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RESOLVING THE PROBLEM OF UNDOCUMENTED WORKERS IN AMERICAN SOCIETY: A MODEL GUEST WORKER STATUTE

The presence of large numbers of illegal aliens working in the United States has created several problems. Illegal aliens symbolize the inability of the United States to control its borders and care for its citizens. Their illegal presence indicates a willingness to violate United States laws. Apart from these symbolic problems, illegal aliens may create economic harms. Their fear of apprehension and deportation makes them susceptible to exploitation by employers, leading to lessened enforcement of United States wage, health, and safety legislation, as well as to depressed wages and working conditions. The presence of illegal aliens also increases population pressures on natural resources.

Several solutions have been proposed to the problem of the presence of large numbers of illegal aliens. A program for admission of temporary workers provides one potential solution. Although there are several proposals for modification of the existing temporary worker program, and for creation of a new, larger temporary worker program, these proposals have not met with universal approval. Some groups, for example, have called for the revision or elimination of the existing program, arguing that the presence of foreign workers depresses wages and working conditions for all workers.


3. Migrant Legal Action Program, The "H-2 Program": Temporary Alien Workers in the U.S. Agriculture, in Select Commission on Immigration and Refugee Policy, Staff Report,
This Note argues that a temporary foreign worker program is needed to alleviate the effects of illegal immigration. Part I describes the problems that illegal aliens present and discusses the interests of the groups affected by their presence in the United States. Part II discusses the inability of forced repatriation, amnesty, closing the border, or employer sanctions to satisfy these interests. Part II also discusses the undesirability of ignoring the problem of illegal aliens. Part III explains how a program for admission of temporary foreign workers best meets the interests of domestic employers, domestic and foreign workers, sending countries, and the United States as a society. Finally Part IV proposes a model statute for a temporary foreign worker program.

I. Illegal Alien Workers: Problems and Competing Interests

A. Problems Created by the Presence of Illegal Aliens

Although it is impossible to determine exactly how many illegal aliens are currently in the United States, estimates range from two to twelve million, with general agreement that the actual figure falls between four and six million. Estimates of new entrants each year range from 100,000 to 1,200,000, with general agreement on approximately 600,000.
Most of these individuals become part of the work force, but many return home when no longer employed.

The presence of these large numbers of illegal aliens creates a variety of problems. Symbolically, illegal immigration signals failure of the government — as planners and enforcers — on a large scale. Such a large population of illegal aliens suggests that the United States has lost control of its borders. It also signifies the vitiation of the United States immigration policy. The existence of a large group that enters and exists outside the law reduces respect for the law. Finally, popula-

8. Reubens, supra note 6, at 135 (reporting that eighty percent of illegal aliens work); see also INTERAGENCY-TASK FoRCE, supra note 6, at 148; Fogel, Illegal Aliens: Economic Aspects and Public Policy Alternatives, 14 SAN DIEGO L. REV. 63, 67 (1979); North & LaBel, Manpower and Immigration Policies in the United States (National Commission for Manpower Policy Special Report No. 20, 1978).

9. Workers have traditionally moved across the land now marked as the border between the United States and Mexico. See Fogel, supra note 8, at 74-75; Scruggs, The US, Mexico, and the Wetbacks, 1942-1947, reprinted in SENATE COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS., SELECTED READINGS ON U.S. IMMIGRATION POLICY AND LAW 238, 239 (Comm. Print 1980). Many Mexican families rely on income earned from work in the United States. Lopez, Undocumented Mexican Immigration: In Search of a Just Immigration Law and Policy, 28 UCLA L. REV. 615, 685 (1981); Siegel, Passel & Robinson, supra note 4, at 28-29 (finding that three quarters of the families in one village relied on United States earnings and two-thirds of these alien workers were legal immigrants). Many illegal aliens intend to work only temporarily in the United States. W. CORNELIUS, L. CHAVEZ & J. CASTRO, MEXICAN IMMIGRANTS AND SOUTHERN CALIFORNIA: A SUMMARY OF CURRENT KNOWLEDGE 14-15 (1982); Bustamente & Martinez, Undocumented Immigration from Mexico: Beyond Borders but within Systems, 33 J. INT'L AFF. 265, 268 (1979); Poitras, The U.S. Experience of Return Migrants from Costa Rica and El Salvador, in STAFF REPORT, supra note 3, app. E, at 45, 89. Immigration and Naturalization Service enforcement policies and ineligibility of illegal aliens for United States social service programs encourage Mexican illegal aliens to return to Mexico when they are not employed. Martin, supra note 7, at 232 (possibility of apprehension encourages return in times of high United States unemployment); see also North & LaBel, supra note 8.

10. The United States does not exercise its sovereign power of control of its borders when it allows illegal entry. See Fallows, Immigration: How it's Affecting Us, ATL. MONTHLY, Nov. 1983, at 45, 48; Fogel, supra note 8, at 76. Foreign countries, taking advantage of this weakness, may send their undesirable members to the United States. A recent example is Cuba's shipment of prisoners and mental hospital patients to the United States in the 1980 Mariel Harbor boatlift. See, e.g., Orlow, America's Incoherent Immigration Policy: Some Problems and Solutions, 36 U. MIAMI L. REV. 931, 933 n.10 (1982).

11. The illegal entry of aliens defeats policy decisions about the allocation of visas to each country, Immigration and Nationality Act (INA) § 202(a), 8 U.S.C. § 1152(a) (1982), the types of persons to be excluded, INTERAGENCY TASK FORCE, supra note 6, at 41, 60; INA § 212, 8 U.S.C. § 1182, and the primacy of family reunification, Chiswick, Guidelines for the Reform of Immigration Policy, 36 U. MIAMI L. REV. 893, 901-02 (1982); INA §§ 201(b), 203(a)(1), (2), (3), (5), 8 U.S.C. §§ 1151(b), 1153(a)(1), (2), (3), (5); see also Goodpaster, Illegal Immigration, 1981 ARIZ. ST. L.J. 651, 653 (1981) (noting that citizens, through the political process, or illegal aliens can define the types of persons currently entering the United States and therefore the future composition of the United States society).

12. See Lopez, supra note 9, at 707 (reporting loss of respect by Mexicans for United States laws). One major violation, smuggling of aliens into the United States, constitutes a major problem for law enforcement agencies, and a danger to many aliens. See also Goodpaster, supra note 11, at 681.
tion planning and resource allocation cannot occur when there is a large but unidentified group of people in the United States.\textsuperscript{13}

In the short term, significant economic effects of illegal immigration must be considered. Although the effects of illegal immigration cannot be proven conclusively, there are claims that these effects are large and undesirable. Illegal aliens may impose burdens on United States income transfer programs.\textsuperscript{14} More significantly, widespread

\textsuperscript{13} Regardless of the role the United States should play as a sovereign or as a haven for disadvantaged people, the immigration policy must show some concern about the number of people in the country. Population growth from legal and illegal immigration imposes pressures on natural resources and disparity in living conditions, leading to poverty and cultural conflict. Goodpaster, \textit{supra} note 11, at 653; Comment, \textit{Employer Sanctions: The "New Solution" to the Illegal Alien Problem}, 1979 \textit{ARIZ. ST. L.J.} 439.

\textsuperscript{14} Because illegal aliens are, by definition, outside the law, there is limited information from which to draw conclusions on their use of, and contribution to, social services. Although it appears aliens are not responsible for large drains on social services, some aliens do receive services to which they are not entitled or indirectly cause others to need such services. For some aliens, the opposite problem occurs; they contribute to government offers but are afraid to use the services.

Some scholars have found that illegal aliens directly and indirectly burden social service programs. Some studies report that illegal aliens impose costs greater than their contributions to social service and income transfer programs. See, e.g., Chapman, \textit{A Look at Illegal Immigration: Causes and Impact on the United States}, 13 \textit{SAN DIEGO L. REV.} 34, 35 (1975); Manulkin & Maghame, \textit{A Proposed Solution to the Problem of Undocumented Mexican Alien Workers}, 13 \textit{SAN DIEGO L. REV.} 42, 48 (1975). In addition, illegal aliens impose an indirect burden on income transfer programs; domestic workers unemployed due to competition from illegal aliens turn to income transfer programs. Lopez describes this belief as part of the "informed consensus" about illegal aliens, a consensus based on an inaccurate understanding of historical events and present circumstances. Lopez, \textit{supra} note 9, at 635.

Other researchers say these conclusions are incorrect. Illegal aliens are not eligible for most social service and income transfer programs, including Aid to Families with Dependent Children (AFDC), Social Security Supplemental Income for the Aged, Blind and Disabled (SSI), Food Stamps, Medicaid and Unemployment Insurance. D. North, \textit{Enforcing the Immigration Law: A Review of the Options} 73 (1980) [hereinafter cited as D. North, \textit{Review of Options}]; Goodpaster, \textit{supra} note 11, at 696. Legal obstacles and the fear of being caught and deported have discouraged illegal aliens from trying to collect money from income transfer programs. For example, estimates of illegal aliens who have collected unemployment compensation range from 2% to 10% of illegal aliens. D. North, \textit{Immigration and Income Transfer Policies in the United States: An Analysis of a Non-Relationship} 37-38 (1980); Lopez, \textit{supra} note 9, at 636.

