill, H.R. 4321, 111th Cong. § 451 (2009); *see also* COUNCIL ON FOREIGN REL., U.S. IMMIGRATION POLICY: INDEPENDENT TASK FORCE REPORT NO. 63, at 89 (2009); *see also* Menendez Bill, S. 3932, 111th Cong. § 481 (2010).

[15] *See* Gutierrez Bill, H.R. 4321, 111th Cong. § 317 (2009) (creates 100,000 PUM visas annually to persons from countries with large numbers of illegal immigrants via a lottery system).

Adoption of an earned legalization program. Again, the CFR Report, the Gutierrez Bill and the Menendez Bill provide in varying degrees for such a program.[16] The Gutierrez Bill establishes an initial conditional non-immigrant status. The applicant must be in the U.S. at the time of passage to be eligible. Six years down the road, the applicant may adjust to lawful permanent resident status upon a showing that he or she will contribute to the United States through employment, education, military service, or voluntary community service. The applicant must meet English and civics requirements, pay all taxes and be admissible. The Bill provides for special rule adjustment for those qualifying under the DREAM Act, available to those who came to the U.S. prior to the age of 16, who have completed high school or received a general equivalency diploma ("GED"), and who have then completed 2 years of college, employment or military service.[17] The CFR Report notes that the term "Earned Legalization" is used to avoid the unfair characterization of the law as an "amnesty," a term which has been used to defeat similar legislation in the past.[18]

Adoption of provisions, which would prevent the "aging out" by children of fiancée visas by establishing that the age of the child shall be considered to be determined as the age of the beneficiary at the time Form I-129F is filed.[19]

Modification of the term "aggravated felony" so as to cover only extremely unusual crimes involving violence.[20]

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[16] *See* Gutierrez Bill, H.R. 4321, 111th Cong. Title IV (2009); *see also* COUNCIL ON FOREIGN REL., U.S. IMMIGRATION POLICY: INDEPENDENT TASK FORCE REPORT NO. 63, at 90 (2009); *see also* Menendez Bill, S. 3932, 111th Cong. Title V (2010).

[17] *See* Gutierrez Bill, H.R. 4321, 111th Cong. § 401 (2009); *see also* Federation for American Immigration Reform, *Summary of H.R. 4321: Comprehensive Immigration Reform for America's Security and Prosperity,* Jan. 8, 2010, at 2, *available at* http://www.fairus.org/site/DocServer/cirsummary_0110_rev2. pdf?docID=4341 (listing the prerequisites that must be completed before aliens that entered the U.S. under the age of 16 can apply for a green card).

[18] *See* COUNCIL ON FOREIGN REL., U.S. IMMIGRATION POLICY: INDEPENDENT TASK FORCE REPORT NO. 63, at 95 (2009).

[19] Giselle Carson, *Screening the Visas of Love: A Microscopic View of the Couple*, IMMIGRATION LAW TODAY (Sept.–Oct. 2008) (stressing the need to loosen the eligibility restrictions that prevent K-2 visa holders from adjusting their status after turning 21 so as to prevent "aging out").

[20] *See, e.g.*, COUNCIL ON FOREIGN REL., U.S. IMMIGRATION POLICY: INDEPENDENT TASK FORCE REPORT NO. 63, at 107 (2009).

Liberalization of the provisions relative to motions to reopen.[21] These as currently constituted can establish a death knell for intending immigrants. The current provisions provide for reopening only within a 90-day period following entry of a final order of removal [unless the alien is applying for asylum and can establish a fundamental change in the country of origin supporting a well-founded fear of persecution].[22] So if the alien is currently wedded to a U.S. citizen ("USC") [which he presumably was not at the time the proceedings were last pending], he would have to proceed abroad to receive an immigrant visa thereby triggering the three- and ten- year bars. The only exceptions, rarely available, are a joint motion with U.S. Immigration and Customs Enforcement ("USICE") or an application to the Immigration Judge to make the motion *sua sponte* in the interests of justice.[23] These restrictions are most punishing in that they impede orderly immigration where the alien clearly qualifies for immigration based on the approval of a visa petition, and they can in effect preclude refugee status claims where the alien is applying based on changes in personal circumstances rather than on a change in country conditions.

