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A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker

GARY H. MANULKIN*
B. ROBERT MAGHAME**

INTRODUCTION

On June 27, 1952, the McCarran-Walter Act was enacted into law as the Immigration and Nationality Act (hereinafter referred to as the Act). Passage into law, however, did not quell the criticism, which came from President Truman, numerous senators and representatives, and the American Bar Association. Proposals by President Kennedy, later supported by President Johnson, resulted in a major amendment to the Act, effective in 1965.

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2. Upon original passage of the bill, President Truman vetoed it and sent it back to Congress criticizing the severity of the grounds prescribed for exclusion, deportation and denaturalization, and the limitations on the authority to alleviate hardship. 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE 1-13 (rev. ed. 1975).
The 1965 amendment partially succeeded in rehabilitating the glaring defects of the Act. In light of the immensity of the problems, Congress in 1965 proposed to continue its study of the Act and enact major legislation in its next session. Unfortunately, reconsideration of the Act by Congress has not materialized, and nearly a decade after the last major amendment, the nation is still faced with this hopelessly ineffectual, incoherent, incomprehensible and anachronistic piece of legislation.

The major failure of present laws dealing with the immigration regulations is in the area of labor importation, certification and control. Over 90 percent of all problems facing the Immigration and Naturalization Service (hereinafter referred to as the Service) emanate from illegal-entrant alien workers. The purpose of this article is to illustrate failures of the present laws, consider proposed remedies, and offer an alternative route for alleviation of the problem. The authors' proposal is directed toward further economic research, sociological studies and comprehensive political analyses to propose a legislative package which would completely supplant the present Act.

ALIEN LABOR: THE FACTS AND THE LAW

The Causes and Effects of Alien Labor Migration To The United States

The Immigration and Nationality Act, McCarran-Walter Act, and subsequent amendments thereto have palpably failed to meet the challenges of immigration problems prevalent in the United States. A clear demonstration of such failure is indicated in the recent annual report of the Service for the year ending June 30, 1974. According to that report, the Service apprehended a record number of "illegal aliens"—788,000 during the fiscal year. This was an increase of 20 percent over the 1973 total. At the same time, a record 529,706 aliens, a 40 percent increase over the previous year, were denied entry to the United States.

Despite this record of apprehending illegal entrants and excluding undesirable aliens, the number of undocumented and unin-
spected aliens remains extremely high. A conservative guess is that about one to two million "illegal" aliens are currently living in the United States. Although the Government concedes that there are no exact figures of how many undocumented aliens reside in this country, even an estimate based on the number of aliens apprehended by the Service will reveal a greater number than estimated by Congressman Rodino and others.

Congressman Rodino reached his conclusion on the number of "illegal" aliens living in the United States by what he calls the "rule of thumb formula." According to this formula, "if we consider that the Immigration Service apprehends approximately one out of every five or six" illegal-entrants, all that is needed for an accurate estimation is to multiply the number of aliens apprehended times five or six. Oddly enough, if we multiply the number of apprehended aliens (788,000) times five or six we will end up with figures such as 3,940,000 and 4,728,000, respectively, which differ significantly from the estimates offered by the Rodino Committee.

More importantly, however, the estimates offered by Congressman Rodino and others lack essential foundation for accuracy. Statistics offered by the Subcommittee and others are based entirely on apprehension records of the Service. The assumption which the authors are unable to make is that the Service apprehends aliens at a certain rate, irrespective of all other intervening forces. We believe the number of aliens apprehended by the Service is more realistically tied to its manpower, funds, and efficiency, than to the number of "illegal aliens" at large. Thus, if the Service suffers from such deficiencies, the number of aliens apprehended will automatically decrease, but the number of illegal entries or aliens at large in the United States may be unaffected—or actually increase. Therefore, statistics based on the Service's record of apprehension are probably both misleading and incorrect. Obviously, the number of aliens at large in this country is not reduced if, because of lack of manpower or inefficiency, the Service reduces its apprehension of aliens. As a matter of fact, the opposite may be

7. Id.
8. Id.
9. Mr. Raymond Farrell, former Commissioner of the Immigration and Naturalization Service, stated in a letter to Congressman Rodino that the ratio for illegal aliens is "essentially the same among those apprehended by the Service officers as among those still at large in the United States." Id., pt. 5, at 1323.
true. As the Service becomes more inefficient, for any reason, fewer aliens are apprehended. One is forced to conclude that any estimate of the number of illegal aliens at large in this country based on the Service's record of apprehensions is without a proper foundation and thus of little substantive value.

Considering the foregoing, if the purpose of the Immigration and Naturalization Service and the laws governing foreign-workers' migration is to provide a service to aliens and devise an orderly system of acceptance and admission of aliens to this country, then the records indicate a dismal failure. While lawful aliens in the United States are harassed, intimidated and abused by immigration officers, while thousands of qualified workers are denied entry to this country annually, streams of uninspected and undocumented aliens are multiplying at an alarming rate.

Why is there such a flood of aliens risking their lives, family ties and reputation to enter the United States surreptitiously? The answer may include several major factors, the most dominant of which is economic conditions. As the hearings before Congress revealed, most aliens are basically law-abiding and honest people. But, faced with high unemployment and intolerable economic conditions, they have no choice but to seek residence in a country where they can live and work without fear of starvation.

Due to the economic conditions in Mexico, and that country's proximity to the United States, Mexican nationals by far lead the ranks of all illegal-entrants. Consequently, the focus of this study will be on the economic conditions in Mexico which are probably responsible for labor migration from that country.

