

# THE IMMIGRATION REFORM AMENDMENTS OF 1986: REFORM OR REHASH?

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## INTRODUCTION

Few doubt that reform of this nation's immigration and refugee policy requires the immediate attention of the Executive and Legislative Branches. The scope of the needed reform, however, is subject to strong disagreement. In a political compromise<sup>1</sup> that only begins to address the problems of immigration reform, the 99th Congress passed a series of immigration bills.<sup>2</sup>

The same interests that have dominated congressional debate since restrictions were first placed on immigration in 1875<sup>3</sup> controlled the 99th Congress. These include the voices of those wishing to restrict immigration<sup>4</sup> and those seeking to preserve existing immigration law.<sup>5</sup> The agricultural interest groups also forcefully argued their position.<sup>6</sup> Noticeably ineffective were those seeking to correct a host of unaddressed issues in U.S. immigration law.<sup>7</sup>

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1. See, e.g., *House Rejects Consideration of Immigration Reform Bill*, 63 INTERPRETER RELEASES 832, 833 (1986).
2. The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (the most widely publicized of the immigration bills); Immigration Marriage Fraud Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537; and Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 [hereinafter collectively cited as 1986 Amendments].
3. See Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.
4. Restrictionists were reform proponents, who argued that U.S. borders were like a sieve. See Zolberg, *Contemporary Transnational Migrations in Historical Perspective: Patterns and Dilemmas*, in U.S. IMMIGRATION AND REFUGEE POLICY: GLOBAL AND DOMESTIC ISSUES 15, 45 (M. Kritz ed. 1983).
5. Opponents of the restrictionists could be called "preservationists," as they did not propose that immigration be increased. Preservationists never controlled the debate and were relegated to arguing that immigration reform should preserve the traditional humanitarian and family reunification policies.
6. Directly and adversely affected by proposals to restrict immigration, the agricultural interest group was not interested in reform. Rather, it argued that if immigration reform was needed, it must consider employers' legitimate demands for inexpensive farm labor. The agricultural industry argued that farmers must be able to bring in harvest workers, lest crops rot in the fields. Congress had to accommodate this need or cause the cost of food products to increase dramatically.
7. The immigration laws have been criticized as being racist, antiquated, illogical and generally unfair. See U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 7-19* (1980) [hereinafter cited as CIVIL RIGHTS COMM'N REPORT]; Gordon, *The Need to Modernize our Immigration Laws*, 13 SAN DIEGO L. REV. 1 (1975);

The 99th Congress' inability to seriously address certain issues central to immigration reform should not be surprising, for the issues do not lend themselves to easy solutions. It also is of little surprise that there were few proponents of broader reform,<sup>8</sup> as U.S. immigration policies have become more restrictive since the the 1870s.<sup>9</sup> The greatest danger of the 1986 Amendments, however, is that their passage will convince Congress that it has adequately addressed the important issues.<sup>10</sup>

This piece will attempt to put the recent immigration legislation in perspective in three ways. First, it will briefly review the history of immigration reform since the McCarran-Walter Act of 1952. Second, it will describe the changes in immigration law resulting from the 1986 Amendments. Finally, it will propose reform regarding some of the important issues not addressed by the 99th Congress.

### HISTORICAL PERSPECTIVE

The United States would like to be viewed as a nation that welcomes "[the] tired . . . poor . . . [and] huddled masses . . ." <sup>11</sup> Yet its immigration laws have constantly imposed further restrictions on the admission of foreigners.<sup>12</sup> Rarely have immigration enactments intended

Hing, *Racial Disparity: The Unaddressed Issue of the Simpson-Mazzoli Bill*, 1 LA RAZA L.J. 21 (1983); Orlow, *Foreword: Immigration and Nationality Symposium*, 21 SAN DIEGO L. REV. 1 (1983); Orlow, *America's Incoherent Immigration Policy: Some Problems and Solutions*, 36 U. MIAMI L. REV. 931 (1982) [hereinafter cited as *America's Policy*]; Wasserman, *The Undemocratic, Illogical and Arbitrary Immigration Laws of the United States*, 3 INT'L LAW. 254 (1969); Watson, *The Simpson-Mazzoli Bill: An Analysis of Selected Economic Policies*, 20 SAN DIEGO L. REV. 97 (1982).

8. Americans' perception that their nation is out of control of its borders also stymies debate conducive to a more open immigration policy. Moreover, the historical trend has been toward greater restrictions, rather than a liberalization. See *infra* notes 12-14 and accompanying text.
9. An act passed in 1875 barred the admission of convicts and prostitutes. Act of Mar. 3, 1875, ch. 141, 18 Stat. In 1882, when the first general immigration laws were enacted, blatantly racist exclusion provisions banned the admission of Chinese persons. See The Chinese Exclusion Act of 1882, Act of Aug. 3, 1882, ch. 376, 22 Stat. 58. The Chinese Exclusion Act remained in force until 1943. See Act of Dec. 17, 1943, ch. 344, 57 Stat. 600. Through legislation and executive agreements, the racial exclusion grounds were expanded to include persons from the entire Asia-Pacific Triangle. See Act of Apr. 29, 1902, ch. 641, 32 Stat. 176; Act of Feb. 5, 1917, ch. 29, 39 Stat. 874.
10. The version of the bill approved by the House of Representatives, H.R. 5665, was titled "The Immigration Control and Legalization Amendments of 1986." See H.R. 5665, 99th Cong., 2d Sess. (1986). At first glance, one might conclude that the package of employer sanctions, a guest worker program and amnesty are signs that reform has arrived. Although they did not affect as many people, amnesty and guest worker programs have been used previously. See Gordon, *supra* note 7, at 3.
11. E. Lazarus, "The New Colossus" (1883) (verse inscribed on the Statue of Liberty).
12. For discussion of forces affecting attitudes on immigration policy, see Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1-3, 85 (1984); Whelan, *Principles of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447 (1983). For discussion of the historical development of U.S. immigration law and policy, see Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROBS. 213 (1956); see also C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* §§ 1.2-1.4h (rev. ed 1987).

to allow more aliens to come within our borders. This policy may be paradoxical because immigration laws represent both what the nation views itself as becoming and what it fears most.<sup>13</sup>

The reform movement culminating in the 1986 Amendments began soon after the enactment of the McCarran-Walter Act of 1952.<sup>14</sup> Immediately after Congress overrode his veto of the Act, President Truman established the Perlman Commission on Immigration and Naturalization, which made extensive recommendations for reform.<sup>15</sup>

Efforts at comprehensive reform were unsuccessful and limited to the passage of separate amendments from 1953 to 1980.<sup>16</sup> Interestingly, the reform proposals discussed by contemporary reformers and commentators bear a striking resemblance to proposals made immediately after passage of the McCarran-Walter Act.<sup>17</sup> In 1978, President Carter created the Select Commission on Immigration and Refugee Policy, which issued its final report in 1981.<sup>18</sup>

Before the creation of the Select Commission, scholars and practitioners criticized virtually every major provision of the McCarran-Walter Act.<sup>19</sup> Nevertheless, Congress could not reach a consensus on

13. At least one scholar has argued that immigration reform is elusive in part because it tugs at the emotional fabric of the nation. See Fuchs, *Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 433 (1983). See also Schuck, *supra* note 12, at 47-55.

14. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

15. See Exec. Order No. 10,392, 17 Fed. Reg. 8,061 (1952). See also H.R. Doc. 520, 82nd Cong., 2d Sess. 1-9 (1952), reprinted in 1952 U.S. CODE CONG. & ADMIN. NEWS 921-27 (President Truman's veto message to Congress).

16. See Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400; Act of Sept. 11, 1957, Pub. L. No. 85-316, 71 Stat. 639; Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 650; Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911; Act of Apr. 7, 1970, Pub. L. No. 91-225, 84 Stat. 116; Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

17. See generally REPORT OF THE PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME (1953), reprinted in 6 O. TRELLES & J. BAILEY, IMMIGRATION AND NATIONALITY ACTS LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, at Doc. 11 (1979) (some of the more important recommendations of the Perlman Commission covered such issues as the review of consular decisions, the establishment of a statute of limitations for grounds of deportation and modification of the annual quota based on the 1920 census).

The American Bar Association also made proposals similar to those of the Perlman Commission. See 10 ADMIN. L. BULL. 10-11 (1957); see also Rosenfield, *The Prospect for Immigration Amendments*, 21 LAW & CONTEMP. PROB. 401 (1956).

18. The Select Commission was established to "study and evaluate . . . existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and to the Congress as are appropriate." Pub. L. No. 95-412, § 4, 92 Stat. 907, 908 (1978).

The Commission's study was exhaustive and recommended comprehensive revisions to the Immigration and Nationality Act. For example, the Commission called for sweeping changes including international efforts, employer sanctions, changes in the immigrant preference system and judicial review. See SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, Final Report at XV-XXXII (1981), reprinted in Joint Comm. Doc. No. 8, HOUSE COMM. ON JUDICIARY AND SENATE COMM. ON JUDICIARY, 97th Cong., 1st Sess. (Comm. Print 1981).

19. See generally Chiswick, *Guidelines for the Reform of Immigration Policy*, 36 U. MIAMI L. REV. 893 (1982); Fragomen & Del Rey, *The Immigration Selection System: A Proposal for*

the proper course of action to be taken.<sup>20</sup> Passage of the 1986 Amendments may be more a tribute to the tenacity and legislative genius of the drafters than an expression of national consensus on the issue.<sup>21</sup>

### THE 1986 REFORM EFFORT

Congress' labeling legislation as "reform" does not make it so. The 1986 Amendments were not as far-reaching as any predecessor amendments before Congress.<sup>22</sup> The McCarran-Walter Act remains the core of U.S. immigration policy, and the 1986 Amendments merely continue McCarran-Walter Act policies.<sup>23</sup>

Nevertheless, the 1986 Amendments changed immigration law in two important ways. First, they created a new "tier" of alien status in

*Reform*, 17 SAN DIEGO L. REV. 1 (1979); Gordon, *supra* note 7; Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 5 (1982); Maslow, *Recasting our Deportation Laws: Proposals for Reform*, 56 COLUM. L. REV. 309 (1956); *America's Policy*, *supra* note 7; Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1 (1980); Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145 (1958).

20. The difficulty Congress experienced in the period between the issuance of the Commission's final report and the passage of the 1986 Amendments has been common to immigration legislation. For example, the McCarran-Walter Act of 1952, which remains the core of U.S. immigration law, was very controversial and was passed over the veto of President Truman. See *supra* notes 14-15 and accompanying text. Similarly, the 1917 Act was passed over President Wilson's veto. See C. GORDON & H. ROSENFELD, *supra* note 12, at § 1.2c.
21. The 1986 Amendments are what is left of bills presented in the 97th, 98th and 99th Congresses and preceding years. The Amendments have an extensive history of revisions, beginning in 1981. They have been called the Immigration Reform and Control Act; the Simpson-Mazzoli bill; the Simpson-Rodino bill; and the Simpson-Rodino-Mazzoli bill. For discussion of the history of the 1986 Amendments, see H. REP. NO. 682, 99th Cong., 2d Sess. 51-55 (1986). Only astute maneuvering and political alliances made the eventual passage of the legislation possible. See Leiden, *The Immigration Reform and Control Act of 1986: Introduction and Legislative Overview*, IMMIGR. J., Oct.-Dec. 1986, at 1, 10.
22. See Immigration Reform and Control Act of 1982, S. 2222, 97th Cong., 2d Sess. (1982); S. KLEINMAN, SPECIAL UPDATE: 1986 IMMIGRATION AND NATIONALITY ACTS 4 (1987); Schuck, *supra* note 12, at 46.
23. The nation's immigration laws still distinguish between temporary and permanent migrants. The distinction centers on the length of the aliens' intended stay. The statute presumes that all aliens intend to stay on a permanent basis. It requires them to obtain certification that they will either not enter the labor market or that their employment will not displace or adversely affect the wages and working conditions of U.S. citizens or lawful permanent residents. See 8 U.S.C. § 1182(a)(14) (1982). Alternatively, aliens may show they have the requisite family ties with a U.S. citizen or permanent resident. In addition, they must not fit into any of the categories of "excludable" aliens. 8 U.S.C. § 1182(a) (1982). For example, immigrants must show they can support themselves and that they do not have criminal records. Most importantly, they must show that the immigrant quota in the category upon which their admission is based has not been exhausted for that year.

If aliens wish to stay for a short time, they must also show admissibility under the pre-established "nonimmigrant" categories. 8 U.S.C. § 1101(a)(15)(A)-(M) (1982). Temporary migrants, or nonimmigrants, are not restricted by the annual quota and may not engage in employment unless it is of a temporary nature and restricted to certain nonimmigrant categories. See, e.g., 8 U.S.C. § 1101(a)(15)(H), (L) (1982); 8 C.F.R. 214.2(h), (l) (1987). The 1986 Amendments also allow immigration for the same categories permitted to immigrate by the 1952 Act. These include family relationships, needed foreign laborers and those admitted for humanitarian reasons.

their treatment of amnestied persons—agricultural workers and certain aliens seeking residency via marriage to U.S. citizens. Second, the Amendments increased the Immigration and Naturalization Service's search and seizure power, a change that will affect all U.S. workers and employers.

