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Guest Worker Policy:  
A Critical Analysis of President Bush’s Proposed Reform

Camille J. Bosworth*

INTRODUCTION

United States President George W. Bush has talked publicly about the need for immigration reform since assuming office in 2000. Reform of the agricultural worker program continues to be a pressing issue. In 2001, promising discussions between President Bush and Mexican President Vicente Fox to reform the guest worker program and create an amnesty program for undocumented immigrants living in the United States were brought to an abrupt halt by the terrorist attacks on the World Trade Center.1 Three years later, in January 2004, President Bush introduced another plan for immigration reform. It is now five years later, President Bush is in his second term as President, and no meaningful reform to the agricultural visa program has been enacted.

Focusing on Mexican workers, this Note traces the historical roots of guest worker programs in the United States, analyzes the strengths and shortcomings of President Bush’s proposal and proposes that the Bush administration adopt a longsighted approach to temporary agricultural workers that addresses the reality that no temporary work program is truly temporary.

I. A DEVELOPING POLICY OF EXCLUSION

Long before the threat of terrorism came to the forefront of the national consciousness, the United States federal government engaged in

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a costly, if not erratic, struggle to fortify the southernmost border. These efforts to block immigration conflict with the reality that at any given time there are over eight million undocumented foreigners working in the United States. An estimated sixty percent of these workers are Mexican nationals, many of whom entered the United States illegally. The United States’ economy is dependent upon the labor of undocumented immigrants.

A. DEVELOPMENT OF U.S. POLICY TOWARDS MEXICO

The United States’ restrictive policies towards immigration from Mexico developed gradually. The Mexican-American War ended in 1848 and the United States acquired Arizona, California, New Mexico, Texas, and parts of Colorado, Nevada, and Utah. Until then, immigration between Mexico and the United States was limited and largely informal. In 1921, the federal government initiated a quota system that limited immigration on a per-country basis and set the total national cap at 350,000; however, these restrictions did not apply to Mexicans. The border patrol was established in 1924, but many years passed before it played an active role at the U.S.-Mexico Border. A major reason for the lax immigration policy towards Mexico was that farmers, ranchers, miners, the sugar industry, and the railroads from the Southwest strongly opposed efforts to limit immigration. It was not until 1976 that a per-country quota was set for Western Hemisphere nations.

B. WOULD YOU TREAT YOUR GUESTS THIS WAY? THE BRACERO PROGRAM

The first guest worker program in the United States, the Bracero Program, was initiated in 1942 by the Roosevelt administration. In 1941 the United States entered World War II and many domestic agricultural workers joined the armed forces or moved to the city for better paying jobs. To avoid an agricultural labor shortage the Roosevelt administration negotiated a treaty with Mexico providing for “temporary importation of Mexican farm-workers,” thus creating the Bracero Program.

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4. Id.
7. Massey et al., supra note 1, at 26.
8. Edwards & Gimbel, supra note 6, at 96.
9. Id. at 40.
10. Id. at 35.
11. Id.
The term "Bracero" translates roughly as "farmhand" and is derived from the Spanish word for arm, "brazo." The Bracero Program was actually a series of distinct immigration programs, the first of which was initiated when the Immigration Service formed an interagency committee, including the War Manpower Commission and representatives from the departments of State, Agriculture, and Justice, in order to develop a plan for the importation of farm-workers. Between May and August 1942, the Mexican and United States governments negotiated the terms of the bi-national program. They reached a final agreement on August 4, 1942, in Mexico City.

The two nations agreed upon a number of principles. The program allowed agricultural farm-workers to work in the United States for up to nine months each year, Braceros were to be employed to meet temporary labor needs and were not to displace domestic workers, the United States was to pay recruitment and transportation costs for the trip to the United States, a formal contract between worker and employer stating work conditions was required, minimal standards of housing and sanitation were to be guaranteed, ten percent of a worker’s pay was to be deposited in a savings account and reimbursed upon return to Mexico, and Braceros were to be paid prevailing wages. When the Bracero Program started, the United States government acted as general contractor and guaranteed the farmers’ contracts with the workers. The contracts, theoretically, included round-trip transportation and wages equal to those earned by American workers, and allowed workers’ families to accompany them to the United States. Workers were contracted in Mexico, transported to the United States by train, then placed in the custody of United States government officials, and sent to a given location. In the beginning, Braceros worked for local or county
labor associations rather than individual farmers. The associations entered into the work contracts with Braceros and it was not uncommon for a worker to be placed on a different farm everyday.

From the outset, employers in the United States did not closely follow the provisions agreed to by the two nations. In fact, when the first group of Braceros returned to Mexico at the end of 1942, they reported substandard working conditions, inadequate housing and discrimination. A decade later, consistent dissatisfaction among Braceros continued; complaints focused on low earnings because of work shortage; deductions for the cost of transportation, supplies, and blankets; poor food services; difficulties in access to medical care; falsification of payroll records; substandard housing; and death and injury from transport accidents or exposure to dangerous chemicals. The United States instituted some changes to improve conditions and comply with the bi-national agreement. For example, standards for living conditions were made more specific, requiring employers to provide "hygienic lodging without cost," but it is unclear whether employers actually adhered to the changed provisions.

In 1954, when the existing Bracero agreement expired, negotiations between the United States and Mexico aimed at reaching a new agreement broke down. The United States then followed through on a threat to unilaterally recruit Braceros at the border without an agreement with Mexico. Negotiations subsequently resumed and the two countries reached a new agreement within a month, but the incident made it clear that Mexico’s bargaining power was significantly weaker than before.

During the war years alone, the Bracero Program brought...
approximately 168,000 workers to the United States. It continued until 1964 and at its peak provided visas for over 400,000 Mexicans a year to work in the United States. Over the twenty-year course of the program, five million foreign workers were contracted to work in twenty-four states. The Bracero Program provided agricultural employers temporary labor willing to work for low wages. The Braceros were, essentially, part of a captive workforce whose livelihoods were dependent on staying with the employers who sponsored their visas. Leaving in search of higher wages or better working conditions meant abandoning the Bracero Program and forfeiting the opportunity to participate in the future.