Even when aliens contribute to social programs, they are unlikely to benefit. At least 55% of illegal aliens have social security payments deducted from their wages, according to a summary of five studies. D. North, \textit{supra}, at 27. Illegal aliens contribute tax revenue through sales taxes and property taxes through rent payments. Lopez, \textit{supra} note 9, at 363. Still, few illegal aliens receive benefits from their contributions. Social security payments to retirees in Mexico are lower than payments to retirees in other countries. D. North, \textit{The Border Crossers; People Who Live in Mexico and Work in the United States} (1970), reprinted in \textit{Migrant and Seasonal Farmworker Powerlessness: Hearings on Border Commuter Labor Problem Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare}, 91st Cong., 1st Sess. 2194, 2395-96 (1970) [hereinafter cited as North, \textit{Border Crossers}]. Illegal aliens make limited use of medical care and job training programs. North & Houstoun, \textit{The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study}, summarized in \textit{Staff Report}, \textit{supra} note 3, at 226; see also \textit{Community Research Associates, Undocumented Immigrants: Their Impact on the County of San Diego} (1980); D. North, \textit{Government Records}:
employment-oriented illegal immigration threatens exploitation by employers. A continuing debate addresses the effect of illegal aliens upon the economy. Many analysts believe that alien labor "replaces" American labor in two ways. First, undocumented workers replace domestic workers directly. Because employers can pay lower wages or withhold contributions to social security and unemployment compensation, they may prefer to hire undocumented workers. Second, there may be an indirect, and perhaps more widespread, replacement effect. This indirect replacement occurs because the presence of illegal aliens retards improvements in wages and working conditions that would attract domestic workers. Some experts disagree with the notion of a

What they Tell Us about the Role of Illegal Immigrants in the Labor Market and in Income Transfer Programs (1981).

On balance, their contributions to such systems may outweigh costs that they impose on social service and income transfer programs. STAFF REPORT, supra note 3, at 526; S. Weintraub & S. Ross, supra note 5, at 24-25.

Employers often exploit illegal workers by intentionally refusing to abide by protective legislation. Chapman, supra note 5, at 40; Developments in the Law — Immigration Policy and the Rights of Aliens, 96 HARV. L. REV. 1286, 1437 (1983) [hereinafter cited as Developments]. Illegal aliens fear deportation, see, e.g., INTERAGENCY TASK FORCE, supra note 6, at 390, 395; Hiller, Immigration Policies of the Reagan Administration, 44 U. PITT. L. REV. 495, 502 (1983), and this fear renders them susceptible to exploitation because they have limited power to object to unlawful working conditions. Ortega, Plight of the Mexican Wetback, 58 A.B.A. J. 251 (1972), reprinted in MEXICAN WORKERS, supra note 15, at 85. Flagrant violations of protective legislation lead to disrespect, by illegal aliens and legal residents, for all laws. "Wholesale evasion of the law must inevitably breed contempt for the law." S. Weintraub & S. Ross, supra note 5, at 5; see also INTERAGENCY TASK FORCE, supra note 6, at 399; Lopez, supra note 9, at 629, 707.

This exploitation, apart from its impact on American workers, harms aliens who work in jobs violating legislative definitions of fair wages and safe conditions. Minimum wage, health, and safety legislation applies to all workers regardless of legal status in the United States. Briefing Paper, Protective Labor Laws and Illegal Migrants, in STAFF REPORT, supra note 3, app. E, at 239. As a policy decision, the United States should protect the welfare of the entire work force. North & Houstoun, supra note 14, at 231.

The one-to-one displacement theory holds that illegal aliens directly replace domestic workers by working harder and accepting lower wages and working conditions. Lopez, supra note 9, at 631-33. Illegal aliens who overstay their visas — better educated and more skilled than illegal border crossers — more often replace domestic workers. Chapman, supra note 5, at 37-39.

Still, some authors cite studies casting doubt on the existence of this displacement effect. S. Weintraub & S. Ross, supra note 5, at 18; W. Cornelius, L. Chavez & J. Castro, supra note 9.

Proponents of this position cite economic evidence that the Bracero program (temporary farm worker program operated from 1942 to 1965 under various bilateral agreements with Mexico) restrained wage increases and caused unemployment among domestic farm workers. For descriptions of the Bracero program, see DEPARTMENT OF LABOR, DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, STUDY OF POPULATION AND IMMIGRATION PROBLEMS 23-26 (prepared for the House Comm. on the Judiciary, 88th Cong., 1st Sess.) (Comm. Print 1963); Scruggs, Texas and the Bracero Program, in MEXICAN WORKERS, supra note 15, at 85. For a
replacement effect and explain that illegal aliens fill jobs that domestic workers have already abandoned, thereby enabling marginal enterprises to exist and creating still more jobs.¹⁸

These issues have led to several proposals responding to the presence of large numbers of illegal aliens.¹⁹ The interests of the several concerned groups must be considered in evaluating these proposals.

B. Competing Interests

Several groups have interests in solving the problems posed by illegal aliens in the United States: (1) the United States society as a whole; (2) employers; (3) illegal alien workers; (4) legal United States resident workers; and (5) sending countries.

1. United States society—The United States has several societal interests in the resolution of the problem of illegal alien workers. These

discussion of its impact on farm workers' wages, see Briggs, Foreign Labor Programs as an Alternative to Illegal Immigration into the United States: A Dissenting View, in Staff Report, supra note 3, app. F, at 141.

This view assumes that United States businesses now employing illegal aliens would respond to the decrease in available workers by upgrading wages and working conditions to attract domestic workers, see Note, supra note 1, at 360-61, or by converting to less labor-intensive operations, Fogel, supra note 4, at 72; Reubens, supra note 6, at 107. Both alternatives assume enterprises sufficiently profitable to justify increased wages or capital investments. See Fogel, supra note 8, at 72; Reubens, supra note 6, at 107. It has been argued, however, that marginal enterprises will not survive the added costs of higher wages or capital investments. Note, supra note 1. Rigid wage systems may require increases for several job categories if employers raise the lowest wages to attract domestic workers, creating costs greater than the employer can cover. Martin & Houstoun, The Future of International Labor Migration, 33 J. Int'l Aff. 311, 325-26 (1979).

Some marginal enterprises will close, resulting in a loss of jobs filled by legal and illegal workers. Reubens, supra note 6, at 103. Galbraith reports that many European businesses would close without foreign workers. J. GALBRAITH, THE NATURE OF MASS POVERTY 129-30 (1979). Fogel, however, argues that closings will occur less often than employers intimate. Fogel, supra note 8, at 72.


¹⁸. See E. THOMAS, IMMIGRANT WORKERS IN WESTERN EUROPE: THEIR LEGAL STATUS 218 (1982); Fogel, supra note 8, at 71; Reubens, supra note 6, at 103-04. Further, higher wages alone might not attract domestic workers. S. WEINTRAUB & S. ROSS, supra note 5, at 103.

¹⁹. See Interagency Task Force supra note 6, at 79 (describing a proposed temporary worker program); Senate Staff Report, supra note 1 (proposing temporary status with an opportunity to adjust to permanent resident alien); Briggs, supra note 17, at 154 (describing proposed temporary worker programs); Cook, Amnesty/Temporary Worker Plan, in Staff Report, supra note 3, app. F, at 338 (proposing temporary worker status); Lansing & Alabart, The Reagan Administration Proposals on Immigration: The Problem of the Undocumented Alien in the United States, 13 Cal. W. Int'l L.J. 1 (1983) (describing proposal for renewable term temporary residence); Reubens, supra note 6, at 119 (recommending a temporary worker program).
include maintenance of economic health\textsuperscript{20} and enforcement of laws.\textsuperscript{21} The United States also has an interest in maintaining good relations with countries sending large numbers of illegal aliens,\textsuperscript{22} and that interest may influence the viability of any response to the large number of illegal aliens.

2. Employers— Employers of illegal aliens have an interest in the continued presence of workers willing to accept jobs.\textsuperscript{23} This interest coincides with society's interest in the continued survival of enterprises employing domestic and illegal alien workers. If aliens are taking jobs no one else will take, or taking jobs at lower wages, they aid the profitability of the employer. If employers seek to exploit illegal aliens, however, their interest conflicts with society's interest in enforcement of worker protection legislation.

3. Aliens working in the United States— Alien workers have an interest in entering the United States. For some, the interest lies in the opportunity to immigrate. Unfortunately, not all who wish to live

\textsuperscript{20} To the extent that illegal aliens displace domestic workers, income transfer payments rise. See supra note 19. On the other hand, if employers raise wages and increase capital investments and then raise prices, consumers suffer. If marginal enterprises close or relocate to other countries, domestic workers in those enterprises and the economy suffer.