### Two-Tiered Residency

Traditionally, the treatment aliens arriving in the United States received depended on how long they intended to stay. Employment of aliens coming for a short time (nonimmigrants) is severely limited, while those coming permanently (immigrants) enjoy constitutional protections when returning to the United States.<sup>24</sup> Legislation and judicial opinions, however, have whittled away the rights of lawful permanent residents. Aliens' rights increasingly are conditioned upon their becoming part of the national community with a concomitant disgorgement of foreign allegiances.<sup>25</sup>

The 1986 Amendments continue the trend toward limiting aliens' rights in two important ways. First, it will be more difficult for aliens to stay in the United States as "permanent residents" without becoming citizens. Second, certain aliens who under prior law would have been classified as immigrants will only be granted a nonimmigrant or conditional status. This change is reflected in provisions allowing for large-scale admission of "temporary" agricultural workers and in the conditional status placed on aliens eligible for amnesty<sup>26</sup> or those who are seeking immigration benefits based upon marriage to U.S. citizens or lawful permanent residents.<sup>27</sup>

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24. See 8 C.F.R. § 109.1 (1987); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Generally, aliens may be accorded either nonimmigrant or immigrant status. Nonimmigrant status may be granted only to those meeting the statute's requirements and showing that they have a residence abroad to which they will return after their temporary stay in the United States. 8 U.S.C. § 1101(a)(15)(A)-(M) (1982). Immigrant status can only be accorded to persons who establish the requisite family ties or a specific need for their work skills in the United States. 8 U.S.C. § 1153(a)(7) (1982).

25. See Aleinikoff, *Aliens, Due Process and Community Ties: A Response to Martin*, 44 U. PITT. L. REV. 237 (1983); Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 173-80 (1983). It has been argued that the United States should adopt a "consensual" law of citizenship that limits the acquisition of U.S. citizenship by children of non-U.S. citizens or permanent residents. See P. SCHUCK & R. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 116-19 (1985).

26. The amnesty, or legalization, is designed to initially place aliens in a temporary resident status. In order to qualify, they must have resided continuously and unlawfully in the United States since before Jan. 1, 1982.

27. The Marriage Fraud Amendments provide severe penalties against aliens who marry U.S. citizens or permanent residents for the sole purpose of obtaining immigration benefits. See Pub. L. No. 99-639, 100 Stat. 3537 (1986). The provisions impose a two-year conditional residency status on *all* aliens seeking residency based upon their marriage to a U.S. citizen or lawful permanent resident. Those who marry a U.S. citizen or lawful permanent resident while in deportation or exclusion proceedings are precluded from obtaining permanent

## Search and Seizure Power

Insulated from judicial review and the normal scrutiny placed on governmental action, immigration law has maintained a unique position in our legal system. The judiciary's deference to immigration control as a regulatory, rather than penal, power<sup>28</sup> and acceptance of the notion that immigration control is an inherent foreign policy power of the federal government have granted immigration law its unique status.

The 1986 Amendments will, for the first time, bring the Immigration and Naturalization Service's enforcement power squarely within the country's borders.<sup>29</sup> Although employers do not bear the full responsibility of enforcing the law or even of reporting violators to the INS, they will become the law's indirect enforcers.<sup>30</sup> For the first time, employers are subject to penalties for immigration law violations.<sup>31</sup> All citizens, whether employers or employees, will come legally within the easy reach of INS record searches.<sup>32</sup>

residence based upon that marriage until they have resided outside of the United States for two years after the marriage. See Pub. L. No. 99-639, § 2(a), 100 Stat. 3537 (1986) (adding 8 U.S.C. § 1186). See also *Congress Passes Marriage Fraud and Consular Efficiency Bills*, 63 INTERPRETER RELEASES 904, 907 (1986); *More Details on New Marriage Fraud and Consular Efficiency Laws*, 63 INTERPRETER RELEASES 963, 964 (1986).

28. The Supreme Court, for example, has reasoned that deportation is a civil, not criminal, sanction. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). It is because of this civil character that certain governmental actions are permissible. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Mahler v. Eby*, 264 U.S. 32 (1924) (finding the prohibition against ex post facto laws inapplicable to immigration questions).
29. Although Justice Brandeis asserted that deportation was perhaps one of the worst forms of punishment for an individual to experience, constitutional arguments in favor of criminal protections for aliens in deportation proceedings have yet to succeed. *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922).
30. The control of immigration has not been a major concern for most U.S. citizens, except when they have felt directly affected by the influx of foreigners. This lack of concern for immigration laws is attributable, in part, to the fact that immigration laws do not apply to U.S. citizens. See C. GORDON & H. ROSENFELD, *supra* note 12, at § 4.5a. Americans have become more aware of the growing immigration crisis recently. This awareness may be caused, in part, by mass influxes of aliens, because of political and economic upheaval abroad and drug smuggling across the border. See Leiden, *supra* note 21, at 9. Some commentators highlight the Carter Administration's inability to account for thousands of Iranian students in the United States after the Iranian "hostage crisis" as contributing to growing awareness of the need for reform. See *id.* at 1.
31. This policy of shifting the responsibility of enforcing immigration laws is increasing. For example, the INS has promulgated regulations that will place more responsibility upon educational institutions for the enforcement of regulations governing foreign students. See 52 Fed. Reg. 13, 223 (1987) (to be codified at 8 C.F.R. § 214.2. Similar approaches have been taken in operating detention centers and in implementing the legalization program. NAT'L INST. OF JUSTICE, *THE PRIVATIZATION OF CORRECTIONS* 4-7 (1985); 52 Fed. Reg. 16,192 (1987) (to be codified at 8 C.F.R. § 103.2(c)(2) and (3)).
32. The bill makes it unlawful for any employer, irrespective of the number of persons in his employ, to hire or recruit for a fee aliens who do not have permission to work. Pub. L. No. 99-603, § 101, 100 Stat. 3359 (1986) (amending 8 U.S.C. § 1324A(a) (1982)). Employers who violate this provision may be subject to fines from \$250 to \$10,000 or imprisonment up to six months, depending on the violation. Pub. L. No. 99-603, § 101, 100 Stat. 3359 (1986) (amending 8 U.S.C. § 1324A(e) and (f)).

In order to assure that employer sanctions are effective and nondiscriminatory, the INS, in cooperation with other agencies, has been charged with developing a verifiable identification system.<sup>33</sup> The system will enable employers to ascertain whether a person has permission to work. Uncertainty remains about what form this verification system will take.<sup>34</sup>

Through employer sanctions and a national identification system, all U.S. citizens, either as employers or job seekers, will be required to prove that their employment relationship is federally permissible. To protect against the discrimination that may be caused by an employer's fear of sanctions,<sup>35</sup> the statute makes discrimination on the grounds of national origin an "unfair immigration related employment practice," and discrimination complaints may be lodged against violating employers.<sup>36</sup> Although INS activities hardly have affected domestic constituencies, the employer-sanction and discrimination provisions bring the

establish that they have reviewed a potential employee's documentation, there will be a presumption that the alien employee did not have permission to work. Employers must review the applicant's passport, certificate of citizenship or naturalization or alien registration receipt card (green card).

The circumstances that, in effect, shift the burden of proof to the INS are:

1. The employee was referred to the employer by a state employment agency.

2. The alien presented a driver's license or similar document with a photograph issued by a state for identification accompanied by the alien's social security card (if it does not contain an endorsement that it is not valid for employment purposes) or a birth certificate (or, in the case of persons under the age of 16, other documentation allowed by the Attorney General).