C. Recruitment and Repatriation

In addition to working and living in substandard conditions, Braceros became pawns in an ongoing pattern of recruitment and repatriation of Mexican workers. Periods of recruitment, followed by mass repatriation efforts, were not a new thing for Mexican workers. During the Great Depression, Mexicans were widely blamed for unemployment resulting in a major "repatriation" of Mexican immigrants from 1929 to 1934. According to the Mexican government, 345,000 Mexicans were returned to their country of origin between 1929 and 1932.

This cycle began again in 1952 when Congress passed the "Wetback Act" to discourage illegal immigration from Mexico. The act allowed border patrol officers to enter and patrol private land within twenty-five feet of the border in order to stop illegal immigration. A major

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38. Massey et al., supra note 1, at 36 (identifying the "war years" as the period from 1942 to 1945).
39. Laura C. Oliviera, Comment, A License to Exploit: The Need to Reform the H-2A Temporary or Agricultural Guest Worker Program, 5 Scholar 153, 162 (2002); Bruce Goldstein, Farmworker Justice Fund, Inc., The Basics About Guest Worker Programs (2004), at http://www.fwjustice.org/GWbasics.htm (last visited Apr. 22, 2005). More than seventy percent of Bracero workers were Mexican but the program was also available to workers from other nations, including Barbados, the Bahamas, and Canada. Edwards & Gimpel, supra note 6, at 97.
40. Calavita, supra note 13, at 1.
41. See id. at 70-72.
42. Id. at 74.
43. Id.
45. See id.
46. Id. at 243.
47. Id.
49. Smith, supra note 44, at 245-46; see also E. Willard Miller & Ruby M. Miller, United States Immigration 21 (1996).
“repatriation” of Mexican workers followed.\textsuperscript{50}

Recruitment and subsequent repatriation of Mexican workers continued through the 1950s.\textsuperscript{51} Despite the agricultural industry’s demand for workers, the early 1950s was a period of public outcry against immigration.\textsuperscript{52} The post-Korean War recession, cold war McCarthyism,\textsuperscript{53} and claims by the President’s Commission on Migratory Labor that illegal immigrants were driving down wages, forcing domestic workers to relocate, and threatening public health, all contributed to the anti-immigrant sentiment.\textsuperscript{54} As a result, the United States government initiated “Operation Wetback” and between 1954 and 1958 millions of individuals, including American citizens of Mexican descent, were forcibly returned to Mexico without formal deportation proceedings.\textsuperscript{55}

“Operation Wetback” was considered a success on two fronts:\textsuperscript{56} first, due to the sheer number of people who were removed from the United States;\textsuperscript{57} second, when undocumented workers were apprehended they were replaced by legal Braceros, which satisfied the farmers and solidified the pattern of temporary contract agricultural workers.\textsuperscript{58} It was declared such a success by Commissioner of the INS, Joseph Swing, that in 1951 he announced that the “‘wetback’ problem’ no longer exist[ed].”\textsuperscript{59} By forcefully expelling legal and undocumented Mexicans—as well as United States citizens of Mexican descent—while at the same time recruiting Braceros, the INS satisfied the public and the agricultural industry while further marginalizing the Mexican worker.

D. THE END OF THE BRACERO PROGRAM

After “Operation Wetback” a system developed in which just enough Braceros were supplied to meet the demand for labor.\textsuperscript{60} The growers made it clear that in the event there were not enough Braceros to meet their needs they would employ “illegal aliens.”\textsuperscript{61} The INS was

\textsuperscript{50} Miller & Miller, supra note 49, at 21.
\textsuperscript{51} See Calavita, supra note 13, for a comprehensive discussion of “Operation Wetback.”
\textsuperscript{52} Massey et al., supra note 1, at 37.
\textsuperscript{53} Id.; Calavita, supra note 13, at 50.
\textsuperscript{54} Calavita, supra note 13, at 47 (citing President’s Commission on Migratory Labor 69 (1951)). The President’s Commission on Migratory Labor was created by President Truman as a result of the National Farm Labor Union’s requests for an investigation into migrant farm workers. Calavita, supra note 13, at 47 n.23. For an indepth look at the adverse effects of migrant labor on domestic workers, particularly regarding wages, see Galarzo, supra note 27, at 199-218.
\textsuperscript{56} Calavita, supra note 13, at 54–55.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 55.
\textsuperscript{59} Id. at 55 (citing 1955 INS Ann. Rep. 15).
\textsuperscript{60} Id. at 82.
\textsuperscript{61} Id. at 83.
constantly short on resources and wanted to keep the number of Mexicans entering the United States illegally as low as possible. Therefore, it sided with growers in pushing for the continuation of the Bracero system. On the other hand, it was the Department of Labor's (DOL) responsibility to control the number of Braceros granted entry and it faced pressure from labor unions and domestic workers to reduce the number of Braceros. This created tension between the INS and the DOL as the INS supported an expanded Bracero Program while the DOL favored a smaller one. Conflict between these government agencies, fueled by the underlying struggle between growers and domestic workers, continued to build through the late 1950s and early 1960s.

It was not until 1965 that the Bracero Program ended. Numerous factors, in addition to pressure from domestic workers, contributed to the demise of the Program. A change in public ideology played a major role. In the early 1960s, the civil rights movement was gaining force; welfare and labor unions enjoyed increasing influence on Congress; and the Kennedy administration was less inclined to support the growers than previous administrations. Civil rights groups saw the Bracero Program as exploitative and a CBS documentary portraying the difficult plight of farm workers, entitled "Harvest of Shame," sparked public outcry. An increasingly aware public had little tolerance for the Bracero Program.

In addition to pressure from the public, organized labor had grown stronger and its influence on the DOL increased. In response, the DOL issued a number of regulations making it more difficult for growers to hire Braceros. In 1965, the Bracero Program expired and was not re-instituted.