The economic disparity between Mexico and the United States is considerable. For example, unemployment in the border cities of Mexico ranges as high as 50 percent. The Counsel General of Cuidad Juarez, Mexico, William Hughes, testified before the House Judiciary Subcommittee:

10. In the year ending June 30, 1974, out of 18,824 aliens formally deported, 13,925 (nearly three-fourths) had entered the U.S. without inspection. Of 718,740 aliens "required to depart" without the issuance of formal deportation orders, a total of 657,169 (approximately 92%) were Mexican nationals who had entered without inspection. Of the total 286,826 aliens detained by the Service or other agencies, 267,379 (over 93%) were from Mexico. See 52 Interpreter Releases, supra note 5, at 108.
The official minimum wage in the City of Juarez prescribed by the Mexican Government is $2.89 a day in the central portions of the city, and $2.52 a day in the outlying barrios, or suburban communities. We estimate that about one-third of the work force in Juarez earn the minimum wage, and at least two-thirds earn less than the minimum wage prescribed. According to the best figures furnished us by the official statistician of the State Government of Chihuahua 2 days ago, 50 percent of the heads of the families in Juarez are unemployed.12

It is not surprising, therefore, that many aliens feel compelled to come across the border to avoid poverty and unemployment in Mexico. One witness testified, "as long as there is a great disparity between wealth of the United States and the poverty of Mexico, . . . the problem of the illegal entrant will continue to exist."13

The Service and its officials contend that problems of illegal entries may be controlled with more manpower and funds from Congress. This contention, however, is not substantiated by any facts or figures. If the real problem is lack of manpower and funds, why has the number of illegal entries allegedly increased so drastically in recent years?14 The budget for the Service has certainly increased steadily over the years.15 However, if the contention is that the number of illegal entries has increased more rapidly than the budget, then the question is where do we draw the line? How much money and how many officers are we willing to invest in this project? Our investments may have diminishing returns. In other words, we may be spending more energy, time and money to apprehend a single alien than the damages he allegedly may inflict upon our economy.

Ironically, not even all the personnel of the Service support the above contention. Some officials concede that police power alone is not the answer. The INS Director for the Denver District, for example, testified:

[It] is well known to us, there isn't the slightest question in our minds, and outsiders are well aware also, that the number of illegal aliens in the area is increasing and will probably continue to

14. INS District Directors for Denver, Chicago and Commissioner Farrell all testified before the Subcommittee that the number of illegal aliens in their district and the United States in general has multiplied at an incredible rate. See Hearings, pt. 2, at 286, pt. 3, at 635, pt. 5, at 1307.
15. Hearings, pt. 5, at 1307–08. In fiscal year 1972 the budget for the INS was $130 million. Next year, in 1973, the budget was increased by nearly $6 million. By 1974, the budget had increased by $10 million over only 2 years.
increase unless some different approach to the problem can be es-
tablished.16

In Chicago, INS District Director Alva Philliod said to the Sub-
committee that the number of illegal aliens apprehended in Illinois,
Indiana and Wisconsin has increased 800 percent over the last dec-
ade. He noted:

It has been suggested that we have an increase in manpower, and
an increase in manpower would, no doubt, bring an increase in the
number of apprehensions. However, it's my firm conviction that
the aliens will continue to come to this area or anywhere where
they can seek employment, so long as the employment opportuni-
ties exist, and the continued apprehensions and deportations will
not to a great extent deter them.17

The former Commissioner of the Immigration and Naturalization
Service, Mr. Farrell, also believes that manpower alone is not the
answer to the problem.18 The Office of Management and Budget
concurs with his position.19 It appears that everyone agrees that
we need more than just funds and personnel.

Therefore, one is forced to conclude that the number of undocu-
mented entries has increased mainly because the economic condi-
tions in Mexico have grown worse and the United States' restrictions
on alien workers have increased considerably. For example, in 1965
while the economic situation in Mexico, as well as other parts of
the world, was heading toward decay, the governments of Mexico
and the United States agreed to cancel the Bracero Program.20
This program provided Mexican laborers with legal United States
employment, while meeting the needs of American employers,
mostly growers. Additionally, amendments to the Act further re-
stricted immigration of permanent and temporary alien workers.
Thus after 1965, with the demise of both the Bracero Program and
the liberal immigration policy toward alien labor, Mexican workers
were left with no alternative but to cross the border illegally.

If the number of illegal entries is on the rise and the border
patrols are unable to control the flood of illegal entrants, why are

17. Id., pt. 3, at 685.
18. Id., pt. 5, at 1307.
19. Id. at 1348.
20. Under this program, farm workers and labor were brought to the
United States pursuant to an agreement between the governments.
we unwilling to liberalize our immigration policies once again? Several rationales have been offered to justify present policies. Some claim that the presence of working aliens in this country contributes to the increase in smuggling, drug importation and other criminal activities. This claim is not substantiated by any available statistics.21

Another rationale rests on the claim that alien workers tend to replace American labor in agriculture, industry and services. Therefore, it is argued, more restricted immigration would assure more employment for Americans. The opponents of this theory point out that American labor has consistently refused to engage in the type of menial employment—domestic work and seasonal agricultural jobs—which aliens are willing to do. Therefore, as the laws of supply and demand dictate, if Americans refuse to do certain jobs, employers will turn to anyone who is willing. Thus, it is difficult to demonstrate that aliens are replacing Americans in employment.

It should be noted that the concept of seeking scapegoats for our economic ills has not been limited to aliens and unemployment. It is as though we are never at fault for pursuing our economic policies. We blame our unemployment on the presence of aliens—not our need for workers. We blame inflation on a war—not our economic overextension. We blame our recession on Arabs—not on our addiction to and overconsumption of oil. Excuses should not be offered for failures of our economic, social and political policies. Solutions must be devised.