22. See \textit{Developments}, supra note 15, at 1459 & n.132 (noting the need to meet the interests of sending countries sufficiently to secure their cooperation in preventing illegal entry into the United States). The impact of foreign relations on immigration policy is clearly presented in United States relations with Mexico. An estimated 60\% of the illegal aliens in the United States are Mexicans. Id. at 1436 & n.13. The 2000 mile United States border with Mexico has an interdependent economy. See NORTH, \textit{Border Crossers}, \textit{supra} note 14, at 2194, 2213. Workers have historically moved freely across the border. See Goodpaster, \textit{supra} note 11, at 667, and United States employers have historically recruited workers in Mexico. See Bustamante & Martinez, \textit{supra} note 9, at 266. The federal government implicitly participates in entry by frequent relaxation of border enforcement, see Cardenas, \textit{U.S. Immigration Policy Toward Mexico: An Historical Perspective}, 2 \textsc{Chicano L. Rev.} 66, 91 (1975), and by relatively small resource allocations to enforcement, see Chiswick, \textit{supra} note 11.

23. See \textit{supra} notes 16-18.
permanently in the United States will have the opportunity to do so.\(^{24}\)
For other aliens, the interest in entering the United States is an interest in temporary work. Historically, many immigrants intend to return to their home country in a position to enjoy a better life.\(^{25}\) Nevertheless, United States immigration law and policy, with the exception of the limited H-2 program,\(^{26}\) only provides immigration for permanent residence.

Undocumented workers in this country have an interest in acknowledgement of their basic human rights,\(^{27}\) the consistent application of protective legislation, a clear statement of their rights to social services and income transfer programs. In addition, many illegal aliens working in the United States have contributed to the economy. They deserve recognition for this contribution.\(^{28}\) They also deserve a clear determination of their responsibility for tax payments.

\(^{24}\) No more than 20,000 visas issue to natives of an individual country each year. INA § 202(a), 8 U.S.C. § 1152(a) (1982). Within this ceiling, visa allocations occur within preference categories. Four of seven preference categories consist of family members of citizens and permanent resident aliens. INA §§ 202(b), 203(a)(1), (2), (4), (5), 8 U.S.C. §§ 1151(b), 1153(a)(1), (2), (4), (5). One preference category covers members of professions or workers with exceptional ability. INA § 203(a)(3), 8 U.S.C. § 1153(a)(3). One category covers workers "performing specified skilled or unskilled labor . . . for which a shortage of employable and willing persons exists in the United States." INA § 203(a)(6), 8 U.S.C. § 1153(a)(6). A seventh category includes all persons not within the first six categories. Visas in this seventh category were last available in 1978. Chiswick, supra note 11, at 950; Developments, supra note 15, at 1337.

\(^{25}\) W. Cornelius, L. Chavez & J. Castro, Mexican Immigrants and Southern California: A Summary of Current Knowledge 57-58 (1982); Campo, Spain, in International Labor Migration in Europe 156, 158 (R. Krane ed. 1979) (saving to buy an apartment or tools to work independently for Spanish workers); Kessner, Repatriation in American History, in Staff Report, supra note 3, app. A, at 287; Thomas, The Migratory Phenomenon and Returning Migrants in Turkey (A Case Study), in Immigrant Workers in Europe: Their Legal Status 4 (Thomas ed. 1982) (saving to start business or buy farm for Turkish workers migrating to Europe).

European guest workers initially intend to go home. Reimann & Reimann, Federal Republic of Germany, in International Labor Migration in Europe, supra, at 63, 69; Hoffman-Nowotny & Killias, Switzerland, in International Labor Migration in Europe, supra, at 45, 60-61. Several factors pressure aliens to remain in the host country: adjustment to the rewards of an industrial society, formation or immigration of families, inadequate savings to achieve goals upon return to the home country, scarcity of jobs in the sending country, and continuing availability of jobs in the host country. Martin & Houstoun, supra note 17, at 327. European countries, recognizing the dependence of their economic structure on the presence of alien workers, have moved to encourage alien workers to remain. Rist, The European Economic Community (EEC) and Manpower Migrations: Policies and Prospects, 33 J. Int'l Aff. 201, 215 (1979).


\(^{27}\) Ortega, supra note 15, at 195 (advocating the need to recognize basic human rights of illegal aliens); Lopez, supra note 9, at 695. For a discussion of the rights accorded aliens in Europe, see E. Thomas, Immigrant Workers in Europe: Their Legal Status 244 (1982); Chaney, Migrant Workers and National Boundaries: The Basis for Rights and Protections, in Boundaries: National Autonomy and Its Limits 54-58 (Brown & Shue eds. 1981).

\(^{28}\) Imported workers remove labor bottlenecks, allow capital investment by their willingness to work second and third shifts, delay wage increases, allow domestic workers to move to more skilled jobs, make fewer demands for social services and move into and out of jobs, increasing
4. **Citizens and resident aliens working in the United States**— Resident workers, both citizens and permanent resident aliens, have an interest in the protection of their jobs, wages, and working conditions. This interest is defeated when illegal aliens displace domestic workers in available jobs but is supported when the presence of additional workers enables employers to continue employing domestic workers. Domestic workers also benefit, as do citizens, from lower prices for goods and services that result from continued operation of marginal enterprises. If such enterprises close, decreased supply would lead to higher prices. Likewise, increased wages would lead to higher prices.

5. **Sending countries**— Sending countries have an interest in the protection of their citizens from exploitation while living and working in the United States and in the continued availability of United States work for their citizens. Immigration and temporary work serve as safety valves for countries with high rates of unemployment and underemployment, easing the social and political tensions that limited job opportunities create. Remittances sent by workers in the United States aid the economies of sending countries.

Any successful solution to the problem of the presence of large numbers of illegal alien workers in the United States must consider all of these competing and overlapping interests. Each proposed solu-
tion to the presence of illegal aliens must be reviewed in terms of these competing interests.

II. ALTERNATIVES TO A TEMPORARY WORKER PROGRAM

Immigration analysts have proposed many solutions to the problems of illegal aliens. These include forced repatriation, legalization of status, closure of United States borders against future entries of undocumented aliens, employer sanctions, and several other programs. Some have also advocated simply that the status quo remain intact. Responsible participants in the policy dialogue have discussed each of these proposals. Unfortunately, the proponents of these alternatives have failed to consider the interests of all of the relevant groups, and this failure results in difficulties with each of the proposed alternatives.

A. Forced Repatriation

As one alternative, the United States might forcibly repatriate illegal aliens. This would involve locating and deporting all aliens without legal entry papers or with expired non-immigrant visas.

Implementing this alternative would incur fiscal, economic, social and foreign policy costs. This program would be expensive, due to the administrative costs involved in locating illegal aliens scattered throughout the United States, conducting deportation hearings in accordance with due process requirements and transporting aliens with insufficient money to cover their own travel costs. In addition, forced repatriation would strain judicial resources.

33. Other alternatives mentioned but not widely discussed include lowering trade barriers to encourage importation of goods from Mexico, and identifying labor intensive production systems in agriculture and industry which sending countries can implement. UNITED PRESBYTERIAN CHURCH IN THE U.S.A. & PRESBYTERIAN CHURCH IN THE UNITED STATES, MEXICAN MIGRATION TO THE UNITED STATES: CHALLENGE TO CHRISTIAN WITNESS AND NATIONAL POLICY 42 (1981).

34. INS Interior Enforcement Procedures, in STAFF REPORT, supra note 3, app. G, at 69-75 (describing procedures to locate and deport illegal aliens); Reubens, supra note 6, at 113 (arguing that forced repatriation will be difficult and expensive); Note, supra note 1, at 363 (arguing that administrative costs of forced repatriation are prohibitive). European countries have attempted repatriation programs, including cash payments to induce aliens to return home. The programs have had limited success. BOVENKERK, The Netherlands, in INTERNATIONAL LABOR MIGRATION IN EUROPE 118, 129-30 (R. Krane ed. 1979); KOELSTRA & SIMON, France, in id. at 142.

35. See Note, supra note 1, at 363-64 & n.124.

36. The Immigration and Naturalization Service pays costs of deportation to the port of entry and, in many circumstances, to the receiving country. See INA § 243(c), 8 U.S.C. § 1253(c) (1982).

37. See Gordon, Recent Developments in Judicial Review of Immigration Cases, 15 SAN DIEGO L. REV. 9 (1977) (general discussion of judicial review of immigration decisions). Goodpaster, supra note 11, at 679, describes the limited involvement of district courts in deportation procedures for illegal aliens apprehended near the Mexican border, and argues that any increased involvement would overwhelm those courts.
Economically, mass deportation of illegal workers would be disadvantageous. Agricultural and industrial enterprises currently dependent upon illegal alien labor would incur costs either in raising wages and working conditions to attract United States workers or in investing the funds necessary to convert to less labor-intensive production methods. Other marginal enterprises would fold or move to countries with lower labor costs, resulting in loss of jobs currently filled by legal as well as illegal alien workers.

A program of forced repatriation could only be accomplished at large social cost. Procedures for locating and apprehending illegal aliens would invade the civil rights of citizens and permanent resident aliens. The invasion of civil rights and the forced deportation of large numbers of individuals would alter the image of the United States as a humane country that welcomes people seeking a better life.