The demand for Mexican labor that led to the creation of the Bracero Program in the first place did not disappear along with the Braceros. The wide availability of Mexican workers during the Bracero years led growers, particularly in the Southwest, to become dependent on

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62. Id. at 84.
63. Id.
64. Id. at 83.
65. Id.
66. Id. at 141-43.
67. Massey et al., supra note 1, at 41.
68. Id.
69. Calavita, supra note 13, at 142.
70. Id. at 143.
71. Id.
72. Id.
73. Id. at 149.
74. Id. at 143-49, 151.
the low wages and work conditions that the Braceros accepted.\textsuperscript{75} Likewise, the Bracero Program increased the pool of Mexican migrants willing to come to the United States.\textsuperscript{76} Those who came to the United States developed familiarity with the labor market, established contacts, and spread word of their experiences when they returned to Mexico.\textsuperscript{77} Not only were former Braceros more likely to return to work, they also spurred interest in working in the United States amongst their friends and family. Needless to say, the formal end of the Bracero Program did not eliminate the immigration model that it had created.

E. The Beginning of the H-2 Program

In 1952, in the midst of the Bracero Program, the Immigration and Nationality Act of 1952 [INA], also known as the McCarran-Walter Act, was enacted.\textsuperscript{78} The INA created the H-2 Visa.\textsuperscript{79} It originated as a nonimmigrant visa intended to allow workers to enter the United States to perform temporary labor or services when the DOL certified that “unemployed persons capable of performing such service or labor cannot be found in this country.”\textsuperscript{80} The INA provided for the entry of temporary foreign workers under the H-2 program when there was a certifiable labor shortage.\textsuperscript{81} Unlike the Bracero Program, which was administered by the DOL, the H-2 program was run by the INS.\textsuperscript{82} Mexicans were excluded from the H-2 program during the Bracero era; however, as the Bracero Program ended, the agricultural industry looked to the H-2 program as a possible means to meet its labor needs.\textsuperscript{83}

The H-2 Program exposed foreign workers to the U.S. job market in the same way as the Bracero Program did, also leading to undocumented immigration when visas were not available.\textsuperscript{84} However, fewer workers came to the United States under the H-2 visa than through the Bracero Program because many employers felt that it took too long to bring workers through the H-2 program.\textsuperscript{85} The H-2 visa continued in a limited capacity until being revised by the Immigration Reform and Control Act of 1986.\textsuperscript{86}

\textsuperscript{75} Massey et al., supra note 1, at 41-42.
\textsuperscript{76} Id. at 42.
\textsuperscript{77} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Calavita, supra note 13, at 148.
\textsuperscript{82} Id. at 134.
\textsuperscript{83} Id.
\textsuperscript{84} Hayes, supra note 55, at 31.
\textsuperscript{85} Id.
\textsuperscript{86} See infra Part II.B.
II. NEW TRENDS IN IMMIGRATION

This Part addresses immigration policies after the Bracero Program ended. Particularly, it addresses the restrictions imposed on the number of Mexican workers that were legally permitted to come to the United States, the cycle of entry and deportation that developed through the 1970s and 1980s, and the enactment of the Immigration Reform and Control Act of 1986. This Part concludes with a discussion of the current state of immigration in the United States.

A. THE CYCLE OF DEPORTATION AND REENTRY

From 1965 to 1986, the United States restricted entry of Mexican workers to the United States. While the government changed immigration policy to allocate a greater number of visas to European and Asian citizens, the number of visas awarded to Mexican nationals decreased substantially.\(^87\) Illegal immigration entered heavily into the political spotlight in the 1970s as the United States suffered high inflation and unemployment and low wages.\(^88\) As a result, Congress amended the INA, making it more difficult for documented immigrants to sponsor visas for family members, applying the 20,000-per-country visa limit to the Western Hemisphere, and including Mexico in the preference system.\(^89\) By the mid-1980s, the number of visas granted to Mexicans was dramatically reduced.\(^90\)

At the same time that the United States reduced Mexicans' access to visas, Mexico's population boomed and its economy declined.\(^91\) Mexican workers continued to come to the United States, but now the vast majority entered illegally.\(^92\) Between 1965 and 1986, an estimated 28 million Mexicans entered the United States without documents, compared with 1.3 million documented Mexican immigrants and 46,000 contract workers.\(^93\)

A cycle of illegal entry followed by deportation and reentry became firmly entrenched. Undocumented workers would enter the United States illegally and, if apprehended, would go back to Mexico under the voluntary departure program only to turn around and take up again on the journey to the United States.\(^94\) From the late 1970s to the early 1980s, an undocumented worker entering the United States averaged a one in

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87. Massey et al., supra note 1, at 40. In 1968, Mexicans were included in the hemispheric limit of 120,000 visas and thus forced to compete for visas with people from Central and South America and the Caribbean. Id. at 43.
88. Id.
89. Id.
90. Id. at 42.
91. Id. at 44.
92. Id.
93. Id. at 45.
94. Id. at 45-47.
three chance of being apprehended. Nonetheless, high demand for labor, willing Mexican workers, and lax border enforcement contributed to the cycle.

B. IMMIGRATION REFORM AND CONTROL ACT OF 1986

In 1986, under pressure for immigration reform, Congress enacted the Immigration Reform and Control Act [IRCA]. IRCA made major changes in immigration policy and revised the H-2 program. It was restrictive in that it dramatically increased border control funding. However, it also enacted amnesty programs and established the H-2A program for agricultural workers and the H-2B program for laborers and service workers. Additionally, IRCA afforded greater labor protection to agricultural workers and established civil and criminal penalties for employers hiring illegal immigrants.

IRCA included a number of programs granting amnesty to illegal immigrants. The Special Agricultural Worker [SAW] provision legalized workers who could prove they had worked in agriculture for at least ninety days between May 1985 and May 1986. Additionally, to complement SAW, a Replenishment Agricultural Worker [RAW] provision was included to compensate for SAW workers that left agriculture. IRCA also granted amnesty to undocumented immigrants who could prove they had lived continuously in the United States since January 1, 1982.

