Illegal Immigration: Employer Sanctions and Related Proposals

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ILLEGAL IMMIGRATION: EMPLOYER SANCTIONS AND RELATED PROPOSALS

This Comment examines the present situation resulting from large numbers of undocumented aliens entering the United States. Particular attention is given to why legislative proposals of sanctions for employers who hire undocumented aliens should be enacted. In addition, recommendations of the President's Select Commission on Immigration and Refugee Policy and proposals for amnesty relief, and temporary worker programs are analyzed in relation to an overall immigration package.

INTRODUCTION

The best estimate of the number of undocumented aliens in the United States is between three and six million. Over the past decade the question has arisen of how to best curb the inflow of

1. The term "undocumented alien" refers to persons of foreign origin who have entered the United States unlawfully or who, after legal entry, have violated the terms of their admission, generally by overstaying and/or accepting unauthorized employment in violation of 8 U.S.C. §§ 1101-1503 (1976). Comptroller General, Administrative Changes Needed to Reduce Employment of Illegal Aliens Rep. No. HRD-81-15 at 1 (1981).

undocumented aliens into the United States. While a continuation of legal immigration should be allowed to fill gaps in the American labor force, there is no longer economic justification for the influx of large numbers of illegal, relatively unskilled workers. The United States can no longer afford such generosity.

Most undocumented aliens enter the United States from Mexico,\(^3\) unlawfully bypassing border inspections.\(^4\) Although they come with few skills, they are willing to work diligently in order to escape poverty. Still, a small number enter legally and subsequently violate the terms of their visas by accepting unauthorized employment.\(^5\)

In 1978 Congress established the Select Commission on Immigration and Refugee Policy\(^6\) (Select Commission) to review the present thicket of laws governing the nation's immigration policies and to recommend changes to help ameliorate problems. The report of the Select Commission contains proposals which presumably reflect the views of the majority of United States citizens.\(^7\)

This Comment will focus upon the Select Commission's recommendations for economic deterrents in the workplace.\(^8\) Related suggestions concerning enforcement of present legislation and the legalization of undocumented aliens already present in the United States will also be reviewed. Together, these recommendations and suggestions may provide the foundation for a new and much needed immigration policy.

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3. United States v. Baca, 368 F. Supp. 398, 402 (S.D. Cal. 1973) (approximately 85% of illegal aliens are citizens of Mexico) (citing U.S. DEP’T OF JUSTICE, SPECIAL STUDY GROUP ON ILLEGAL IMMIGRANTS FROM MEXICO, A PROGRAM FOR EFFECTIVE AND HUMANE ACTION ON ILLEGAL MEXICAN IMMIGRANTS 6 (1973)).

4. See Sehgal & Vialet, supra note 2, at 18.

5. Id.

6. THE SELECT COMM. ON IMMIGRATION AND REFUGEE POLICY, THE FINAL REPORT AND RECOMMENDATIONS TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES [hereinafter cited as FINAL REPORT] (Submitted pursuant to Pub. L. No. 95-412). The 16-member panel was headed by the Reverend Theodore Hesburgh, President of the University of Notre Dame and past Chairman of the Civil Rights Commission from 1969 to 1972. The Commission's three major responsibilities were summarized as resolving the problem posed by illegal aliens presently in the United States, articulating goals for an immigration policy consistent with the national interest, and suggesting needed revisions to the Immigration and Nationality Act of 1952. See Donahue, Eyes on the Door: Immigration in the 1980's, AMERICA, Feb. 21, 1981, at 135.


8. See FINAL REPORT, note 6 supra, at xxxiv. By a vote of 14 to 2 the Select Comm. recommended that some form of employer sanction legislation be enacted. Id.
The Problem

The majority of undocumented aliens come into the United States for only one reason—to find a job.9 As long as the possibility of employment exists, the undocumented aliens will continue to take great risks by coming into the United States.10 The only practical short-range solution is to turn off the magnet which attracts thousands to our country, the ability to obtain employment.11

The Federal government's attempts to make it a crime to employ undocumented aliens date back to 1951. At that time, bills were introduced into Congress which would have made it a felony for an employer to hire undocumented aliens.12 These and similar legislative proposals have repeatedly failed in Congress.13

Congress chose instead to enact the Texas Proviso.14 It explic-
itly exempts employers from penalties for hiring undocumented aliens. The proviso is an enigma to many when contrasted with the harsh penalties imposed on aliens by the Immigration and Nationality Act (INA) for illegally entering the United States. While illegal aliens are subject to deportation hearings, their employers experience only temporary inconvenience. Employers merely suffer a loss of time and money in training replacements. Furthermore, the same illegal aliens are often back at work in a day or two.

Enforcement of American immigration law is extremely lax compared to that of other developed countries. Even though increasingly large numbers of undocumented aliens have been apprehended over the past decade, it is likely that more escape detection than are apprehended.

While no major federal immigration and nationality legislation has been enacted during the past three years, this is mainly because the Select Commission's study has not been completed.

As a result of current economic and employment conditions within the United States, increasing national attention has focused on the economic impact of millions of undocumented workers on the American labor force. The pressures on the United States economy from illegal immigration can be expected to increase in the future.

**ECONOMIC IMPACT**

Undocumented aliens have adversely affected the United States labor market. For example, the presence of undocumented workers is a factor in depressing wages, displacing United States

15. See generally 8 U.S.C. § 1252(a)(2) (1976) (formal deportation); id. § 1325 (fraudulent entry punishable by six months, $500 fine, or both for first offense and up to two years, $5,000 fine, or both for subsequent violations); id. § 1326 (subsequent apprehension after conviction or deportation punishable by two years, $1,000 fine, or both).

16. See generally Comptroller General, supra note 1, at 22.

17. See Teitelbaum, supra note 3.

18. See Sehgal & Viallet, supra note 2, at 18.

19. See The Alien Adjustment and Employment Act of 1977, Hearings on S.2252 Before the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) [hereinafter cited as Subcomm. Hearings on S.2252] (statement of Peters Willson, Rep. of Zero Population Growth). Of the 15 major source countries, primarily in Latin America, contributing to illegal immigration, with three exceptions, the population of each country is expected to double within the next 30 years. These source countries have approximately 45 percent of the population ages 15 years or younger and unemployment rates between 20 percent and 40 percent. Id.

20. 57 Interpreter Releases 1 (1980).