Forced repatriation may affect American foreign relations. Relations with countries to which the United States repatriates large numbers of illegal aliens would deteriorate. Sending countries would have to integrate returning aliens into their economy. They would also have to respond to the higher expectations for social services and political rights held by returning aliens.

In contrast, forced repatriation does meet some needs of the United States society and of the workers of the United States. It would enable the United States to enforce immigration and worker protection laws. Moreover, workers deprived of jobs filled by illegal aliens would benefit

38. Note, supra note 1, at 347 n.3, 364 (asserting that massive apprehension would require a paramilitary effort which in turn would result in violations of the civil rights of citizens and permanent resident aliens). Apprehension of all illegal aliens would require "more troops than we sent to Indochina — a patently absurd concept." Badillo, Is Amnesty for Illegal Aliens a Sound U.S. Policy? Pro, 56 CONG. DIG. 240, 242 (1977); see also Bernsen, Search and Seizure on the Highway for Immigration Violations: A Survey of the Law, 13 SAN DIEGO L. REV. 69 (1975); Fragomen, Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment, 13 SAN DIEGO L. REV. 82 (1975).

39. United States citizens and citizens of other countries have an image of the United States as a humane country which admits immigrants. INTERAGENCY TASK FORCE, supra note 6, at 230; Simpson, supra note 1, at 152.

40. Koelstra & Simon, France, in INTERNATIONAL LABOR MIGRATION IN EUROPE 133, 142 (R. Krane ed. 1979) (observing that Tunisia encountered problems when Libya sent workers home); Miller, Reluctant Partnership: Foreign Workers in Franco-Algerian Relations 1962-1979, 33 J. INT’L AFF. 219, 234 (1979) (noting that Algeria anticipated problems if France repatriated Algerian workers); Reubens, supra note 6, at 123-24 (noting the deteriorating relations with countries to which aliens return). Forced repatriation also creates conflicts for other countries to which the aliens might seek entry. Studlar, Great Britain, in INTERNATIONAL LABOR MIGRATION IN EUROPE 88, 92 (R. Krane ed. 1979) (describing expulsion of Commonwealth country citizens from Kenya and Uganda; many sought to enter England).

41. M. MILLER, FOREIGN WORKERS IN WESTERN EUROPE: AN EMERGING POLITICAL FORCE (1981) (arguing that guest workers develop increased expectations of living standards and political participation).
from forced repatriation. Forced repatriation would also eliminate exploitation of those illegal aliens by United States employers. Finally, countries with lower labor costs would benefit from the relocation of some United States enterprises.

Forced repatriation does not, however, meet the needs of other interested groups. It would not allow the United States to share its wealth through the purchase of excess labor from developing countries and would not meet the employers' needs for workers. Aliens would not acquire an opportunity to work temporarily in the United States and many aliens would not have a significant opportunity to immigrate. Forced repatriation would also result in lost jobs for United States workers in marginal enterprises that cannot raise wages or improve working conditions sufficiently to attract United States workers. Finally, forced repatriation would remove a safety valve from developing countries with high rates of unemployment and underemployment.

The effects on internal politics, United States employers, and international relations suggest that forced repatriation does not provide a viable alternative. Most importantly, though, this alternative, at most, solves the result of the problem; it does not deal with the cause of the illegal alien problem. Forced repatriation removes illegal aliens currently in the United States, but does not modify the factors that encourage aliens to enter or remain in the United States illegally. Those factors will result in recurrence of the presence of large numbers of illegal aliens.

**B. Amnesty**

Legalizing illegal alien status, usually termed amnesty, presents another alternative solution to the presence of large numbers of illegal aliens in the United States. This proposal typically involves adjustment of status to that of permanent resident alien for persons who can prove a specified length of residence in the United States. Those who do not meet the time requirement retain varying alternatives, such as participation in a temporary worker program.

Several arguments support granting amnesty to illegal aliens. Legalization eliminates a large class of law breakers by converting persons cur-

42. For descriptions of amnesty proposals, see D. NORTH, AMNESTY, CONFERRING LEGAL STATUS ON ILLEGAL IMMIGRANTS (1980); Badillo, supra note 38, at 242; Goodpaster, supra note 11, at 711; Note, supra note 1, at 363.


44. See, e.g., Sinkin, Weintraub & Ross, supra note 17, at 348 (recommending an interim temporary worker program).
rently in the country illegally into legal residents. It solves the problems that flow from illegal status, such as vulnerability to exploitation. It meets employers' current needs for unskilled and semi-skilled workers. Aliens already in the United States retain access to its higher wages and acquire the opportunity to remain permanently. Amnesty also protects United States workers from competition with workers fearful of deportation.

There is some question whether an amnesty program would legalize the status of a significant number of aliens. Experiences with amnesty programs in other countries\(^46\) indicate that success depends on the form of notification, extent to which organizations traditionally serving aliens support the amnesty program, and the extent to which benefits to aliens from the amnesty program outweigh harms resulting from continued illegal status. Furthermore, amnesty programs work only to the extent that potential participants apply for amnesty. Applying, however, involves alerting the government to one's status as an illegal alien. If the government subjects aliens who apply — but whom the government finds ineligible — to harsh penalties, this will discourage aliens from seeking amnesty.

An amnesty program also suffers from some disadvantages. Amnesty limits sharing the United States wealth to those aliens who have been present in the country for a specified time period. Other aliens do not have the opportunity to earn United States wages or to immigrate for permanent settlement, except through the family preference and limited worker preference provisions. In addition, persons adjusting to permanent resident alien status would acquire the right to admit immediate relatives, mushrooming legal immigration.\(^47\) The resulting United States population growth imposes pressures on natural resources.\(^48\)

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48. See Goodpaster, *supra* note 11, at 712 (noting the depletion of natural resources resulting from the greater size of the U.S. population); see also Senate Staff Report, *supra* note 1,
more importantly, however, general amnesty may encourage future illegal immigration. The belief that the United States will respond in the future to the presence of illegal aliens with amnesty may encourage aliens facing long waits for immigrant visas to enter illegally.49

Amnesty, like forced repatriation, may solve the problem of illegal aliens currently in the United States, but does not address the factors causing the accumulation of large numbers of illegal aliens.50 Unless the government controls the flow of illegal aliens through closer enforcement of time limits on the stays for non-immigrants and stricter enforcement of immigration laws at the borders and ports of entry, the amnesty program will fail to solve the longterm problem of illegal aliens.

C. Border Closure

Closing the border involves prevention of entry except at immigration inspection stations. In addition, it requires greater scrutiny of the documents of all persons seeking to enter the United States.

Border closure will meet some of the needs of interested groups. Closing the borders would enable the United States to enforce its immigration and worker protection laws and would prevent the development of a class of workers with limited rights. Border closure would, indirectly, protect aliens from exploitation by United States employers, and would protect legal workers from competition with illegal aliens.

Closure of United States borders does, however, entail significant disadvantages. The civil rights violations necessary to enforce border closure would harm the United States as a society.51 Also, the United States could not redistribute wealth through the purchase of labor from less developed countries. Moreover, employers would lose access to willing workers, and their responses might result in a reduction of jobs

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50. Jobs draw immigrants. Goodpaster, supra note 11, at 652; Scanlan, Immigration Law and the Illusion of Numerical Control, 36 U. MIAMI L. REV. 819, 846 (1982); Note, supra note 1, at 358. Other factors in sending countries also induce immigration. Krane, INTERNATIONAL LABOR MIGRATION IN EUROPE 4 (R. Krane ed. 1979) (citing urbanization and imbalance in regional development as factors inducing immigration); Goodpaster, supra note 11, at 665 (arguing that reports by returning migrants encourage immigration); Scanlan, supra at 844 (arguing that wage disparity and the mobility of populations facilitates immigration); Simpson, supra note 1, at 154 (describing population growth and economic stagnation as influencing immigration).

51. See Reubens, supra note 6, at 128 (arguing that border closure results in civil rights violations).
available to legal workers or a rise in prices for goods and services. Finally, many aliens would not have the opportunity for temporary United States work or permanent immigration, and sending countries would lose the safety valve of sending workers to the United States.

Closing United States borders to all entry would also create administrative, social, and foreign relations costs. The Immigration and Naturalization Service (INS) must bear the significant administrative cost of closing the border. Stricter inspection at ports of entry and along the thousands of miles of United States borders with northern and southern neighbors would require more INS officers. Changes in border patrol methods and perhaps in the open state of the border might prove necessary.

A variety of social costs parallel the administrative costs. Citizens of the United States may object to the invasion of rights and privacy of citizens and permanent resident aliens necessary to the screening of all entrants. Actions necessary to close the long stretches of open borders, resembling actions by other governments to prevent their citizens from crossing borders, would also raise concerns. Further, sending countries might object to treatment of their citizens seeking entry to the United States. Finally, other third world countries might categorize border closing efforts as a denial of responsibility to share United States wealth with less developed countries.

Many illegal aliens enter the United States on non-immigrant visas and remain beyond the time authorized by those visas, requiring enforcement of non-immigrant visa time limits to eliminate increases in the numbers of illegal aliens. Enforcement of visa time limits would require different actions from those required to close the borders but would create similar burdens. Enforcing visa time limits would also meet interests parallel to those met by border closure.

