



Testimony of

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*Securing the Border: Defining the Current Population Living in the Shadows
and Addressing Future Flows*

Before

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Chairman Johnson, Ranking Member Carper, Members of the Committee,

Good morning. My name is Marc Rosenblum, and I am deputy director of the U.S. immigration program at the Migration Policy Institute, an independent, non-partisan think tank in Washington, DC that analyzes U.S. and international migration trends and policies. Thank you for the opportunity to testify today.

The United States is currently home to about 11.2 million unauthorized immigrants.¹ My statement analyzes this population, explaining: 1) why the United States has such a large unauthorized population, 2) what we know about the characteristics of unauthorized immigrants in the United States and 3) potential strategies to divert unauthorized immigrants into legal channels.

Understanding Illegal Immigration to the United States

With 11.2 million unauthorized immigrants in 2012, the United States is believed to have the largest unauthorized population of any country in the world. If all unauthorized immigrants in the United States lived in the same state, they would constitute the 8th largest state, slightly behind Ohio, with 11.6 million people, and well ahead of Georgia, with 10.1 million. If U.S. unauthorized immigrants lived in their own country, they would be the 78th largest country in the world, in between Cuba and Greece, and larger than 118 sovereign members of the United Nations.

In light of these numbers, it's easy to forget that large-scale illegal migration is a relatively new phenomenon for the United States. Historically, the United States did not experience significant illegal migration during earlier waves of large-scale immigration because immigrants were screened against qualitative restrictions (e.g. health, national origin), but not numerical ceilings, which were not included in earlier immigration law. As a result, the overall numbers of immigrants reflected job opportunities in the country. Thus, the U.S. unauthorized population stood at

¹ Three organizations publish regular, credible estimates of the size of the U.S. unauthorized population: the Pew Research Center, the Center for Migration Studies of New York (CMS) and the Department of Homeland Security (DHS). Pew's latest estimate, based on 2012 data, is that there are 11.2 million unauthorized immigrants in the United States; see Pew Research Center, "Unauthorized Immigrant Population Trends for States, Birth Countries, and Regions," December 11, 2014, www.pewhispanic.org/2014/12/11/unauthorized-trends/. The latest CMS estimate, based on 2013 data, is 11.0 million unauthorized immigrants; see CMS, "Estimates of the Unauthorized Population for States," accessed March 23, 2015, <http://data.cmsny.org/>. And the latest DHS estimate, based on 2012 data, is 11.4 million; see Bryan Baker and Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012* (Washington, DC: DHS Office of Immigration Statistics, 2013), www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

between 1 million and 2 million in 1970, and most unauthorized immigrants were seasonal agricultural workers who returned home on a regular basis. Their numbers grew to about 3 million in 1980, 3.5 million in 1990 (despite the legalization of an estimated 2.7 million people following the 1986 Immigration Reform and Control Act), 8.5 million in 2000, and to an all-time high of 12.2 – 12.4 million in 2007.²

Why is the United States home to so many unauthorized immigrants today? Ultimately, the answer depends on a complex system of “push” factors in countries around the world, “pull” factors in the United States and social networks connecting immigrants to U.S. communities. People migrate to improve their “opportunity differentials”: to boost their earning power, to earn seed money to start a new business or build a home, to be reunited with family members living abroad. Others migrate to escape violence or other adverse circumstances at home. The costs and benefits of any particular immigration stream evolve over time, as previous migrants generally make it easier for those that follow.

But illegal immigration also reflects policy choices for three reasons. First, while migration flows mainly reflect these underlying drivers, immigrants’ legal status depends on how these drivers align with existing laws and policies. *Illegal immigration occurs only when more, or different, people migrate than the law permits.* Many people want to enter the United States and the supply and demand of visas will never be perfectly aligned; so a second reason policy matters is that *effective migration control policies can limit or prevent illegal immigration* even when visas are scarce. But a third reason policy matters is that *poorly considered policies and policies that are too inconsistent with market conditions may actually exacerbate illegal migration* and its effects, a pattern we have observed in the United States.

This framework—drivers of migration, supply and demand of visas and potential unintended consequences of migration control policies—explains much of the increase in illegal immigration to the United States since the 1970s.

Drivers of Unauthorized Immigration: *Illegal migration increased after the 1970s due to strong employment demand in the United States and large labor supply in Mexico and other migrant-sending states.*

² Estimates for 1970-1980 from Arthur F. Corwin, “The Numbers Game: Estimates of Illegal Aliens in the United States, 1970-1981,” *Law and Contemporary Problems* 45 (1983): 241-3; estimates for 1990-2007 from Ruth Ellen Wasem, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, Report RL33874 (Washington, DC: Congressional Research Service, 2012), 3, <http://fpc.state.gov/documents/organization/202461.pdf>.

What are the drivers that have caused unauthorized immigrants to enter the United States? The most important answers to this question are economic and demographic complementarities between the United States and Mexico, as well as other major source countries of U.S. unauthorized populations. The United States has undergone a broad economic transformation since the 1970s, shifting from an industrialized, unionized, relatively high-wage blue-collar workforce to a lower-skilled, predominantly service economy. Under pressure from international trade, and as union membership has declined, real wages for lower-skilled workers in the United States have been flat or falling, even as the education levels, expectations and ages of native-born workers have risen. For example, between 1979 and 2013, productivity in the United States grew by 65 percent while hourly compensation of production and non-supervisory workers—80 percent of the private-sector workforce—increased just 8 percent.³ The result has been that demand for relatively low-skilled, low-wage workers has outpaced the supply of native workers employed in such jobs.