The North American Free Trade Agreement [NAFTA] followed IRCA with discussions beginning in the late 1980s. NAFTA focused on opening up trade between the United States and Mexico and virtually

95. Id. at 45.
96. Id.
101. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) to (b) (2005). While the IRCA did not limit the number of H-2A visas, a 65,000 visa limit was set on H-2B visas. Goldstein, supra note 39.
104. Calavita, supra note 13, at 168. RAW enabled employers to contract with additional workers to replace workers who left agriculture for more desirable employment upon becoming legal. Id.
ignored the issue of immigration. In 1994, while acting to remove trade barriers, the Clinton administration increased border control measures by fortifying the California-Mexico border. The project was titled Operation Gatekeeper. It included twenty-four hour helicopter surveillance, electric sensors, and night vision along the border, as well as construction of two parallel fences. Operation Gatekeeper drove illegal immigrants to enter the United States through the harsh Arizona desert rather than through California, resulting in many deaths.

In 1996, the Immigration Reform and Immigration Responsibility Act was passed and it devoted yet more resources to border enforcement and deterrence. It also made it more difficult to sponsor a family member and severely limited illegal immigrants’ access to public services. This sent a strong message that promoting free trade between the United States and Mexico was high on the administration’s agenda, but enabling movement of individuals between the nations was an entirely different issue and the United States was in no way preparing to open its border with Mexico.

C. IMMIGRATION IN THE TWENTY-FIRST CENTURY

Undocumented workers comprise a substantial portion of the United States’ work force and are important to the nation’s economy. The 2000 U.S. Census estimated that there were approximately 8.5 million undocumented immigrants residing in the United States. From 1991 to 2001, one out of three undocumented aliens arriving to work in the United States was from Mexico. In addition, between 3 and 4.5 million undocumented workers were believed to be living in the United States, according to a study released by the UCLA School of Public Policy and Social Research. A study released by the Pew Hispanic Center in 2001 reported between 3.4 and 5.8 million undocumented

108. Massey et al., supra note 1, at 94 (providing details of Operation Gatekeeper).
111. Massey et al., supra note 1, at 95.
112. Id.
113. John Simons, Even in a Recession, the U.S. Economy Depends on Immigration and Mexico is Depending on One Man to Improve the Fate of Those Crossing the Borders, FORTUNE, Nov. 11, 2001, at 92.
116. Id.
Mexican workers in the United States. Current estimates indicate that there are between 8 and 10 million undocumented foreign workers in the United States, half of whom are Mexican nationals. Mexican immigrants contributed $220 billion to the United States' economy in 2000.

Controlling the border constitutes a significant expenditure in the federal budget. However, despite increased resources dedicated to border enforcement, the number of people entering the United States illegally each year has remained unchanged. In an interview on National Public Radio in January 2004, immigration expert Professor Douglas Massey stated that between 1986 and 2000, the number of border patrol officers was increased from fewer than 2,000 to more than 12,000, while the budget was increased from below $200 million to approximately $1.3 billion in 2004. While the number of people immigrating to the United States has remained relatively stable in proportion to the population, the nature of undocumented immigration has changed in the past century. Whereas in the beginning migrants came seasonally and then returned home with their earnings, workers now stay longer and often settle permanently in the United States. This is largely a result of the increasing risk associated with crossing the border. As the costs of crossing the border illegally rise, temporary workers remain in the United States longer rather than risk being apprehended at the border when they decide to return.

III. CURRENT GUEST WORKER VISA PROGRAMS

The following Part focuses on the H-2A visa for temporary agricultural workers and discusses the policy goals and the actual consequences of the visa program. Two visas are specifically for agricultural and other low-skill workers: the H-2A and H-2B visas. The H-2A visa is provided to aliens "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services." The H-2B

120. See Massey, supra note 99.
121. Id.
122. Massey et al., supra note 1, at 42.
123. Id. at 128-29.
visa is directed to service and labor workers and provides visas to aliens who meet the same requirements as agricultural workers coming under the H-2A visa. The strict limits imposed on both the H-2 visas make them inadequate to meet the United States' demand for labor. This Note focuses on the H-2A agricultural visa.

A. H-2A Agricultural Visa

The H-2A visa permits the temporary or seasonal entry of nonimmigrant aliens to work in agriculture in the case of a domestic labor shortage. The DOL and the Department of Justice [DOJ] jointly administer the program. A potential employer must first file a petition with the DOL asserting that there is a shortage of national workers “who are able, willing, qualified, and available to work” and that “the employment of foreign nationals will not adversely affect the wages and working conditions of similarly employed United States workers” before approval can be granted. Meanwhile, a prospective worker must apply for the H-2A visa in his home country. If the DOL certifies that there is a labor shortage, then the employer can be certified to hire workers under the H-2A visa, and employer-linked visas can be issued.

Both employers and workers criticize the H-2A visa program. Employers lament that the program is too cumbersome; they must anticipate labor needs and certify the demand for foreign workers well in advance. Employers are also required to provide housing and transportation and pay workers a higher salary than they pay non-H-2A workers, called an “adverse-effect wage,” so that domestic workers remain competitive.

Although workers are supposed to receive food, lodging, permission to work legally, and slightly higher wages, many decline to apply for an H-2A visa for a combination of reasons. As the H-2A visa is attached to a specific employer, it limits job flexibility and freedom to report

127. See supra Part II.A.
129. Id.
130. Id.
131. Id.
132. Id.
134. Carroll, supra note 133.
135. Id.
136. Id.
abuse because such action may result in loss of both job and visa. Under the visa, the worker must also return to his home country when the agricultural season ends or else he becomes ineligible for a visa the following season. Furthermore, the H-2A visa does not provide a means for workers to obtain permanent residence or citizenship, nor does it allow for workers to bring their families. A recent DOL study revealing that the vast majority of agricultural workers do not have visas indicates the failure of the current H-2A program. The study found that sixty percent of farm workers in the United States are here illegally. In 2002, only 41,000 workers, of the estimated 2.5 million agricultural workers, were certified for H-2A visas, and in 2003 fewer than 30,000 H-2A visas were issued. These statistics reflect the reality that there is little incentive for employers or workers to use the H-2A visa.