152
workers, preventing change in the basic structure of the secondary labor market,\textsuperscript{22} and creating a two-class labor force.

Undocumented workers will generally accept a lower wage than will the average United States laborer.\textsuperscript{23} Thus, many United States employers are willing to hire undocumented workers. Further, studies have shown that the undocumented worker is in his or her prime working years,\textsuperscript{24} and is a hard worker who is willing to labor long hours and accept substandard conditions.

Pursuant to the basic law of supply and demand, the large supply of unskilled workers tends to retard increases in wages, thus making certain jobs unattractive to Americans. In an advanced economy with relatively few unskilled jobs, the increased concentration of unskilled undocumented workers depresses the wages of the lower-skilled native American work force. What is too low a wage for an American to accept may be ten times that which the migrant could receive in his homeland.\textsuperscript{25}

Opponents argue that undocumented aliens are hired to fill the gaps in the secondary labor market.\textsuperscript{26} Those against employer sanctions argue that there is not a surplus of American workers in the secondary labor market, but rather a shortage of labor. The secondary labor market, in contrast to the primary labor market, is characterized by irregular employment, low wages, and poor working conditions. They suggest that because the domestic secondary labor market is segmented, American workers are insulated from the direct employment effects of the aliens.\textsuperscript{27} Recent studies show, however, that many undocumented aliens reside in major cities and hold jobs in non-agricultural occupations, placing them in direct competition with the United States citizen or the

\textsuperscript{22} W. Cornelius, Mexican and Caribbean Migration to the U.S. (1979). See also M. Piore, Birds of Passage (1979). Modern industrial societies generate high unemployment and low earnings in disadvantaged groups, resulting in a theory of dual labor markets—a "primary" market and a "secondary" market which operate side by side. For the most part, disadvantaged workers are denied the opportunity of moving from the secondary to the primary market. The primary market is characterized by good paying jobs and working conditions, and steady employment, while the secondary market is characterized by irregular employment, low wages, and poor conditions. \textit{Id.}


\textsuperscript{24} \textit{Id.} at 41.


\textsuperscript{26} See Piore, \textit{infra} note 41.

\textsuperscript{27} \textit{Id.}
permanent resident worker. 28

From July 1, 1977 to July 31, 1979 the Department of Labor conducted an investigation of the undocumented workers in the United States labor force. 29 Of those apprehended by the Immigration and Naturalization Service (Service), the majority received wages above what is required by the Fair Labor Standards Act. 30 Furthermore, although the Department of Labor’s undocumented worker program was designed to reduce unauthorized employment by enforcing wage and hour standards, the investigation revealed that this would be an ineffective tool. In fact, many of the jobs held by undocumented workers are considered desirable by United States citizens, but the Department of Labor is precluded from acting against employers when wages exceed established minimums. 31

The view that undocumented workers are a cost-free benefit because they take jobs that United States workers reject as demeaning is not supported by recent studies. 32 In 1978, approximately fifteen million workers earned $3.00 per hour or less, a wage comparable to that of the undocumented worker. 33 A recent study conducted in San Diego, California found that an estimated 59,705 undocumented aliens were employed in the country. 34 The Service initiated an employer cooperation program to assist employers in identifying undocumented aliens on the job and to fill those jobs with local unemployed United States citizens or legal workers. Three hundred and forty undocumented aliens were found and terminated from their jobs. All of the jobs were filled. Although ninety percent were filled by legal aliens and “commuter


29. See Comptroller General, supra note 1, at 6. Statistics from 59,728 INS apprehensions during 1977-78 indicated that 78% of the undocumented workers earned more than the minimum wage rate. The Fair Labor Standards Act, enacted in 1938 set standards for minimum wage, overtime pay, and other worker protections. In 1977, the minimum wage rate was $2.50 per hour, in 1978 it was $2.65 per hour, in 1979 it was $2.90 per hour, and in 1980 it was $3.10 per hour. Id. at 7.


31. See Comptroller General, supra note 1, at 8.

32. See Wachter, The Labor Market and Illegal Immigration: The Outlook for the 1980’s, 33 INDUS. LAB. REL. REV. 342 (1980); MANPOWER, supra note 21, at 164.

33. See Wachter, supra note 32, at 357.


154
workers" from Baja California, Mexico, the employers were able to fill the job openings with legally authorized workers.

Labor unions have consistently favored the imposition of employer sanctions. They argue that large groups of illegal aliens in a single place of employment have been an obstacle to organizing efforts. The effect is to prevent the upgrading of wages and working conditions in these areas. As a result of this, the AFL-CIO estimates that American workers lose about ten billion dollars in wages annually.

Employers, in particular, have helped to prevent any changes in the secondary labor market. By keeping the labor market intensive, employers can avoid mechanization of work procedures, job redesignation, and increases in wages which would induce Americans to work for the higher paying companies. The farming industry is a prime example of how to reduce reliance on illegal aliens. Over the past few years the need for undocumented workers has been drastically reduced, due in large part to mechanization. Although these changes take time, they are essential steps towards providing enough high paying jobs for legal residents in the future.

Undocumented alien supporters argue that low-wage employers would be forced to shut down or move abroad if employer sanctions were enacted. This result would intensify the present unemployment problem. This argument is based on the "unavailability" of the United States workers for many of the jobs

35. Id. E.g., Salinas & Torres, The Undocumented Mexican Alien: A Legal, Social and Economic Analysis, 13 HOUS. L. REV. 653, 678 (1976) (Chicago experienced a similar result when 150 people applied for 50 janitorial positions opened after an INS raid.). Compare Los Angeles Times, July 3, 1975, Pt. 1, at 1, col. 4 (job openings could not be filled after an INS raid, but wages were set below the minimum).
37. See MANPOWER, supra note 21, at 159. But cf. Gibbs, Protecting undocumented workers right to organize, 9 IMMIGRATION NEWSLETTER 3 (No. 6, 1980) (many unions have been forced to reevaluate their positions). Id.
38. See Chapman, supra note 25, at 190.
39. See MANPOWER, supra note 21, at 160.
40. See Subcomm. Hearings on S.2252, supra note 19, at 159.
held by undocumented aliens. Michael Piore argues that many undocumented aliens work in industries that would close or relocate outside the United States if there were no alien work force to draw upon.\textsuperscript{42} This result would in turn affect United States workers because these industries also have jobs desired by United States workers. Thus, the net effect of allowing undocumented aliens to work is to provide jobs rather than displace workers.