Finally, there are those who believe that aliens create burdensome expenses on the United States Government. The expenses allegedly come in varied forms. For example, while no adequate statistics are available, it is claimed that many illegal aliens end up on welfare or other types of public benefits provided by federal or state governments.22 The Service claims that soon after Operation Wetback23 a survey was conducted to determine the effects of the Operation on public services. The survey showed

\[ \ldots \text{that unemployment compensation claims had declined some } 8\% \text{ percent more than the usual seasonal declines of the two preceding years. This reduction amounted to about } 8,000 \text{ claims and repre-} \]

21. In fact, in the hearings before the Judiciary Subcommittee, witnesses testified that an alien laborer is “industrious, hard-working and motivated by the desire to improve his lot in life and provide for his family.” 1973 Hearings 10.
22. Id. at 16.
23. Operation Wetback, conducted in mid-1950’s was a massive utilization of manpower and funds to, supposedly, curb the rising tide of illegal entries over the United States borders by Mexican nationals.
sented an average weekly savings of $188,000 in one State alone . . . .

One county hospital reported savings of $12,000 a year. Welfare payments were cut in half in another county.24

It is interesting, however, with all expenses which aliens are allegedly causing this country to incur, that neither the federal nor the state governments has any idea how many illegal aliens are in the United States or how many of those here actually participate in public assistance.25

In the area of health care, it is contended, aliens also contribute to burdens of the American taxpayers. Dr. Clifton Govan of the Colorado Department of Health, testified:

Last year the illegal aliens we assume used between a sixth and a fifth of our health money. This year it appears that many more illegal aliens are in the States and will use a larger portion of our funds.26

Dr. Govan’s estimates, however, should be considered with a high degree of suspicion since there are no accurate statistics on how many illegal aliens live in the United States. Dr. Peter Dans, former Chairman of the Migration Coalition, has admitted that “[c]omplete data on the types of diseases and cost of health care of illegal aliens is very difficult to obtain.”27

Among other expenses allegedly created by aliens are evasion of federal and state income taxes, cost of detention, investigation and

25. In the hearings before the Judiciary Subcommittee, one official of the Department of Labor considered the cost of welfare not only because aliens go on welfare, but because they take jobs which could be filled by American citizens on welfare. *Hearings*, pt. 1, at 101. This is an interesting theory in light of the fact that welfare is normally given to one who is incapable to perform in an occupation. The class of welfare recipient, therefore, is narrowed by regulation to include aged, handicapped and mothers with very young children. Thus, those who are able to work are unable to collect welfare and those handicapped by nature are assisted by these benefits. We are unable to see how the presence of alien workers can contribute to the increase of Americans on welfare. Austin Fragomen, former Staff Counsel to the House Subcommittee on Immigration and Nationality, agrees with our contention. “Since a certain degree of screening transpires to determine eligibility for welfare, the number of aliens on welfare tends to be quite small.” A FRAGOMEN, THE ILLEGAL ALIEN: CRIMINAL OR ECONOMIC REFUGE (Monograph, Center for Migration Studies Press 1973).
27. *Id.* at 327.

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deportation, and the adverse effect of aliens on the United States balance of payments. In fiscal 1970, according to Commissioner Farrell's testimony before the Judiciary Subcommittee, the Immigration and Naturalization Service spent in excess of $35 million for removing aliens from the United States. In addition to this cost, several witnesses claimed that illegal aliens save 90 percent of their earnings and send all their savings back to Mexico. For example, INS District Director for El Paso, Howard Adams, testified that aliens can earn at least $500 to $600 before apprehension and that a "tremendous amount of money" could be returned to Mexico annually without being taxed here.

Allegedly, a large number of aliens who earn money in this country fail to file income tax returns, claim nonexistent dependents or "otherwise fail to comply with federal tax requirements." Again, there are no statistics which substantiate such claims. The proponents of this theory point to several programs initiated by the Service and the IRS to support their claim that tax evasion is prevalent among the alien workers. Although some of the programs succeeded in collecting some money, their effectiveness and constitutionality remained in doubt. In fact, most of such programs were abandoned soon after their establishment. Perhaps the Service, after instituting such programs, came to a quick realization that a desperate worker who allegedly sends all his money back to his country is not the most promising source for collection of back taxes.

No one disagrees that the United States is faced with some costly programs which are related to the immigration problems. However, it is absurd to believe that we can combat the problems and eradicate the costs by increasing the police power and enacting indiscriminately restrictive laws.

The Inadequacies and Inequities of Present Statutes Concerning Alien Labor

In view of what has been said above, certain conclusions seem unavoidable. First, the problems of illegal entries are significant.

29. Id. at 18.
30. Id.
at 18.
32. In its conclusions, the Subcommittee claims that the total amount runs into millions of dollars, on which no taxes are collected. Id. at 496.
33. One such program in New York required any alien who sought voluntary departure to obtain an IRS clearance before departing the United States.
Second, most aliens entering the United States are here to work and make a living for themselves and their families. Third, the Service has failed to control the flood of illegal entries, claiming that they lack sufficient funds and personnel. In this section we shall examine the immigration laws concerning alien labor to determine their adequacies in alleviating the problem at hand.

It has been established that the majority of illegal entries are made in pursuit of employment. For an alien worker to seek employment, however, he must be certified by the Department of Labor's Manpower Administration. In addition, employers are required to apply for certification of all their alien workers to avoid replacing available American workers.

The determination and certification required to be made by the Secretary of Labor is described in section 212(a)(14) of the Act.

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

\[(14)\] Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.\[^{34}\]

Criticism of the present status of this law was offered by Mr. Jack Wasserman, former president of the Association of Immigration and Nationality Lawyers.\[^{35}\]

The labor certification program initiated by \(8\) U.S.C. § 1182(a)(14), as amended in 1965, has been a dismal failure according to the North Report entitled "Alien Workers: A Study of the Labor Certification Program," Trans Century Corporation, August 1971. It involves, with grants to the states, an annual expenditure of \(\$3,795,000.00\) (North, P. 121). It effects only about \(1/13\)th of the alien work force or about \(50,000\) persons annually (North, P. 169), and has virtually no impact either upon the total immigration (North, P. 113).


\[^{35}\] We have relied on Mr. Wasserman's testimony before the House Subcommittee No. 1, on June 6, 1973, since Mr. Wasserman is among the most authoritative sources in this field.
In addition, it has brought to the immigration process government lawlessness, inconsistencies, confusion, arbitrary secret action and one of the worst phases of the federal administrative process.