IV. BEING A BETTER HOST: REFORM

The following Part discusses President Bush’s guest worker proposal and considers why actual reforms are yet to be implemented.

A. TALKS OF REFORM END ABRUPTLY IN 2001

In August 2001 immigration was a hot issue. President Bush and President Fox were scheduled to meet in early September 2001. Both Democrats and Republicans made recommendations, including suggestions for reworking the guest-worker program and for creating an amnesty provision granting legal residency status to undocumented foreigners who held jobs and paid taxes. President Fox was also
pushing hard for immigration reform. The political climate in Mexico had changed dramatically from the Bracero days and President Fox was experiencing internal pressure to create a viable and humane immigration agreement that would protect Mexican nationals living and working in the United States. During his three-day visit to Washington in early September, President Fox announced hopes that the two nations would reach an agreement by the end of the year. He encouraged President Bush to grant legal status to the estimated three million undocumented Mexicans working in the United States.

Talks of immigration reform, however, came to a standstill after the terrorist attacks on September 11, 2001. It was not until two months later, in November 2001, that Mexico and the United States resumed discussions on immigration, and it was in a different and limited capacity. This time it was Senate Majority Leader Thomas A. Daschle and House Minority Leader Richard A. Gephardt who went to Mexico to meet with President Fox. Before meeting with President Fox, both Senator Daschle and Congressman Gephardt emphasized publicly that despite the events of September 11, they were both still committed to immigration reform. President Fox also relaxed his aggressive stance on immigration reform while stressing the difference between foreign terrorists and poor Mexicans who enter the United States to work.

Moore argued that (1) immigration from Mexico has remained steady since the 1930s, especially when considered in the context of the overall population; (2) "the new immigrants are economically beneficial to the United States"; and (3) that "guest worker programs can help reduce illegal immigration." Moore suggested a broad policy allowing guest workers, with significant fines and punishments for illegal immigration.


Sheppard, supra note 143, at 42; Allen, supra note 144; Chen & Smith, supra note 146; Reuters, Democratic Support for Bush on Immigration, L.A. TIMES, Sept. 9, 2001, at A19. Fox outlined his ambitious goal in his remarks at the arrival ceremony, stating:

[We] must, and we can, reach an agreement on migration before the end of this very year, which will allow us, before the end of our respective terms, to make sure that there are no Mexicans who have not entered this country legally in the United States, and that those Mexicans who have come into the country do so with the proper documents.

Remarks by President George Bush, supra note 146.

Sheppard, supra note 143, at 42; Allen, supra note 144; Chen & Smith, supra note 146; Reuters, supra note 147.


Id.

Id.

Id.
suggested that "identifying and legalizing" Mexican workers in the United States could lead to increased national security. Despite media publicity, the post-September 11 discussions did not culminate in immigration reform, and the United States continued to implement increasingly restrictive immigration policy.

B. IMMIGRATION REFORM IN 2004

In 2004, reform of the United States' immigration policy reentered the national limelight. On January 7, 2004, President Bush proposed plans for a new temporary worker program. Without revealing specific details, President Bush outlined a plan allowing temporary workers to come to the United States on three-year work visas that would be renewable on one occasion if the worker remained employed and satisfied other program requirements. President Bush proposed that, like the Bracero Program, the new program would include incentives for workers to return to their home countries. He also emphasized that the jobs must be prearranged and would only be open to foreign workers when no American worker was available. The proposal did not include amnesty provisions. He proposed, however, that workers would be allowed to travel freely between their country of origin and the United States, and would be allowed to bring dependents if they could prove that they would be able to support them.

After disagreements in late 2003 and early 2004, relations between President Bush and President Fox were improving. On March 9, 2004, President Fox traveled to the United States to meet with President Bush for discussions on migration, trade, and national security. The atmosphere was less charged than during the expectation-laden talks

154. Id.
155. Skeptics theorized that both Democrats and Republicans knew from the outset that immigration reform would not take place yet engaged in talk of reform to garner political support. Sheppard, supra note 143, at 44-45.
157. President Bush Proposes New Temporary Worker Program, supra note 156.
158. Id.
159. Id.
160. Id.
163. Id.
three years before, but President Fox expressed support for the Bush administration’s immigration reform plan as a first step in the right direction for immigration policy.¹⁶⁴

V. PRESIDENT BUSH’S PROPOSAL

President Bush’s proposed temporary worker plan engendered much debate. In February 2004, at the first of an anticipated series of hearings evaluating guest worker programs, Senator Saxby Chambliss, a Republican senator from Georgia, outlined the core objectives of President Bush’s proposal.¹⁶⁵ While emphasizing the need for strong border enforcement and internal security, Senator Chambliss also stressed the United States’ demand for guest workers.¹⁶⁶ This proposal both appeased those seeking strict border control and satisfied the agricultural industry, which supports an expanded guest worker visa program with extended visa duration and clear guidelines regarding the costs for which the employer is responsible.¹⁶⁷

A. CRITIQUE OF BUSH’S PROPOSAL

Although the United States needs immigration reform, President Bush’s temporary worker plan is weak in a number of areas and, if implemented, is unlikely to provide a long-term solution. Primarily, (1) it does not provide any means for immigrants to improve their status within the United States; (2) it does not provide an incentive to workers to apply for a temporary visa; (3) it does not include wage or labor protections; and (4) there is no amnesty provision.

1. Status of Mexican Workers in the United States

President Bush’s proposal will not enable workers to improve their status in the United States because the visa will be linked to a specific employer. While members of the agricultural industry may support President Bush’s proposal, organized labor and immigrants’ rights organizations are generally skeptical.¹⁶⁸ Undocumented agricultural

¹⁶⁴ Id.
¹⁶⁵ Chambliss, supra note 133.
¹⁶⁶ Id. Senator Chambliss stated that:

Even with our best efforts, illegal immigration remains a vast problem that is getting more and more out of control. Most estimates say there are 8 to 10 million illegal aliens in the United States. Of those, it is estimated that 60% entered the United States without inspection, which is a criminal offense. Such a large number of illegal aliens creates a financial drain due to non-reimbursed medical and educational services, burdens our judicial system, and allows criminal acts to go unchecked.