These changes occurred as Mexico (and other sending states) had large labor surpluses fueled by high birth rates in the 1960s and '70s. While U.S. and Mexican birth rates both boomed after World War II, Mexico's remained between five and six births per woman well into the 1970s compared to a U.S. rate of about two by that time.⁴ (Mexico's fertility rate now stands at 2.2 births per woman, down from 7.3 in 1960, and approaching the U.S. rate of 1.8; this is one factor that has contributed to a significant reduction in Mexican migration to the United States in recent years.⁵) After robust economic growth in the 1950s and '60s, Mexico's large labor cohort in the 1970s-1990s entered a highly volatile labor market wracked by currency devaluations and with poor employment opportunities—arguably exacerbated by the North American Free Trade Agreement. As a result, many new entrants to the labor force (those over 16 years old) found their best employment prospects abroad. For example, one analysis finds that a 10 percent reduction in Mexican real wages in 1976-1995 was

³ Elise Gould, *Why America's Workers Need Faster Wage Growth—And What We Can Do About It* (Washington, DC: Economic Policy Institute, 2014), www.epi.org/publication/why-americas-workers-need-faster-wage-growth/.

⁴ Gordon Hanson and Craig McIntosh, "The Great Mexican Migration" (NBER Working Paper 13675, National Bureau of Economic Research, Cambridge, MA, December 2007), www.nber.org/papers/w13675. Hanson and McIntosh find that Mexican state-level variation in the labor supply (i.e., birthrates from 15 years prior) explains 40 percent of the variation in Mexican emigration in the 1980s and '90s.

⁵ See Aaron Terrazas, Demetrios G. Papademetriou and Marc R. Rosenblum, *Evolving Demographic and Human-Capital Trends in Mexico and Central America and Their Implications for Regional Migration* (Washington, DC: Migration Policy Institute, 2011), www.migrationpolicy.org/research/RMSG-demographic-human-capital-trends-mexico-central-america; the World Bank, "Fertility rate, total (births per woman)," accessed March 23, 2015, http://data.worldbank.org/indicator/SP.DYN.TFRT.IN?page=6&order=wbapi_data_value_2012%20wbapi_data_value%20wbapi_data_value-last&sort=asc.

associated with an 8 percent increase in apprehensions at the U.S.-Mexico border, suggesting a similar increase in illegal outflows.⁶

By the 1990s, the combination of worsening wages and working conditions in the United States and rising Mexican inflows caused migration to become a structurally embedded feature of many U.S. labor markets, meaning both workers and employers came to view certain positions as “immigrant jobs” for which younger U.S. workers were no longer available.⁷

Alignment between Migration Drivers and U.S. Immigration Policy: Since 1965, U.S. immigration policies have imposed strict limits on low-skilled immigration from the Western Hemisphere.

U.S. immigration policies were a poor match for these strong migration push and pull factors during this period. In particular, increased migration demand beginning in the 1970s coincided with a pair of legislative developments in 1964-1965 that closed the door to most legal migration from Mexico. In 1964 Congress allowed the U.S.-Mexico Bracero program to expire, eliminating a system that had previously admitted up to 450,000 Mexican seasonal agricultural workers per year dating to the World War II years; and in 1965 Congress amended the Immigration and Nationality Act (INA), imposing the first numerical limits on permanent visas for Mexican (and other Western Hemisphere) immigrants.

The 1965 amendments to the INA also created a global problem of unmet demand for visas because the law set out categorical reasons people may migrate to the United States to join family members here, but it combined these rules with numerical limits that are far below the number of people in these categories. Congress failed to anticipate the degree of this imbalance, which is why 4.3 million relatives of U.S. citizens and lawful permanent residents are currently facing long wait times—some of up to 25 years—to receive a visa to join their U.S. families.⁸

⁶ Gordon Hanson and Antonio Spilimbergo, “Illegal Immigration, Border Enforcement, and Relative Wages: Evidence from Apprehensions at the U.S.-Mexico Border” (NBER Working Paper 5592, National Bureau of Economic Research, Cambridge, MA, May 1996), www.nber.org/papers/w5592.

⁷ Wayne A. Cornelius, “The Structural Embeddedness of Demand for Mexican Immigrant Labor: New Evidence from California,” in *Crossings: Mexican Immigration in Interdisciplinary Perspective*, ed. Marcelo Suárez-Orozco (Cambridge, MA: Harvard University Press/David Rockefeller Center for Latin American Studies, 1998), 115-55.

⁸ U.S. Department of State, “Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2014” (Washington, DC: State Department, 2014), <http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf>.

This combination of growing migration push factors in Mexico, growing employment and family-based pull factors in the United States and strict limits on visa allocations created the conditions for increased illegal migration beginning in the 1970s. This mismatch was amplified over the next three decades as migrant families, employers and social networks became increasingly entrenched and far reaching.