Most applications for certifications are indiscriminately denied. The Manpower Administration has established a practice of codifying the job, presumably on the basis of job description. This code determines availability of workers, prevailing wage, educational qualifications and years of experience required for each job. As Mr. Wasserman pointed out:

Initial decisions are made in secret upon undisclosed evidence upon unrevealed statistics, upon prevailing wages computed in camera and required experience adjudicated *ex parte*. Administrative appeals are generally decided in similar fashion and without the courtesy or fairness of oral argument or any advance notice of the real issues to be decided upon such appeal.

Applications for labor certification are bogged down for several months. In the great majority of cases, a rejection notice is sent to the applicant without any adequate explanation.

In sum, it is practically impossible for an alien-applicant who desires to enter or remain in this country for purposes of employment to receive an expeditious or positive reply to his application. It should come of no surprise that aliens may abandon this procedure and resort to illegal entry. Aliens and their American employers, after years of discrimination, denials and deprivations, are increasingly avoiding the requirements of the laws.

Mr. Wasserman, in his testimony before the Subcommittee, enumerated several glaring deficiencies of the labor program, which are pertinent to this discussion.

Disregard of the Statutory Mandate

Under the mandate of the statute, the Secretary of Labor is required to determine whether the certification of an alien laborer would adversely affect the job market for American workers who are "able, willing, qualified and available" at the place to which the alien is destined. The Department of Labor, contrary to the statutory mandate, totally neglects the statutory language of "able, willing, qualified" and only concentrates on the word "available."

An alien who seeks to immigrate for the purpose of employment instead of on another basis ... is ineligible to receive a visa ...
unless the Department of Labor has determined and certified . . .
that qualified U.S. workers are not available and that his employment will not adversely affect wages and working conditions of the workers in the United States similarly employed.\textsuperscript{38}

This regulation totally neglects the need for determination of whether the qualified and available workers are in fact willing and able to be employed, and that such individuals are actually present in the community in which the alien intends to work.

Construed this way, the statute fails to accomplish the purpose for which it was enacted. The statute is not concerned with any worker in this country who may be adversely affected. The statute was aimed at protecting those United States workers who live and work in the same community as the alien intends to live and work in, and further, to those United States workers who are "able," "willing," "qualified" and "available" for that particular job.

The courts on several occasions have reversed the decisions of the Labor Department and have nullified labor certification denials because the Manpower Administration had failed, as it normally does, to show "that any job seekers listed were 'able,' 'qualified,' 'willing' or even still 'available' on the date in question."\textsuperscript{39}

The Department of Labor, as Mr. Wasserman pointed out, does not even comply with the statutory requirements. For example, 29 C.F.R. § 60.7, dealing with certain professionals, is totally misconstrued by the Department of Labor. According to Mr. Wasserman:

The statute, 8 USC 1153(a) (3) [Section 203(a)(3)], requires exceptional ability in the sciences or arts and advancement of the national interest only for scientists and artists. The Labor Department, however, makes this a prerequisite for all non-schedule A professionals, expands the requirement into uniqueness, and refuses to consider job offers or whether domestic workers in such category are able, willing and qualified to perform the duties specified in a job offer for such professionals. This is a complete misreading and disregard of the statute.\textsuperscript{40}

Determination of Prevailing Wages

Regulations have been established for determining what wages

\textsuperscript{38} 29 C.F.R. § 60.1 (1974) (emphasis added).
\textsuperscript{39} H.R. 981 Hearings 188. See, e.g., Digilah v. Secretary of Labor, 495 F.2d 323 (1st Cir. 1974); Bitang v. Regional Manpower Adm'r, 351 F. Supp. 1342 (N.D. Ill. 1972). Despite these decisions, the Manpower Administration continues to disregard the mandate of the statute.
\textsuperscript{40} H.R. 981 Hearings 188.
given to aliens for their jobs would adversely affect the U.S. job market. This procedure is known as the prevailing wage standard. The problem with this standard is its method of adoption. To establish standards for a certain job in a particular community, the Department of Labor resorts to secret investigations and computations. Despite the fact that most of the Department’s decisions are made *ex parte* and without any apparent consistency, the Department of Labor’s Manpower Administration claims its determinations are fair and adequate.\(^{41}\)

**Determination of Availability**

When an application for certification is filed with the local office of the State Employment Service, that agency must review the application and search the community labor market for the availability of United States workers, prevailing wages, and working conditions. After such review, all relevant information is forwarded to the regional office of the Manpower Administration. Ironically, though the Labor Department is statutorily bound to consider the recommendations of the local employment office, the Department refuses to reveal the basis for its decisions. In other words, in the majority of cases it is not known whether the regional office of the Manpower Administration has followed the advice of the state agency, as required by regulation.\(^{42}\) Any decision contrary to the statutory mandate is unfair, arbitrary and capricious. As Mr. Wasserman added:

> In many areas this unfairness and feeling of arbitrary action is heightened by the refusal of labor officials to make available the list of unemployed workers. These workers register to obtain jobs or unemployment benefits. This registration is hardly in confidence and The Freedom of Information Act (5 U.S.C. 552) should require this disclosure which is now being denied.\(^{43}\)

**Other Deficiencies**

As was mentioned above, when an application for certification is denied by the Department of Labor, the basis for denial is not revealed. Thus, the alien-applicant or his American employer is unable to have a meaningful judicial review of the administrative