Piore argues that these industries would rather go abroad in search of labor than raise wages.\textsuperscript{43} But these jobs are not set in concrete and must evolve to meet demand as must all other successful industries. There is diminutive economic justification for allowing industries which rely on foreign labor supply to continue if they cannot generate sufficient profits to otherwise operate. The effect is an implicit subsidy through the labor component. By allowing employers to depend on a foreign source of labor, the United States government indirectly waives the protection normally provided the American laborer through Fair Labor Standards, Occupation Safety and Health Act\textsuperscript{44} regulations, and citizenship or naturalization.\textsuperscript{45} The result is to distort the factors of production throughout the economy.

The fact that most undocumented aliens are employed in low-skill, low-wage occupations leads to a "self-fulfilling prophecy" that undocumented aliens take jobs that no Americans would accept. But in fact, previous undocumented aliens have forced down the wages to such levels that United States workers would not, and could not afford to accept the jobs.\textsuperscript{46} The biggest losers become those who traditionally worked in lower paying or lower skilled jobs, the youth of our society.

Today the young have the highest unemployment rate; between twenty and forty percent are unemployed,\textsuperscript{47} and the number of unemployed is significantly greater for minorities. By enforcing immigration policies, the Service has projected that a million jobs for Americans would be created.\textsuperscript{48} One expert suggests: "I see il-
legal immigration as preventing the economic phase of the civil rights movement." In short, either directly or indirectly, undocumented aliens are decreasing job opportunities for legal workers, particularly the young and disadvantaged.

Present Legislation

State Legislation

The ineffectiveness of federal immigration law enforcement is shown by the growing number of states that have enacted laws to prevent employment of undocumented aliens. Several States have made efforts to enact laws prohibiting the knowing employment of undocumented aliens to protect their employable citizens. The United States Supreme Court in *De Canas v. Bica* permitted states to pass legislation which does not conflict with federal law. The Court's decision upheld a California statute prohibiting the knowing employment of illegal aliens if such employment would have an adverse effect upon lawful resident workers. The Court held that the undocumented alien problem remains a local issue because Congress has not passed national legislation in this area. But, the effects of illegal immigration are national in scope and federal legislation is needed.

The disadvantages of State legislation are many. Individual State laws are more likely to have varying degrees of impact and enforcement. This may cause "mass interstate exoduses" and influxes of undocumented aliens to neighboring States with fewer employment restrictions. State personnel do not have the experi-

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52. The California statute has not been enforced because of a permanent injunction against its enforcement entered in the unresolved case of Dolores Canning v. Milias, No. C-16928 (L.A. Ct., Cal. Super. Ct., filed Nov. 23, 1971).


rience of the Service, and States are not prohibited from discrimi-
nating on the basis of citizenship or alienage. In addition, for-
geren should be able to look to one law for compliance with
the United States' immigration policy.

If federal sanctions on employers for hiring undocumented
aliens are enacted, a question will be raised as to whether federal
law will preempt State laws. To avoid this problem, Congress
should specifically invalidate De Canas and preempt States from
providing sanctions against employers for hiring undocumented
aliens. The United States' immigration policy should be strength-
ened and brought firmly under the control of the federal
government.

Farm Labor Contractor Registration Act

At present, the only federal law that provides sanctions for the
employment of undocumented aliens is the Farm Labor Contra-
tor Registration Act of 1963 (FLCRA), and only an isolated pro-
vision of the FLCRA relates to the hiring of undocumented
workers. The coverage is substantially limited by the definition of
a "farm labor contractor" so that any "farmer, processor, canner,
ginner, packing shed operator, or nurseryman" is excluded from
sanctions if he recruits solely for the purpose of supplying work-
ers for his own operation. Growers have been virtually immune
from sanctions under this Act. A redefinition of a farm labor
contractor would be consistent with proposed employer sanction
legislation.

Among the supporters of proposed employer sanction legisla-
tion and strengthening of the FLCRA is the National Council of
Agricultural Employers (NCAE). The NCAE suggests that fed-
eral legislation should preempt State laws so that agricultural em-
ployers will not be subjected to variations between the laws. The
NCAE also suggests that the FLCRA be amended to bring agricul-
tural employers into conformity with the federal legislation.

The regulations implementing the FLCRA list several docu-
ments as acceptable evidence of United States citizenship or per-

ers discriminate against aliens, the aliens are protected under the Equal Employ-
makes it illegal to discriminate on the basis of citizenship or alienage." 414 U.S. at
95.


57. See generally id. (large backlogs confirm little impact in reducing employ-
ment). See COMPTROLLER GENERAL, supra note 1, at 31.

58. See generally COMPTROLLER GENERAL, supra note 1, at 28.

59. See Judiciary Hearings on S.2252, supra note 28, at 343.
manent residence. In agriculture, where large numbers of workers are needed and hired, often at the same time, the employer must be able to readily examine the documentation provided. The NCAE suggests that the Social Security card be adopted as the sole acceptable evidence for employment authorization.

Alien Smuggling

A person commits a felony under the INA if he "wilfully or knowingly conceals, harbors, or shields from detection" an undocumented alien. Criminal sanctions should be imposed not only on those persons who receive compensation for knowingly smuggling an undocumented alien into the United States, but also on those who aid an undocumented alien in obtaining employment. Alien smugglers or "coyotes" operate as brokers to supply undocumented aliens with jobs. The alien smugglers appear to be responsible for a substantial portion of unlawful Mexican immigration into the United States. "Coyotes" run a lucrative business in this human smuggling system, cargoing aliens across the border into southwestern cities. High priority should be given to linking an employer sanction program with the detection, investigation, apprehension, and prosecution of "coyotes". By subjecting alien smugglers to increased criminal prosecution, a known source of unlawful immigration could be reduced.

The Select Commission's Report

The Select Commission, in its report, concluded that successful curbing of illegal migration depended on effective economic deterrents. The Commission believed that the border patrol could not curtail the flow of illegal migrants by itself. The absence of a law penalizing employers served as a further enticement for undocumented workers to come to the United States.

60. Id. at 344.
61. Id.
62. Id.
64. See Subcomm. Hearings on S.2252, supra note 19, at 85.
67. See note 6 and accompanying text supra.
The Commission decided that monitorization of the entire United States labor market was undesirable. The Commission believed this would be an ineffective utilization of enforcement resources. Instead, the Commission proposed focusing on businesses with approximately fifteen or more employees.