D. Employer Sanctions

Proposals for employer sanctions address one of the major pull factors drawing illegal aliens to the United States, the opportunity to work. Although specific proposals vary, all impose a penalty on persons

52. See D. North, Review of Options, supra note 14.
53. For a description of current border enforcement procedures, see INS Border Enforcement Procedures, supra note 34, at 77.
54. See Congressional Research Service, supra note 4, at 60; Comment, supra note 13, at 465.
55. For a description of current internal enforcement procedures, see INS Interior Enforcement Procedures, supra note 34.
56. For discussions of employer sanctions, see Lansing & Alabart, supra note 19; Loeff, Report of the Select Commission on Immigration and Refugee Policy Task Force on Work Eligibility/Employer Responsibility, in Staff Report, supra note 3, app. E, at 377; Notre Dame Pro-
employing illegal aliens. Some proposals punish only "knowing" employment of illegal aliens. Much of the dispute about employer sanctions focuses on the methods by which employers will verify the legal status of job applicants. Alternatives include a worker identity card and a computerized data bank of information about workers.

Proponents argue that employer sanctions would meet the United States need to reduce the number of illegal aliens. An employer sanction program would encourage employers to hire domestic workers by increasing the cost of hiring illegal aliens. Aliens, without the pull of United States wages, would not enter illegally. This would, necessarily, avoid exploitation of aliens by United States employers and would protect legal workers from competition with illegal aliens.

Acknowledging that an effective employer sanction program would eliminate the incentive for illegal aliens to seek work in the United States, opponents of such a program point to associated costs. Disseminating information about potential employees may have deleterious effects on civil liberties. The potential for government abuse of any information system provides a strong reason for extreme caution in implementing an employer sanction program. The establishment of such a system would also be expensive. Employers would face paperwork costs in verifying applicants' status and maintaining records of that verification. Members of various ethnic groups may be

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58. Several proposals provide a statutory defense if the employer proves that he saw appropriate identification. Notre Dame Project, supra note 21, at 613 & 631; Comment, supra note 13, at 459.

59. Scanlan, *supra* note 50, at 845 (discussing other, admittedly less effective, alternatives).

60. See *CONGRESSIONAL RESEARCH SERVICE, supra* note 4, at 58; *SENATE STAFF REPORT, supra* note 1, at 8-9; Sinkin, Weintraub & Ross, *supra* note 17, at 345.


63. Recent Developments, *supra* note 62, at 414 (discussing paperwork costs to employers).
discriminated against by employers unwilling to risk hiring an illegal alien. 64

Employer sanctions also do not meet the interests of aliens or of sending countries. Illegal aliens will lose the opportunity to work at United States wages, even for temporary periods of time as illegal entrants. Employer sanctions will also eliminate the ability of sending countries to alleviate their problems of unemployment and underemployment.

Opponents of employer sanctions also raise issues concerning enforcement. 65 Countries with employer sanctions have not consistently enforced those laws. 66 Factors inhibiting enforcement include limited staff allocation, limits on communication between the enforcement agency and other agencies that may have information useful to the enforcing agency, and constraints on investigative techniques. 67 An enforced employer sanction program imposes high civil rights and privacy costs on illegal aliens and legal workers alike without solving the underlying problem of the presence of large numbers of illegal aliens.

E. Retain the Status Quo

Retaining the status quo, failing to escalate responses to the illegal alien problem, presents a final alternative. 68 This alternative has the political attractiveness of not requiring a change in policy. It meets the needs currently served by illegal immigration: employers have access to a pool of willing workers and aliens have access to work at United States wage levels.

Ignoring the problem, however, fails to meet the needs of several interest groups. The United States inadequately enforces immigration and other laws. Aliens continue to enter or remain illegally, may be exploited by employers, and have limited access to social service pro-

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64. Employers may use the threat of penalties to justify actions which constitute discrimination against members of ethnic groups associated with high levels of illegal aliens. Goodpaster, supra note 11, at 704; Comment, supra note 13, at 460.

65. Employers may evade responsibility through subcontracting arrangements. Light penalties will become a cost of doing business. GENERAL ACCOUNTING OFFICE, INFORMATION ON THE ENFORCEMENT OF LAWS REGARDING EMPLOYMENT OF ALIENS IN SELECTED COUNTRIES 2 (1982). Enforcement requires employer cooperation. Scanlan, supra note 50, at 844. Many employers will, however, comply voluntarily. CONGRESSIONAL RESEARCH SERVICE, supra note 4, at 57.

66. GENERAL ACCOUNTING OFFICE, supra note 65, at 2. The "knowing employment" requirement in the Canadian law led the enforcement agency to focus initial activities on educating employers. Id. at 3. Large German employers contracted with smaller exempt firms to provide workers. Id.

67. Id. at 2.

68. Legislative inaction and the budget process tend to maintain the status quo. Keely, The Development of U.S. Immigration Policy Since 1965, 33 J. INT'L AFF. 249, 261 (1979). The status quo is always changing, however, because of the number of new immigrants each year. Gregory, supra note 20, at 289.
grams. Legal workers face continued competition from illegal aliens. Sending countries retain the option for their citizens to seek work in the United States and for remittances from those workers, but only at the cost of limited protection for those citizens. In light of the growing concern about the numbers of illegal aliens and their effects on United States society, this alternative becomes increasingly difficult to defend.

III. DESIGNING A TEMPORARY WORKER PROGRAM: FROM CURRENT PROPOSALS TO A MODEL STATUTE

Several proposals for temporary worker programs have been developed. These include proposals to (1) expand the existing H-2 program, (2) provide interim temporary worker programs to help employers adjust to a smaller labor pool, and (3) implement temporary worker programs of indefinite duration. Unfortunately each of these various proposals leaves some significant problems unsolved.

A. Expanded H-2 program

One proposal advocates expansion of the current H-2 temporary worker program.69 This small program currently provides approximately 30,000 workers annually to a limited number of agricultural employers.70 An employer requests the Department of Labor to certify that qualified domestic workers are not "available and willing to work."71 Based on that certification, the INS provides visas for temporary workers, whom the employers may then recruit.72 Dissatisfied employers may send workers home or reject specific workers,73 giving workers a strong incentive to please employers. H-2 workers arrive without dependents,74 remain in the United States for relatively short periods of time,75 and leave the United States at the conclusion of their work assignments.76

69. The Simpson-Mazzoli bill includes a proposal to expand the H-2 program. See Senate Staff Report, supra note 1, at 44.
72. The sending country is sometimes involved in recruitment of workers. D. North, supra note 70, at 57.
73. Employers may request H-2 workers by name, send workers home and receive replacement workers, and "blacklist" a worker, preventing that worker from ever entering the United States on another H-2 nonimmigrant visa. Id. at 57-58.
74. Migrant Legal Action Program, supra note 3, at 48.
75. H-2 agricultural workers receive visas for a few weeks to a few months. D. North, supra note 70, at 57.
76. H-2 workers do not overstay their visas to join the pool of illegal aliens in the United States. Reubens, supra note 6, at 118.
The federal government excuses employers from withholding social security and federal income taxes and from contributing to social security taxes, but employers still must pay a minimum wage and provide working conditions approved by the Department of Labor. Nonetheless, the right of employers to send workers home for unsatisfactory conduct severely limits the ability of H-2 workers to organize for collective action, a right that the National Labor Relations Act grants to all workers.

An expanded H-2 program would provide some benefits. It would enable the United States to distribute wealth to less developed countries by employing workers from those countries. Employers would have continuing access to needed workers, though accompanied by the costs and delays associated with Department of Labor certification of worker need. Foreign workers would have the opportunity to earn United States wages and sending countries would have the option of United States employment for their surplus workers.

Without greater protection of the rights of H-2 workers, however, the wealth distribution resulting from such an expanded program would occur at the expense of creating a larger group of second-class workers. As employers sought the lower labor costs accruing from employment of H-2 workers, they might systematically exclude United States workers from some forms of employment. H-2 workers would not enjoy many of the rights accorded United States workers and would not acquire any greater opportunity to immigrate to the United States. Sending countries would have some, but limited, control over the rights accorded their citizens working in the H-2 program.

Expansion of the H-2 program would aggravate a number of problems. An employer paying equal wages to H-2 and United States workers saves at least nine percent of labor costs for H-2 workers by the exemption of employer contributions to social security taxes. This in effect confers a bonus upon employers for hiring foreign workers. Indeed, under the present H-2 program, some employers may refuse to hire United States workers while awaiting Department of Labor certification of the unavailability of United States workers.