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41. Some courts have strongly disagreed with the determination of prevailing wages and have overruled the Manpower Administration’s decisions. Ozbirman v. Regional Manpower Adm’r, 335 F. Supp. 467, 472 (S.D.N.Y. 1971); Golabek v. Regional Manpower Adm’r, 329 F. Supp. 892, 896 (E.D. Pa. 1971).
42. 29 C.F.R. § 60.3 (1974).
43. *H.R. 981 Hearings* 188.
Moreover, whereas the Attorney General and Secretary of State have been granted power to make regulations, no such powers are granted to the Secretary of Labor. Nonetheless, the Department of Labor distributes guidelines to its field offices. Although these guidelines are not regulations, as Mr. Wasserman testified:

These guidelines enumerate the standards for approval of alien certification for professionals, for scientists, for members of the arts, for live-in maids and for other workers. These guidelines have not been published in the Federal Register although 5 USC 552 and 553 require such publication of procedures which have a “substantial impact both upon aliens and employers.” Lewis-Moto, et al. v. The Secretary of Labor, 469 F.2d 478 (2d Cir. 1972), ruled that the Secretary of Labor is subject to 5 USC § 553 . . . .

These are only a few major difficulties which confront workers and American employers. It is not surprising, therefore, that increasing numbers of aliens are willing to violate the immigration laws in order to meet their needs. In sum, the present statutory provisions and practices of the Labor Department are far too impractical, time consuming and arbitrary to be followed by aliens and employers.

THE RODINO BILL AND ITS IMPLICATIONS

Present laws and practices involving labor migration from foreign countries apparently have not been accepted and obeyed voluntarily. Therefore, a fundamental reformation of all laws in this area is suggested.

Representative Peter Rodino has offered a new bill in the House of Representatives in hopes of reforming the statutory chaos dealing with the undocumented workers. H.R. 16188 was introduced on September 12, 1972. The House of Representatives passed the bill and forwarded it to the Senate. The Senate Judiciary Committee did not consider the bill due to hurried adjournment for the 1972 national elections.

44. A fundamental principle of administrative law requires that any findings by an administrative agency must be sufficiently articulated in order that proper juridical review can be made. Florida v. United States, 282 U.S. 194, 215 (1931); Environment Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).
46. H.R. 981 Hearings 189.
On January 3, 1973, Chairman Rodino once again introduced his bill in the House, as H.R. 982. After extensive hearings in the District of Columbia, Los Angeles, Denver, El Paso, Chicago, Detroit and New York were held in connection with H.R. 16188, the Committee adopted the following findings: (1) It shall be unlawful for an employer to "knowingly" employ an alien employee who has not been lawfully admitted to the United States for permanent residency unless the employment of such alien is authorized by the Attorney General; (2) the employer shall not be deemed to have violated this law if he has conducted a bona fide preliminary investigation in the status of his prospective employee. As prima facie proof of such an inquiry, an employer may obtain a signed statement from the employee that he resides in this country lawfully; (3) should an employer violate this law, the following sanction may be imposed: (A) First offenders will receive a citation from the Attorney General; (B) a subsequent violation, within two years of the citation, will carry a penalty of $500 imposed by the Attorney General; (C) an additional violation will constitute a fine not exceeding $1,000 and/or one year imprisonment for each alien employed.48 After considering all the findings, the House, pursuant to the Subcommittee's recommendation voted in favor of the bill.

There is a general consensus that new laws are needed to reform the decaying statutes relating to alien workers and illegal entrants. Few contend that the solution lies in levying additional penalties on the aliens. There are already sufficient penalties prescribed in the statutes for unlawful entry to the United States.

For example, section 275 of the Act,49 provides that any alien who enters the United States without inspection or through fraud and misrepresentation is guilty of a misdemeanor, punishable by a fine ($500) or imprisonment (up to six months). A subsequent offense is a felony, punishable by not more than two years in prison and/or a $1,000 fine. Section 276 of the Act50 imposes the same penalty upon deported aliens who return to the United States without the permission of the Attorney General. There is a general agreement that more penalties on aliens would be ineffective. Joseph Sureck, Regional Counsel in San Pedro, testified as follows before the Subcommittee:

48. H.R. 982, 93d Cong., 1st Sess. § B(1)-(5) (1973). There are other proposals dealing with penalties and enforcement which have been omitted here.
50. Id. § 1326.
The employee who comes in surreptitiously—or if he has entered by fraud or misrepresentation—is already subject to prosecution under section 275, and we have already found that our magistrates—many of them—are imposing fines upon these aliens when prosecuted.

In addition, this same individual is subject to deportation.

So I personally am not so concerned to add a further penalty upon the employee.51

Chairman Rodino himself has stated:

To impose more penalties on illegal entrants in the opinion of this member, would not only be futile but unwarranted.

. . . 

We have got to be aware in Congress that no matter how many laws we make to curtail illegal immigration, there are going to be people who see the United States as a country of great opportunity and will come here regardless of the consequences.52

Thus, it is recognized that any additional penalty against aliens would be “futile” and inhumane. The question remains, however, as to what must be done with the problem of illegal entrants attempting to obtain employment in this country.

Chairman Rodino, in his proposal to Congress, suggests that the incentives be eliminated for both the would-be employer and the prospective employee. The Rodino Bill proposes new sanctions against aliens and their employer. In this manner the profit margin for the employer is reduced and, it is hoped he will refrain from employing illegal aliens.