The Commission suggested a series of graduated penalties to correspond with the frequency and magnitude of the offense, beginning with an administrative citation while reserving a civil fine for subsequent offenses.

To protect the rights of employers and employees, the Commission emphasized the need for a dependable mechanism for determining a potential employee's eligibility for employment. The Commission did not reach a consensus on the specific type of identification that should be required, but it did focus on the benefits of utilizing an existing form of identification. Despite the lack of a consensus, the members of the Commission believed the form chosen should embody reliability, protection of civil rights and civil liberties, and cost effectiveness.

To ensure that the sanctions would be effective, the Commission supported increases in the Immigration and Naturalization Service budget to increase its investigative manpower. Without the initiation of a strong immigration policy to curtail illegal migration, the Commission decided that legalization of undocumented aliens already living in the United States would serve as a further inducement to migrate illegally. In a companion recommendation, the Commission supported a continuation of the current H-2 temporary worker program and decided to maintain labor certification by the United States Department of Labor.

The Commission supported the temporary worker program despite the inadequacies it had found in the program, believing improvements could more readily be made working within the present system. The Commission decided not to recommend the introduction of a large-scale temporary worker program.

**PROPOSED LEGISLATION**

*The Immigration and National Security Act of 1981*

A number of bills have been introduced in Congress specifically aimed at the problem of illegal immigration. A representative bill is the Immigration and National Security Act of 1981 (the Act) which concentrated immigration enforcement on fair hiring proce-

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dures. The core of the Act prohibits the knowing employment of an alien "who has not been lawfully admitted to the United States for permanent residence, unless the employment of such alien is authorized by this Act or by the Attorney General." The Act provides for a system of graduated penalties related to the frequency of the offense, as suggested by the Select Commission. The first step subjects the employer to a civil penalty imposed only after an opportunity for a hearing. Collection of any unpaid civil penalty could be enforced in a civil action in the District Court. If the employer refuses to recognize the judgment, a criminal penalty for the first offense is provided, and a fine not to exceed $500 or imprisonment not to exceed one year, or both. A subsequent offense is made a felony punishable by a fine not to exceed $20,000 or by imprisonment not to exceed three years, or both.

Previous bills have been criticized as overly vague, thus opening the door for widespread discrimination. The Act addresses this issue by providing a reliable means to verify employment eligibility. The first phase of the Act requires the applicant to sign an affidavit that he or she is authorized to work. In this connection, the W-4 form which every employer must file has been suggested as a method to meet this requirement.

The second phase of the Act has a delayed commencement.

71. See The Final Report, supra note 6, at 64.
73. Id.
74. Id.
75. Id.
76. Employer Sanctions: Unjust Solution to Economic Problems, 6 IMMIGRATION NEWSLETTER (Nos. 5, 6, 1978) (past legislative proposals only required a "bona fide inquiry" as to a person's immigration status); Bevilacqua, Legal Critique of President Carter's Proposals on Undocumented Aliens, 23 CATH. L. 286, 292-97 (1978); Glizenstein, Select Commission: Employer Sanctions, 10 IMMIGRATION NEWSLETTER (Nos. 1, 6-8, 1981).
78. Id.
79. See Judiciary Comm. Hearings on S.2252, supra note 28, at 323. The affirmation could be included in the existing W-4 form, eliminating additional paperwork and costs. 127 CONG. REC. S2580 (daily ed. March 24, 1981) (statement of Sen. Huddleston). Los Angeles County saves $46 million a year in welfare. Studies have shown undocumented aliens are reluctant to lie about their extra-legal status. Id.
When it takes effect, each job applicant will be required to give a social security number to the employer. Utilization of a call-in data bank to validate the number will provide the employer with a complete defense against prosecution. This aspect of the Act solves problems that could arise if only the affidavit were required. Until the second phase of the Act is commenced, the employer is only provided with the affidavit which represents a rebuttable presumption that the employer was not aware of the undocumented workers' status.

A secondary verification system will begin approximately four or five years after enactment of the Act. It will result in a new, and more counterfeit-proof social security card. The counterfeit-proof card would be required to be presented only when changing jobs. The card could be introduced over time as people seek new jobs, thus saving substantial costs. The Social Security Act already requires that all gainfully employed people have a social security number and that this number be given to the employer. Whether or not this was the original intention, all employers demand it as an employment prerequisite. Thus, the basic structure for controlling employment through a single document is already in existence. Making additional use of the card would in no way inconvenience the person seeking the job. This nonburdensome method provides a greater possibility of successful enforcement. The use of the card is not a solution; it is merely a means to aid in regulation of the problem. The requirement of a work eligibility card, such as the social security card, could be imposed on the entire workforce with minimal change in present hiring procedures.

Analysis of the Sanctions Imposed by the Proposed Legislation

In regard to the sanctions imposed by the Act, imposition of civil penalties before criminal penalties is favored because of difficulties which often frustrate criminal prosecution. In addition, the use of administrative proceedings will prevent further clogging of the court system. If the administrative fines are resisted, then access to civil courts would be available to both parties. Therefore, an effective appeals mechanism is assured.

81. Id.
83. See supra note 81.
84. See supra note 72.
Repeated offenses could bring the employer into the criminal courts. The Select Commission suggested criminal penalties for employers who are guilty of “flagrant and extended” violations of the civil penalty law.\textsuperscript{87} Several past legislative attempts called for imposition of criminal penalties only when employers engaged in a “pattern or practice” of hiring undocumented aliens.\textsuperscript{88} Senate Bill 776 changes the wording to a “willful violation.” A willful violation could easily be shown after previous administrative fines had been levied, putting the employer on notice that his hiring practices violate the law.

The Federal Government needs to do everything possible to reduce the number of undocumented workers in the United States domestic labor market. The proposed legislation is a positive response to the problem. Like the Alien Adjustment and Employment Act of 1977\textsuperscript{89} presented to Congress by the Carter administration, Senate Bill 776 embodies a multi-faceted solution to the illegal immigration problem. Congress should establish a workable program for implementing Senate Bill 776 as a short-range solution to the illegal immigration problem.

