

AILA Issue Paper

Comprehensive Immigration Reform: Major Legislation to Be Introduced

THE ISSUE: Most people agree that our current immigration system is broken and desperately needs to be reformed; that an effective system is essential to our national security so that we know who is here and can keep out those who mean us harm; and that we need reform now. Agreement ends there, however, with opponents of immigration continuing to advocate for enforcement of our severely dysfunctional system. What are the symptoms of this dysfunctional system? Families of U.S. citizens and legal permanent residents separated for many years; businesses unable to bring in needed workers; and a status quo that does not meet our security needs.

We need comprehensive reform that will make immigration safe, orderly, and legal. Such reform would include: an earned adjustment for people who are living here, working and contributing to the U.S.; a “break-the-mold” worker program that would allow essential workers to enter the U.S. safely, legally, and expeditiously without displacing U.S. workers; and backlog reductions in family-based immigration. Proposals that fail to embrace these three components and seek only to increase enforcement of the current unworkable system will only perpetuate and exacerbate current problems.

Comprehensive immigration reform will make legality the norm and enhance our security. It will bring hard working immigrants out of the shadows to be reviewed and scrutinized by our government, create a legal flow by which needed workers can enter and leave the U.S., shut down black markets that represent a weak spot in our security apparatus, facilitate family reunification, and help us maximize our enforcement efforts.

BACKGROUND: Several measures were introduced in the 108th Congress and President Bush, in January 2004, announced his Administration’s immigration reform proposal. The President also announced in January 2005 his intention to pass immigration reform through the 109th Congress. Several of the congressional measures introduced in the last Congress included:

Democratic Comprehensive Immigration Reform Bill: Senator Edward Kennedy (D-MA), Representatives Robert Menendez (D-NJ) and Luis Gutierrez (D-IL), and others introduced a comprehensive immigration reform bill (S. 2381/H.R. 4262) on May 4, 2004 entitled the “Safe, Orderly Legal Visas and Enforcement (SOLVE) Act of 2004.” This bill included the measures necessary for reform: an earned adjustment for eligible people already living and working in the U.S., family reunification through backlog reduction, and a new “break-the-mold” temporary worker program. The bill would have enhanced our security by bringing immigration under the rule of law and enabling our law enforcement agencies to focus on terrorists and criminals rather than workers and families. The measure also would have encouraged legality at our borders and strengthened our intelligence capacity and ability to verify documents and identity.

The SOLVE Act included an earned adjustment for immigrants who resided in the U.S. for five or more years on the date of enactment and could demonstrate 24 months in the aggregate of employment (including self-employment) in the U.S. and payment of taxes. The principal applicant’s spouse and unmarried children under 21 also would have been eligible. These applications would have been adjudicated outside the numerical limitations on immigrant visas, and grounds of inadmissibility related to undocumented status would have been waived. Applicants would have undergone criminal background checks and medical examinations, would have registered with the Selective Services, and would have needed to demonstrate an understanding of English and civics, or have been pursuing a course of study to achieve such understanding. Applicants would have been

able to travel and work with authorization while their application was pending. The bill also would have provided for administrative and judicial review of denials of an application. Applicants residing in the U.S. less than five years would have been eligible, after a background check, for transitional status lasting three years, during which they would have been able to work with authorization and travel abroad. After twenty-four months in the aggregate of work, they would have been eligible to adjust their status.

The SOLVE Act addressed the need to reduce the backlog in family-based immigration by, among other provisions: exempting immediate relatives from counting towards the 480,000 ceiling on family-based immigrant visas and including spouses and children of permanent residents in the definition of immediate relatives; responding to the inequities that result from per-country ceilings on visas by allocating a visa outside of the per-country and world-wide caps to immigrants waiting more than five years; recapturing unused family-based visas in any given year and applying those visas to future years without per-country and worldwide numerical limitations; reducing the income test for the affidavit of support from 125% to 100% of the poverty level; and repealing the bars to re-entry.

The SOLVE Act embraced the need to legalize future immigration flows by reforming the current H-2B program and creating a new H-1D program. Both programs targeted low- and semi-skilled workers and excluded workers who qualified for other visas. 250,000 visas were designated for H-1D workers in two-year increments; these visas were renewable for two additional terms (6 years total). 100,000 visas were designated for H-2B workers in 9-month increments; these visas were renewable for up to 40 months. These programs would not have sunset. Immediate family members would have been able to accompany the H-2B and H-1D workers, but would have been eligible to work only if they themselves qualified for an H-2B, H-1D, or other work visa. In addition, these workers would have been eligible to move to another H-2B or H-1D job after three months. Importantly, these programs included a path to permanent residency. An employer could have petitioned for permanent residence on behalf of a worker immediately upon employment or a worker could have self-petitioned after two years of employment. Immigrant visas allocated under this program would not have counted against the numerical caps.