The employer must also have the employee or prospective employee attest, on a special form designated by the Attorney General, to the authenticity of documents used to establish identification. This attestation form must be kept by the employer and must be available for inspection by officers of the Department of Labor or the INS for three years after the date of hire or one year after termination of employment, whichever is later. Pub. L. No. 99-603, § 101, 100 Stat. 3359 (1986) (amending 8 U.S.C. § 1324(b)(3) (1982)). Employers' failure to keep the attestation forms may subject them to fines of up to \$1,000. Pub. L. No. 99-603, § 101, 100 Stat. 3359 (1986) (amending 8 U.S.C. § 1324(e)(5) (1982)).

33. In the past, the INS has had difficulty gaining access to employers' records. In some INS districts, officers were able, through a program known as "Operation Cooperation," to gain access to employers' records to determine who was and was not authorized to work. Under this program, employers believed it was better to allow an "informal" search of the records than to have a sweep of the workplace during the work day. This statutory provision, in effect, allows for warrantless searches, as it is clearly within the INS authority to review such records. See Kleinman, *supra* note 22, at 5.
34. It is not clear whether the identification system will provide cause for the INS officer who suspects that an alien is undocumented to request production of a valid document. Such questioning, if permissible, would justify inquiry until it is established that the interrogee is a U.S. citizen.
35. Opponents of the employer-sanctions provisions are concerned that employers' fear of sanctions for hiring undocumented workers may cause an inclination toward discrimination against certain job applicants because they are "foreign-looking." See *Anti-Discrimination Provisions of H.R. 3080, Joint Hearings Before the House Subcomm. on Immigration, Refugees and International Law and the Senate Subcomm. on Immigration and Refugee Policy, 99th Cong., 1st Sess. 111 (1986) (testimony of Rep. Garcia); Pub. L. No. 99-603, § 102a, 100 Stat. 3359 (1986) (adding 8 U.S.C. § 1324B(a)(1))*.
36. This provision was inserted to allay concerns that employer sanctions would cause "national origin" discrimination against certain minority groups. What constitutes an "unfair immi-

agency into direct contact with U.S. citizens. The courts likely will place greater scrutiny on INS actions in the future when U.S. citizens are the complainants.

### NEW PRESSURE AREAS

Economic and political upheaval abroad create a supply of people seeking to migrate.<sup>37</sup> U.S. employers' needs for skilled and unskilled workers provide demand for immigrants.<sup>38</sup> These forces are analagous to a macroeconomic supply and demand curve. Immigration policy affects the supply of and demand for immigrants. Three policy methods used to control immigration supply and demand are quota systems, amnesty programs and agricultural worker provisions.

#### The Quota Problem

An inflexible, oversubscribed annual quota prohibits the admission of most potential immigrants.<sup>39</sup> The demand for immigrant visas by U.S. citizens and lawful permanent residents for the admission of their family members far exceeds availability. Many otherwise qualified aliens have to wait two to seven years for immigrant visas.<sup>40</sup>

The 1986 Amendments increase the pressures on the immigration

gration-related employment practice" is not clear, for an employer may arguably discriminate against an individual based on national origin when the alien is a permanent resident or nonimmigrant. Although it prohibits national-origin-based discrimination, the statute does not prevent an employer from hiring an "equally qualified" U.S. citizen over an alien. Pub. L. No. 99-603, § 102a, 100 Stat. 3359 (1986) (amending 8 U.S.C. § 1324B(a)(4)). Allegations of discrimination will be investigated by a special counsel created under the statute. In the event that action is not brought by the special counsel within 120 days of the filing of a complaint, an individual may bring a private action to enforce the statute.

37. "Push" factors are those internal forces that cause persons to leave their homes and migrate. For discussion of push-pull factors, see Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 623-29 (1981); see also generally J. Card, *Push and Pull Factors at Origin and Destination as Determinants of Migration* (1980) (study prepared for the Select Comm'n on Immigration and Refugee Policy).
38. Pressures in the immigrant-receiving nations that attract migrants are commonly referred to as "pull" factors. See *supra* note 37 and accompanying text.
39. See generally CIVIL RIGHTS COMM'N REPORT, *supra* note 6, at 7-12; Hing, *supra* note 7, at 22-31.
40. The present quota system, for example, delays the immigration of spouses or children of lawful permanent residents between one and five years, depending on the country of origin. If the quota is exhausted in the applicant's preference category, he or she is put on a waiting list until there is a visa available. The system delays the immigration of siblings more than seven years. The delays are greater for persons from countries such as India, Korea, Mexico and the Philippines or colonies such as Hong Kong. See generally Note, *The Immigration System: Need to Eliminate Discrimination and Delay*, 8 U.C. DAVIS L. REV. 191 (1975).

The original Simpson-Mazzoli bill would have increased the total number of immigrants entering the United States each year. The bill provided for an annual cap of 425,000 immigrants but limited the family reunification quota preferences. See S. 2222, 97th Cong., 2d Sess. §§ 201-13 (1982). Although this was an increase from the annual immigrant quota of 270,000, legal migration outside of the quota system brought the total number of immigrants in 1986 to 500,109. See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, WORLDWIDE VISA SERVICES DURING 1986, at 1 (Vol. 100, No. 5), reprinted in 64 INTERPRETER RELEASES 234-35 (1987); see also Scanlan, *Immigration Law and the Illusion of Numerical*



system. Pressures on the border will be felt when those seeking admission find it more difficult to enter.<sup>41</sup> In addition, demands for family-reunification immigration will increase when aliens amnestied under the 1986 Amendments begin petitioning for family members, all of whom will add to the quota backlog. These pressures will be exacerbated when combined with U.S. employers' unquenched demand for skilled and unskilled workers.<sup>42</sup>

Elimination of the fixed quota would require cooperation between the Executive and Legislative Branches. A flexible admissions system could draw a balance between family reunification and the purely economic interest in skilled and unskilled labor.<sup>43</sup> The only proposals to modify the quota system have attacked individual preference categories.<sup>44</sup>

Migration limitations based upon skilled or unskilled labor have been criticized as contradictory and illogical in methodology.<sup>45</sup> Employers unable to find U.S. workers are forced to hire aliens, must advertise for the already filled positions and then wait up to two years before the aliens can work in legal status.<sup>46</sup> The 1986 Amendments do not attack these problems; instead, they allow a limited group of employers (farmers) to bring in workers and limit their rights to those of casual visitors.

### Agricultural Worker Provisions

The 1986 Amendments' provisions for agricultural workers may be the one area in which the need for workers is eased for a period of

*Control*, 36 U. MIAMI L. REV. 819, 827 (1982). The net increase in legal migration would not have been substantial because the bill would have placed immediate relatives otherwise outside of the quota within the quota. See Fuchs, *supra* note 13, at 444.