\textbf{ENFORCEMENT OF EMPLOYER SANCTIONS}

To further discourage illegal job seeking in the United States, the proposed legislation applies not only to corporate employers, but to “mom and pop” retail establishments, and to small farmers and ranchers.\textsuperscript{90} The United States cannot put employer sanctions on the books without assuring that they will be obeyed and violations will be prosecuted. In order for employer sanctions to be effective, other instruments and modifications must be applied. These include a verification system, retention of the Texas Proviso, employer compliance, and additional resource allocation.

\textsuperscript{87} See The Final Report, supra note 6, at 64.
\textsuperscript{88} President's Message to Congress Proposing Actions to Reduce the Flow of Undocumented Aliens (August 4, 1977).
\textsuperscript{89} S.2252, 95th Cong., 1st Sess., 123 Cong. Rec. S18064 (daily ed. Oct. 28, 1977). This legislative proposal did not include a recommendation for a national identity card. \textit{Id}.
\textsuperscript{90} See generally Illegal Aliens: Hearings on H.R. 16188 Before the Subcomm. on the Judiciary, supra note 10, at 15 (remarks of Rep. Dennis); Wash. Post, March 1, 1975, § A, at 14, col. 1 (may jeopardize small employers unfamiliar with the law).
The Verifier

As with any type of identification now used in the United States, forgery looms as a distinct possibility. A call-in data bank could enable employers to verify if the card had recently been used in obtaining a job, one of several possible screening indicators. Use of the social security card or work permit is critical to enforcement of employer sanctions legislation. Without it, the employer would be left with discretionary and arbitrary enforcement abilities. There would be no means of enforcing the requirement that employers must knowingly hire undocumented workers before they can be punished. The card would enable employers to identify with greater certainty persons who are not authorized to accept employment, thereby reducing the discriminatory effects of requiring only the employee's affidavit. If the card turned out to be a forgery the employer would not be punishable.

The Texas Proviso

The proposed legislation does not repeal the Texas proviso. Instead, the Act adds the employer sanction provision to section 274(8) (a) of the Immigration and Nationality Act. Thus, the employer would not be subject to prosecution under both the "harboring provision" and new employment sanctions law. Further, cases have held section 274 of the INA to be solely a penal provision, thus avoiding possible application of the same rationale to civil sanctions.

Employer Compliance

Many opponents to employer sanctions argue that it is incon-
ceivable that businesses will abandon added profits acquired from hiring undocumented aliens or that they will voluntarily comply with a new law. Opponents suggest that large employers could easily deduct any fines imposed under the new law as a business expense. Commentators argue that the undocumented workers would eventually bear this added cost. Still, at many “round-ups,” approximately seven to eighty-five undocumented workers may be apprehended. At $1,000 per each violation, the cost becomes an important consideration even for large businesses. Furthermore, those businesses with violations would be targeted for further investigation.

Resource Allocation

The Administration’s and Congress’ commitment to supporting employer penalty enforcement policy would be necessary for the successful implementation of employer sanctions. Commitment of resources is a requisite for an effective immigration policy. In the past, when new laws were enacted, the Service manpower budget was not increased. A prime example was the enactment of the Freedom of Information Act. The demands under the Act required conversion of thirty-seven Service operations positions to Freedom of Information clerks, yet no additional funding for personnel was granted.

The present staff of the Service could not adequately enforce an employer sanction law. In light of the current administration’s effort to reduce government expenditures, this is not a good time to recommend expanding the resources of any governmental program. Nevertheless, without increased manpower, the law would go unenforced. The resulting job opportunities for both citizens

98. See, e.g., COMPTROLLER GENERAL, supra note 1, at 32-33.
100. Interview with Robert Mitton, INS Director, in San Diego, California (June 25, 1981).
101. The INS has repeatedly asked for a larger budget in order to hire more agents. However, between 1964 and 1973, when the number of undocumented aliens increased tenfold, the INS staff was increased only by ten percent. INS REGIONAL OFF. REP. 6 (1974).
and legal residents will far outweigh the costs of an expanded enforcement mechanism. But employer sanctions alone will not be effective. Moreover, a verification of employment alone will not be effective. Enforcement requires a total effort including allocation of resources for investigation as well as employer cooperation. Without a complete enforcement package, United States immigration laws will be ineffective, and the immigration problem will go unremedied.

**OPPOSITION TO ADOPTION OF EMPLOYER SANCTIONS**

The enactment of employer sanctions legislation would require an employer to determine whether an applicant violated immigration laws. If the applicant were in violation of the INA and the employer hired the applicant, then the employer would be in violation of the law and subject to civil or criminal penalties.

Opponents to adoption of employer sanctions argue that employers are not trained to decide whether an applicant has violated the immigration laws. In effect, the employer would be serving as an agent of the Federal Government by enforcing the immigration laws. Opponents argue that since it is difficult to determine whether an employee is an undocumented alien, they should not be held responsible for immigration law enforcement. Furthermore, civil rights groups argue that a person whose appearance was foreign or Hispanic would be subject to special discriminatory burdens when seeking employment. Thus, there are some caveats that must be considered in dealing with the immigration problem. In particular, it is critical that the distinction between legal and illegal immigrants be fortified or public resentment will spill over onto lawful immigrants as well.

The new legislation would take the burden of detection off the employer. For example, because undocumented aliens are generally unskilled or low-skilled workers, they often compete for jobs with members of ethnic and minority groups who have tradition-

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103. *See Legislative Analysis, supra* note 48.

104. Glizenstein, *Select Commission: Employer Sanctions, 10 Immigration Newsletter, (Nos. 1, 6-8, 1981).* The essence of this argument is that employer sanctions legislation will work too well. *See S. Weintraub & S.R. Rose, The Illegal Alien From Mexico, Policy Choices for an Intractable Issue 36 (1980).*

For a discussion of Constitutional considerations and ramifications of employer sanction legislation, *see id. at 79-84. See also Salinas & Torres, supra* note 35, at 891.

ally been denied opportunities to improve their skills. In many
instances these legal workers are native-born Mexican-Americans
or lawfully admitted aliens. The verification system would no
longer require the employer to make a "bona-fide inquiry" as to
the person's immigration status. The applicant's eligibility for
employment would be presumed until the government told the
employer to the contrary. By taking this burden off the employer,
the only threat is to the undocumented worker.

Employer sanctions legislation alone would cause severe in-
creases in discrimination. The inclusion of this verification sys-
tem alleviates the possibility of procedural uncertainty and
discretionary abuse. All employees seeking work would be re-
quired to give their social security card as they presently do. The
ease of verification would reduce the burden on the employer.
Thus, the proposed legislation has a much greater chance of being
effective and nondiscriminatory.

