

## A Redesigned Immigration Selection System

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# A Redesigned Immigration Selection System

By Muzaffar Chishti†

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## Introduction

For more than a decade, the need for a fundamental reform of our immigration policy has been evident. The prospects for such a reform, however, have been elusive. In the 1990s, political events and calculations prevented any congressional action.<sup>1</sup> President Bush's election in 2000 brought new prospects of reform, as he announced immigration as one of his earliest policy goals.<sup>2</sup> The events of September 11, 2001, unfortunately, dimmed any such hopes and immigration reform became a casualty of the terrorist attacks.<sup>3</sup> In January 2004, President Bush reintroduced the subject of immigration reform<sup>4</sup> and Congress started to debate immigration legislation in its 2005-2006 session.<sup>5</sup>

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1. MPI Staff, *A New Century: Immigration and the US*, MIGRATION INFO. SOURCE, Feb. 2005, <http://www.migrationinformation.org/Profiles/display.cfm?ID=283>. In the 1990s, California passed Proposition 187 that denied undocumented immigrants access to medical care, public schools, and other social services. *Id.* During this decade, Congress also passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *Id.* The IIRIRA made it easier for the executive branch to deport illegal immigrants who commit crimes and the PRWORA limited immigrants' access to federal benefits such as Medicaid. *Id.*

2. Eric Schmitt, *Bush Aides Weigh Legalizing Status of Mexicans in U.S.*, N.Y. TIMES, July 15, 2001, §1, at 11; Ginger Thompson, *U.S. and Mexico to Open Talks on Freer Migration for Workers*, N.Y. TIMES, Feb. 16, 2001, at A1.

3. Press Release, Human Rights Watch, *The Aftermath of September 11 - The Tightening of Immigration Policies* (Apr. 13, 2002), <http://hrw.org/press/2002/04/valenciaspeech0413.htm>.

4. President George W. Bush, *President Bush Proposes New Temporary Worker Program* (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

5. See Comprehensive Immigration Reform Act of 2006, S. 2611-2612, 109th Cong. (2006); Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005); H.R. 2330, 109th Cong. (2005); see also Darryl Fears, *Immigration Measure Introduced*, WASH. POST, May 13, 2005, at A8.

A thoughtful and responsible reform package must accomplish a few things. First, it must address the dilemma of the existing undocumented immigrant population in our country. Second, it must regulate future flows of immigrants consistent with our labor market needs and economic interests in an increasingly inter-dependent world. Third, it must advance the protection of both U.S. and foreign workers. Finally, it must reflect the deeply engrained American value of fairness.

## I. The Current Undocumented Population

The plight of the estimated 12 million undocumented immigrants—and the challenges that they present—is the central element of the current immigration policy debate.<sup>6</sup> Even if we make the removal of this population the exclusive priority of our law enforcement agencies, it would take us years to deport all of them. The removal of these 12 million undocumented immigrants would cause massive dislocation to our economy and would exact an unacceptable price in the loss of civil liberties. Simple honesty compels us to conclude that we do not have the moral will, the political will, and certainly not the resources to round up 12 million people for deportation. If we acknowledge this central reality, the responsible course of action is to offer the undocumented an opportunity to regularize their status. There is considerable broad-based support for this policy.<sup>7</sup> Many of these undocumented immigrants have become important participants in our society and economy.<sup>8</sup> Many have spent years in our country, have become parents of U.S.-citizen children, are performing jobs that are essential to our economic productivity and lifestyle, are paying taxes, and building stable communities.<sup>9</sup> It is simply unfair and unrealistic to ask these people to uproot themselves and return to their countries of origin. They must have the opportunity to earn permanent resident status. There may be disagreement about the parameters of the legalization program: whether

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6. See DORIS MEISSNER ET AL., *MIGRATION POLICY INST., IMMIGRATION AND AMERICA'S FUTURE* 19 (2006).