Elimination of the one-year filing limitation on asylum. There are clear problems here with respect to whether the U.S. is in compliance with international law.[24]

Reform of central humanitarian remedies contained in the Act, including Cancellation A, available to lawful permanent residents seeking relief from the collateral consequences of weighty criminal convictions, and Cancellation B, available to non-lawful permanent residents whose family members having status in the U.S. would experience extremely unusual and

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[21] *See* INA §§ 240(c)(7) and (d), 8 U.S.C. §§ 1229a(c)(7) and (d) (2010); *see also* 8 CFR 1003.2(a) (2010).

[22] *See* 8 U.S.C. § 1229a(c)(7)(C)(ii) (2010) and 8 C.F.R. § 1003.2(c)(3)(ii) (2010); *see also* Malty v. Ashcroft, 381 F.3d 942, 945–46 (9th Cir. 2004) (holding that B.I.A. abused its discretion in denying as untimely and numerically barred a motion to reopen based on changed circumstances and a well-founded fear of prosecution in Egypt).

[23] 8 C.F.R. § 1003.2(c)(3)(iii) (2010) (proclaiming that an exception to the time restrictions exists if the motion to reopen is agreed upon by all parties and jointly filed); *see also* 8 C.F.R. § 1003.2(a) (2010) (declaring that the B.I.A. may reopen proceedings sua sponte at any time).

[24] *See e.g.*, Refugee Protection Act of 2010, S. 3113, 111th Cong. (2010) (eliminating the one-year filing limitation on asylum).

exceptional hardship upon removal of the non-citizen.[25] Elimination of the "stop-time" rule is called for with respect to both Cancellation A and Cancellation B. The Gutierrez Bill adopts this position.[26] Hardship to the alien should also be considered (as was the case under prior law), and application should be able to be made directly to Department of Homeland Security ("DHS") [as was previously the case with INA § 212(c) relief].[27]

Broadening the scope of the Immigration Judge's discretion where humanitarian factors are present. Under the Gutierrez Bill, an Immigration Judge can decline to order removed the parents of U.S. citizen children if such removal would not be in the best interests of the child.[28]

Humanizing the conditions of detention. The Gutierrez Bill and the CFR Report both contain discrete provisions ameliorating the conditions of detention.[29] The Gutierrez Bill contains broad, remedial provisions ameliorating the conditions of detention. Records must be kept of such transfers so as to avoid the situation where the non-citizen cannot be located. Moreover, detention facilities must take into account a variety of factors before engaging in a transfer, including where family members are located and whether the alien can secure counsel in the facility to which he or she is being transferred. Children and parents should not be separated except in conditions of necessity.[30]

Other recommendations which have been made by pro bono publico groups which have not found their way into either the current House or Senate Bills are annotated below: (i) softening the rules restricting adjustment of status by K-1 non-immigrants; (ii) revision of the rules governing "reinstatement" under INA § 241(a)(5), 8 U.S.C. § 1231(a)(5);

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[25] *See* INA § 240A, 8 U.S.C. § 1229b (2010) (listing the situations in which cancellation of removal for lawful and unlawful permanent resident aliens may take place).

[26] *See, e.g.*, Comprehensive Immigration Reform for America's Security and Prosperity Act, H.R. 4321, 111th Cong. § 308 (2009) [hereinafter Gutierrez Bill].

[27] Formerly 8 U.S.C. § 1182(c) (1996), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, Div. C, 110 Stat. 3009-546.

[28] *See* Gutierrez Bill, H.R. 4321, 111th Cong. § 315 (2009).

[29] *See* Gutierrez Bill, H.R. 4321, 111th Cong. Title III(B) (2009); *see also* COUNCIL ON FOREIGN REL., U.S. IMMIGRATION POLICY: INDEPENDENT TASK FORCE REPORT NO. 63, at 107–08 (2009).

[30] *See* Gutierrez Bill, H.R. 4321, 111th Cong. Title III(B) (2009).

and (iii) allowing those who have been granted deferred action status to adjust status in the United States.

Such recent trends as illustrated by the House Bill, the Senate Bill and by the CFR Report appear to indicate that immigration reform is most clearly directed to restoring the statute to its essential policy underpinnings: public interest, family unity and humanitarian concerns.