Another objection is the possible cost of an effective employer
sanctions program. Opponents argue that the costs would not be
proportional to the benefits, thus justifying the elimination of the
penalty provisions. They point to burdensome record-keeping
and verification obligations. But this argument is inapplicable to
the proposed legislation. The Senate bill provides that fines col-
lected under the Act are to be used as revenue by the Service for
further enforcement. The cost of doing nothing could lead to
more discrimination, and more social and political problems. By
utilizing a verification system based on an existing form of docu-
mentation, the employer sanctions could be introduced within

106. See Illegal Aliens: Hearings on H.R. 16188 Before the Subcomm. on the Ju-
107. See generally S.2643, 93d Cong., 1st Sess. (1973); H.R. 982, 93d Cong., 1st
Comm. on the Judiciary Amending the Immigration and Nationality Act, H.R.
Rep. No. 108, 93d Cong., 1st Sess. (1973); Comment, Illegal Aliens and Enforce-
(1975); 54 Cong. Dig. 3-32 (1975).
108. See Supplement to the Final Report, supra note 10, at 577.
109. See Glizenstein, supra note 76.
110. But cf. Supplement to the Final Report, supra note 10, at 587 (total cost
for initial preparations including publicity would be less than $2 million. The addi-
tion of 600 investigators for INS, plus a small appeals system for persons denied
employment or employers challenging fines would cost approximately $23-28 mil-
lion annually.).
Huddleston).
twelve months of legislative action. The long-term benefits would far outweigh the small federal expenditure.

**RELATED PROPOSALS**

**Amnesty**

Undocumented aliens have received open invitations to enter the United States through a bracero type program,¹¹² allowance of commuter status, and inducement from many of the same economic interests that today call for their expulsion.¹¹³

The term amnesty is misleading. In general, amnesty proposes the adjustment of status from undocumented aliens to legal permanent residents. The legalization of the undocumented aliens would not exempt such aliens from prosecution for having violated United States immigration laws, but instead would provide them with an opportunity to exchange their extra-legal status for a status recognized by law.¹¹⁴

The proposals for amnesty for deportable undocumented aliens generally require that the alien reside continuously in the United States prior to a set date.¹¹⁵ Aliens who have resided in this country for the minimum period would have to apply for this new status and provide documentary proof of continuous residency.¹¹⁶ If residency is maintained, the alien could apply for United States citizenship five years after the granting of permanent resident status.¹¹⁷ Undocumented aliens who enter the United States after the effective date would not be able to adjust their status.¹¹⁸

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¹¹². Act of August 4, 1942, 56 Stat. 1759 as amended by Act of Apr. 26, 1943, 57 Stat. 1152. For an explanation of the program, see generally Salinas & Torres, supra note 35, at 872-73. The Bracero program was the largest and longest temporary foreign worker program in U.S. history employing between four and five million Mexican agricultural workers over a period of 22 years. *Id.*

¹¹³. *Obstacles included competition, arising from a limited number of jobs, actually encouraging illegal immigration instead of diverting the flow into legal channels. See N. Copp, "WETBACKs" AND BRACEROS: MEXICAN MIGRANT LABORERS AND AMERICAN IMMIGRATION POLICY, 1930-1960 (1963).*


¹¹⁵. Administration Bill of 1977 (prior to Jan. 1, 1970), Kennedy Bill, S.561 proposed a three-year, and the Rodino Bill, H.R. 982 a seven-year minimum period of continuous residency. *See Supplement to the Final Report, supra note 10, at 643.* The Commission proposes a continuous residency requirement of two years. Even set at two years, the Commission estimates no more than 60% of the present undocumented alien population would qualify. *Id.*


¹¹⁷. C. Gordon & E. Gordon, IMMIGRATION AND NATIONALITY LAW § 15.3 (1980).

migration laws would continue to be enforced against them.119

The Carter administration's bill of 1977 provided a different type of amnesty. The administration's bill proposed a temporary residency status to determine the number, locality, family size, and economic situation of undocumented aliens in the United States. The purpose of this temporary resident status was to help evaluate undocumented aliens' impact on the American economy.120

This second type of amnesty tends to correspond with the distinction between permanent and temporary migrants. The chief problem with the proposal is that it would put undocumented aliens in an uncertain position while requiring them to register. Because this proposed new subclass of undocumented aliens would register without a guarantee of amnesty, it is unrealistic.121

The current version of the INA already provides relief from deportation for those aliens "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application" for "suspension of deportation."122 In essence, the proposed legislation is an expansion of the earlier statute, and does not substantially differ from it.

Opponents of the amnesty provision contend that it will congratulate successful violators of our laws.123 They point to the millions of people throughout the world who have worked within our laws patiently waiting to obtain permanent resident status. They suggest that the government is siding with the lawbreaker, thus giving unfair advantage to those breaking the law. In addition, opponents point out that aliens would flood into the United States attempting to take advantage of amnesty.124 The flood would produce forged documents and encourage others to come in hopes of future amnesties. Finally, some argue that difficulties in enforcing amnesty and determining who is properly eligible would aggravate the immigration problem.125 For example, Sena-

119. Id.
120. See generally President's Message, supra note 88, at 5.
121. Temporary resident status has been heavily criticized. See generally Subcomm. Hearings on S.2252, supra note 19, at 106-07; Carter's Immigration Proposal, AGENDA, Sept./Oct. 1977, at 10.
122. 8 U.S.C. § 1254(a)(1) (1970). The undocumented alien status is adjusted to permanent resident status if the application is approved. Id.
123. See Roybal & Schweiber, supra note 118, at 235.
124. Id.
125. Id. at 237. See also Interview, supra note 100. Each amnesty case takes approximately six hours of officer time. Multiply this by approximately 6,000,000
tor Richard S. Schweiker stated that: “Drying up employment opportunities, not rewarding illegality, should be the cornerstone of our nation's policy toward illegal aliens.”

Nevertheless, the major features of the proposals to legalize undocumented aliens residing in our country are consistent with the tradition upon which the United States was founded. Thus, some form of amnesty must be granted to persons who have lived in the United States for many years and who have established personal and familial roots in this country. Massive deportation of undocumented aliens already in the country would be both “inhumane” and “impractical.”