In support of this proposition, testimony of several INS officials is offered by Chairman Rodino. For example, James Hennessey, Executive Assistant to the Commissioner stated:

What we are concerned with is the absence of legislation to destroy the incentives which in large part brings this person into the United States and enables him to take jobs at the expense of the unemployed person. Legislation will be forthcoming, hopefully, to place some penalty upon the employer, either by way of criminal sanction directly against him, or as the Chairman has suggested, greater utilization of material in the possession of other branches of the Government and specifically, the Social Security Administration.53

Former INS General Counsel, Charles Gordon commented:

52. Id., pt. 4, at 1166-69.
53. Id., pt. 1, at 42.
They [aliens] come here for employment and we find them there and we think that if this new sanction were adopted, we would have much more to deter them in the first place.\textsuperscript{54}

There are several fundamental defects with the proposed Rodino Bill. Initially, a strong argument can be made that it violates the fifth and fourteenth amendments to the Constitution by requiring an employer to deprive an employee of a property right—that is his right to work—without a hearing in compliance with procedural standards of due process as recently established by the courts.\textsuperscript{55}

Since H.R. 982 applies to prospective as well as presently working employees, it is easily conceivable that employees could summarily be dismissed by the employer pursuant to the mandate of this bill. The employee is deprived of his civil liberties and property without a fair notice and hearing.\textsuperscript{56}

The proposed bill, it can be argued, also conflicts with another federal statute, the 1964 Civil Rights Act as amended in 1968.\textsuperscript{57} That statute provides in part:

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with

... ... ...

(2) any person because of his race, color, or national origin and because he is or has been

... ... ...

(C) applying for or enjoying employment, or any prerequisite thereof, by any private employer or any agency of any state or sub-division thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency...

\textsuperscript{58}

There are those who believe that the fourteenth amendment does not apply in this situation since there is no state action involved. That is not so. As mentioned above, even assuming acts of the employer are totally private, section 245 of Title 18, would be applicable. Employer actions, however, are not totally private since they are performed pursuant to the command of the government, as agents, or at least—quasi-federal agents for the purposes of enforcement of this regulation.

\textsuperscript{54} Id. at 53.

\textsuperscript{55} Gary H. Manulkin, coauthor of this article, raised some of these objections in a guest editorial. L.A. Times, Jan. 23, 1973, § 2, at 2, col. 5.

\textsuperscript{56} Employment contracts, like any other valid contract, are certainly a part of the employee's property. In Lynch v. United States, 292 U.S. 571, 579 (1934), Justice Brandeis stated that "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States."


\textsuperscript{58} Id. § 245 (emphasis added).
Under the bill, an employer is wrongfully and unfairly required to make determinations that can only properly be made by the Service. In effect, the employer is obliged to act as an immigration officer in determining whether an alien is authorized by the United States Attorney General to accept employment. Complex legal issues will be determined by unknowledgeable employers.

Consider the example of an actual or potential employee born in a different country, whose parents were born in the United States. He may not even be aware that he has derivative rights to be a citizen of this country and, if he is aware of that fact, he will probably be unable to satisfactorily explain to an employer the technical intricacies of section 301(a)(7) and 301(b)\(^5\) giving him such citizenship at birth. If the Rodino proposal is adopted by Congress, such an employee will be summarily discharged by a fearful and intimidated employer who does not want any trouble with the law.

If the Rodino Bill were to be passed, less qualified applicants would be hired when the choice is between a citizen and other job seekers who arouse even the slightest suspicion of immigration or citizenship complications. Because of this proposed mandate for differentiation in the treatment of actual or potential employees, there would be deprivation of equal protection of the law.

When a statutory classification is based upon certain "suspect" criteria, or affects some "fundamental rights" of the parties involved, in order to sustain these classifications, the government must show a "compelling interest" for denying equal protection.\(^6\) The Supreme Court in *Graham v. Richardson*\(^6\) stated:

> Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate.

> The classifications involved [aliens] . . . are inherently suspect to strict judicial scrutiny whether or not a fundamental right is impaired.\(^6\)

The fourteenth amendment requires that those who are similarly

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\(^5\) 8 U.S.C. §§ 1401(a) (7), 1401(b) (1970).
\(^6\) Even the traditional equal protection test of "rational relationship" would not uphold the classification in the Rodino Bill. However, this test is not appropriate in this instance because aliens are a suspect class. See text accompanying notes 62-65 infra.
\(^6\) 403 U.S. 365 (1971).
\(^6\) Id. at 372, 376 (citations omitted).
situated be similarly treated. Professors Tussman and tenBroek ask:

[W]here are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.63

If the purpose of the proposed legislation in this instance is to eliminate the incentive for illegal entrants to migrate to the United States, then this legislative classification is probably “under-inclusive.” As Professors Tussman and tenBroek explain:

All who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include. Since the classification does not include all who are similarly situated with respect to the purpose of the law, there is a prima facie violation of the equal protection requirement of reasonable classification.64

The present classification unreasonably imposes an unjustifiable burden on non-Anglo-appearing employees who are legally in this country and are not covered within the purpose of the proposed bill.

Even if one were to concede that there may be elements of rationality within the classification offered by the Rodino Bill, such rationality alone would not sustain the constitutionality of the Bill. As has been said:

There are some “classifications” that are far from irrational, but that are nonetheless unconstitutional because they produce inequities that are unacceptable in this generation’s idealization of America. In giving effect to the principle of substantive equal protection, sometimes the Court will state that a classification, even though rational, bears a heavier burden of justification than mere rationality.65

In summary, the Rodino proposal, in its attempt to solve the problem of illegal entrants in this country, offers immeasurable cost, invaluable taxation of individual freedoms, questionable constitutional infringement and infraction of the basic principles of capitalism and freedom of choice.

64. Id. at 348.
A Proposal

The Rodino Bill attempts to remedy the immigration problems facing this country in a piecemeal manner. It concentrates not on the disease, but only on the symptoms. What is needed is an overall program which removes the incentive for illegal migration, and develops positive constructive programs, rather than punitive and repressive measures against the illegal entrant or the innocent employer.

As was established earlier, over 90 percent of the immigration problems of this country involve illegal entrants from Mexico. It was further pointed out that the major, and probably the sole reason, for this unlawful migration to the United States stems from economic conditions prevalent in Mexico. Therefore, it could be logically concluded that if the economic complications were remedied, the pressures on United States immigration would be minimized.