These worker programs also included a strengthened attestation process under which prospective employers would have had to attest that U.S. workers were unavailable and that the employment of foreign workers would not have adversely affected the wages and working conditions of U.S. workers. Foreign workers could only have applied for a job offer from an employer who complied with Department of Labor (DOL) obligations. DOL also would have had the authority to enforce compliance with the terms of the program through inspections and audits (as well as complaints). H-2B and H-1D workers would have been able to pursue a private right of action against employers who failed to comply with the provisions and requirements of the worker program. In addition, H-2B and H-1D employers would have had to pay the prevailing wage, as determined by the organization's collective bargaining agreement, or, in its absence, under the Davis Bacon or McNamara-O'Hara Service Acts. If the job was not covered by these prevailing wage determinations, the prevailing wage would have been the mean of the highest 66% of the wage data provided by DOL's Bureau of Labor Statistics Occupational Employment Survey.

This bill also included a response to the Supreme Court's *Hoffman Plastics* decision on backpay, workman's compensation, and related issues. Finally, the bill included a study of the H-2B and H-1D programs that would have examined, among other issues, the appropriate labor market test to protect U.S. workers, the appropriate wage calculation formula, and the positive and negative impact of the programs. The study also would have reassessed the program, and made recommendations to Congress.

Bipartisan Senate Bill: S. 2010, the Immigration Reform Act of 2004, introduced by Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD) in January 2004, also included the components necessary for comprehensive immigration reform. This bill shared a framework and many provisions with the SOLVE Act. S. 2010 was significant because it was the first BIPARTISAN comprehensive reform bill, and bipartisanship was and is essential for any measure to pass Congress. While AILA was concerned with some of the bill's provisions, the Immigration Reform Act articulated the goal of creating an immigration system that reflected our nation's values, and our traditions and needs.

The Immigration Reform Act of 2004 included some, but not all, of the provisions in the SOLVE Act. With regard to family reunification, the bill included the following: immediate relatives were no longer subtracted from the 480,000 cap on family-based immigration; the spouses and minor children of legal permanent residents were reclassified as immediate relatives; certain grounds of inadmissibility were addressed; and derivative eligibility was expanded for all immediate relatives.

The Immigration Reform Act of 2004 also included a "Willing Worker" program that reformed the current H-2B program and created a new H-2C program (similar to the SOLVE Act's H-1D program). The bill was similar to the SOLVE Act in that it capped the H-2B program at 100,000. However, this number would have been reduced to 66,000 after five years. Admission of H-2B visa holders was limited to nine months in any twelve-month period (with a maximum of 36 months in any 48-month period, versus 40 months in the SOLVE Act). The H-2C program was a two-year program renewable for another two years, in contrast to the SOLVE Act's H-1D program, which was renewable for two additional two-year periods. The program was capped at 250,000 annually. Unlike the SOLVE Act, this program would have sunset five years after regulations were issued. S. 2010 required an attestation for both visas, with employers having to meet certain U.S. worker recruitment requirements. Dual intent was permitted with respect to both visas and derivative status was available for both as well.

S. 2010 included a different enforcement regime than did the SOLVE Act. S. 2010's worker protection provisions included a complaint-driven procedure in which the DOL and the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) would have investigated claims and provided for mediation and, in certain instances, hearings and further appeals. Employer groups and unions could have petitioned for these workers. The bill also created a commission to review the impact of the program and report on wage determinations. Petition and filing fees for each worker were on a sliding scale, based on the number of the employer's employees.

Like the SOLVE Act, S. 2010 included an earned adjustment for those who met several requirements including: physical presence for five years prior to the bill's introduction and successful fulfillment of a past work requirement. Unlike the SOLVE Act, S. 2010 also included a prospective work requirement (at least one year following enactment). S. 2010 also mandated payment of income taxes or entry into an agreement with the IRS to pay all outstanding liabilities, and a payment of a \$1,000 fee (versus \$500 in the SOLVE Act). Other provisions of this earned adjustment included: spouses and minor children were eligible to adjust with the principal applicant; administrative and judicial review provisions were included in recognition of the problems generated by past laws, as were certain waivers and grounds of inadmissibility; and, to encourage employer participation, employers were not subject to civil and criminal tax liability related to the employment of these individuals. Workers who met the physical presence requirement, but not the work requirement, were eligible for a transitional worker status of three years. These workers would have been granted employment authorization and permission to travel, and would have been eligible to adjust status to permanent resident.