Ineffective U.S. Immigration Control Policies: *The United States was slow to respond to rising illegal immigration, and policies implemented in the 1980s and '90s were mostly ineffective.*

Congress recognized the roots of today's immigration problems almost immediately, and held its first hearings on illegal immigration across the Southwest border in 1971—just three years after the 1965 amendments to the INA were fully implemented. But it took another 15 years for Congress to pass the first law designed to counteract these dynamics—the Immigration Reform and Control Act (IRCA) of 1986. And the enforcement system created largely as a result of the IRCA proved mostly ineffective until the early 2000s.

The U.S. immigration control system during the 1980s and '90s consisted of three main pillars. First, with passage of IRCA, Congress made it illegal for employers to knowingly hire unauthorized workers—an effort to combat the employment “magnet” that is such an important driver of illegal immigration. IRCA's employer sanctions system has failed to reduce unauthorized employment, however, because its employment verification system has been vulnerable to document fraud and employment outsourcing (i.e., the use of subcontractors or misclassification of employees as independent contractors), and because worksite enforcement has been a low priority for DHS and its predecessor, the Immigration and Naturalization Service (INS).⁹ For instance, between 1999 and 2012, on average just 155 employers per year were fined for non-compliance with IRCA's verification requirements.¹⁰ By a very rough estimate, this puts the probability that an employer who hires an unauthorized worker will be fined at about 1 in 10,000.¹¹

Second, also beginning with the passage of IRCA, Congress and successive presidents have made major investments in border security, focusing on the U.S.-Mexico border. The Border Patrol quadrupled in size between 1980 and 2001 (from 2,268 agents to

⁹ Muzaffar Chishti and Charles Kamasaki, *IRCA in Retrospect: Guideposts for Today's Immigration Reform* (Washington, DC: Migration Policy Institute, 2014), www.migrationpolicy.org/research/irca-retrospect-immigration-reform.

¹⁰ Andorra Bruno, *Immigration-Related Worksite Enforcement: Performance Measures*, CRS Report R40002 (Washington, DC: Congressional Research Service, 2013), <http://fas.org/sgp/crs/homesecc/R40002.pdf>.

¹¹ This figure is based on the estimated number of unauthorized workers midway through this period, about 8 million workers, and a conservative assumption that therefore about 2 million employers would have hired an unauthorized worker in a typical year.

9,821 agents), and then more than doubled again in the years after the 9/11 attacks (to 20,863 in fiscal year 2014).¹² Spending on border enforcement activities increased from \$800 million in 1980 to \$5.7 billion in 2001 and \$12.4 billion in 2014.¹³

Third, with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Congress increased penalties for unauthorized immigrants, primarily by making it easier for the government to formally deport them (i.e., via removal proceedings rather than informal returns), a process that makes immigrants ineligible to return to the United States and subject to criminal penalties upon a future apprehension. IIRIRA strengthened judicial removal proceedings, created new categories of immigrants subject to mandatory removal and gave INS (now DHS) greater ability to remove immigrants through administrative proceedings, without an immigration hearing.¹⁴

Yet while the United States invested considerable resources in immigration enforcement, experts on immigration flows concluded that enforcement had almost no deterrent effect during the 1980s and '90s. Increased border enforcement raised the costs and risks of crossing the U.S.-Mexico border without inspection. For example, a growing proportion of unauthorized immigrants have come to rely on professional smugglers to get across the border—about 95 percent of border crossers in 2012, up from about 70 percent in 1980—and the fees charged by smugglers increased steadily from about \$600 to about \$2,800 (in constant 2013 dollars).¹⁵ But

¹² Lisa Seghetti, *Border Security: Immigration Enforcement between Ports of Entry*, CRS Report R42138 (Washington, DC: Congressional Research Service, 2014), <http://fas.org/sgp/crs/homesecc/R42138.pdf>.

¹³ Border enforcement spending includes spending by the Immigration and Naturalization Service (INS) for 1980-2001, and by U.S. Customs and Border Protection (CBP) for 2002-2014; see Office of Management and Budget (OMB), *Budget of the United States Government*, fiscal years 1982-2002 (Washington, DC: U.S. Government Printing Office, various years), www.gpo.gov/fdsys/browse/collectionGPO.action?collectionCode=BUDGET; DHS, *Budget in Brief*, fiscal years 2004-2015 (Washington, DC: DHS, various years), www.dhs.gov/dhs-budget.

¹⁴ For a fuller discussion, see Marc R. Rosenblum and Doris Meissner with Claire Bergeron and Faye Hipsman, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement* (Washington, DC: Migration Policy Institute, 2014), www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement.