7. See Tamar Jacoby, *Immigration Nation*, *FOREIGN AFF.*, Nov./Dec. 2006, at 50, 51 (“[A]n overwhelming majority [of Americans]—between two-thirds and three-quarters in every major poll—would like to see Congress address the problem [of illegal immigration] with a combination of tougher enforcement and earned citizenship for the estimated twelve million illegal immigrants already living and working here. A strange-bedfellow coalition—of business associations, labor unions, and the Catholic Church, among others—has endorsed this position. In Washington, the consensus behind it is even more striking, with sponsors spanning the spectrum from conservative President George W. Bush to left-leaning Senator Edward Kennedy (D-Mass.), from mavericks like Senator John McCain (R-Ariz.) to party regulars like Senator Bill Frist (R-Tenn.) and all but a handful of congressional Democrats.”).

8. See generally U.S. CENSUS BUREAU, *PROFILE OF THE FOREIGN BORN POPULATION IN THE UNITED STATES: 2000*, at 38-45 (2001), available at <http://www.census.gov/prod/2002pubs/p23-206.pdf>.

9. *How Would Millions of Guest Workers Impact Working Americans and Americans Seeking Employment?: Hearing Before the Subcomm. on Immigration, Border Security and Claims of the H. Comm. on the Judiciary*, 108th Cong. (2004) (testimony of Muzaffar A. Chishti, Director, Migration Policy Institute), available at [http://www.migrationpolicy.org/research/chishti\\_032404.pdf](http://www.migrationpolicy.org/research/chishti_032404.pdf).

it should be accomplished in one or two steps, whether they should be charged a high penalty for their unauthorized stay, or whether they should be required to make a symbolic exit from the United States followed by a lawful entry. Nevertheless, most Americans acknowledge the need to grant lawful status to these immigrants.<sup>10</sup>

## II. Future Flows

Although there is much broader consensus on the treatment of the current undocumented population, the policy toward future flows of immigrants has generated far more controversy.<sup>11</sup> Many proposals, including that of President George W. Bush, would rely on a temporary or a “guest worker” program to respond to these future flows. The President’s proposal would allow workers to come to the United States, work for an employer for specified periods, and then return to their home country.<sup>12</sup> The President describes this program as “matching willing employers with willing workers.”<sup>13</sup> Opponents of a temporary worker program view it simply as a way to legitimize a pool of cheap exploitable workers for the benefit of organized employer groups.<sup>14</sup> It is a difficult issue, which has led to divi-

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10. Jacoby, *supra* note 7, at 51.

11. Responsible Reform of Immigration Laws Must Protect Working Conditions for All Workers in the U.S., Mar. 1, 2006, <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec02272006e.cfm> (“To embrace . . . the creation of a permanent two-tier workforce, with non-U.S. workers relegated to second-class ‘guest worker’ status, would be repugnant to our traditions and our ideals and disastrous for the living standards of working families.”); see also Steven Greenhouse, *Unions Back New Immigration Policy*, N.Y. Times, Mar. 1, 2006, at A3 (noting that the AFL-CIO proposes increasing permanent resident work visas instead of guest worker program, stating that “admitting workers with . . . green cards, was fairer than admitting guest workers who are often treated like second-class workers”).

12. See President George W. Bush, President Bush Discusses Border Security and Immigration Reform in Arizona (Nov. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2006/05/20060518-18.html> (“We want to know who is coming in the country, and who is not coming in the country. And so I think it makes sense to say, if someone is willing to do a job Americans aren’t doing, here’s a temporary way to come and work; here’s a tamper-proof card, so you don’t have to sneak across the border, you can walk across the border, and you can do that work, and when your time is up, you go home.”).

13. See President George W. Bush, President Bush Discusses Comprehensive Immigration Reform in Nebraska (June 7, 2006), available at <http://www.whitehouse.gov/news/releases/2006/06/20060607.html> (“A temporary worker recognizes that—two things: one, there are jobs Americans aren’t doing, they’re just not, and yet there’s a need. We got employers who are looking for employees to do a certain kind of work. And the second aspect is . . . [t]here are a lot of hardworking, decent people who want to put food on the table for their families. And therefore, they’re willing to get in the back of an eighteen-wheeler, or walk across a hot desert to work.”).