The simplicity with which the problem is stated may disguise the actual complexities involved in the proposed solution. As T.S. Eliot once wrote: "Between the idea and the reality, between the motion and the act, falls the shadow."


In other words, eradication of illegal entrants to the United States would entail a sophisticated and comprehensive reformation of not only the immigration laws of this country, but also the economic concepts embraced by both the United States and Mexico. Short of this type of conceptual reformation, the problems will remain the same.

How do we bring about economic cooperation and reformation in a manner which will be both profitable and effective for both countries? In our opinion, such goals may be attained if the economic and social concepts adhered to by both the United States and Mexico were modeled similar to that of the European Economic Community (EEC). In the following pages we will attempt to present a general overview of the EEC and the probabilities of utilizing that Community as a paradigm for reconstruction of social, political and economic principles in the United States and Mexico.

It must be noted here that this general discussion should not be deemed to exhaust the issues involved and does not offer a panacea
for all problems facing said countries. Much more extensive research must be devoted to this topic in order to assess its feasibilities and possibilities. This discussion is only meant to provoke thoughts and stimulate some response in an area which we feel requires serious attention. The authors hope to engage in a more detailed research and investigation of this subject, time and funds permitting, and offer some recommendations to the proper legislative authorities.

It should be clear at the outset that utilization of the EEC model is not offered for the purpose of resolving the economic difficulties of the United States. It is provided, however, to illuminate the possibilities of resolving the alien-labor problems in this country, while proposing to remedy some of the economic difficulties of Mexico. The European Community, not unlike the United States and Mexico, involves nationalities and minorities with diverse backgrounds, skills and education. The degree of technological advancement also varies among the members of EEC nations, as does labor diversification, population and standards of living. Therefore, if the European Community with initial problems similar to those faced by this country and Mexico, is able to control its economy and foreign labor problems, we must be able to learn from its experience in this area.

The European Economic Community was established in response to the economic and social chaos threatening Europe after the Second World War. Emphasis was placed on economic cooperation and gradual integration since political unity seemed impracticable. Even the proposed economic cooperation was strongly based on two principles: (1) Noninterference with political, social and economic sovereignty of the member states, and (2) the notion that whatever new structures emerged from cooperation among members must be founded on democratic principles.

The Community has a “constitution”—the Treaty of Rome—which outlines the authority of the community. In addition, the Treaty sets out the objectives of the organization and determines the relations between the institutions of the Community. The laws of the organization, in addition to its constitution, are legislated through regulations, which are binding upon member governments and individuals within the member states, directives which require each member state to attain certain goals by whatever means the member government may choose, and decisions which bind only the designated individual or government.67

As for the institutions of the Community, the Treaty of Rome provides for a Parliament, a Commission and a Council of Ministers, and a Court of Justice. The main decision-making body of EEC appears to be the Council of Ministers, consisting of members appointed by each State. The Commission, with its power of initiative, acts as an independent protector of the common interest. The members of the Commission are appointed by the governments of the member States. Ostensibly, the Commission recommends legislation to the Council which, in turn, legislates new laws for the Community. The role of the Parliament in this Organization is restricted to an advisory capacity. Its major contribution is through Committee recommendations for new policies. "The Parliament has no effective means of preventing measures passing into law or otherwise controlling the Council, which is not accountable to it."68

In sum, the EEC is so organized that the Council of Ministers, with its major decision-making powers, allows equal representation for the wishes of each government, so that fair policies may be established without sacrificing sovereignty. The policies established by the Council are then carried on by the Commission, which also can offer new legislation for adoption by the Council. The Court of Justice acts as a Court of Appeal against infractions and breaches of the Treaty and of Community laws. Meanwhile, the Parliament investigates and researches new proposals for more efficient and effective workings of the EEC.

Generally speaking, the European community is structured on the same lines as the United States Government, with federalism, separation of powers and some checks and balances as important features. Therefore, it would not be difficult for us to develop an identical organization, with limited objectives, with our neighbors.

The objectives of the European Common Market are generally enumerated in the Treaty of Rome. Although not all of the objectives are relevant or beneficial for our purposes, a brief discussion of the objectives which are relevant will be illuminating.

The Treaty setting up the European Economic Community was ratified in Rome on March 25, 1957.69 The Preamble states that the signatories of the Treaty are

68. Id. at 46.
69. The original Treaty of Rome was printed only in French, German, Italian and Dutch. Therefore the authors have relied on a revised unofficial.
[a]ffirming as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples, Recognising that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition, . . . Resolved to strengthen the cause of peace and liberty by thus pooling their resources and calling upon the other peoples of Europe who share their ideal to join in their efforts . . . .

Part One, Article 2, of the Treaty sets up the principles upon which the Community is established. The major objectives for economic cooperation between the members are

[t]o promote throughout the Community an harmonious development of economic activities, a continuous and balanced expansion, . . . an accelerated raising of the standard of living and closer relations between the Member States belonging to it.

It is clear, in view of the problems discussed above, that none of these principles are adverse to the general objectives of the United States Government or the Government of Mexico. In fact, should any of these principles be embraced and followed by these two nations most of our problems in economic and related fields would diminish.

For the purposes set out in Article 2 above, the activities of the Community must include, pertinent to our discussion:

(c) The abolition, as between member states, of obstacles to freedom of movement for persons, services and capital;

(i) The creation of a European Social Fund in order to improve the possibilities of employment for workers and to contribute to the raising of their standard of living . . .

Title III, Chapter I, Article 48, describes the freedom of movement for workers. Such freedom, according to this Title, shall entail the abolition of any discrimination based on nationality between workers of the member state, as regards hiring, wages and other conditions of work. It also entails the right

. . . subject to limitations justified on grounds of public policy,
. . . public safety or security and public health:
(a) To accept offers of employment actually made;
(b) To move freely within the territory of member states for this purpose;
(c) To stay in a Member State for the purposes of employment in accordance with the provisions governing the employment translation of the treaty prepared by the Foreign Office of Great Britain. TREATY SETTING UP THE EUROPEAN ECONOMIC COMMUNITY (Her Majesty's Stationery Office 1967).