Id. Senator Chambliss emphasized the distinction between illegal and legal workers and the need to prevent any illegal immigration while bringing immigrants in through a guest worker program in order to fill gaps in the U.S. labor market. Id.

workers in the United States are subject to many disadvantages. They are not eligible for federal programs; and they pay money into a social security system which pays them nothing in return. Nonetheless, the United States economy has proved to be dependent on these workers, and as President Bush's proposal to increase the number of temporary work visas indicates, the United States government does not want to lose access to immigrant labor.

President Bush's proposal continues to link workers' visas to specific employers. Linking temporary work visas to employers, as is currently the case with the visa program, hurts the worker and the employers. First, it is not compatible with the industries that the temporary worker program serves. Agricultural jobs are often of limited duration and workers change employers frequently; both employers and workers want flexibility. Employer-linked visas are especially bad for the workers because being tied to a specific employer puts the worker at the mercy of that employer. If workers must keep prearranged jobs in order to keep their visas, they are inclined to accept lower wages and unfit or dangerous working conditions rather than risk losing their visas. Linking the visa to the employer essentially creates a class of voiceless laborers who must accept whatever is asked of them in order to keep their employment and remain in the United States.


In a striking deviation from the current H-2A program, and the former Bracero Program, President Bush's proposal does not include wage or labor protections. This is bad for both temporary foreign workers and workers in the United States. Employers will pay, and temporary workers will accept, wages below those that native workers will accept. Employers can also maintain work conditions at levels that are unacceptable to native workers. Because the dollar is generally much stronger than the Mexican peso, it is still economically beneficial for Mexican workers to accept substandard wages and conditions. Without wage and labor provisions, unemployed domestic workers are underbid while foreign workers are forced to work in inhumane conditions. President Bush's failure to include wage and labor provisions in his


169. See supra text accompanying note 119.
170. Taylor, supra note 168.
171. Id.
172. Goldstein, supra note 39.
173. Id.
174. Farmworker Justice Fund, supra note 168. Both the current H-2A visa program and the Bracero Program included wage and labor provisions. Id.
175. Id.
proposed temporary worker plan is unjust to immigrant laborers and is to the detriment of native workers.\textsuperscript{176}

3. \textit{Proposed Temporary Worker Plan Does Not Provide an Incentive For Undocumented Workers to Apply for the Visa}

President Bush’s proposed temporary worker program does not provide an incentive for undocumented workers to apply because it does not offer priority in Green Card processing or any other means of acquiring citizenship or long-term legitimate status. To apply for a Green Card undocumented workers must still return to their home country and the wait can last up to ten years.\textsuperscript{177}

Lawmakers claim that the proposed temporary worker plan will improve national security because the government will be able track immigrants once they have applied to the program.\textsuperscript{178} Although this is theoretically a possibility, temporary workers, especially those already living in the United States, must receive some benefit from the visa before they will apply. Immigrants, primarily undocumented workers, who have been working here for many years will not apply for the temporary visa if they know that it does not afford priority in receiving a Green Card.\textsuperscript{179} Furthermore, undocumented workers are well-aware that the waiting list to receive a Green Card is long and the three-year temporary worker visa is likely to expire before they receive permanent residence. Thus, the temporary worker visa, which can legalize a worker’s immigration status for up to six years if that worker meets all the requirements for renewal, may actually jeopardize workers’ long-term well-being. Individuals will be easier to track and, thus, more likely to face deportation to Mexico when their visas expire.

Currently, the government awards 140,000 Green Cards every year. While five thousand go to low-skilled workers, the majority go to professionals and skilled workers.\textsuperscript{180} White House Spokeswoman Claire Buchanan has tried to address concerns regarding President Bush’s omission of Green Card provisions by indicating that the President may propose an exception for formerly undocumented immigrants participating in the guest worker program.\textsuperscript{181} The administration, however, has yet to reveal any specific plans.\textsuperscript{182} While President Bush

\begin{thebibliography}{9}
\bibitem{176} Farmers often claim that they are unable to find United States citizens who are able and willing to work. A more accurate way to frame their conundrum is to say that they are not able to find native workers who are willing to work under the conditions demanded.
\bibitem{178} \textit{President Bush Proposes New Temporary Worker Program}, \textit{supra} note 156.
\bibitem{179} Alonso-Zaldivar, \textit{supra} note 177, at A14.
\bibitem{180} \textit{Id.}
\bibitem{181} \textit{Id.}
\bibitem{182} \textit{Id.}
\end{thebibliography}
proposes that the guest worker program will promote national security because the government will be able to register and monitor immigrants, as long as there is no incentive to apply for the temporary worker visa, undocumented immigrants are not likely to participate in the program.\textsuperscript{183}

4. **No Amnesty Provision**

President Bush’s proposed temporary worker plan does nothing to facilitate temporary workers acquiring permanent residence or citizenship in the United States. This does not reflect the reality of immigration between the United States and Mexico. The proposed visa would allow a worker a maximum stay of six years. After working six years in the United States, however a worker may be even more dependent on work in the United States as a means of providing for himself and his family than before first coming. Furthermore, the worker is likely to have developed connections in the United States enabling him to return more easily, albeit illegally. After the six-year term of the visa expires, there is no way for a worker to immigrate legally, yet work will still be available. Many formerly legal workers who entered under President Bush’s proposed plan will become undocumented workers when the visa expires.