41. The reform legislation provides for greater controls at the border. This combined with the added domestic enforcement through employer sanctions makes it more difficult for aliens to enter and more likely that undocumented aliens will be found. See *supra* notes 28-37 and accompanying text.
42. Even when an employer can establish that there are no qualified, willing and available U.S. workers, the alien employee may not be able to obtain lawful permanent residence for up to two years. See *supra* note 32 and accompanying text.
43. A flexible system could be established in which the Executive Branch, after consultation with Congress, could set the legal immigration level for any given period of time. Alien admissions could be based upon the needs for family reunification and employment and could be adjusted periodically. Alternatively, the annual admission of immigrants could be set by a formula that takes into account humanitarian, economic and political factors. Such a system need not include refugee admissions, because these numbers are set separately. See 8 U.S.C. § 1157.
44. Although the 1986 Amendments do not change the quota system, an earlier Senate version would have eliminated the immigration of brothers and sisters of U.S. citizens and the unmarried children older than of lawful permanent residents. See S. 2222, 97th Cong., 2d Sess. § 202 (1982).
45. For discussion of reform in the labor certification process, see Rubin & Mancini, *An Overview of the Labor Certification Requirement for Intending Immigrants*, 14 SAN DIEGO L. REV. 76, 77-80 (1976); see also generally Wildes, *The Department of Labor: Toward a Sound Approach to Labor Certification*, 57 INTERPRETER RELEASES 357 (1980).
46. See generally Wildes, *supra* note 45.

time. The agricultural worker provisions<sup>47</sup> allowing for increased legal migration of alien farm workers were the linchpin of the 1986 Amendments' passage. Yet the legislative solution was neither new nor innovative.<sup>48</sup> The program is designed to assure that farmers have enough workers to harvest their crops, and, notwithstanding the employer sanctions,<sup>49</sup> that their businesses will not be disrupted. The legal migration of agricultural workers is intertwined with the amnesty provisions of the reform legislation.<sup>50</sup>

Given the popular perception that foreign workers displace U.S. workers, Congress was not inclined to increase the immigrant quota. Rather, it formulated a temporary solution,<sup>51</sup> which is a modification of the "Bracero Program," a controversial policy that began in the World War II era.<sup>52</sup> The Bracero Program caused great hardships to foreign workers who were admitted, and it may be a source of problems along the border today. The problems are far-reaching in creating a subclass of aliens whose status is conditioned on the good graces of an employer or other person. For example, aliens are less likely to complain about substandard wages or working conditions when they know loss

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47. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 301-5, 100 Stat. 3359, 3411-34 (amending 8 U.S.C. §§ 1101(a)(15)(H), 1180 and 1186) (these provisions are often referred to as the "guest worker" statutes).

48. Temporary worker provisions are not new to immigration law. The nonimmigrant "H-2" visas provide for the admission of aliens when U.S. workers are unavailable to perform temporary work. 8 U.S.C. § 1101(a)(15)(H)(ii) (1982). For discussion of earlier provisions allowing the influx of large numbers of agricultural workers, see CIVIL RIGHTS COMM'N REPORT, *supra* note 7, at 7-12.

49. The employer-sanction provisions apply to agricultural employers beginning in December 1988. See Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360 (1986) (amending 8 U.S.C. § 1324(i)(3) (1982)).

50. Amnesty is the grant of conditional resident status to persons who can show they worked on farms during a 90-day period between May 1, 1985, and May 1, 1986. See Pub. L. No. 99-603, § 302, 100 Stat. 3359, 3417 (1986) (adding 8 U.S.C. § 1180 (1982)); see also *infra* notes 57-59 and accompanying text.

51. This solution is referred to as the Special Agricultural Worker Program or "SAW" provisions. See Pub. L. No. 99-603, §§ 302-03, 100 Stat. 3359, 3417-31 (1986) (adding 8 U.S.C. §§ 1160, 1160A (1982)). The SAW Program fully sunsets in 1993, because Congress hopes that the demand for agricultural workers will have been met through legalization and temporary admission. See Pub. L. No. 99-603, § 303, 100 Stat. 3359 (1986) (adding 8 U.S.C. § 1160(a)(1)); see also 132 Cong. Rec. S16888 (daily ed. Oct. 17, 1986) (statement of Sen. Simpson).

Although one solution might be to treat agricultural workers the same as other workers coming for extended periods of time, the immigrant quota system makes it impossible to meet the tremendous demands for foreign labor. Absent a change in the present statute, treating agricultural workers like other workers would render many of them ineligible because of quota restrictions. See *supra* notes 39-44 and accompanying text. The solution, for now, was to create an exception to the rule that those coming to work for long periods of time be subjected to a quota and labor certification.

52. The "Bracero Program" initially came about because of the shortage of agricultural workers. Through this program, the United States allowed needed farm workers into the country. Later, the informal policy was given sanction by an agreement with Mexico signed in 1951. For further discussion of the program, see Note, *The Mexican Farm Labor Program*, 30 GEO. WASH. L. REV. 84 (1961); Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW & CONTEMP. PROBS. 334 (1956); CIVIL RIGHTS COMM'N REPORT, *supra* note 7, at 7-12.

of employment would render them deportable for failure to maintain their status as temporary workers.<sup>53</sup>

The significant change created by the 1986 Amendments is the replacement of the clause "to perform temporary services or labor" with "to perform agricultural labor or services." This change allows favorable treatment of aliens based not on their intention of staying in the United States, but on the work performed. Although U.S. employers need aliens' services, the aliens are not entitled to the protections afforded other permanent residents.<sup>54</sup> This leaves agricultural workers subject to the vagaries of their employers and contravenes the original policies behind the labor certification provisions for the permanent admission of aliens, which are to protect U.S. workers. Under the 1986 Amendments, "temporary" agricultural workers could come to the United States for years without receiving the protections of lawful permanent residency.<sup>55</sup> Continuing an agricultural worker program that only grants a temporary or conditional status is not "reform." A nonimmigrant agricultural worker program stretches the definition of "temporary" in the nonimmigrant visa provisions by ignoring the true nature of their stay.

### Amnesty

The granting of amnesty<sup>56</sup> is a response to the nation's inability to control the border. It also reflects the knowledge that even if the INS could catch the nation's millions of undocumented aliens, it could not deport them.<sup>57</sup> Deportation was frustrated by a judicial process that

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53. Immigration laws require that all nonimmigrants properly maintain their status in order to legally stay in the country. See 8 U.S.C. § 1251(a)(9) (1982); *Phillipides v. Day*, 283 U.S. 48 (1931). See also 1A C. GORDON & H. ROSENFELD, *supra* note 12, at § 4.9 (1986); *Dastmalchi v. INS*, 660 F.2d 880 (3d Cir. 1981); *Ghorbani v. INS*, 686 F.2d 784 (9th Cir. 1982).

There are separate rules for the Special Agricultural Worker alien seeking lawful permanent resident status. See Pub. L. No. 99-603, § 302, 100 Stat. 3359 (1986) (adding 8 U.S.C. § 1180(a)).