Other Legislation: Bills introduced by Representatives Flake (R-AZ), Kolbe (R-AZ) and Senators McCain (R-AZ) (H.R. 2899/S.1461) and Cornyn (R-TX) (S. 1387) also took important steps toward achieving reform. It is very significant that Senators from border states recognized the need for a legalization program for eligible people living here as well as a worker program. It is also significant that these Senators recognized, as clearly articulated by Senator McCain, that our nation cannot achieve border security unless we reform our immigration laws. Missing from their initiatives, however, were provisions that would have reduced the backlogs in family-based immigration. It is hoped that future versions of these measures will include such provisions.

S. 1461/H.R. 2899 would have allowed undocumented immigrants living and working in the U.S. to become lawful temporary workers, permitted them to change employers, and provided them with an option to become legal permanent residents through either an employer-sponsored petition or a self-petition. These provisions appeared to have encompassed those who would have fallen under the current H-2A, H-2B and H-1B programs (without terminating these programs). (AILA believed that agricultural workers and foreign professionals should have been addressed separately.)

More specifically, S. 1461/H.R. 2899 would have created two new nonimmigrant worker visa categories: the H-4A and H-4B temporary worker categories. H-4A workers would have been admitted initially for a three-year period that was renewable for an additional three years. Employers had to attempt to recruit U.S. workers prior to filing a petition for an H-4A worker and re-advertise prior to filing an extension petition. H-4A workers could switch employers and were eligible to adjust to permanent resident status. Immediate family members of H-4A workers could not accompany the worker unless they also had H-4A status. The legislation also created an electronic job registry to satisfy the job recruitment requirements and to advertise the job to non-US workers, as well as an employment eligibility confirmation system that would have confirmed a person's identity and employment authorization. Both the job registry and employment eligibility confirmation system were ambitious initiatives that raised many concerns because our government has yet to create a database of the size that this one would need to be to work properly. In addition, the proposal was unclear about how the registry would have worked – specifically, how U.S. workers and foreign workers would have gained access to it and thus how it would have matched willing workers with employers.

S. 1461/H.R. 2899 also would have offered the opportunity for undocumented people to apply for temporary H-4B status. Such individuals must have entered the U.S. before August 1, 2003, and resided in the U.S. in an unlawful status after such date and through the application for H-4B status. These individuals must also have been employed since that date and through the date of application or be the spouse or child of an H-4B worker. To apply for permanent residence, they must have remained in valid H-4B status for three years and then applied for a change to H-4A status. From H-4A status, they could have applied for permanent residence either through employer sponsorship or self-petitioning. Given the requirements of this section, it would have taken anywhere from three (unlikely) to nine years for an H-4B worker to adjust status to permanent resident.

Senator Cornyn's bill (S. 1387) would have created a guest worker program with any country entering into an agreement with the U.S. Workers enrolled in the program would have been eligible for a "W" visa and been placed in job openings in the U.S. The program would have encompassed both seasonal and nonseasonal employment, with no limitations on the types of employment for which a W visa could have been utilized. Seasonal guestworkers would have been limited to 270 days in any calendar year, and nonseasonal guestworkers to 12 months -- with two, one-year extensions permitted. Workers would have been required to return to their home countries for six months before reapplying. W nonimmigrants who worked in the program for three continuous years would have been eligible to apply from their home countries for legal permanent resident status. Priority would have been granted based on a point system, including factors such as whether the worker was

sponsored, received promotions and pay increases, paid taxes, was proficient in English, was educated, and refrained from illegal activity. AILA did not support the provisions in S. 1387 that failed to limit the types of employment encompassed in the W visa. We believe that this bill should not have covered agricultural workers or foreign professionals. **In addition**, the requirements in S. 1387 mandating that W workers return to their home countries to apply for permanent residence through a point system would have been disruptive to the labor force and, by bringing much uncertainty into the system, would have limited worker participation.

President Bush's Support for Reform: The Bush Administration, on January 7, 2004, unveiled an immigration proposal that reflected the President's views about the important contributions that immigrants have made to our nation. The Administration's reform proposal essentially was an uncapped temporary worker program intended to "match willing foreign workers with willing U.S. employers when no Americans can be found to fill the job." The program would have granted program participants temporary legal status and authorized working participants to remain in the U.S. for three years, with their participation renewable for an unspecified period. Initially, the program would have been open to both undocumented people as well as foreign workers living abroad (with the program restricted to those outside of the U.S. at some future, unspecified date). American employers would have had to make reasonable efforts to find U.S. workers. Under this proposal, participants would have been allowed to travel back and forth between their countries of origin and "enjoy the same protections that American workers have with respect to wages and employment rights." The proposal also included incentives for people to return to their home countries and called for increased workplace enforcement as well as an unspecified increase in legal immigration.