14. Emily B. White, Comment, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 289-90 (2007) (“Immigrant rights advocates see pro-business interests as primarily looking to maximize the bottom-line profits for employers, not to protect the civil rights of immigrant workers. They view such support for the new legislation not as expansive protection for workers under federal employment discrimination laws, but rather a way to continue the profitable system that they have enjoyed with the widespread use of illegal labor”) (footnote omitted).

sion within the immigrant as well as the advocacy and policy community, and merits serious debate.<sup>15</sup>

To be fair, the skepticism about temporary worker programs is well founded. They come with a troubling legacy of employer abuse and exploitation. From the infamous “Bracero” program that ended in the 1960s<sup>16</sup> to the current H2-A temporary agricultural program,<sup>17</sup> temporary worker programs have been stacked against real protections for foreign workers in the United States.<sup>18</sup> Nevertheless, the legacy of these programs must not foreclose the possibility of reform. Legal scholars and reformers must review historical positions in the context of the present reality. There are four central elements of this reality.

- First, the Immigration Reform and Control Act of 1986 (IRCA)<sup>19</sup> that legalized 3 million immigrants taught us important lessons.<sup>20</sup> Although the IRCA provided a remedy for the undocumented immigrants already living in the United States, it ignored the fact that undocumented workers would continue to come to the United States to meet the demands for their labor in various segments in the labor market. In the absence of legal channels, the undocumented population mushroomed, causing the problem that we face today.<sup>21</sup> We must learn from the lessons of the past.
- Second, the absence of legal avenues for labor migration often forces people into desperate and dangerous acts. About four hundred people die annually trying to cross the United States-Mexico border.<sup>22</sup> The death toll since 1994 is over 2,600.<sup>23</sup> We cannot

15. See Rebecca Smith & Catherine Ruckelhaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEG. & PUB. POL’Y 555, 567-81 (2007).

16. The Bracero Program was a labor program that the Mexican and U.S. governments initiated in 1942, which over the next two decades brought approximately 5 million agricultural laborers from Mexico to work temporarily in the United States. See Maria Elena Bickerton, Note, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 TEX. L. R. 895, 897, 909 (2001) (“[B]raceros received insufficient food and substandard housing, and suffered inadequate wages, unsafe working conditions, and unemployment during the contract periods.”).

17. Congress created the H-2A visa program for temporary agricultural workers. See White, *supra* note 14, at 289-90. The H-2A visa program is widely criticized for its low level of worker protections. See *id.*

18. S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUEST WORKER PROGRAMS IN THE UNITED STATES 18-21 (2007), available at <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf>.

19. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

20. See Luis Andres Henao, *After the Amnesty: 20 Years Later*, CHRISTIAN SCI. MONITOR, Nov. 6, 2006, at 13.

21. See JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 1 (2006), available at <http://www.pewhispanic.org/files/reports/61.pdf> (noting that the undocumented population multiplied four times between 1986 and 2001).

22. Estimates of fatalities vary greatly. See GOV’T ACCOUNTABILITY OFFICE, ILLEGAL IMMIGRATION 3 (2006), available at <http://www.gao.gov/new.items/d06770.pdf> (citing an increase from 241 deaths in 1999 to 472 deaths in 2005).

ignore the human toll of illegal border crossings.

- Third, the views of undocumented workers deserve to be heard. As they frequently have told credible researchers, undocumented workers would rather have the status of temporary or “guest workers” with some basic rights, than to be undocumented with no rights and to live in constant fear.<sup>24</sup>
- Fourth, we must recognize that, given a choice, many foreign workers may prefer to work in the United States for a short period of time and then return to their home countries. We must not assume that permanent residence in the United States is the goal of all foreign workers. This is much more true in today’s interconnected world where people, even low wage workers, are comfortable living in more than one place.<sup>25</sup>

### III. Protections for Foreign Workers

Although there are good arguments for revisiting the historical (and principled) positions against the idea of temporary worker programs, endorsing a temporary worker program today does not mean accepting elements that have discredited such programs in the past. Indeed, if we make the philosophical shift and acknowledge that these programs can serve as an appropriate vehicle to regulate and manage future flows of labor migrants, we may have a unique opportunity to fundamentally reform temporary worker programs as we know them. The following should be the elements of a reformed temporary worker program.