54. Similarly situated non-agricultural workers will be able to receive lawful permanent residence. As lawful permanent residents, aliens may work where they please, may petition for family members and eventually obtain U.S. citizenship.
55. Admissions of agricultural workers as nonimmigrants renders them deportable upon loss of employment because they are not entitled to remain in the United States when not employed and may not work outside of farms. Legalized workers (granted either temporary or permanent residence) may move about and work wherever work can be found. One remedy would be to treat agricultural workers the same as all other workers: Upon proof that their employment will not take jobs from U.S. workers, they could be eligible for permanent residence and, thereby, not subject to potential employer abuses.
56. The terms "amnesty" and "legalization" are intended to be synonymous. See Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394-404 (1986) (amending 8 U.S.C. § 1255 (1982)).
57. Many undocumented aliens could apply for suspension of deportation and other forms of relief from deportation. Given the large numbers of undocumented aliens, it is inconceivable that the INS could handle such claims. Although nobody seems to be sure how many persons might be covered under the amnesty provisions, the legalization effort will be monumental. Only rough approximations can be made of the number of undocumented aliens in the

made it impossible to expeditiously resolve pending cases.<sup>58</sup> In addition to easing the burden on the enforcement arm of the INS, amnesty also brings forward an underground population of undocumented aliens.<sup>59</sup>

This amnesty program differs from previous programs that accorded the beneficiaries full status as lawful permanent residents. The conditional status afforded these aliens prohibits them from petitioning for immediate family. They must also satisfy prerequisites, which, in the past, only applied to aliens seeking naturalization.<sup>60</sup> Similar provisions grant conditional status to aliens seeking permanent residence based upon marriage to U.S. citizens or lawful permanent residents.<sup>61</sup>

### THE FUTURE

In no other area of law is Congress' power as extensive as in controlling immigration.<sup>62</sup> Its power includes the ability to define classes

United States. One estimate places the number between 3.6 million and 4.8 million. See *Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 45, 47 (1985) (statement of Mr. Nelson, Commissioner of the INS). Another estimate places the number between 2 million and 6 million. See NATIONAL ACADEMY OF SCIENCE, *IMMIGRATION STATISTICS: A STORY OF NEGLECT* 87-88 (1985). Yet another estimates there were 2 million to 4 million undocumented aliens in the United States at the time of the 1980 census. See *Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 202, 225 (1985) (statement of J. Passel, Bureau of the Census); see also Corwin, *The Numbers Game: Estimates of Illegal Aliens in the United States, 1970-81*, 45 *LAW & CONTEMP. PROBS.* 223 (1982).

58. Much has been said about the overloading of the INS system. Although it is difficult to pinpoint the source of the problem, it may be attributable to a combination of factors. The INS has faced a significantly increased workload, because of the number of aliens arriving at the border and the number of aliens within the country seeking benefits. The massive influx of Indochinese refugees during the 1970s and other mass migrations have caused substantial increases in the number of aliens arriving here. Subsequent to arrival, aliens petition for family and seek permanent residency and citizenship for themselves. The time period from arrival to citizenship can take up to seven years and requires three separate INS adjudications. In addition, the number of nonimmigrants arriving in the United States has increased significantly. Meanwhile, the INS has not significantly modified its method of adjudication. See generally Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 *Iowa L. Rev.* 1297 (1986); Verkuil, *A Study of Immigration Procedures*, *UCLA L. REV.* 1141 (1984).
59. Congress has granted forms of amnesty in the past. The 1952 Act provided an alternative to deportation known as suspension of deportation. It allowed aliens to show that their deportation would cause extreme hardship to them or to their children or spouses who were U.S. citizens or lawful permanent residents. In such cases, deportation will be suspended, and they will receive lawful permanent residence. See 8 U.S.C. § 1254(a)(1) (1982).
60. Traditionally, permanent residents have not been required to seek U.S. citizenship. 3 C. GORDON & H. ROSENFELD, *supra* note 12, at § 14.1.
61. See *Immigration Marriage Fraud Amendments of 1986*, Pub. L. No. 99-639, § 2(a), 100 Stat. 3537 (1986).
62. It has been long accepted that the authority to determine which aliens are welcome in the United States rests with Congress.

Although Congress has the power of exclusion, the Executive has the responsibility of enforcing Congress' will. The immigration power derives from both the Constitution and inherent powers all nations have. See generally *The Chinese Exclusion Case*, 130 U.S. 581

of deportable aliens, as well as the ability to limit the rights of those seeking admission.<sup>63</sup> This plenary power over immigration enables Congress to enact blatantly racist statutes.<sup>64</sup> The types of governmental action tolerated in enforcement of the immigration laws has "known few bounds."<sup>65</sup> Given the judiciary's reluctance to review executive and legislative action involving immigration, it becomes particularly important for these branches to exercise considerable self-restraint when enacting immigration reform.

The country must reach a consensus regarding several immigration reform issues. We must first define U.S. interests and then balance these interests against how we wish the world to view us. Furthermore, we need a clearer understanding of the forces driving migration.

The political and procedural maneuvering used to enact the 1986 Amendments evidences a lack of direction in immigration policy. These shortcomings do not, however, reflect a failure of national will. Rather, they reflect the need for further public deliberation.

Any examination of the 1986 Amendments requires an initial inquiry into whether, given the enormous pressures placed on the immigration system, the new law can be implemented.<sup>66</sup> This country's

(1889); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); 1 C. GORDON & H. ROSENFIELD, *supra* note 12, at 2-19.

Congress does not exercise exclusive control over immigration policy. The Executive may also act pursuant to its foreign affairs powers. See *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1981), *cert. denied*, 446 U.S. 957 (1980) (the Court of Appeals found certain powers as flowing from the Executive's responsibility over foreign policy); *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980); *but see Olegario v. United States*, 629 F.2d 204, 216-26 (2d Cir. 1980). See also 1 C. GORDON & H. ROSENFIELD, *supra* note 12, at § 2b; *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Gegiow v. Uhl*, 239 U.S. 3 (1915).

63. The extent of this power passed constitutional scrutiny when Congress prohibited the admission of Asians. See *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); 1 C. GORDON & H. ROSENFIELD, *supra* note 12, at § 2.2.

Many scholars, however, have criticized the assumption that the congressional power is plenary. See Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392-95 (1953); Gordon, *The Alien and the Constitution*, 9 CAL. W.L. REV. 1, 23-24 (1972); Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1295-97 (1975) (Judge Friendly suggests earlier cases that had upheld the exclusion power as being plenary may have been decided differently had they been decided later); see also Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. TRANSNAT'L L. 925, 942-47, 953 (1984); Martin, *supra* note 25, at 173-80; Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 823-29 (1983).

64. See, e.g., Chinese Exclusion Act of 1882, ch. 376, 22 Stat. 58. Although the policy exhibited U.S. immigration policy at its worst, it also must be recognized as a demonstration of humanitarian compassion.

65. United States citizens traditionally have counted on the courts to protect individual rights. Aliens, however, must rely on small constituencies within the American political structure that protect foreigners' rights. Once laws are passed, aliens are subject to the beneficence and discretion of the government agencies entrusted to enforce the immigration laws. See *Jean v. Nelson*, 711 F.2d 1455, 1465-66 (11th Cir. 1983), *rev'd on other grounds*, 727 F.2d 957 (11th Cir. 1984).