¹⁵ See Princeton University Mexican Migration Project (MMP), “Graph 2: Access to Border-Crossing Guides and Family/Friends on First Undocumented Trip,” accessed March 23, 2015, <http://mmp.opr.princeton.edu/results/002coyote-en.aspx>; MMP, “Graph 1: Border Crossing Costs,” accessed March 18, 2015, <http://mmp.opr.princeton.edu/results/001costs-en.aspx>. A second, unfortunate indicator is the number of known fatalities among border crossers, which increased from about 250 per year in 1998-1999 to about 450 per year in 2012-2013, before falling back to about 300 in 2014; see U.S. Border Patrol, “Southwest Border Deaths by Fiscal Year,” accessed March 18, 2015, www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Sector%20Deaths%20FY1998%20-%20FY2014_0.pdf. These data may undercount actual border deaths since they only include cases detected by Border Patrol agents.

just as many U.S. employers during this period accepted the (small) risk of being fined as an acceptable business expense, so too did many unauthorized immigrants come to accept the (somewhat larger) chance of being apprehended as an acceptable part of the immigration process, and almost everyone deported at the border succeeded on a subsequent crossing attempt.¹⁶

Recent Evidence Suggests That Further Enforcement Efforts during the Last Decade Have Begun to Pay Off: *New investments at the border and in the interior have been associated with falling immigrant apprehensions and a shrinking stock of unauthorized immigrants.*

A number of important new enforcement programs have been implemented or expanded in the last decade. Following passage of the Secure Fence Act of 2006, DHS has completed the installation of fencing, vehicle barriers and other infrastructure along strategically important sectors of the border.¹⁷ The Bush and Obama administrations have taken full advantage of IIRIRA's fast-track removal provisions, particularly for immigrants apprehended at the border, resulting in an unprecedented number of formal removals. And the two administrations also began to prosecute an increasing number of border crossers for immigrant-related criminal offenses, particularly since 2005.¹⁸ By raising the costs (to the immigrant) of enforcement, these efforts appear to have discouraged some border crossers from re-entering the United States following a deportation. Thus, the Border Patrol's recidivism rate (i.e., the proportion of apprehended migrants who are apprehended a second time in the same year) fell from 29 percent in 2007 to 14 percent in 2014.¹⁹

¹⁶ See for example, Thomas J. Espenshade, "Using INS Border Apprehension Data to Measure the Flow of Undocumented Migrants Crossing the U.S.-Mexico Frontier," *International Migration Review*, vol. 29, no. 2 (1995): 545-65; Wayne A. Cornelius and Idean Salehyan, "Does border enforcement deter unauthorized immigration? The case of Mexican migration to the United States of America," *Regulation & Governance* 1.2 (2007): 139-53; Douglas S. Massey, Jorge Durand and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (New York: Russell Sage Foundation, 2003).

¹⁷ Remarks of Homeland Security Secretary Jeh Johnson, "Border Security in the 21st Century," Center for Strategic and International Studies, Washington, DC, October 9, 2014, www.dhs.gov/news/2014/10/09/remarks-secretary-homeland-security-jeh-johnson-border-security-21st-century. Also see Seghetti, *Border Security: Immigration Enforcement between Ports of Entry*.

¹⁸ Rosenblum and Meissner with Bergeron and Hipsman, *The Deportation Dilemma*. The Obama administration has developed a Consequence Delivery System to maximize the impact of the CBP prosecution resources and to discourage immigrants from re-entering after deportation: voluntary return has been essentially phased out in favor of formal removal; and migrants with previous apprehensions or criminal records are more likely to be targeted for harsher enforcement outcomes, such as immigration-related criminal charges that may result in jail time and lateral repatriation involving deportation through a port of entry far away from the point of apprehension.

¹⁹ Rosenblum and Meissner with Bergeron and Hipsman, *The Deportation Dilemma*; Seghetti, *Border Security: Immigration Enforcement between Ports of Entry*.

Another important change seen since about 2005 is that the Bush and Obama administrations have put in place a fourth element of the U.S. enforcement system: interior enforcement. While enforcement during the 1980s and '90s was concentrated almost exclusively at the Southwest border, U.S. Immigration and Customs Enforcement (ICE) during the last decade has developed a number of major programs to identify and remove deportable immigrants within the United States, including by partnering with federal, state and local law enforcement agencies.²⁰ The Obama administration has also significantly expanded audits of employer compliance with IRCA's basic employment verification requirements, with the number of such audits increasing from fewer than 500 in 2008 to more than 3,000 yearly in 2012 and 2013.²¹

Partly as a result of these new programs and investments, the unauthorized population stopped increasing in 2007, and fell by 1 million people (from about 12.2 million to 11.2 million) between 2007 and 2012. As far as we know, this is the first time that the size of the unauthorized population has fallen without a legalization program. Other key indicators of illegal inflows, such as apprehensions at the Southwest border, are also at historic lows, while measures of the effectiveness of enforcement efforts have improved. For example, Southwest border apprehensions—long recognized as an indicator of illegal migration flows—fell to 328,000 in 2011, the lowest level since 1972. While apprehensions rebounded somewhat between 2012 and 2014, the 487,000 apprehensions that occurred in 2014 were still less than one-third the 1.68 million apprehensions recorded in the peak year of 2000.²² At the same time, however, major new enforcement efforts have coincided with the Great Recession and slow economic recovery, and with reduced push factors in Mexico, so it's not clear exactly how much of these gains are due to more effective enforcement versus changes in the drivers of migration flows.