- The foremost is the ability of workers to change employers. Under most temporary worker programs, a foreign worker is tied to his or her sponsoring employer, establishing an inherently unequal relationship. We can remedy this problem by allowing the worker to move to a comparable job with a different employer without jeopardizing his or her visa status.
- Foreign workers must have full access to and the protection of our court system. Workers must be allowed to bring private causes of action against employers for violations of their contractual or statutory rights and be entitled to lawyer’s fees. Under existing temporary worker programs, workers’ exclusive remedies are complaints to regulatory bodies that lack adequate resources and appropriate remedies.
- Temporary workers must have the option, over time, to earn permanent resident status in the United States. Prescribed periods of

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23. *Id.*

24. DAVID GRIFFITH ET AL., GUESTS IN RURAL AMERICA: PROFILES OF TEMPORARY WORKER PROGRAMS FROM U.S. AND MEXICAN PERSPECTIVES (2002).

25. See Michael Poulain & Nicolas Perrin, *Is the Measurement of International Migration Flows Improving in Europe?* 10 (U.N. Statistical Comm’n & the U.N. Econ. Comm’n for Eur. Conference of European Statisticians, Working Paper No. 12, 2001), available at <http://mmo.gr/pdf/library/Data%20issues/12.e.pdf>.

employment in the United States may be a requirement for attaining such status. The option of permanent residence also acknowledges the social phenomenon of migration: that workers may have U.S. born children or have developed other close family ties in the United States. For this population, the temporary workers status thus becomes a path, or a transitional status, toward permanent residence.

Permanent residence, however, may not be the preferred option for all temporary residents. Those who wish to return to their countries should not be adversely affected in either their ability to move between the United States and their countries of origin or their eligibility to participate in temporary worker programs in the future. In this regard, bilateral arrangements like transfer of Social Security payments to the workers' home countries, which President Bush's 2004 proposal suggested,<sup>26</sup> are worth exploring. Such arrangements remove the disincentive for those workers who may want to return to their home countries.

#### IV. Design of a Restructured Selection System

Apart from responding to the plight of the current undocumented population, a comprehensive immigration policy must also create a new structure for our future immigration selection system. A new immigration structure must truly respond to the challenges and the needs that the United States faces in the twenty-first century. At the same time, it must acknowledge the realities of the lives of immigrants in the global age. The analysis regarding the temporary worker programs, outlined above, should thus be an important component of a policy that shapes our selection system.

My views on a redesigned selection system are based significantly on a recent report that the Migration Policy Institute, the institute with which I am affiliated, issued. The report is titled *IMMIGRATION AND AMERICA'S FUTURE*.<sup>27</sup> It is the product of a year-and-a-half-long study by a bipartisan task force that the institute organized. Lee Hamilton and Spencer Abraham chaired the task force but the task force also included members of Congress who work closely with these issues, former administration officials, immigration scholars, and advocates.<sup>28</sup> The task force reviewed the history and experience of the United States's current immigration system, heard views of numerous experts on diverse aspects of immigration policy, and made recommendations for a new selection system.<sup>29</sup>

The present U.S. immigration system, which has its roots in the Immigration and Nationality Act of 1952,<sup>30</sup> gives strong preference to reunifica-

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26. President George W. Bush, *supra* note 4.

27. MEISSNER ET AL., *supra* note 6.

28. *Id.*

29. *Id.*

30. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

tion of families.<sup>31</sup> From 2001 to 2005, for example, the United States admitted approximately 1 million permanent residents (popularly referred to as green card holders) per year.<sup>32</sup> Two-thirds of these immigrants entered via family-sponsored immigration,<sup>33</sup> approximately 17% via employment-based immigration,<sup>34</sup> and 11% via the “humanitarian” stream of immigration, which includes refugees and asylees.<sup>35</sup> A miscellaneous array accounts for the rest of the immigrants admitted into the United States.<sup>36</sup>

The pool of 17% of immigrants admitted through the employment-based preferences also includes the immediate family members of these employment-based immigrants.<sup>37</sup> Thus, the number of employment-based immigrants includes not only the principal immigrant coming to take a particular job but also his or her other dependent family members. In effect, only about 8% of the total lawful permanent residents admitted to the United States today enter the United States to meet the identified labor market needs of the country.<sup>38</sup> If we add the unauthorized immigrants to the total number of immigrants who enter the U.S. annually, the number far exceeds the average of 1 million a year; in 2004, for example, it hovered around 1.8 million.<sup>39</sup>