70. Id. at 1.
71. Id. at 3.
72. Id. at 3.
of nationals of that state imposed by law, regulation and administrative action . . . .73

Article 49 sets up the procedure for elimination of certain discriminations which would hinder the progressive development of free movement, i.e., laws and agreements in and among member states. Also, subsection (d) of this Article provides for:

Setting up appropriate machinery to bring offers of employment into touch with applications for employment and for better equating labor supply with demand, in such a way as to avoid serious threats to the standard of living and of employment in the various regions and industries.74

The above provisions, establishing freedom of movement for workers, and other similar articles providing for capital movement, and creation of business enterprises, set up a comprehensive infrastructure for developing an economic program which allows labor and employees to meet each other's demands without artificial obstacles. If we were to adopt these types of provisions and similar economic structures and institutions, governed by organizations closely related to our type of government, most of the economic difficulties of this country and Mexico would become subject to control. This is not to say that all economic problems of Mexico and the United States would disappear with the creation of such an economic community. But it should be emphasized that such a community, with principles and institutions similar to the EEC, might be able to handle the economic problems of Mexico while dealing with related labor problems in the United States.

In order to finance such programs and organizations, member states of the EEC are required to contribute to a fund which ensures development at an even pace. Once development begins, a lending institution, similar to the European Investment Bank, might be established to contribute to steady progress. For this purpose, Title IV, Article 130 provides for bank grants and guaranteed loans, on a nonprofit basis, for:

(a) Projects for developing less developed regions;

(b) Projects for modernizing or converting undertakings or for developing fresh activities called for by the progressive establishment of the common market, where such projects by their size or nature cannot be entirely financed by the various means available in the individual Member States . . . .75

73. Id. at 21.
74. Id. at 22.
75. Id. at 41.
CONCLUSION

The United States Government is faced with an ever-increasing problem of enforcing the immigration laws of this country. The number of illegal entrants have, according to government sources, increased tremendously over the past decade. The cost, according to the same source, is estimated to run as high as a billion dollars a year.\footnote{Chapman, A Look at Illegal Immigration: Causes and Impact on the United States, 13 SAN DIEGO L. REV. 34, 37 (1975).} This does not include the money expended for the governmental bureaucracies which are created to deal with these difficulties. In addition to the economic expense, some social and moral disturbances have been allegedly attributed to the presence of the illegal-entrant.

Some governmental officials, mainly those connected with the Immigration and Naturalization Service, believe the problems may be adequately resolved if we spend more money for manpower and equipment for apprehension of the violators of the immigration laws. This suggestion has met with disfavor in the Congress and the Office of Management and Budget.

It is generally agreed that the problems of illegal entrants are a direct result of the economic disparity between Mexico and the United States and the insufficiency of American legislation in this field. Congress, following the recommendations of the Judiciary Committee and its Chairman, Peter Rodino, has voted in favor of statutes imposing sanctions on any employer who knowingly hires undocumented workers. This legislation, in our opinion, lacks rationality and efficacy in light of the fact that it only concerns itself with the problem after it is created, not before. There are virtually no preventive characteristics inherent in this legislation.

We suggest a radical overhaul of our perspective in this matter. That is, let us learn from other parts of the world which have faced a similar problem. The European Economic Community, known as the Common Market, offers the best example with an exceptional degree of success in this field.

Germany and Italy may come close to depicting the vast differences between a completely diversified and industrialized nation and one which is less industrialized. If Italy, with her vast population of nonindustrial and service-oriented labor, can resolve her problems with a large degree of success and no harm to her sovereignty, then the United States and Mexico might obtain the same objectives.
The Common Market, with its constitution, separate institutions, and Federalist structure has been able to develop economic, social and some political integration and unity in Europe. Moreover, it has solved the problems of labor migration and their ill-effects on the host nation. The principles of “Four Freedoms,” which include freedom of movement for labor, capital, and enterprise, have robbed the incentives for illegal entrys and hiring of the undocumented worker. The Commission for the organization, the Common Market, is able to recommend legislation and execute laws legislated by the Council of Ministers. The Council, in turn, enacts the needed legislation while jealously guarding the sovereignty of each member state. The Courts, as the Judicial Branch, will have the power to interpret the law and sanction infractions. Such a well-structured organization as the EEC, with the limited objective of reducing the economic burden on each member state, seems to offer a better prospect for dealing with our problems than enacting new punitive legislation or adding more police to enforce our unworkable laws.

Putting aside any political benefits which might be derived from economic integration with our neighbors, the benefits are immeasurable. Economically both countries would benefit. Mexico would, with assistance from the Investment Bank, proceed more rapidly through industrialization and development, thus enabling United States businesses to expand in neighboring countries with little restriction. Moreover, as Mexico is able to provide more jobs for its own population, the United States would be able to give more jobs to its citizens and not be faced with the problem of the undocumented workers.

The money that we are allegedly losing each year because of alien employment, balance of payment, tax evasion and for subsidizing the Service, could be deposited in the Investment Bank to attain its objectives. Furthermore, as the Bank developed and enterprised capital, and labor were able to move freely, the American economy would not be totally subjugated to the workers’ union. This may, in turn, result in equalization of wage differences which would prevent industries from fleeing the high cost of labor in this country. The more businesses are able to remain in the United States, the more employment and revenue are generated for the government.

No doubt, our proposal entails benefits and detriments which
have not been discussed in this article. As was mentioned earlier, our hope was not to offer a comprehensive solution, with complete cost-benefit analysis. However, we did hope that this type of proposal would serve as a stimulus for more effective response to the problem that everyone agrees is taxing our human dignities as well as our social, political, and economic policies.