²⁰ See testimony of Marc R. Rosenblum, Deputy Director, U.S. Immigration Policy Program, Migration Policy Institute, before the House Judiciary Committee, *Examining the Adequacy and Enforcement of Our Nation's Immigration Laws*, 114th Cong., 1st sess., February 3, 2015, http://judiciary.house.gov/index.cfm/hearings?Id=04BC548D-5FAF-45CC-841D-22DFF85672D6&Statement_id=CACA9A5E-9381-46D2-BB4A-4C28899B2170; also see Marc R. Rosenblum and William Kandel, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, CRS Report R42057 (Washington, DC: Congressional Research Service, 2012), <http://fas.org/sgp/crs/homesec/R42057.pdf>.

²¹ *Business Management Daily*, "I-9 Audits Again Hit Record; Get Forms in Compliance," October 2, 2014, www.businessmanagementdaily.com/40994/i-9-audits-again-hit-record-get-forms-in-compliance#.

²² Moreover, apprehensions of Mexicans have continued to fall since 2011, reaching a low point of 227,000 in fiscal year 2014. The ongoing downward trend in apprehensions is significant because Mexicans have traditionally accounted for about 97 percent of apprehensions. Meanwhile, the growth in apprehensions since 2011 consists almost entirely of Central Americans, about half of whom are families and children presenting themselves at the border and seeking asylum or other form of humanitarian protection. For a fuller discussion see Rosenblum, *Examining the Adequacy and Enforcement of Our Nation's Immigration Laws*.

Unintended Consequences of Immigration Control Policies: Border enforcement has reduced return migration.

While efforts to secure the Southwest border failed to deter northbound crossers during the 1980s and '90s, analysts have found that the higher costs and risks of crossing the border had the perverse effect of encouraging unauthorized immigrants to remain in the United States for longer periods of time, rather than traveling back and forth between the United States and Mexico (or elsewhere in Latin America).²³ In this way, the higher cost of crossing the border reinforced trends in the U.S. labor market toward more year-round employment, and more employment opportunities for unauthorized immigrant women. Thus, according to a decades-long bi-national U.S.-Mexico survey, the probability that a first-time unauthorized immigrant from Mexico would return home within a year of arrival fluctuated between 55 and 60 percent between 1965 and 1986; but by 2009 the probability of a return trip within a year had fallen to zero.²⁴ Similarly, the median length of U.S. residence among unauthorized immigrants (estimated using U.S. Census Bureau data) has risen from 7.4 years in 2003 to 12.7 years in 2013; and 62 percent of unauthorized immigrants have lived in the United States for a decade or more, compared with 35 percent in 2000.²⁵ As University of California-San Diego political scientist Wayne Cornelius concludes, "Given the high costs and physical risks of illegal entry today, [unauthorized immigrants] have a strong incentive to extend their stays in the U.S.; and the longer they stay, the more probable it is that they will settle permanently."²⁶

The shift toward permanent U.S. settlement has been reinforced by the three- and 10-year bars on re-entry included in the 1996 IIRIRA law. These bars prohibit unauthorized immigrants who have been unlawfully present in the United States for at

²³ Lecture by Douglas S. Massey, Henry G. Bryant Professor of Sociology and Public Affairs, Princeton, "Chain Reaction: The Causes and Consequences of America's War on Immigrants," Institute for the Study of Labor, Julian Simon Lecture Series no. VIII, May 2011, www.iza.org/conference_files/amm2011/massey_d1244.pdf. Also see Jorge Durand, Douglas S. Massey and Emilio A. Parrado, "The New Era of Mexican Migration to the United States," *Journal of American History* vol. 86 no. 2 (1999): 518-36, www.journalofamericanhistory.org/projects/mexico/jdurand.html; Manuela Angelucci, "U.S. Border Enforcement and the Net Flow of Mexican Illegal Migration" (IZA Discussion Paper Series, IZA DP No. 1642, Institute for the Study of Labor, Bonn, June 2005), <http://ftp.iza.org/dp1642.pdf>; Wayne A. Cornelius, "Impacts of Border Enforcement on Unauthorized Mexican Migration to the United States," *Border Battles: The U.S. Immigration Debates*, September 2006, <http://borderbattles.ssrc.org/Cornelius/index.html>.

²⁴ Massey, "Chain Reaction."

²⁵ Jeffrey S. Passel, D'Vera Cohn, Jens Manuel Krogstad and Ana Gonzalez-Barrera, *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled* (Washington, DC: Pew Research Center, 2014), www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/.

²⁶ Cornelius, "Impacts of Border Enforcement on Unauthorized Mexican Migration to the United States."

least six months from receiving visas to re-enter the United States for three years, and those unlawfully present for more than one year from re-entering for 10 years. The bars mean that many unauthorized immigrants who are eligible for immigrant visas (primarily through marriage, other family ties or employment) are forced to remain in unauthorized status rather than claiming their visas, because unauthorized immigrants who entered the United States without inspection can only adjust to legal status (i.e., claim a visa) at a U.S. consulate located *outside* the country. Yet by leaving the country to claim their visas, these immigrants would cause the bars on re-entry to go into effect, and they would be prohibited from re-entering.²⁷ The Migration Policy Institute (MPI) has estimated that as many as 1.3 million unauthorized immigrants are spouses of U.S. citizens or parents of U.S. citizens over the age of 21, and therefore are immediately eligible for a green card under existing immigration law barring disqualifying factors.²⁸ The fact that so many people who are eligible for visas are nonetheless unauthorized suggests that they are unable to claim their visas because of the three- and 10-year bars.

