



Statement of

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Oversight Hearing  
on

"How Would Millions of Guest Workers Impact Working Americans and Americans  
Seeking Employment?"

before the

Subcommittee on Immigration, Border Security, and Claims  
Committee on the Judiciary  
United States House of Representatives  
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Mr. Chairman, Congresswoman Jackson Lee, and other distinguished members of the sub-committee.

My name is Muzaffar Chishti, and I direct the Migrations Policy Institute's office at New York University School of Law.

One must assume that the backdrop of today's oversight hearing is a proposal for a temporary worker ("guest worker") program that President Bush announced on January 7<sup>th</sup> of this year. The President's high profile and well orchestrated announcement has generated considerable controversy. It has been attacked from both sides of the political spectrum for doing "too much" or "too little." The timing of the President's announcement may have had something to do with the electoral considerations of this year. But the reaction to his proposal, once again, establishes that immigration reform -- complex in any season—is intensely contentious in an election year. The President, it seems, did not need any help from the members of his opposing party to abandon any attempts at legislation this year to pursue his proposal; influential voices within his own party have offered strong opposition.

Whatever the President's motivations, credit must be given where it is due. The need for a fundamental revision and reform of our immigration policy has been evident for close to two decades. However, the prospect for such a reform has been elusive. Political events and calculations of the 1990s left little appetite for any immigration reform legislation. A slow momentum toward a fresh engagement of the debate was brought to a

halt by the tragic events of September 11<sup>th</sup>. Immigration reform certainly became one of the casualties of the terrorist attacks.

The President's announcement of January 7<sup>th</sup>, is, thus, a bold move at creating a new political space for a serious deliberation of immigration reform. He has put the subject – complex, divisive, and emotionally charged as it is – at the center stage of our political discourse. For that he deserves due credit.

Important as the President's proposal is, it is sketchy on details. Some would say that it is deliberately vague. It is incomplete, and many aspects of it are problematic. But simply opening the door for reform creates a big opportunity for Congress – and all of us interested in the future of our country – to craft the details of a legislative framework that does justice to the importance of the challenge of true immigration reform. Perhaps it is for the best that no legislation can be enacted in the heat of an election. That gives us time to be thoughtful and responsible.

A thoughtful and responsible reform package must accomplish a few things: a) it must address the dilemma of the existing immigrant population in our country; b) it must regulate future flows of immigrants consistent with our labor market needs and economic interests in an increasingly interdependent world; and c) it must advance the protection of both U.S. and foreign workers. And it must ultimately reflect the deeply engrained American value of fairness.

## **Undocumented workers currently in the United States**

The outline of a true reform package must begin with the honest admission of the facts regarding the current undocumented population. No one knows for sure, but estimates of the undocumented population range from eight to twelve million. Even if we make the removal of this population the exclusive priority of our law enforcement agencies, it would take us years to deport them. It would cause massive dislocation to our economy, and 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 this size of a population for deportation. If we acknowledge this central reality, the responsible course of action is to offer the undocumented an opportunity to regularize their status. Many of them have become important participants in our society and economy. Many have spent years in our country, are 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. Many have been unable to regularize their status because unconscionable bureaucratic backlogs would not allow their applications for immigration benefits to be processed. (There are currently 6.2 million un-adjudicated applications for various immigration benefits in DHS pipelines). 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. The President's proposal especially falls short with respect to this population. His proposal would offer them the opportunity to enroll only as temporary workers, with no real prospects of permanent residence. A program that only offers temporary residence is unlikely to generate full participation. Maximum compliance should be the goal of any

successful regularization program – especially a program that has the stated additional objective of responding to the post- September 11<sup>th</sup> security imperatives.

In addition, simple pragmatism argues against temporary status. We cannot expect people who have lived for years in the U.S. to return to their countries of origin after an interim lawful temporary period of three (or six) years. The tendency to revert back to undocumented status would be strong.

As we design a mechanism for regularizing the existing undocumented population, we should learn from the lessons of the past: especially lessons from our 1986 legalization program. By introducing cutoff dates for eligibility that are further away from the dates of enactment, we only invite fraud. Proving long periods of residence inevitably gives rise to a cottage industry in fraudulent documents. Similarly, immediate family members of legalized immigrants should also be extended the benefits of legalization. When families are apart, the impulse to unite illegally is strong and natural.

The status of permanent residence need not be granted in one step. It is perfectly rational to make it a two-step process. In the first instance, the current undocumented population, by coming forward, would receive a conditional lawful status. They would then “earn” permanent resident status by meeting a combination of criteria: work, payment of taxes, civic participation, gaining English proficiency, and “good citizen,” crime-free behavior. Such a two-step process would lend both integrity and a special meaning to the process of legalization.

## **Future Flows**

While there is a much broader consensus on the treatment of the current undocumented population, the policy toward future flows of immigrants has generated far more controversy and anxiety. Many proposals, including the President's, would rely on a temporary worker program to respond to these future flows. Opponents of a temporary worker program see it simply as a way to legitimize a pool of cheap exploitable workers for the benefit of organized employer groups. It is a difficult issue, which merits serious debate.

To be fair, the skepticism about temporary worker programs is well founded. They come with a troubling legacy of abuse and exploitation by employers. From the infamous "bracero" program that ended in the 1960s to the current H-2A temporary agricultural worker program, these programs have been stacked against real protections for foreign workers.

But, the legacy of these programs must not foreclose the possibility of their reform.

Historical positions must be reviewed in the context of present reality. There are a few central elements of this reality:

- The 1986 legalization program taught us important lessons. Though the program provided a remedy for the undocumented who were already in the country, it ignored the fact that undocumented workers would continue to come to the U.S. to meet the demands for their labor in various segments of the labor market. In the absence of legal channels, the undocumented population

mushroomed, confronting us with a problem that we face today. We must learn from the lessons of the past.