Further, because the continued employment of H-2 workers depends on employer satisfaction with all aspects of their behavior, employers may exten-

77. D. North, supra note 70, at 59; Migrant Legal Action Program, supra note 3, at 43.
78. The Department of Labor establishes adverse wage rates, based on prevailing wages. Employers must offer H-2 workers those wages and working conditions. Fraade & Arton, supra note 71, at 250; Migrant Legal Action Program, supra note 3, at 44.
80. D. North, supra note 70, at 59. Martin & Houstoun, supra note 17, at 324 (estimating that employers save 25% to 35% of wage payments).
81. Migrant Legal Action Program, supra note 3, at 51.
sively exploit such workers through inadequate recording of working time, overcharging for inadequate housing and meals, and withholding of wages earned.\textsuperscript{82} Finally, an extended H-2 program would increase administrative costs in determining the unavailability of United States workers.\textsuperscript{83}

The administrative problems and the potential for worker exploitation involved in an expanded H-2 program render it an undesirable alternative. Consequently, the model temporary worker program proposed in this Note does not incorporate an expansion of the H-2 program. Further the model program does not exempt employers from payment of social security and other taxes, restrict workers to single employers, or involve the Department of Labor in certifying the shortage of workers for specific jobs.

**B. Interim Temporary Worker Programs**

Interim temporary worker programs, designed to exist for only a few years,\textsuperscript{84} serve two purposes. First, interim programs provide an alternative to forced repatriation for aliens ineligible for amnesty because of time limits or because of failure to meet a continuous residence requirement.\textsuperscript{85} Second, such programs provide an adjustment period for enterprises now dependent on an illegal alien work force.\textsuperscript{86}

An interim temporary worker program, however, is a poor complement to amnesty. The program may not provide a sufficiently strong incentive to encourage illegal aliens to apply for amnesty. Aliens applying for amnesty will no doubt consider the government's response to those applicants who do not meet the eligibility requirements. An ineligible illegal alien may face only the alternatives of deportation or participation in a temporary worker program. Illegal aliens who want to immigrate will have little incentive to risk identifying themselves to the federal government to determine their eligibility for amnesty. The alternative of temporary work in the United States offers an incentive only to those illegal aliens who wish to remain in the United States for temporary work purposes.\textsuperscript{87}

\textsuperscript{82} D. North, supra note 70, at 86.

\textsuperscript{83} Migrant Legal Action Program, supra note 3, at 19 (describing costs of Department of Labor certification); see also Rodino, The Impact of Immigration on the American Labor Market, 27 RUTGERS L. REV. 245 (1974) (describing the labor certification program).

\textsuperscript{84} See, e.g., Sinkin, Weintraub & Ross, supra note 17, at 349 (recommendating five years).

\textsuperscript{85} Cook, supra note 19, at 338; Sinkin, Weintraub & Ross, supra note 17, at 348.

\textsuperscript{86} Goodpaster, supra note 11, at 718 (describing the need for interim provisions for employers currently dependent on illegal alien workers).

\textsuperscript{87} Cornelius, Legalizing the Flow of Temporary Migrant Workers from Mexico: A Proposal, in STAFF REPORT, supra note 3, app. F, at 307, 309. Some proposals do include the right to adjust to permanent resident status as an incentive for aliens interested in permanent settlement in the United States. Id. at 313.
Interim programs cause numerous other difficulties. They do not allow the United States to distribute a portion of its wealth by purchasing labor from other countries, or provide a continuing supply of labor. In addition, they do not enable aliens to enter the United States labor market in future years.

In order to avoid these difficulties, this Note proposes a model program of indefinite duration, providing continuous alien access to the United States labor market.

C. A Temporary Worker Program of Indefinite Duration: Structuring A Model Program From the Proposed Programs

Proposed temporary worker programs of indefinite duration represent a range of possible program structures. The model program proposed in this Note, designed to meet the needs of the interest groups, combines the strong features of the several proposed temporary worker programs. A number of differing features in these programs must be considered to determine which program can best serve aliens and sending countries, while advancing the interest of the United States, its labor force and private employers.

1. Freedom of job movement—The freedom of temporary workers to change jobs largely defines the rights and liberties of those workers. Nonetheless, most temporary worker programs allow little freedom of job movement. One proposed program would restrict temporary workers to sectors of the economy that would otherwise experience worker shortages. Another proposal recommends the issuance of visas to workers with specific contracts in the United States. Other proposals provide temporary workers more complete freedom of job movement.

The model program proposed in this Note, recognizing the relationship between freedom to change jobs and other worker rights, places no restrictions on worker access to jobs. This decision prevents the

88. Interim proposals limit future entry of workers. Yet some experts predict a United States shortage of low-skilled workers. The extent to which enterprises currently dependent on illegal alien labor will adjust by raising wages or investing in less labor-intensive production methods, rather than closing or moving to countries offering less costly labor, remains subject to debate. Interim programs rest, however, on the assumption that enterprises will remain in the United States and will hire more domestic workers.

89. See, e.g., Cornelius, supra note 87; Gregory, supra note 20; Mines, A Temporary Work Permit Program for Mexicans (1979), in STAFF REPORT, supra note 3, app. F, at 327.

90. The restriction to specific employers encourages exploitation of H-2 workers. D. NORTH, supra note 70, at 57; Sinkin, Weintraub & Ross, supra note 17, at 351; Briggs, supra note 17, at 154.

91. Sinkin, Weintraub & Ross, supra note 17, at 350-51 (recommending restriction of temporary workers to sectors of the economy certified by the Department of Labor as needing workers).

92. Gregory, supra note 20, at 303.
institutionalization of a second class of workers. It also eliminates the need to increase enforcement of worker protection legislation to protect temporary work visa holders from exploitation.

2. Number of visas—If a temporary worker program seeks to preempt illegal migration for work, it must allow for a sufficient number of visas to meet the needs of United States employers for workers\(^\text{93}\) and must provide potentially illegal entrants with the likelihood of legal admission. Long waits for receipt of temporary work visas will not draw potentially illegal entrants into the legal program.

Several proposals recommend that the determination of the number of visas issued in any year would rest upon an assessment of the needs of United States employers.\(^\text{94}\) Another proposal recommends that the needs of the sending country also be considered in determining the yearly number of temporary worker visas.\(^\text{95}\)

The model temporary worker program proposed in this Note recommends issuance of 500,000 temporary work visas during the first year, a number large enough to encompass the majority of estimated yearly illegal entrants. The model program also provides yearly adjustments in the numbers of visas issued, based on information collected by the Department of Labor about United States labor needs. Due to the inadequacy of current information, the model program includes a provision for the Department of Labor to develop a new data collection system.

3. Visa time period—Temporary worker proposals specify the time period of each visa, ranging from six months\(^\text{96}\) to two years.\(^\text{97}\) If the proposal anticipates that temporary workers will fill jobs that are temporary or seasonal in nature, the time span provided should reflect that decision.

Several conflicting policies influence the decision about the length of stay for each visa. Short stays provide a limited time for workers to locate jobs and recover travel costs, decreasing the potential savings workers can realize from each trip. Workers with a limited time to earn United States wages may prove more willing to accept unsafe working conditions in return for higher wages, undercutting efforts to improve worker safety.

On the other hand, longer stays result in more disruption of family relationships if visa holders may not bring their families. Longer stays

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93. The recommended numbers range from 50,000, see Sinkin, Weintraub & Ross, supra note 17 at 350, to 750,000, see Cornelius, supra note 87, at 316.
94. Cornelius, supra note 87, at 315; Sinkin, Weintraub & Ross, supra note 17, at 351.
95. Sinkin, Weintraub & Ross, supra note 17, at 348.
96. Cook, supra note 19, at 339.
also weaken ties with the home culture and increase the chance that the worker will develop expectations dependent on United States culture.

The model program proposed in this Note incorporates a moderate alternative in which visas would remain valid for twelve months of work over a twenty-four month period. The twelve months do not have to be consecutive, providing flexibility for aliens who want to alternate between working in the United States in seasonal agricultural jobs, and working in the home country during seasonal periods of limited United States agricultural employment.

4. Adjustment of status—For aliens who want to immigrate to the United States, the opportunity to acquire an immigrant visa would offer a strong incentive to participate in a legal temporary worker program rather than to enter the United States illegally. Some proposals include provisions allowing for the eventual adjustment of status to permanent resident alien after participation in the temporary worker program.98

The model program proposed in this Note also facilitates the desire of some aliens to immigrate. Aliens may renew their temporary work visas and may apply for adjustment of status to permanent resident alien after five years of participation in the temporary work program.

5. Exit checking system—Many illegal aliens who initially entered the United States legally have overstayed the time allowed by their visa. To avoid a repetition of this pattern, a temporary worker program must insure that aliens entering on temporary worker visas leave at the expiration of those visas.