Legal Migration as an Alternative to Unauthorized Flows

One of the topics for this hearing is how the legal immigration system could be modified to reduce pressures for unauthorized flows. With this goal in mind, several recent immigration reform proposals would expand and modify existing low-skilled temporary work visas, such as the H-2A visa for temporary agricultural workers and the H-2B visa for temporary non-agricultural workers, or would create new temporary visas for low-skilled workers.

Congress should create new employment-based visas as part of a broader strategy to reduce illegal immigration, but to be effective any new visa program would need to differ from the existing H-2A and H-2B programs in a number of ways. A key challenge would be to design an employment-based visa that attracts employer participation, but also provides adequate worker protections to prevent immigrants from being exploited and to guard against downward pressure on U.S. wages. Striking this balance would also require changes to worksite enforcement. While new

²⁷ For a fuller discussion, see testimony of Paul W. Virtue, attorney, Hearing on Shortfalls of 1996 Immigration Reform Legislation, before the House Judiciary Committee Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, 110th Cong., 1st sess., April 20, 2007, www.aila.org/File/Related/07042463d.pdf.

²⁸ Randy Capps and Marc R. Rosenblum with James D. Bachmeier, *Executive Action for Unauthorized Immigrants: Estimates of the Population that Could Receive Relief* (Washington, DC: Migration Policy Institute, 2014), www.migrationpolicy.org/research/executive-action-unauthorized-immigrants-estimates-populations-could-receive-relief.

employment-based visas, designed correctly, would reduce illegal immigration and strengthen the U.S. economy, it bears emphasizing that such visas are just one of several changes to U.S. immigration policy that Congress should undertake.

Why Congress Should Create a More Flexible Employment-Based Visa System: *Employment-based visas reduce unauthorized flows and strengthen the U.S. economy.*

Employment-based visas help combat illegal immigration and strengthen the U.S. economy.

Unauthorized immigrants are highly responsive to labor market demand, which makes them obvious candidates for employment-based visas. Most unauthorized immigrants are motivated, to varying degrees, by better employment opportunities,²⁹ and unauthorized immigrants have a higher labor force participation rate than U.S. natives.³⁰ Many employers who hire unauthorized immigrants would prefer to hire lawful workers if a system were in place that allowed them to do so, but U.S. immigration law allocates only 5,000 green cards annually for low-skilled workers.

Perhaps the most important reason Congress should expand legal immigration of low-skilled workers is that the United States has reached the limits of what enforcement-only approaches to preventing illegal immigration can be expected to achieve. We are at a point of diminishing returns without additional complementary policies that address the underlying dynamics of illegal immigration. As described earlier, successive Congresses and presidents have implemented a series of reforms since 1986 to combat illegal immigration. During this period, total spending on immigration enforcement increased from \$574 million to \$18.3 billion; and the United States has spent \$208 billion on immigration enforcement just since 2001.³¹ By comparison, the United States has spent an annual average in the last five years of \$15.2 billion on *all other federal criminal law enforcement agencies combined*.³² INS budgets consistently lagged the budgets of other law enforcement agencies in the 20 years before 9/11, but

²⁹ See for example, Douglas Massey, Joaquin Arango, Graeme Hugo, et al., *Worlds in Motion: Understanding International Migration at the End of the Millennium* (New York: Oxford University Press, 2005).

³⁰ The Migration Policy Institute (MPI) estimates that 72 percent of unauthorized immigrants were either employed or looking for work in 2012, compared to 64 percent of all U.S. workers; see MPI, “Estimates of the Unauthorized Population: United States,” www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US; and U.S. Department of Labor, Bureau of Labor Statistics, “Labor Force Statistics from the Current Population Survey,” accessed March 23, 2015, <http://data.bls.gov/pdq/SurveyOutputServlet>.

³¹ Calculations based on Doris Meissner, Donald M. Kerwin, Muzaffar Chishti and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Washington, DC: Migration Policy Institute, 2013), <http://migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>

³² *Ibid.*

immigration enforcement spending has grown three times faster than other federal law enforcement spending since 2001.³³ In contrast, U.S. employment-based visa policies have been frozen since 1990. The combination of robust enforcement and rigid employment-based visa policies must be recalibrated to resolve the problem of an unauthorized population that has increased three-fold during this period.

Moreover, while there are costs associated with unauthorized immigrants living in the United States, in aggregate and over the long term the taxes paid by immigrants exceed the cost of services they consume (i.e., immigrants are a net fiscal benefit to the United States); and immigrants also promote growth and productivity.³⁴ The fiscal and overall economic benefits of immigration increase as unauthorized immigrants obtain legal status, primarily because legal immigrants are more likely to join the formal economy and pay greater state and federal income and payroll taxes. Legalization also promotes integration, enhances immigrants' earning power and promotes economic growth because legal immigrants have fuller access to U.S. labor and financial markets, more ability to upgrade and utilize their skills and increased protection against discrimination and exploitation by unscrupulous employers.