66. The 1986 Amendments place new adjudicatory and investigative responsibilities on the INS and other governmental agencies. These new responsibilities include determining eligibility

growing demand for skilled and unskilled labor,<sup>67</sup> combined with external political and economic factors, creates the additional pressure of increased migration. In light of U.S. employers' needs to tap into the undocumented worker pool, the potentially extensive intrusion by the INS and Department of Labor authorized by the 1986 Amendments will increase domestic pressures on the INS. Small businesses, traditionally exempt from federal employment statutes, will find it particularly difficult to comply. These pressures at the border and within the country have the potential of unraveling the 1986 Amendments' legislative success.

In the past, immigration law and policy has received little public scrutiny. The 1986 Amendments add a new dimension to immigration law by bringing it into the fabric of domestic policy. The INS, which

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for the amnesty and temporary worker programs and violations of the employer anti-discrimination provisions. The expansion of the power to conduct searches on business premises and enforcement of employer sanctions also will place additional burdens on the bureaucracy. The pressures will further increase as the INS attempts to deport the newly discovered undocumented aliens found ineligible for amnesty.

The INS always has been behind in adjudicating applications. One example of the adverse effect of the backlogs in the adjudicatory process can be seen in asylum applications. Faced with an overwhelming backlog, INS officers cannot spend the necessary time on applications, which causes a diminution in the quality of the agency's decisions. See Schuck, *supra* note 12, at 40; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE 24 (1982). This system overload is likely to "ripple" through other sections of the agency. If immigration judges, because of newly discovered ineligible amnesty applicants, cannot conclude deportation hearings, the INS will find it difficult to deport aliens.

It is also questionable whether the INS will be able to effectively administer the amnesty program. Instead of taking this opportunity to "wipe the slate clean," the INS is taking a very narrow view of its legislative mandate. See, e.g., Roberts & Yale-Loehr, *Legislation Aimed at Illegal Aliens: A High Stakes Riverboat Gamble*, NAT'L L.J., Apr. 27, 1987, at 16, 18. More importantly, it remains to be seen whether it has the resources to adjudicate its potential caseload. At a recent meeting between immigration lawyers and INS officials of the Washington, D.C., district office, the INS advised lawyers that they would be able to adjudicate only 150 legalization applications per day. AMERICAN IMMIGRATION LAWYERS ASS'N, MINUTES OF THE WAS-INS/AILA LIAISON MEETING 1 (1987). In this context, each member of a family is considered to be a separate application.

67. The demand for legal migration under the quota system already far exceeds the availability of immigrant visas. See UNITED STATES DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, IMMIGRANT NUMBERS OF MARCH, 1987, at 2. In 1982, 700,000 persons in the fifth preference category (brothers and sisters of U.S. citizens) could not receive visas because of quota restrictions. See Simpson, *Foreword: Immigration and Nationality Law Symposium*, 20 SAN DIEGO L. REV. 1, 9 (1982). The immigrant visa backlogs have not improved, nor are they expected to do so in the future. The "active" immigrant visa cases, those who have not abandoned their applications, are as follows: 1983—1,411,151; 1984—1,587,360; 1985—1,777,931; and 1986—1,903,475. See UNITED STATES DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, WORLDWIDE VISA SERVICES DURING 1986, at 5 (Vol. 100, No. 5), reprinted in INTERPRETER RELEASES 222, 238 (1987).

Because amnesty creates a two-tiered residency that does not allow newly documented aliens to petition for family members until they have become permanent residents, the demand and availability problems will be exacerbated when the amnestied aliens are eligible to petition for their family members. This problem will place even more pressure on the already strained quota system.

used to have broad discretion in enforcement matters, now will have to operate in the open, often clashing with such domestic interests as agriculture and other industries. This will require the INS to exercise great caution.<sup>68</sup>

Immigration reform must be addressed boldly, not in a piecemeal fashion. In order to be effective, reform must balance a number of important factors. First, it must consider such national concerns as foreign policy considerations and domestic economic and political issues. Second, it must consider migrants' motivations, such as political and economic problems, employment needs and family unification. Finally, reform must consider humanitarian factors. Although these considerations are difficult to balance, the 1986 Amendments have fallen woefully short of reform. Instead of adopting a new approach, Congress built upon a system motivated by a fear of outsiders.

The factors controlling migration and guiding policy have never been constant. The world will always experience political or economic problems. Perhaps the only predictable factor is that human migration will always exist. Advancements in technology and communications, coupled with the basic human desire to improve one's life, will increase the number of migrants.

### A PROPOSAL FOR TRUE REFORM

In light of these changing forces, an effective policy requires flexibility. For instance, quotas must be eliminated. The same objectives can be achieved by setting the annual limits using a consultative process for family reunification immigration or expanding the use of blanket labor certifications. Alternatively, the Executive and Congress could periodically establish certain categories of aliens eligible for unlimited migration. This system would allow immediate migration of qualified persons and would eliminate the lengthy delays immigrants experience under current law. This would remove one of the incentives behind illegal migration.<sup>69</sup>

The present quota system does not serve the national interest. For example, most would agree that family reunification is a noble goal. Yet, the quota system forces close family members of resident aliens

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68. So far, the agency has proceeded with great caution. Breaking precedent, the agency disseminated drafts of the implementing regulations instead of first publishing its Notice of Proposed Rulemaking. 4 FED. IMMIGR. L. REP. (CCH), No. 59 at 1 (Jan. 20, 1987).

69. For example, under current law, aliens must first obtain approval of a petition submitted on their behalf by a family member or prospective employer. Approval can take months. Then, the application is forwarded to the U.S. Consul where aliens later file another application for final approval of an immigrant visa. The scheduling of the final interview is determined by the availability of visas under the quota system. See 1A C. GORDON & H. ROSENFELD, *supra* note 12, at §§ 3.7-3.8. The wait can be for many years. See *supra* note 40 and accompanying text. For many, the wait overseas leads them illegally to the United States, where they may wait for an available visa.

and U.S. citizens to wait years for admission. Similarly, few would argue that employers who have searched unsuccessfully for qualified U.S. workers should have to wait years for qualified foreign workers. These lengthy delays, common under existing law, would not occur under a flexible system allowing immediate admission of qualified aliens.<sup>70</sup>

The 1986 Amendments create a two-tiered residency system.<sup>71</sup> Although generous in granting amnesty, they create a permanent subclass of aliens. Granting temporary status assures a degree of control over aliens, yet the program's consequences could be negative, as evinced by the problems experienced by western European nations with two-tiered systems.<sup>72</sup> Temporary status requires aliens to eventually become permanent residents and places upon them the burden of meeting the requirements equivalent to establishing eligibility for U.S. citizenship.

In addition to the insecure status created by the two-tiered residency, the 1986 Amendments create a more complicated admission procedure for aliens. The Amendments treat aliens differently depending on whether they are agricultural workers, non-agricultural workers or persons receiving immigration benefits through marriage.<sup>73</sup> It is questionable whether this disparate treatment of similarly situated aliens satisfies the national objective of controlling the border.