Undocumented aliens have been stigmatized, segregated from the mainstream of American society, and exploited long enough. Many have been in this country for several years, have established productive lives, and have made significant contributions to our society. If they were deported after having formed family units, the government would be faced with supporting family members left behind. This would increase the welfare rolls and create a greater economic problem than existed before. The Select Commission found that legalization of undocumented aliens would benefit the national interest of the United States. By allowing qualified aliens to come out in the open, they could no longer be exploited in the workplace. Legalized aliens could seek the protections of the United States laws without facing the danger of having their status discovered. And for the first time, the United States would have reliable data on the number of undocumented aliens.

**The Extent of Legalization**

An examination of the different categories of undocumented aliens and other economic factors leads to the conclusion that there must be a distinction between amnesty and the proposed

undocumented aliens and all INS personnel would be mortgaged for a fifty year period. *Id.*


128. See D. North & M. Houston, *supra* note 23. Of the illegal aliens apprehended, 78% paid federal income taxes, and 77% paid social security taxes. In contrast, one-half of one percent received welfare payments; one percent acquired food-stamps; one percent participated in U.S. job training programs; and four percent collected unemployment benefits. *Id.*

employer sanctions. For example, some experts believe the annual flow of undocumented aliens from Mexico is seasonal and temporary. The alien works approximately six to eight months of the year in the United States before returning home. The border patrol witnesses thousands of Mexicans going south across the border beginning every December. Illegal aliens that come from countries other than Mexico tend to be visa abusers who enter the country and subsequently violate the terms of their entrance. The risk and cost of leaving the country and returning home may lead most visa abusers to remain in the United States indefinitely. On economic grounds, some argue that amnesty must be granted so that the source of low-cost labor is not destroyed before employer sanctions are commenced. They contend that manufacturing industries, as well as other sectors, have become dependent on migrant workers and would be destroyed by sanctions.

Still, only after employer sanctions are implemented will we know the true impact that undocumented aliens have on our society. It is possible that many will return home after opportunities for employment have ended. The employer sanction law must be given time to be put into full force to demonstrate the law's effect. Thus, amnesty should not be linked with present proposals for immigration reform.

Premature discussion of amnesty could provide the incentive for undocumented aliens to enter the United States, thus further exacerbating the problem. Amnesty and employer sanctions cannot be introduced together or our true immigration problem will be distorted. After sanctions are enforced, we should have a

130. See Select Comm. on Population, supra note 2, at 15.
131. Id.
133. See Select Comm. on Population, supra note 2, at 15-21. The Mexican entering without inspection can walk across the border; the visa abuser from Asia, Europe, or Latin America must invest in an airline or boat ticket. Id. at 16. See also San Diego Union, June 27, 1981, at 1, col. 4 (Golden, Mainland Chinese Caught Entering U.S. at Tijuana). The journey half-way around the world cost $1,500 each. Id.
134. See Legislative Analysis, supra note 102, at 26. They argue a pool of low-cost labor must first be guaranteed by granting amnesty before employer sanctions are initiated. Id.
135. See Teitelbaum, supra note 2, at 54.
136. Id.
better estimate of how many undocumented aliens reside within our borders. Many may return home voluntarily as they did in the 1930's.\(^1\) Others will finish out the season and return home. But proposals for true amnesty\(^3\) should not be considered until the new immigration policy is fully implemented. Then, in light of the reasons that have been discussed, a system of amnesty can be initiated. Further, compensation of communities and states, which previously were deprived of funds because of the Census Bureau population undercounts, can begin.\(^3\)

Although granting complete amnesty may not be politically expedient or truly practical, it would appear to be a more humane and logical solution to part of the undocumented alien problem once employer sanctions have taken effect. Of course, there remains the possibility that illegal entry will continue after amnesty is granted. But over time, the surplus will decline and the magnet of employment will no longer draw millions to our borders. Although it is difficult to determine the future needs of our labor market, if more employees were needed, an expansion of the H-2 or guest worker program could be a possibility.\(^4\)

**H-2 Temporary Worker Program**

Provisions over the years have allowed for the admission of various categories of alien workers sought by United States employers.\(^1\) In 1976 over 10,000 farm laborers were admitted as H-2

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\(^1\) See House Comm. on the Judiciary, *supra* note 127, at 51. During the depression, Mexican emigration exceeded immigration; over 89,000 legally admitted Mexicans left the U.S. The withholding of welfare payments, to which they were legally entitled, combined with dismal employment prospects, induced them to "voluntarily" leave. *Id.*

\(^3\) MALDEF argues that true amnesty will only be granted if undocumented aliens are exempted from criminal prosecution under the immigration laws. See Subcomm. Hearings on S.2252, *supra* note 19, at 108.

\(^4\) See President's Message, *supra* note 88, at 5.

\(140\) Nonimmigrant alien workers may currently be employed under a controlled-entry program only if their employment is temporary, and there are not sufficient available workers capable of filling the positions in that locality. The alien may be admitted by displaying an Alien Registration Receipt card. Holders are commonly called "green-card commuters" because the cards were green at one time. 8 C.F.R. § 211.1(b) (1978).

The courts have held that commuter status is limited to citizens of Canada and Mexico. Alvarez v. Dist. Dir. of INS, 539 F.2d 1220, 1224 (9th Cir. 1976). A guest worker program has greater flexibility than alternative programs because the supply can be adjusted and the program satisfies employer's needs in seasonal agriculture. See Wachter, *supra* note 32, at 333-54.

\(141\) C. Gordon & E. Gordon, *Immigration and Nationality Law* § C-3 (1980). H-2 represents the nonimmigrant category for temporary workers performing services available in the U.S. *Id.*
temporary workers. The White House may propose a small experimental guest worker program that would admit approximately 50,000 Mexicans per year to work up to nine consecutive months in the United States. As part of the H-2 program the alien would be required to obtain a certification from the Secretary of Labor that there are not sufficient available workers in the locality of the alien's destination and that the employment of such aliens would not adversely affect the wages and working conditions of American workers.

H-2 workers can be fired and deported by their employer for any reason. Therefore, a careful watch must be kept on this program to avoid exploitation of the guest worker. The aliens would enter the United States legally, based on a proven need for workers. Government certification allows monitorization, assuring compliance with labor standards and health and safety requirements. The aliens can return home with their saved wages having benefited both countries.