The primary evidence for the economic benefits of legalization is based on the experiences of immigrants legalizing after IRCA. Two key longitudinal surveys conducted by the Department of Labor found that immigrants' wages increased by up to 15 percent after they acquired legal status.³⁵ Sherrie Kossoudji and Deborah Cobb-Clark, in two separate studies, found that the wage benefit of legalization under IRCA was approximately 6 percent by 1992, and that by that same year, 38.8 percent of Mexican men who legalized under the law had moved on to higher-paying

³³ Ibid. Other federal law enforcement agencies include the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), Secret Service, U.S. Marshals Service and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

³⁴ See, for example, Congressional Budget Office (CBO), *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments* (Washington, DC: CBO, 2007), www.cbo.gov/sites/default/files/12-6-immigration.pdf; Gordon H. Hanson, *The Economics and Policy of Illegal Immigration in the United States* (Washington, DC: MPI 2009), www.migrationpolicy.org/research/economics-and-policy-illegal-immigration-united-states; Organization for Economic Cooperation and Development (OECD), "Fiscal Impact of Immigration on OECD Countries," in *Migration Outlook 2013* (Paris: OECD Publishing, 2013), www.keeppeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/international-migration-outlook-2013_migr_outlook-2013-en#page1; Giovanni Peri, "The Effect of Immigration on Productivity: Evidence from U.S. States," *Review of Economics and Statistics* 94 no. 1 (2012): 348–58; James P. Smith and Barry Edmonston, eds., *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* (Washington, DC: National Academies Press, 1997).

³⁵ See Labor Department, "The 1989 Legalized Population Survey (LPS1)," and "The 1992 Legalized Population Follow-Up Survey (LPS-2)," available at: <http://mmp.opr.princeton.edu/LPS/LPSpage.htm>.

occupations.³⁶ Another study by Francisco Rivera-Batiz in 1999 found a wage increase of approximately 15 percent for men legalized under IRCA and 21 percent for women, and that immigrants' change in legal status had a "strong positive effect" on their earnings.³⁷

More recently, researchers have found similar results for beneficiaries of the Deferred Action for Childhood Arrivals (DACA) temporary legalization program. A national survey of DACA youth found that 61 percent found a new job after receiving DACA status.³⁸ Another national survey found that 70 percent of DACA beneficiaries reported getting their first job or moving to a better job, and 51 percent reported being able to earn more money to assist their families.³⁹

The Goals of Employment-Based Visas: *Employment-based visas should ensure adequate labor supply while protecting the interests of U.S. workers.*

Immigrants benefit the U.S. economy and support robust economic growth, but immigration also has distributive effects and undermines the economic interests of some workers. The basic goals of employment-based immigration policy should be to facilitate immigrants' economic contribution while minimizing any adverse impacts on U.S. workers. From the employers' perspective, immigration policy should provide a flexible and mobile response to labor shortages. From the workers' perspective, immigration policy should protect the job opportunities, wages and working conditions of U.S. workers, and should ensure that migrant workers truly complement the U.S. workforce rather than simply providing a cheaper or more pliable alternative.⁴⁰ The logic of employment-based immigration policy is to balance these

³⁶ Sherrie Kossoudji and Deborah Cobb-Clark, *Coming Out of the Shadows: Learning about Legal Status and Wages From the Legalized Population* (October 1998), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=166535; Sherrie Kossoudji and Deborah Cobb-Clark, "IRCA's Impact on the Occupational Concentration and Mobility of Newly-Legalized Mexican Men," *Journal of Population Economics* 13 (2000): 81-98.

³⁷ Francisco L. Rivera-Batiz, "Undocumented workers in the labor market: An analysis of the earnings of legal and illegal Mexican immigrants in the United States," *Journal of Population Economics* 12 (1999): 91-116.

³⁸ Roberto G. Gonzalez and Veronica Terriquez, *How DACA is Impacting the Lives of Those Who Are Now DACAmented: Preliminary Findings from the National UnDACAmented Research Project* (Washington, DC: American Immigration Council, 2013), www.immigrationpolicy.org/just-facts/how-daca-impacting-lives-those-who-are-now-dacamented.

³⁹ Tom K. Wong and Carolina Valdivia, *In Their Own Words: A Nationwide Survey of Undocumented Millennials* (Working Paper No. 191, Center for Comparative Immigration Studies, San Diego, CA, May 2014), <http://ccis.ucsd.edu/wp-content/uploads/Tom-Wong-In-their-own-words-WP-191.pdf>.

⁴⁰ For a fuller discussion of the goals of employment-based visas, see Demetrios G. Papademetriou, Doris Meissner, Marc R. Rosenblum and Madeleine Sumption, *Aligning Temporary Immigration Visas with U.S. Labor Market Needs: The Case for a New System of Provisional Visas* (Washington, DC: Migration Policy Institute, 2009), www.migrationpolicy.org/research/aligning-temporary-immigration-visas-us-labor-market-needs-case-new-system-provisional.

interests: guarantee that employers have access to needed workers but only under conditions that protect native workers.

Existing Low-Skilled Temporary Worker Programs Do Not Meet These Goals: Programs fail to meet employer demands for needed workers, do not place U.S. workers first in line for employment and lead to exploitation of immigrant workers, which harms native workers.