When an employer establishes that hiring aliens will not adversely affect the employment, wages or working conditions of U.S. workers, aliens normally may enter the country subject to the availability of visas under the quota system.<sup>74</sup> The labor certification procedure as it exists is seriously flawed. First, the bureaucratic process can be time-consuming. Second, the immigrant quota for alien beneficiaries is exhausted notwithstanding the fact that U.S. workers will not be adversely affected. Third, even though the 1986 Amendments create special provisions for agricultural workers, some of these workers are

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70. The serious delays common under the quota system have not been addressed and will be exacerbated by the 1986 Amendments.

71. See *supra* notes 24-27 and accompanying text.

72. See Martin & Miller, *Guestworkers: Lessons from Western Europe*, 33 *INDUS. & LAB. REL. REV.* 315, 327 (1980); Plender, *Recent Trends in National Immigration Control*, 35 *INT'L & COMP. L.Q.* 531, 547 (1986) (insecurity is inherent in a conditional status). For example, because of severe restrictions on aliens within U.S. borders, it is more likely that alien temporary employees will be subject to employer abuse. Temporary farm worker programs present a situation in which there is little doubt alien workers are not taking work from U.S. workers. If foreign agricultural workers significantly displaced U.S. workers, Congress would not allow them to remain in the United States. Congress was concerned with making sure amnestied agricultural workers stayed on the farm. See 132 *CONG. REC.* S16614 and S16886 (daily eds. Oct. 16-17, 1986) (statement of Sen. Simpson). Although it is not suggested that every agricultural employer intends to abuse his employees, conditioning aliens' status on continued employment will have significant negative consequences to relations.

73. See *supra* note 61 and accompanying text.

74. See 8 U.S.C. § 1182(a)(14). For a general discussion of the labor certification process, see Rubin & Mancini, *supra* note 45, at 77-80.



considered "temporary" and are, thereby, precluded from receiving permanent-resident benefits.

Congress could have restructured the labor certification process.<sup>75</sup> It could have resolved the problem had it attacked the inflexible quota system with, or in lieu of an amnesty program.<sup>76</sup> The motivations for favoring agricultural interests should have been present for non-agricultural employers, as well.<sup>77</sup> The benefits bestowed on agriculture, although temporary, will highlight, by contrast, the effects that non-agricultural employers will feel when the employer sanctions go into effect.<sup>78</sup>

The employee verification system will generate controversy. Merely mentioning a national identification system raises the passions of civil libertarians and conservatives.<sup>79</sup> Such a plan conjures up images of a

75. Congress redefined "temporary" as it applies to agricultural workers without addressing the problems with immigrant quotas. The problem with the 1986 Amendments is not what they try to do, but that they culminate in a mere temporary solution that appeases farm employer interests. The pressure, as a result, will be temporarily eased. The United States has had migrant workers for decades, and it is not likely that a temporary amnesty will resolve the problem.

76. Unless it solves the fundamental immigration problems, amnesty can be a bureaucratic nightmare with dubious returns. Given the large number of undocumented aliens and ineligible applicants who must be processed, the system will be overloaded. See *supra* note 57 and accompanying text.

77. Congress' favoring agricultural interests was motivated by the perception that there exists a shortage of U.S. farm workers. See H. REP. NO. 682, 99th Cong., 2d Sess. 79-88 (1986). Some examples of this favoritism can be seen in Section 116 of the 1986 Amendments, which restricts warrantless searches of agricultural work places and the delay of sanctions for agricultural workers until 1988. See PUB. L. NO. 99-603, § 101, 100 Stat. 3359 (1986) (adding 8 U.S.C. § 1324A(i)(3)(A)). Section 116 restricts the "open fields" doctrine endorsed by the Court in *Oliver v. United States*, 466 U.S. 170 (1984). Pub. L. No. 99-603, § 116, 100 Stat. 3359, 3384 (1986). In a case decided the same day, the court held that a *factory* search involving the questioning and arrest of employees did not amount to a seizure under the fourth amendment. *INS v. Delgado*, 466 U.S. 210, 218 (1984). The Court in *Delgado* found no need to address the question of whether a warrantless search was permissible. *Id.* at 213. Nevertheless, the difference in treatment between agricultural and non-agricultural employers has been set out in the legislation.

Although there has been a steady erosion of aliens' rights in search and seizure questions, it is notable that agricultural interests have been able to carve out an exception to the rule. The Reagan Administration originally had opposed the differentiation in treatment between farm and factory employers. See H. REP. NO. 682, 99th Cong., 2d Sess. 113 (1986). For a more general discussion of the INS' authority to search businesses, see Note, *Fourth Amendment Warrant Standards for Immigration Search of Business Premises for Undocumented Aliens: A New Hybrid Probable Cause*, 13 RUTGERS L.J. 607 (1982); Comment, *INS Surveys of Business Establishments: Reasonable, Individualized Suspicion of Illegal Alienage*, 78 Nw. U. L. Rev. 632 (1983).

78. Although agriculture will experience few disruptions, non-agricultural employers will quickly experience the effects of sanctions, which could range from increased INS searches and difficulty in filling certain jobs to higher labor costs.

79. The 1986 Amendments evince an attempt by Congress at balancing privacy and enforcement interests. For example, the House Committee noted that the verification procedure was not to be used for "administrative (non-criminal) enforcement purposes." See H. REP. NO. 682, 99th Cong., 2d Sess. 67, 68 (1986). Moreover, the verification system has yet to be created and cannot be implemented without further Congressional approval. See *generally* Pub. L. NO. 99-603, § 101, 100 Stat. 3359, 3360 (1986) (amending 8 U.S.C. § 1324 (1982)).

national identification card. In addition to ideological objections, the initial verification used by employers is highly susceptible to forgery.<sup>80</sup> As do sanctions, however, a verification system only serves the national interest if the family reunification and employment needs are satisfied. Sanctions and verification attack a symptom, not a cause, and unless the cause is addressed, the problem will not go away.

### CONCLUSION

The success or failure of immigration reform does not lie in the 1986 Amendments. Rather, it lies in new legislative and executive initiatives to alleviate pressures caused by issues unaddressed by the 1986 Amendments. Any effort further closing the border requires a solution addressing the complex problem of human migration. The 99th Congress only began to consider these forces. In order to obtain true reform, we must address the basic inadequacies in the present system.

Until now we have been satisfied with avoiding immigration reform. Perhaps the greatest benefit of the 1986 Amendments is that the new law will highlight the fundamental deficiencies of our immigration law. The hoped-for result will be a revitalization of efforts toward crafting a positive immigration law and policy truly in our national interest.

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Ultimately, failure to design a secure verification system could be the demise of the 1986 Amendments. Without verification, the employer sanctions will be unenforceable, and without sanctions, there is no control of one of the important motivations for migration.

80. For example, an alien need only show his or her employer a Social Security card and driver's license, both of which are widely available on the "black market." See Simpson, *supra* note 67, at 3-5.