Since 1952, the United States has also made a sharp distinction between temporary immigrants and permanent immigrants. The current system assumes that people who come to the United States to study, for example, will obtain their education and return home.<sup>40</sup> Similarly, it assumes that people who come to work as temporary workers (like professional workers on H-1B visas) in Silicon Valley or at companies like Microsoft will work for a fixed number of years and then return home.<sup>41</sup> In reality, a large number of students and professional temporary workers choose to live permanently in the United States.<sup>42</sup> Thus, although our immigration system creates this distinction between temporary and permanent immigrants, the evidence is that this distinction is illusory. Typically,

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31. *Id.*

32. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2005 YEARBOOK OF IMMIGRATION STATISTICS 18 (2005), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS\\_2005\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf).

33. *Id.* at 2.

34. *Id.*

35. *Id.*

36. *Id.*

37. See U.S. Dep't of Homeland Sec., U.S. Citizenship & Immigration Serv., Employment-Based Permanent Residence (2005), available at <http://www.uscis.gov/files/article/Bull14final110303.pdf>.

38. *Id.*

39. See MIGRATION POLICY INST., ANNUAL IMMIGRATION TO THE UNITED STATES: THE REAL NUMBERS 1-2 (2007), available at [http://www.migrationpolicy.org/pubs/FS16\\_US\\_Immigration\\_051807.pdf](http://www.migrationpolicy.org/pubs/FS16_US_Immigration_051807.pdf).

40. MEISSNER ET AL., *supra* note 6, at 33.

41. See *id.* at 33-34.

42. See KELLY JEFFERYS, DEP'T OF HOMELAND SEC., US LEGAL PERMANENT RESIDENTS: 2006, at 2 tbl.1 (2007), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/IS-4496\\_LPRFlowReport\\_04vaccessible.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/IS-4496_LPRFlowReport_04vaccessible.pdf).



60% of the 1 million green card recipients every year already live in the United States and just “adjust” to permanent resident status.<sup>43</sup> The distinction between temporary and permanent immigration is a legal fiction and should be ended.

With this backdrop, the Migration Policy Institute’s task force recommended a major redesign of our immigration system. The redesigned system should meet four requirements. First, it should simplify the categories of admission.<sup>44</sup> The current U.S. immigration system has twenty-four different categories of visas for people who want to enter for short-term, temporary stays.<sup>45</sup> The number of categories can at least be reduced to seven categories covering the spectrum of non-immigrants from students, short-term visitors, and diplomats to those who enter to perform temporary work. Second, the immigration system must help reunite families as quickly as possible and must respond to the labor needs of the country as efficiently as possible.<sup>46</sup> Third, there must be flexibility built into the selection system.<sup>47</sup> Finally, the system must recognize the links between temporary and permanent migration.<sup>48</sup>

Family-sponsored immigration must remain a major priority of our selection system. Family-based immigration is good for the country, good for families, and advances a deeply-rooted American value. Families also provide a very important cushion for adjustment when a new immigrant arrives in the United States.<sup>49</sup> Families not only provide social comfort, they also frequently provide important links to the labor market.<sup>50</sup>

The current family-based immigration system has caused special hardship in one particular category. For lawful permanent residents wishing to sponsor a spouse for immigration to the United States, the waiting period can be as long as six years.<sup>51</sup> To sponsor a spouse who is a national of Mexico takes even longer.<sup>52</sup> That is a very long period to separate families. The selection system should be changed so that spouses and minor children of permanent residents are treated the same way as the immediate relatives of citizens: they should not be subject to any quota limitations.<sup>53</sup>

A redesigned system also has to overhaul the employment-based immigration, which is where much of the current immigration crisis rests. To

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43. *Id.*

44. MEISSNER ET AL., *supra* note 6, at 37-39.

45. See Ruth Ellen Wasem & Chad C. Haddal, Congressional Research Serv., U.S. Immigration Policy on Temporary Admissions 2 (2007), available at <http://openers.cdt.org/document/RL31381>.