The enforcement of exit requirements occurs more easily when workers are bonded to specific employers, as with the H-2 program. In light of the negative aspects of restricting workers to single employers, however, the solution embodied in the H-2 program is inadequate. Alternative means of assuring timely departure have been recommended. The implementation of a computerized record-keeping system for temporary worker visas would aid in monitoring the exit of temporary workers.99 Some proposals prohibit the issuance of another visa, for temporary work or permanent immigration, to aliens who fail to leave at the termination of their temporary visa period.100 Other proposals incorporate stronger pressures to abide by the visas time limit. One proposal decreases the number of new visas available to a sending country for each visa that has not been turned in at expiration.101 Another

98. See Cook, supra note 19, at 340; Cornelius, supra note 87, at 313; Gregory, supra note 20, at 304; Mines, supra note 89.
100. Id. at 311.
101. See Reubens, supra note 6, at 123.
builds on the social structure of the aliens’ sending community: when one temporary visa holder exits, turning in a visa, that visa would be issued to an individual whom the first visa holder nominated at the time of the initial visa application. An alien who knows that a relative or neighbor will receive a visa only after his return has a strong incentive to turn in the temporary work visa and return home.102

The model program proposed in this Note, recognizing the role of social pressures and the potential contribution of the sending countries to encouragement of return migration, provides for a decrease in the number of new visas available to a sending country for those aliens who overstay their temporary work visa. The model program incorporates a computerized system for monitoring the entry and exit of temporary visa holders and prohibits the issuance of new visas to persons who have overstayed a temporary work visa.

6. Admission of dependents—The admission of dependents of aliens raises numerous issues and concerns. First, dependents increase the numbers of individuals seeking access to social services, such as health care and education.103 Second, workers whose family members move to the host country are less likely to return home. Third, aliens seeking to accumulate money will save more by supporting dependents in the sending country than in the United States. Still, the psychological costs that individual workers and their families incur because of separation during periods of United States work are a consideration in favor of admission of family members.

Current temporary worker proposals encompass a variety of alternatives, including prohibition of entry of family members,104 admission of spouse on the worker’s third temporary worker visa,105 and open admission of family members.106

The model program proposed in this Note excludes family members, due to the costs incurred in maintaining a family in the United States and the desire of many illegal aliens to remain only temporarily in the United States. Although the exclusion may impose some psychological costs on aliens seeking temporary work, the flexibility that the model program allows aliens — in the frequency of their en-

102. Mines recommends a system of revolving visas, where the second visa, upon receipt of the visa surrendered by the first temporary worker on his exit, is issued to an individual named by the first visa holder at the time of his application for a temporary work visa. Mines, supra note 89, at 334.
104. Cook, supra note 19, at 339.
105. Gregory, supra note 20, at 304.
106. Cornelius, supra note 87, at 313.
try and the duration of their stays — enables workers to return home as their earnings and savings goals permit.

7. Rights in the workplace— The various temporary worker proposals allow for the full enforcement of worker protection legislation, such as the minimum wage, to guard the interests of aliens. These proposals typically grant aliens the right to join a union, \(^{107}\) though some proposals restrict aliens from accepting jobs with employers involved in labor disputes. \(^{108}\)

The model program proposed in this Note provides full rights to organize and bargain collectively. The fundamental policy decision that organization rights accrue to all workers requires extension of this right to temporary workers. By granting temporary workers the right to join unions, the model statute provides an incentive to unions to recruit temporary workers and to safeguard their right to enforcement of health and safety legislation. The grant of the right to join a union limits any incentive employers have to exploit alien workers.

8. Social service programs— Many illegal aliens have taxes and charges for other services, such as health insurance, deducted from their pay. The majority of illegal aliens receive no benefit from these payments. Some services, such as workers’ compensation, directly relate to the worker’s participation in the work force. The value of other services, however, varies significantly. For example, the worker who cannot bring dependent children to the United States for the duration of the work permit period cannot use education services, but remains subject to the sales and property taxes that support such services. \(^{109}\)

The temporary worker proposals require employers to withhold income tax payments from wage payments and require employer and employee contributions to social service programs, such as social security. \(^{110}\) Several proposals provide, however, for a return of these funds to the alien worker in the sending country. \(^{111}\)

To avoid taking taxes as payments for services from which alien workers do not benefit, a temporary worker program must either allow access to those services or must refund payments to workers when they leave the United States. To avoid granting an undue advantage to temporary foreign workers in the competition for United States jobs, however, the payments required of employers for temporary workers must equal those required for domestic workers.

\(^{107}\) Cornelius, supra note 87, at 314; Sinkin, Weintraub & Ross, supra note 17, at 355.

\(^{108}\) Cornelius, supra note 87, at 314.

\(^{109}\) For a discussion of tax payments by illegal aliens, see supra note 14.

\(^{110}\) Mines, supra note 89, at 334 (recommending a flat 15 percent tax withheld from wages of temporary workers); Sinkin, Weintraub & Ross, supra note 17, at 354 (recommending that employers and employees contribute to social service program taxes).

\(^{111}\) Mines, supra note 89, at 334; Sinkin, Weintraub & Ross, supra note 17, at 355.
The model program proposed in this Note provides for payment of employer and employee taxes and for normal contributions to social programs. The local government continues to impose taxes, since the alien receives police and fire protection. The extensive administrative costs involved in exempting the alien from initial payment of the local tax, or in refunding any of the payments, preclude those alternatives. Those costs do not apply to payroll withholding taxes and employer contributions to federal social programs, and consequently those funds are returned to the worker in the home country. The alien must return his expired temporary work visa to obtain the refund payment. This provision equalizes employer labor costs, does not charge the alien for services from which the alien receives no benefit, insures the alien of accumulated savings at the conclusion of the work period, and provides an incentive for the alien to return to the home country to collect his savings.

D. Those Affected by Temporary Worker Programs

Temporary worker programs meet several of the needs of the interested groups — society, employers, aliens, workers, and sending countries. Proponents argue that temporary worker programs would enable the United States to enforce its immigration and worker protection laws while meeting the need for unskilled and semi-skilled workers. Temporary worker programs would also enable the United States to distribute a portion of its wealth to less developed countries by purchasing surplus labor from those countries.

Employers would have continued access to a large labor pool. By granting job mobility to temporary workers, the program would avoid the costs incurred by employers and the government in certifying labor shortages.

Aliens would acquire an opportunity to earn United States wages free from fear of deportation. The temporary workers would enjoy the rights, protections, wages, and working conditions accorded domestic workers.

Aliens holding temporary work visas would have restricted rights to social services, but would receive notice of those limitations before applying to enter the program. Aliens would gain the opportunity to immigrate. A temporary worker program would protect legal workers from unfair competition by illegal aliens willing to accept substandard wages and working conditions.

Sending countries would retain the benefits of immigration. They would receive relief from pressures resulting from unemployment and underemployment and would pass income to poorer portions of the population through temporary worker remittances. In addition, they would have a greater guarantee of the protection of the rights of their citizens while they work in the United States.
Temporary worker programs do not, however, meet all the needs of all interest groups. Aliens participating in a temporary worker program would face some restrictions on their work, such as length of time in the United States, access to social services, and entry of family members. Domestic workers would face competition from temporary workers. Still, although that competition might retard wage increases, it might also retard conversion to labor-saving production methods which result in an overall loss of jobs. Moreover, the temporary workers, freed from the fear of deportation, would not depress wages and working conditions by accepting work under exploitive conditions. Finally, sending countries would continue to experience the loss of enterprising workers and would encounter rising expectations among returning workers and their dependents.

Despite these drawbacks, a temporary worker program of indefinite duration presents the best resolution of the competing interests and values. Conflicting economic arguments about the positive and negative effects of large numbers of illegal workers on the economy do not support a major change in the numbers of available workers by elimination of illegal aliens from the work force. A carefully designed temporary worker program provides for a continued supply of workers while protecting the interests of United States society, employers, domestic workers, the aliens themselves, and sending countries.

IV. Model Temporary Work Program

STATEMENT OF PURPOSE AND POLICY

Finding that public policy requires a response to the growing number of illegal aliens;

that stricter enforcement of immigration laws serves the public interest;

that the United States benefits from immigration;

that the economy requires a continued supply of unskilled and semi-skilled workers which current population patterns will not provide;

that provision of opportunities for citizens of less developed countries to sell their labor at high United States wages benefits those workers and improves diplomatic relations with less developed countries;

that the present immigration system provides limited opportunity for aliens without family members in the United States to immigrate;

that aliens working illegally in the United States are subject to exploitation;

that workers who, because of a fear of deportation, accept wages and working conditions below the minimum statutory levels subject legal workers to unfair competition;

and that countries whose citizens become illegal aliens in the United...
States have an interest in continued access to United States labor markets for their citizens and in protection of the rights of those citizens while working in the United States; this legislation amends the Immigration and Nationality Act by providing for a continuing program of admission of temporary workers. This amendment is intended to operate in conjunction with a program of sanctions for employers who hire aliens not authorized to work in the United States and an amnesty authorizing adjustment to permanent resident alien status for illegal aliens in continuous residence in the United States for the requisite number of years.

SECTION 1: DEFINITIONS

For the purposes of the Act, the following words and phrases shall, unless the context clearly indicates otherwise, have the meanings ascribed to them in this section:

(a) "Temporary worker" means a person within the United States on a visa issued pursuant to this Act, authorizing the individual to seek and hold employment during the time period specified in the visa document.

(b) "Adjustment of status" means adjustment to permanent resident alien status, with all rights associated with that status, including the right to petition for admission of immediate relatives and the right to apply for citizenship.

(c) "Visa abuse" means violation of terms of a visa by remaining in the United States illegally at the expiration of the time period for which a visa was issued, or working while holding a visa that does not authorize the visa holder to work in the United States.