The advantage of a temporary worker program is that it provides a mechanism to direct the flow of undocumented/illegal aliens into legal channels of migration. In addition, the temporary worker program would act as a safety valve helping to avoid difficulties for United States and Mexican border regions which have grown dependent on present employment patterns.

In Western Europe, temporary workers became a permanent part of the population. The additional source of labor has benefited Western Europe's economy, but it has also been accompanied by high socio-economic costs. The major costs associated with the program were the result of an ineffective mechanism to insure prompt return of temporary workers to their native homelands at the end of the work cycle. Rather than meeting the temporary manpower needs of businesses, the continued flow became an es-

143. San Diego Union, June 7, 1981, at 7, col. 1. Since President Reagan's and Mexican President Lopez-Portillo's meetings on June 8 and June 9, 1981, this figure has jumped to 350,000 Mexicans per year. The proposed expansion is sure to face vigorous opposition in Congress. Id., June 27, 1981 at 1, col. 1.
144. See note 140 supra.
145. SUPPLEMENT TO THE FINAL REPORT, supra note 10, at 692-93.
146. Id.
148. SUPPLEMENT TO THE FINAL REPORT, supra note 10, at 674-81.
established part of the European economy.\textsuperscript{149}

When employer sanction legislation has reduced the influx of undocumented workers, an increase in temporary workers should be permitted to meet the legitimate seasonal demands of agricultural employers. Even with millions of undocumented workers, there is a continued need for temporary alien workers during labor-intensive agricultural periods.\textsuperscript{150}

**FOREIGN POLICY IMPLICATIONS**

Any reform in our immigration policy will have both domestic and foreign implications. For example, Mexico is one of a group of countries whose economy depends to some extent on the United States dollar.\textsuperscript{151} Thus, employer sanctions can only be a short-term solution to the overall illegal immigration problem. The long-term solution would be to encourage economic development in the countries from which undocumented aliens migrate. Development in these countries would significantly reduce the "push" factors which encourage migration to the United States.\textsuperscript{152}

Some commentators argue that enforcement of our immigration policies would be taken as an unfriendly act having serious implications in light of United States oil requirements.\textsuperscript{153} Still, the United States cannot fashion an immigration policy based solely on oil and gas issues. Furthermore, our immigration policy is still the most generous in the world, allowing legal entry of fifty thousand Mexicans per year.\textsuperscript{154} President Lopez Portillo has said that Mexico wishes to export its products, not its people to the United States.\textsuperscript{155} Nonetheless, United States relations with those nations

\textsuperscript{149} Id. at 679.

\textsuperscript{150} See Subcomm. Hearings on S.2252, supra note 19, at 159.

\textsuperscript{151} See Giandoni, Lopez Portillo Wants U.S. Cooperation, San Diego Union, June 7, 1981, § C, at 7, col. 1. Remittances from undocumented alien workers in the United States may improve Mexico's balance of payments by as much as three billion dollars per year. Undocumented Workers: Implications for U.S. Policy in the Western Hemisphere, Hearings Before the Subcomm. on Inter-American Affairs, 95th Cong., 2d Sess. 31 (1978). See also Supplement to the Final Report, supra note 10, at 496. The devalued peso has substantially increased the incentive to migrate, at least temporarily from Mexico to the United States. Id. Cf. J. Bustamante, Espaldaes Mojasdas (1976). (Bustamante concluded, "the greater share of those who obtain work send to Mexico no more than one third of their wages."). Id.

\textsuperscript{152} See 127 Cong. Rec. S795 (daily ed. Jan. 29, 1981). "Push" factors are adverse conditions in the alien's homeland. "Pull" factors are better conditions elsewhere. When these two factors work together, immigration decisions are influenced bringing foreigners to the U.S. Id.

\textsuperscript{153} See Teitelbaum, supra note 2, at 46.

\textsuperscript{154} See generally id.

\textsuperscript{155} See Giandoni, supra note 151. But approximately 50% of the Mexican work force is unemployed, roughly 8 1/2 million Mexicans. Oil exports should pro-
from which undocumented aliens migrate will be strained if steps are taken to restrict the migration into the United States. President Ronald Reagan has noted that seasonal and temporary migration to this country acts as a "safety valve" for Mexico's unemployed. Thus, a better solution would be to allow amnesty.

The nations benefiting from a grant of legalization to their citizens who have migrated illegally to the United States will be pleased. The change in status relieves these countries from directly dealing with the population burden on their own shores. While years of lax immigration policy have done more harm than good to these developing nations, their hardworking, ambitious youth have fled, offering only temporary solutions to their own unemployment problems and causing long-term social and economic problems.

Congress must be sensitive to foreign policy implications, but the complexities and difficulties involved in developing a working agreement cannot dictate our immigration policy. Whatever policies are formulated should be developed jointly with Mexico, improving the situation in both countries. Because the United States has severe unemployment problems to deal with, it cannot continue to absorb the unemployment problems of other countries.

CONCLUSION

Depletion of our resources and continued population growth threaten the future well-being of millions. Immigrants have played a historic role in enriching the United States, but there are 226 million Americans in this country. A broad consensus favors protecting Americans' national interests. Employer sanctions for hiring undocumented aliens are a means of confronting our immigration problems. Americans must face up to the problem before the situation grows worse.

vide Mexico with over $7 billion annually in gross foreign exchange receipts, stimulating economic development. Id.

156. See MANPOWER, supra note 21, at 172.
158. See MANPOWER, supra note 21, at 171.
159. The New Yorker, March 22, 1976 cited in MANPOWER, supra note 21, at 172. "[E]migration had a placebo effect... encouraging illusions of domestic wealth based on returning salaries..." Id.
Passage of Senate 776, or a bill similar to it, would help curb the continuing flow of undocumented aliens. Employer sanctions used in connection with a work identification card cannot stop the "push" factors encouraging millions to leave their homelands in search of better futures. The poor and hungry in other countries will not be aided by reducing work opportunities for undocumented workers. The poor and hungry in the United States, however, will have a better chance of improving their way of life if millions of foreigners are not competing for their jobs and depressing their wages.

The United States must continue to mediate between traditional hospitality toward immigrants and restraints imposed by resource limitations. If employer sanctions are enforced in conjunction with an amnesty and a guest worker program, the illegal flow to the United States would be curbed. The United States could again maintain a policy of limited and controlled immigration.

TERESA MAJOR STEWART