46. MEISSNER ET AL., *supra* note 6, at 36.

47. *Id.*

48. *Id.*

49. *Id.*

50. See Elizabeth Llorente, *Proposed Limits on Families Worries Region’s Immigrants*, N.J. RECORD, June 28, 2007, at A1.

51. See MEISSNER ET AL., *supra* note 6, at 23 tbl.5.

52. See *id.*; Julia Preston, *Rules Collide with Reality in the Immigration Debate*, N.Y. TIMES, May 29, 2006, at A11 (citing a wait period of more than seven years for a legal resident to bring a spouse from Mexico to the United States).

53. See MEISSNER ET AL., *supra* note 6, at 40-41, 123.

begin with, it is prudent to design a system that starts from the current reality of the behavior of the principal stakeholders in employment-based immigration—the employers and the workers. The Migration Policy Institute report, therefore, recommends three streams of employment-based immigration: 1) short-term or seasonal workers, 2) provisional workers, and 3) workers admitted for permanent residence.<sup>54</sup>

Seasonal or short term workers would be those who come to do a job which, by its very nature, is short-term or seasonal.<sup>55</sup> Harvesting one crop is a seasonal job; the system expects workers will come, do the job, and then return home. Working at ski resorts is another example of a seasonal job. In the case of such seasonal jobs, the workers and their employers know approximately when the job will end. Similarly, any job that by its very nature lasts less than a year would be classified as a short-term job.<sup>56</sup> Family members of seasonal or short-term workers would not be allowed to join the worker during their stay in the United States.<sup>57</sup> Experience suggests that when families accompany workers, they tend to stay; their stay becomes less seasonal and more permanent.<sup>58</sup> Short-term or seasonal workers would require employer sponsorship, but the workers would have the same labor protections as U.S. workers under present law.<sup>59</sup> The number of workers in the seasonal or short-term category is expected to be small because of the creation of a new category of provisional workers.

The category of provisional workers would bridge the gap between temporary and permanent migration in our current system. This category would reflect how immigration actually works today and how labor markets operate in reality. All categories of workers—from physics professors to garment workers—would be eligible to immigrate as provisional workers. The worker would need an employer sponsorship.<sup>60</sup> The employers would need to go through a labor attestation process.<sup>61</sup> This attestation process would not be as drawn-out as the current labor certification process, and at least some employers could be pre-certified to sponsor provisional workers.<sup>62</sup> Pre-certified employers would need to establish a history of compliance with labor laws and immigration laws. They would also need to demonstrate systematic efforts to recruit U.S. workers and to upgrade the skills of their workforce.<sup>63</sup> Employers would have to meet all of these requirements before they would be allowed to sponsor workers under the labor attestation process.<sup>64</sup>

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54. *See id.* at 38-41.

55. *Id.* at 38.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 38-39.

61. *Id.* at 39.

62. *Id.* at 65-66.

63. *Id.* at 66.

64. *Id.*

Provisional workers would also be "portable." Rather than be tied to one single employer that initially sponsors them, they would be able to move from one employer to another, as long as the new employer also qualifies through the labor attestation process.<sup>65</sup> Employers who are not pre-certified would have to obtain individual labor attestation from the Department of Labor to make sure that they have a record of compliance with all of the relevant labor protection and immigration statutes. Provisional workers would also have access to courts and would have the right to bring private causes of action to remedy violations by their employers.<sup>66</sup> They would also have access to Legal Services Corporation (LSC) lawyers. LSC representation is critical for meaningful access to courts since low-income workers otherwise will not have the resources to bring claims against employers.

Provisional workers would initially be admitted for a period of three years. At the end of three years, these workers would have a choice. They could either return to their home country, or they could apply to stay as provisional workers for three more years.<sup>67</sup> At the end of the six year period, they would also have the right to apply for permanent residence.<sup>68</sup> The provisional workers could be sponsored for permanent residence by an employer, or they could self-petition. For the self-petitioning option, the worker would have to demonstrate work history and future employability in the United States in his or her occupation.<sup>69</sup> Provisional workers, therefore, would have two options of "graduating" to permanent residence: either by self-sponsorship or by an employer sponsorship. In practice, workers with an employer sponsorship would have the ability to adjust their status more quickly.