Immigration experts have likened President Bush’s current proposal to the 1986 IRCA.\textsuperscript{184} In addition to other differences, IRCA, however, included provisions for employer sanctions and amnesty provisions.\textsuperscript{185}

President Bush’s proposed plan does not include an amnesty provision, an important component of IRCA.\textsuperscript{186} Millions of undocumented workers in the United States form an integral part of the national economy and social fabric.\textsuperscript{187} It has been almost a decade since the IRCA offered amnesty, and many people are living in limbo. While many argue that it is poor policy to reward illegal immigration with amnesty, this argument ignores the reality that there is a demand for labor in the United States and much of that demand is satisfied by undocumented workers.\textsuperscript{188} Although expanding the temporary worker visa program may temporarily afford legal status to a number of

\textsuperscript{183} Id.
\textsuperscript{184} See supra Part II.B.
\textsuperscript{185} Under 8 U.S.C. § 1324a(a)(1)(A) it is illegal “to [knowingly] hire, or to recruit or refer for a fee” an unauthorized alien for employment in the United States. The Ninth Circuit Court of Appeals held that the INS must be able to prove the employer had constructive knowledge that the employee was illegal. See Collins Foods Int’l., Inc. v. INS, 948 F.2d 549, 551 (9th Cir. 1991). It is sufficient for the employer to rely on documents presented by the employee that “reasonably appear to be genuine.” Id. at 554 (citing H.R. REP. No. 99-682, pt. 1, at 62 (1986)); see Jorge A. Vargas, Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights, 2 SAN DIEGO INT’L J. 1, 81 (2001).
\textsuperscript{186} Supra Part II.B.
\textsuperscript{187} See id.
\textsuperscript{188} See supra Part II.A.
undocumented workers, if all undocumented workers currently living in the United States were to apply, and then extend their visas, six years from now the United States would find itself in the same position as it is in today. There is no reason to believe that workers living in the United States illegally prior to receiving the temporary work visa would leave when the visa expired. Therefore, many undocumented workers would return to undocumented status when their visas expired.

Indeed, many experts and immigration policy groups are skeptical whether President Bush's plan can ever meet the labor demands of the agricultural industry. \[^{189}\] Claudia Smith, director of California Rural Legal Assistance, an immigrant advocacy group based in Oceanside, California, \[^{190}\] is one of the skeptics. In an interview with CBS, she stated that she does not believe the proposed visa program will not be large enough to accommodate the demand of Mexicans seeking work or of United States' industries seeking undocumented labor. \[^{191}\] She reasoned, therefore, that the visa would have little impact on the number of individuals entering the United States illegally. \[^{192}\]

An additional difference between President Bush's proposal and IRCA is that the President has not stated that he will include sanctions against employers that hire undocumented immigrants. While employer sanctions have not proved successful in curbing illegal immigration, implementing such sanctions is often suggested. One problem with previous attempts at employer sanctions is that they have never been strictly enforced. \[^{193}\] As the Ninth Circuit found when determining whether an employer was guilty of knowingly employing an undocumented worker based on fraudulent documents, "the legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process." \[^{194}\] In practice, employer sanctions have proved ineffective to stop employment of illegal workers and have merely served to restructure the agricultural hiring process to include middlemen, thereby decreasing overall wages. \[^{195}\] To effectively deter employers from hiring workers who do not have visas, sanctions must be consistently and diligently enforced.

\[^{189}\] Id.
\[^{190}\] More information about California Rural Legal Assistance’s ideology, projects and services is available on their web-page. See California Rural Legal Assistance, Inc., at http://www.crla.org.
\[^{191}\] CBS & Associated Press, supra note 161.
\[^{192}\] Id.
\[^{193}\] Vargas, supra note 185, at 81.
\[^{194}\] Collins Foods Int’l., Inc. v. INS, 948 F.2d 549, 551 (9th Cir. 1991) (citing 8 U.S.C. § 1324a (2004)).
\[^{195}\] See Massey, supra note 99. Instead of hiring workers directly, employers often hire through labor subcontractors, and all workers, including citizens and legal resident aliens, must now seek employment through these subcontractors. Id.
C. An Argument for Providing a Path to Citizenship: Looking to the German Experience

Germany's experience engaging in a guest worker program with Turkey can be viewed as an example of what happens when a nation adopts a guest worker program but does not offer the guest workers a path towards citizenship. Germany is currently home to many Turkish immigrants who went to Germany in 1961 as part of a bilateral treaty between the Federal Republic of Germany and Turkey to bring Turks to Germany as guest workers. The program was initiated during the post-World War II labor shortage in Germany and lasted until 1973. Because workers were only to stay temporarily, the program did not offer a means for the Turkish workers to become citizens nor did it invest resources in teaching them German or integrating them into German society.

Both Germany and Turkey maintained that the guest worker program was temporary and always referred to the Turkish workers as "workers," not "immigrants." Nonetheless, many of the Turkish "temporary workers" remained in Germany but never became citizens. Obtaining German citizenship was very difficult for the Turkish workers who remained. Although citizenship requirements were relaxed in 2000, prior to then Germany required fifteen years of residence and required individuals to renounce other citizenships. Furthermore, individuals born in Germany are not automatically citizens; therefore, the children of the Turkish workers are also foreign nationals. As a consequence, Turks who participated in the guest worker program and continued living in Germany formed an immigrant subclass; a large population of alien Turks in Germany are subject to discrimination, experience higher rates of unemployment and substandard education and housing.

The long-term implications of a guest worker program in the United States may be different than in Germany because the United States grants citizenship to individuals born within its borders. Germany's experience is important, however, because it shows that it is unrealistic

198. Id.
199. Id.
200. Id.
201. Id.
202. Id.
204. Melvin, supra note 197, at H1.
and shortsighted to contend that any guest worker program will not result in the permanent settlement of at least a portion of the guest workers, especially when there is significant economic disparity between the sending and the receiving nations. Any guest worker program that focuses on bringing workers temporarily, and does not create a long-term plan to assimilate immigrants remaining in the country, will not succeed as a long-term program.\textsuperscript{205}

**VI. PROPOSALS FOR CREATING A VIABLE, LONG-TERM TEMPORARY WORKER PROGRAM**

Analysis of past temporary worker programs illustrates that they do not prevent illegal immigration or fully protect workers' rights.\textsuperscript{206} Historical analysis does suggest, however, that in order to have any modicum of success, a guest worker program must: (1) provide a means for temporary workers to become permanent residents or citizens; (2) offer benefits to employers that hire workers through the temporary worker program; (3) enact and enforce wage and labor provision; and (4) make the visas specific to the individual worker, not the employer. These measures, if followed, provide incentive for workers to participate in the program and set the minimum standards for a functioning, non-exploitative guest worker program. However, as past programs have illustrated, if all components of the program are not followed closely problems develop that undermine the legitimacy and success of the program.