(d) "Temporary work visa" is a visa authorizing the holder to reside in the United States for a total of twelve months, not necessarily consecutive, during the twenty-four months for which the visa is valid and to hold any job except jobs vacant due to a labor dispute.

(e) "Rule making procedures" refer to relevant portions of the Administrative Procedure Act, Public Law 404-79th Congress, as amended.

SECTION 2: INITIAL ISSUANCE OF VISAS

In the first year of this program, the Immigration and Naturalization Service may issue a maximum of 500,000 temporary work visas under this program. Aliens who do not meet the amnesty requirements may
apply for temporary work visas. During the first year, visas will be issued within the United States, upon application, to aliens present in the United States at the time of passage of this legislation. In the second and subsequent years, visas will be issued in sending countries through normal visa-issuing channels.

Comment

The temporary worker program is intended to fill employers' labor needs, while limiting the opportunity for undocumented aliens to work. The program must consequently provide a number of visas roughly equivalent to the number of new illegal alien worker entrants each year. A figure of 500,000 visas complies with estimates from several sources. Limiting first year visas to aliens currently in the United States without documentation provides an alternative to deportation for persons ineligible for the amnesty program. The restriction to aliens in the United States at the time of passage of the legislation should serve to prevent an influx of aliens seeking immediate access to temporary work visas.

SECTION 3: RENEWAL OF VISAS

At the conclusion of a twenty-four month period, aliens may apply for another temporary work visa. Individual aliens will be eligible for a temporary work visa only once in each twenty-four month period. The alien may apply at the United States consulate in the sending country or, if the alien is in the United States prior to the expiration of one visa, at a regional office of the Immigration and Naturalization Service.

Comment

This provision seeks to enable aliens without specialized skills or family members in the United States to acquire an immigrant visa. The number of years of temporary work required for adjustment to permanent resident alien status (see Section 7) necessitates receipt of multiple temporary work visas.

The restrictions on the frequency with which individual aliens can obtain visas serves two purposes. First, the restriction distributes available visas among applicants within a sending country. Second, the restriction encourages aliens who have spent a period of time working in the United States to renew work and social ties to their home community.

SECTION 4: NUMBER OF TEMPORARY VISAS

In the first year and each year thereafter, the Attorney General, after
consultation with the Secretaries of Labor, Agriculture, and State, will establish a maximum number of temporary work visas to be issued during the following twelve month period. The Attorney General shall consider the supply of labor available in the United States, the desires of the governments of countries from which individuals have sought temporary work visas, and recommendations from the several Secretaries. This list does not exhaust the factors the Attorney General may consider.

Comment

The temporary work program serves the need for workers that the supply of domestic workers does not and probably will not meet. It serves neither as a temporary response to stricter enforcement of the immigration laws nor as an interim solution to the status of illegal aliens ineligible for adjustment of status to permanent resident alien.

The program directs the Attorney General to establish, through formal rule making procedures in accordance with the Administrative Procedure Act, the methods and criteria relevant in establishing the number of visas to be issued. The Attorney General retains the discretion, however, to make the final determination of the number of visas.

SECTION 5: AUTHORIZATION UNDER THE VISA

The temporary work visa authorizes the holder to enter the country for a total period of twelve months during the twenty-four months for which the visa is valid. The temporary work visa holder may search for and hold any job, except that the temporary work visa holder may not replace workers engaged in a labor dispute. The Secretary of Labor shall establish, through rule making procedures, regulations for enforcing this exemption.

Comment

The twelve month time period serves as a compromise between competing interests. The workers would favor more time in the United States, because that would offer greater job opportunities and would enable them to achieve a higher return for their investment of time and trouble in obtaining a temporary work visa. Labor unions seeking to organize these workers would also desire longer work periods during which temporary work visa holders could participate in union activities. Employers would also want to retain workers once they have been trained. All of these interests argue for a longer period of work for each visa holder.
Various factors, however, militate toward a shorter time period. The exclusion of family members, discussed in the comment to section 9, would dissuade many workers from remaining for an extended period. A shorter stay would also result in less assimilation to the United States and therefore in less desire to immigrate.

The program rejects restrictions on temporary work visa holders' job freedom. They may compete with domestic workers for jobs. Still, the rights of domestic workers to strike for better wages and working conditions, and to protest alleged unfair labor practices, deserve protection. This provision prohibits temporary workers, whose desire to earn relatively high United States wages during their twelve months of eligibility may encourage them to take any job, from seeking employment in jobs vacant because of labor disputes.

SECTION 6: ADJUSTMENT OF STATUS

(a) Aliens who have worked a total of sixty months in the United States will be eligible, upon application, for adjustment of status to permanent resident alien. Application for a refund of tax money in accordance with the provisions of section 8 does not preclude later application for adjustment of status.

(b) Once status has been adjusted in accordance with (a), these aliens shall have all rights accorded to any permanent resident aliens. Visa numbers for such aliens shall count against the total number for the sending country in the year in which any alien receives such adjustment of status.

Comment

This provision offers a legal alternative to those persons who desire to immigrate, thereby lessening the pressure on those aliens to overstay their temporary work visa period. It also provides an immigration opportunity to aliens with limited skills and no family ties in the United States.

SECTION 7: RETURN OF TEMPORARY VISAS PRIOR TO ISSUANCE OF NEW VISAS

The total number of visas available to any country in any year will be decreased by the number of expired temporary work visas issued to citizens of that country which have not been returned to the Immigration and Naturalization Service or a United States consular office.
Comment

This provision enlists the interests of the sending countries in encouraging their citizens holding temporary work visas to comply with visa time limits. This provision also imposes a ceiling on the total number of temporary workers from any one country. The total number of workers with valid and expired visas will be equal to or smaller than the number of visas allocated to that country.

SECTION 8: PENALTIES FOR VISA ABUSE

(a) Any worker found guilty of overstaying his or her temporary work visa will not be eligible for adjustment of status to permanent resident alien, receipt of an immigrant visa, or receipt of another temporary work visa.

(b) The Attorney General shall develop and implement a system for documenting the entry and exit of aliens holding temporary work visas.

(c) The Attorney General shall have the power to waive this penalty in the event that circumstances warrant, in accordance with regulations the Attorney General shall develop under APA rule making procedures.

Comment

This section requires the implementation of a comprehensive system to document the entry and exit of aliens under temporary work visas. Modern information processing capabilities should enable the Attorney General to develop and implement such a system.

The Attorney General holds the discretionary authority to waive the restriction of this section in individual cases. This provision expressly grants this authority to enable the Attorney General to modify the potentially harsh effects of this section of the statute.

SECTION 9: DEPENDENTS EXCLUDED

Aliens may not bring or send for spouses or dependents during their stay on a temporary work visa.

Comment

Because the temporary work visa holder remains in the United States for a relatively short period of time, the hardships involved in separation from family members are of similarly short duration. This provi-
sion also encourages the visa holder to return home at the end of the visa period. Finally, this provision limits costs that local and state governments might incur as a result of the temporary worker program.

SECTION 10: TAXES AND OTHER PAYMENTS

(a) Employers of aliens holding temporary work visas shall be responsible for normal payments and withholdings required for worker's compensation; social security; and federal, state, and local income taxes.

(b) Aliens shall file federal income tax returns. The consular office shall so inform workers when they apply for a temporary worker visa and shall provide assistance in the filing of such tax returns. The Internal Revenue Service shall assist temporary visa holders in the filing of United States tax returns.

(c) Aliens earning income in the United States in any tax year under a temporary work visa who file a federal income tax return for that year will receive a tax refund from the federal government. The Attorney General shall yearly establish the amount of the refund in consultation with the Secretary of Housing and Urban Development and the Secretary of Education. This refund shall cover the costs of services for which the temporary worker visa holder is not eligible while in the United States.

(d) Temporary work visa holders may, upon return to their home country and surrender of their visa, secure their contributions to the social security system. Temporary visa holders who elect not to remove their contributions may participate in the United States social security retirement system.

Comment

This section eliminates the bonus accorded employers of H-2 workers, raising the cost to employers of hiring aliens holding temporary work visas to the level of the costs for hiring other workers. This section thus equalizes the rights of foreign and domestic workers to retirement and worker's compensation.

Aliens on temporary work visas are excluded from access to some public services, such as unemployment compensation and education for their children. To balance this limitation on worker rights, the federal government will reimburse all aliens working in the United States under a temporary work visa. The amount of this refund will be determined by the Attorney General, in cooperation with the Department of Housing and Urban Development and the Department of Education. The Attorney General will consider, among other factors, the average school
tax rate in the United States, and the cost of governmental services for which temporary work visa holders are not eligible, such as welfare and unemployment compensation.

SECTION 11: JUDICIAL REVIEW

Decisions about the status of temporary work visa holders and adjustment of status are reviewable. Review may occur in the federal district court for the region where (1) the decision appealed from occurred, (2) the alien is employed or resides, or (3) the District of Columbia.

Comment

This provision for judicial review of immigration decisions is consistent with, and is not intended to expand, current provisions in the Immigration and Nationality Act.

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