The third employment-based category would be the permanent immigration category. It would have two streams. The first would consist of workers graduating from the provisional category, as explained above.<sup>70</sup> The second would consist of people admitted directly as permanent residents.<sup>71</sup> This category would be very close in definition to the "EB1 category" in our current law. People of extraordinary ability, such as outstanding professors, would fit this definition. In addition, professionals in fields that are strategically important to the United States would enter under this category. Examples of strategic importance industries might include energy independence projects or biomedical research.<sup>72</sup> Professionals in such strategic growth occupations would not have to go through the waiting period as provisional workers but could go straight into the permanent immigration stream. The permanent immigration category would thus consist of: extraordinary ability individuals, professionals in

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65. *Id.* at 67.

66. *Id.*

67. *Id.* at 69.

68. *Id.*

69. *See id.*

70. *Id.* at 39-40.

71. *Id.* at 40.

72. *Id.*

occupations designated as strategic occupations, and workers graduating from provisional worker status.<sup>73</sup>

The final aspect of the Migration Policy Institute's proposal is the need to build flexibility in our selection system.<sup>74</sup> The present structure freezes categories and the number of immigrants allowed in the categories for years. Only congressional action can alter the numbers within categories. Experience shows that Congress can take years to enact changes in immigration policy. A way to establish flexibility in the selection system is by instituting a new Standing Commission on Immigration and Labor Markets (the Standing Commission).<sup>75</sup> This would be an independent commission reporting directly to the President.<sup>76</sup> The Standing Commission would have a role comparable to what the Federal Reserve has in setting the country's monetary policy.<sup>77</sup> The interest rates in this country can be reset many times a year to respond to various economic and fiscal imperatives,<sup>78</sup> but no such ability exists to regulate the number of immigrants admitted each year. The Federal Reserve employs 400 professional economists,<sup>79</sup> yet no one in the federal government today has the job of analyzing the needs of our labor markets in the context of selecting the numbers and categories of immigrants that we admit.

The Standing Commission would review on an ongoing basis the state of the labor market: the demand for jobs in specific sectors of the economy, the availability of U.S. workers, and their level of training and experience. It would look at national and regional trends.<sup>80</sup> The commission would make recommendations to the President and Congress for adjustment to levels and categories of immigration. The Commission would submit its recommendations every two years.<sup>81</sup> When the commission presents its recommendations, Congress could enact legislation not to accept the commission's recommendations and maintain the existing statutory levels. If Congress chooses not to act, the President would issue a formal determination setting the numbers and categories for the following two years.<sup>82</sup>

The Standing Commission would have five members. These would include high-caliber people who have strong expertise in labor market issues, and the President would appoint them with the consent of the Senate.<sup>83</sup> Commissioners would hold their positions for five years, renewable for a second five-year term.<sup>84</sup> They would be drawn from both political

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73. *Id.*

74. *Id.* at 41-43.

75. *See id.* at 41-42.

76. *Id.*

77. *Id.*

78. *See generally* John J. Balles, *The Federal Reserve: The Role of Reserve Banks*, 16 J. MONEY, CREDIT & BANKING, 110, 112 (1984).

79. *See id.* at 111; V. GILMORE IDEN, *THE FEDERAL RESERVE ACT OF 1913: HISTORY & DIGEST* 6 (1914).

80. MEISSNER ET AL., *supra* note 6, at 42.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

parties; there would never be more than three Republicans or more than three Democrats amongst them.<sup>85</sup> Finally, the commission would make its recommendations in the odd years, so as to minimize the pressures of electoral politics that seem to dominate immigration policy debates.<sup>86</sup>

In sum, these proposals will bring American immigration policy in line with reality. The country now acknowledges that it is at a moment of crisis in our immigration policy. Moments of crisis can create opportunities for fundamental reform, which should not be missed. It is, therefore, important to tackle immigration reform comprehensively and not on a piecemeal basis. If we give in to the urge to attempt partial reform, like addressing only the issue of the current undocumented population without rethinking the fundamental structure of our immigration system, we will be debating the crisis of immigration for a very long time.

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85. *Id.*

86. *Id.* at 41.