- The absence of legal avenues for labor migration often forces people into desperate and dangerous acts. Last year alone, more than 400 people died trying to cross the US-Mexico border; the death toll since 1994 is over 2600. The human toll of illegal border crossings cannot be ignored.
- The views of the undocumented workers deserve to be heard. As they have frequently told credible researchers, they would rather have the status of temporary, or “guest workers” with some basic rights, than be undocumented with no rights and live with constant fear.
- We must recognize that, given a choice, many foreign workers may prefer to work in the U.S. for a short period of time and then return to their home countries. We must not assume that permanent residence in the U.S. is the only goal of foreign workers. This is much more true in today’s inter-connected world where people—even low wage workers—are comfortable in living in more than one place.

### **Protections for Foreign Workers**

There are good arguments for revisiting the historical (and principled) positions against the idea of temporary worker programs. But, on the other hand, endorsing a temporary worker program in principle today does not mean accepting elements that have discredited past programs. Indeed, if we make the philosophical shift and acknowledge that these programs can be 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 would 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/her sponsoring employer, establishing an inherently unequal relationship. This can be remedied 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 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 lawyers' 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 US. Prescribed periods of employment in the US may be a requirement for attaining such status. The option of permanent residence also acknowledges the social phenomenon of migration: that workers may have US-born children, or develop 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.
- However, permanent residence may not be the preferred option for all temporary residents. Those who wish to return to their countries should not be adversely

affected-- either in their ability to move between the US and their countries of origin, or in their eligibility to participate in temporary worker programs in the future. In this regard, bi-lateral arrangements like transfer of social security payments to the workers' home countries (suggested in the President's proposal) are worth exploring. Such arrangements remove the disincentive for those workers who may want to return to their home countries.

### **Protecting US Workers**

Important as the protections of foreign workers are, a reformed temporary worker program must ultimately protect US workers. Temporary worker programs must not be used to displace US workers or undermine the wages and working conditions of US workers. This is, unfortunately, easier said than done. There is a strong need for some fresh, new thinking on a number of interconnected issues: on gauging the labor markets needs of employers, on testing the labor market to identify qualified US workers, in devising an enforcement mechanism that provides real incentives to hire such qualified workers, and in designing an efficient process that allows employers to hire foreign workers when no US workers are available. It is universally conceded that the present system of the labor market test, i.e. the labor certification process, is too cumbersome, is ineffective in protecting the US interests of US workers, and does not meet the legitimate needs of employers seeking to hire foreign workers. However, as we move toward new and expanded temporary worker programs, the following are some ideas to consider as we develop a framework for protecting US workers.

- There must be numerical limits on the number of temporary workers who are admitted to the US each year. These numbers could vary depending on the state of the economy, and the conditions of the labor market.
- Admission of temporary workers should be confined to certain occupations, industries or to geographic locations where there is a demonstrated shortage of US workers.
- Temporary workers must be paid at least a prevailing wage, which should be determined by local standards and where appropriate, by national standards. Where appropriate, standard employee benefits should also be made available to foreign workers.
- Temporary workers must be entitled to the same workplace rights and remedies as US workers, including the right to collective bargaining.
- Simple attestations of an employer (as envisaged in the President's proposal) cannot be accepted as the test of the labor market. A labor market test that merely relies on the word of an employer lacks credibility. The labor condition attestation (LCA) system contemplated in the President's proposal is close to the existing attestation system for H-1B applications. The present H-1B attestation system—which is done online—only ascertains the completeness of an application. There is no scope even for determining the accuracy of information provided by an employer. The present LCA system is too loose a mechanism on which to build a new and enlarged program of temporary workers.
- If the individual labor certification process cannot be streamlined, it is worth exploring certification of specific occupations, sectors of the labor market or

geographical areas as open to admission of temporary foreign workers. Unions, employer groups or independent experts (perhaps even jointly) may have a role to play in such certification process. State and local governments may, similarly, seek greater roles in determining access to labor markets by temporary workers in their states.

- Certain occupations may lend themselves only to local labor market tests, while for others, it may be more appropriate to extend recruitment efforts regionally or even nationally.
- Employers found guilty of violating any of the provisions designed to protect foreign workers or US workers should be precluded from access to temporary foreign workers in the future.

While these elements of a comprehensive immigration reform are being designed, there already are some legislative initiatives pending in Congress that deserve special attention. The AgJobs bill is the most significant of these because it addresses the special plight of agricultural workers. Agricultural workers are in a class by themselves. The importance of the AgJobs bill cannot be overstated. A compromise on an agricultural worker bill has eluded us for a long time. Finally, an unusual coalition of major growers' organizations, labor unions, and agricultural worker advocates, supported by an equally unusual bipartisan cast of legislators has agreed on a legislative compromise that goes a long way toward improving the status quo regarding agricultural workers. It deserves passage by this Congress.

Even beyond the AgJobs bill, various legislative initiatives have introduced concepts that contain some important elements of what should form the basis for a comprehensive immigration reform. These include bills introduced by Senators Daschle and Hagel, by Senator McCain, and by Congresswoman Jackson Lee. We have a number of exceptionally good ideas on the table.

The President has opened the door for a tough but necessary debate on immigration reform. We may not have legislation enacted this year. But there is no going back. It is our combined obligation to improve on the President's proposal and fill in the important and necessary details in his outline. As we fill in those details, we must acknowledge the unique importance of immigrants in our history and for our future. And we must reflect the sense of optimism that defines the spirit of our country. This committee has an extraordinary opportunity to do that.