First, guest worker legislation must provide a means for temporary workers to become permanent residents or citizens. This is essential to avoid creating a sub-class of non-citizen undocumented workers. The same factors that drive individual guest workers to migrate to the United States in the first place are likely to drive some to overstay their visas. As long as employment is available and workers are not individually monitored and forcibly deported upon visa expiration, workers will stay.

The United States' and Germany's experiences with guest worker programs reveal what happens when guest workers remain in the visa-granting country but are not able to become legal residents. The former guest workers live in limbo. They are unable to fully integrate into society because they are not legally inside the country and they may suffer discrimination on a variety of levels. In the United States, immigrants' children, who will be United States citizens if born inside the country, are also likely to face disadvantages stemming from their parents' status. Enacting a guest worker program that allows workers

\textsuperscript{205} Chang, supra note 203, at 472.

\textsuperscript{206} See Massey et al., supra note 1; Ögelman et al., supra note 196, at 146–47 (discussing social position of Turks in Germany); Vargas, supra note 185, at 86.
who meet certain requirements to become permanent residents will reward and protect those workers who go through legal channels to work in the United States. While a guest worker program that provides a path to permanent residency is not truly a temporary worker program, it addresses the reality that many guest workers remain long after their program ends.

Additionally, the guest worker program should be available, at least in the beginning, to undocumented workers already inside the United States. This will provide amnesty to those workers who are currently undocumented yet want to participate in the program. Because the path to legal residency would be potentially available to all program participants, it would not "reward" individuals who had entered the country illegally, rather, it would motivate those workers who want to remain in the United States to participate in the guest worker program.

Second, the guest worker program must offer benefits to employers that hire workers through the guest worker program, and sanctions must be consistently enforced against employers that hire undocumented workers. Employers will not hire workers through the guest worker program unless there is a benefit to them. This benefit can come in the form of access to a reliable labor pool as well as freedom from possible sanctions. If employers are able to hire guest workers without excessive bureaucratic delays, and the administrative costs are lower than the sanctions they face for hiring undocumented workers, they are apt to participate. Employer sanctions have not been effective in the past.

However, if the standard for holding employers responsible for accepting obviously fraudulent documents is raised and the sanctions are consistently enforced, the cost of hiring undocumented workers will be higher than the cost of hiring guest workers. Hiring workers through the guest worker program should be the only reasonable option for agriculture employers seeking non-domestic labor.

Third, wage and labor provisions must be included and enforced. They are necessary to protect the well-being of the guest workers and to ensure that domestic workers are not edged out of the market by non-native workers willing to accept lower wages and substandard working conditions. Employers must be required to pay guest workers fair wages for their labor. The wage can be determined based on the state and national minimum wages, the cost of living in the regions and the wages paid to domestic workers for similar work. Once the wage is determined,

207. For example, permanent resident status could be granted to guest workers who have renewed their visas three times consecutively and who meet other requirements for immigration to the United States.

208. See Massey, supra note 99.

209. Collins Foods Int'l., Inc. v. INS, 948 F.2d 549, 551 (9th Cir. 1991) (citing 8 U.S.C. § 1324a (2004)).
employers must pay workers that wage. To ensure this, workers must be able to file grievances with the administering agency when they are paid less, the employers should be actively investigated and employers must not be able to punish workers who speak up. Employers caught paying less than the minimum wage must face stiff fines and be prohibited from hiring guest workers in the future.

In addition to wage provisions, labor provisions are necessary to ensure the safety of the guest workers and to prevent abusive working conditions. Employers should be required to provide safety equipment, protection from harmful chemicals, adhere to maximum hour limits, and adopt other labor protection as deemed necessary. The same agency that ensures that wages are enforced should address grievances regarding working conditions and proactively ensure that the provisions are followed in the fields.

Finally, the visa should belong to the individual worker; agricultural workers should not be dependent on a specific employer to sponsor their visas. When a worker's visa is contingent on working for a particular employer, his power to complain about wages, working conditions, or other violations of the guest worker contract is limited. He must accept the conditions imposed on him or forfeit his opportunity to work legally in the United States. If a worker is able to register directly with the administering agency program to obtain the guest worker visa, and then contract with specific employers once inside the United States, he has the freedom to avoid abusive employers and to speak up against violations without risking both his job and his visa. Additionally, if employers know that workers can change employers they will be more apt to follow the provisions of the guest worker contracts.

If the above conditions are satisfied, the guest worker program is more likely to be a success because both workers and employers will have an incentive to participate. Undocumented agricultural workers are currently able to enter the United States and find work; in order for a worker to participate in a guest worker program he must get something out of it. I propose that guest workers have the opportunity to obtain permanent resident status and that wages and labor conditions improve. Employers must also be encouraged to participate. This can be achieved by rigorously enforcing sanctions against employers who violate terms of the guest worker contract and by streamlining the hiring process to make it more suited to the employer’s labor needs.

VII. CONCLUSION

The crucial element of any guest worker program is that it recognizes that the workers entering under it are not truly temporary. A successful program acknowledges that many of the workers will remain in the country and creates a means for workers to obtain legal residency.
It should include wage and labor provisions to protect workers and ensure that employers hire workers through the program and adhere to the contracts. While President Bush is moving in the right direction by addressing the need for reform of the agricultural worker program, if his proposed plan is not modified to include the aforementioned elements, many employers will continue to hire undocumented workers, and many of the workers that do participate will become undocumented immigrants once their visas expire. As long as there is significant economic disparity between the United States and Mexico, immigration will continue. One realistic solution to reducing the market for illegal labor and protecting immigrant laborers is implementing and enforcing a guest worker program that includes the four components listed above.