While these and other general provisions of the plan are known, other provisions of the proposal generated questions about access to permanent legal status. Other concerns involved whether the program would have adequately addressed other major issues such as the long backlogs in legal immigration. The proposal also was silent on the pressing need for family backlog reductions.

CURRENT STATUS: In mid-January, 2005, President Bush again called for immigration reform, noting that he intends to spend political capital this year to force a debate in Congress because "we have a problem in America," and that our current situation is a "bureaucratic nightmare" that must be solved. He continued by noting that: "We've got people living in the shadows of our society, and we've got a border patrol that's overstressed because we've got people streaming across. The system has broken down. And I think that by legalizing workers, we take a lot of pressure off our borders."

Bipartisan comprehensive immigration reform measures are expected to be introduced in both the House and Senate. Importantly, both the Senate Judiciary Committee and the Senate Immigration Subcommittee has new leadership: Senator Arlen Specter (R-PA) is the new chair of the Senate Judiciary Committee, and Senator John Cornyn (R-TX) is the new Subcommittee Chair.

AILA's POSITION: Our immigration system needs to work for America. Congress must address this issue because the status quo is unacceptable. AILA supports reform that reflects the following:

1. **Immigration Reform Must Be Comprehensive:** Since many of the problems with the U.S.'s current immigration system are interrelated, reform must be comprehensive to successfully address our nation's needs and realities. Such reform is necessary, especially in a post-September 11 world in which enhanced security is central, and we need to balance our security with the continued flow of people and goods. Our current system is characterized by families being separated for long periods of time and U.S. employers unable to bring in needed workers. People are forced to live an underground existence, hiding from the government for fear of being separated from their families and jobs. The current enforcement system fails to prevent illegal immigration, and precious resources that should be spent on enhancing our security are wasted

on stopping hard-working people from filling vacancies in the U.S. Our immigration system needs to be reformed so that legality is the norm, and immigration is legal, safe, orderly, and reflective of the needs of American families, businesses, and national security.

2. Immigration Reform is an Important Component of Our Enhanced National Security and Effective Enforcement: Immigration reform that legalizes hard-working people already here and that creates a new worker program will help the U.S. government focus resources on enhancing security, not on detaining hard-working people who are filling vacancies in the U.S. labor market and/or seeking to reunite with their close family members. In addition, addressing the situation of people here would encourage these people to come out of the shadows and be scrutinized by our government. A new worker visa program will create a legal flow through which people can enter and leave the U.S. The legality that results from these initiatives will contribute to our national security by helping to focus resources on those who mean to do us harm. Such legality also will facilitate enforcement efforts by allowing our government to focus resources. Enforcing a dysfunctional system only has led to more dysfunction, not better enforcement.
3. Immigration Reform Must Address the Situation of People Living and Working Here: People who work hard, pay taxes, and are learning English should be allowed to obtain permanent residence. These people are not the problem, but the symptom of the problem: our broken immigration system. Such reform is necessary and realistic: necessary because it would allow our government to know who resides in our country; realistic because this nation will not deport the millions of undocumented immigrants living and working here. Those who suggest that these people don't want to be part of America because they have not fixed their immigration status do not understand that no current law exists to allow them to do so.
4. Immigration Reform Must Include a "Break-the-Mold" Worker Program: Current immigration laws do not meet the needs of our economy or workers. A "break-the-mold" program would provide visas, family unity, full labor rights, and the ability to change jobs and a path to permanent residence over time for those who would not displace U.S. workers. It also would diminish significantly illegal immigration by creating a legal avenue for people to enter the U.S. and return, as many wish, to their countries, communities, and families.
5. Immigration Reform Must Reunify Families: Legal permanent residents often wait up to 20 years to reunite with their spouses and children. Such long separations make no sense in our pro-family nation and reflect poorly on us.
6. Immigration Reform Initiatives Must Be Adequately Funded: Successful, immigration reform must be adequately funded. Congress often passes immigration laws with unfunded, complicated, and conflicting mandates that have contributed to long backlogs and ineffective, inefficient and unfair services. Reforms must be accompanied by clear mandates and adequate funding in the form of direct congressional appropriations.