The United States currently operates two main⁴¹ low-skilled temporary worker programs: the H-2A program for temporary agricultural workers and the H-2B program for temporary non-agricultural workers. In short, these existing programs have failed to meet both of their core goals: they do not provide employers with needed workers—and for that reason they also fail to prevent unauthorized employment—and they do not protect the interests of U.S. workers.

The H-2A and H-2B programs fail to meet employers' demands for needed workers for three main reasons. First, the programs—designed in 1986 and last modified in 1990—fail to cover the types of jobs most unauthorized immigrants perform and that employers of foreign workers demand. The H-2A program is generally limited to short-term and seasonal agricultural work; the H-2B program is limited to non-agricultural work that is strictly temporary, including seasonal or intermittent work or work related to a one-time project. The H-2B program is also limited to 66,000 visas per year—as compared to an unauthorized workforce in 2012 of about 7.6 million people.⁴² Yet the vast majority of unauthorized immigrants are employed in year-round, non-agricultural work. MPI estimates that in 2008-2012, 1.4 million unauthorized immigrants (18 percent of working unauthorized immigrants) were employed in arts, entertainment, recreation, accommodation or food service jobs; 1.3 million (16 percent) were employed in construction; 1.1 million (13 percent) in professional, scientific, management, administrative and waste-management services; and 1.0 million (12 percent) in manufacturing.⁴³ By comparison, while estimates of the number of unauthorized agriculture workers vary widely, they are

⁴¹ A number of additional non-immigrant visas also may permit lower-skilled workers to be employed in the United States, notably the A, E-1, E-2, G, L-1, J-1 and P visas. In general, these programs enjoy far fewer worker protections than the H-2 visas, and a number of studies have documented abusive conditions and other problem. See for example, Daniel Costa, “Guestworker Diplomacy: J Visas Receive Minimal Oversight Despite Significant Implications for The U.S. Labor Market” (EPI Briefing Paper No. 317, Economic Policy Institute, Washington, DC, July 2011), <http://s4.epi.org/files/2011/BriefingPaper317.pdf>; Lydia DePillis, “Au Pairs Provide Cheap Childcare. Maybe Illegally Cheap,” *Washington Post* WonkBlog, March 20, 2015, www.washingtonpost.com/blogs/wonkblog/wp/2015/03/20/au-pairs-provide-cheap-childcare-maybe-illegally-cheap/?postshare=1711426995634106.

⁴² MPI, “Estimates of the Unauthorized Population: United States,” accessed March 23, 2015, www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.

⁴³ Ibid.

undoubtedly a small minority of the total unauthorized workforce, and a much lower share than they were at the time the H-2A program was designed in 1986. Under current temporary worker program rules, employers in industries employing large numbers of unauthorized immigrants only had the option of hiring legal non-immigrant workers if their positions were of a temporary or seasonal nature.

A second limitation of the H-2A and H-2B programs is that the visas are limited to one year, with up to two extensions under certain circumstances, after which time workers must leave the United States for at least six months. This requirement means that employers cannot retain valued employees and provide them with additional training or give them greater responsibility, limiting the value of these programs.

Third, the current system fails to meet employers' need for efficiency and flexibility because rules designed to protect U.S. workers make the process long, burdensome and unpredictable for many employers. The current system relies heavily on detailed "positive recruitment requirements" to ensure that U.S. workers are not available for a job before an employer may hire an immigrant. While testing the labor market is an intuitive way to protect U.S. workers, actual recruitment and advertising rules are artificial and complex, and they are often out of step with how recruitment actually takes place.⁴⁴ In addition, employer recruitment efforts for low-skilled workers must be individually certified by the Labor Department, leading to further delays and uncertainty about when and whether visa applications will be approved. Employer groups have argued that these requirements make the H-2A and H-2B programs too difficult to use and have been important barriers to employers' use of these programs.⁴⁵

At the same time, ***H-2A and H-2B recruitment requirements and other program rules are equally ineffective at protecting the interests of U.S. workers.*** With respect to the recruitment process in particular, U.S. workers may not learn about job openings because requirements are poorly aligned with actual hiring processes; in some cases employers may go through the motions of "positive recruitment" while actually targeting their advertising and recruitment efforts at immigrant workers. Thus,

⁴⁴ Andorra Bruno, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*, CRS Report R42434 (Washington, DC: CRS, 2012), <https://fas.org/sgp/crs/homesec/R42434.pdf>.

⁴⁵ See, for example, testimony of Laura Reiff, Principal Shareholder, Greenberg Traurig, and Chair, Business Immigration and Compliance Group, Essential Worker Immigration Coalition, *Examining the Role of Lower-Skilled Guest Worker Programs in Today's Economy*, before the House Committee on Education and the Workforce Subcommittee on Workforce Protections, 113th Cong., 1st sess., March 14, 2013, www.gpo.gov/fdsys/pkg/CHRG-113hhrg79739/html/CHRG-113hhrg79739.htm; U.S. Chamber of Commerce and ImmigrationWorksUSA, *The Economic Impact of H-2B Workers* (Washington, DC: U.S. Chamber of Commerce and ImmigrationWorks USA, 2010), www.uschamber.com/sites/default/files/legacy/reports/16102_LABR%20H2BReport_LR.pdf.

advocates have repeatedly testified that qualified U.S. workers are passed over by employers who prefer to hire foreign workers.⁴⁶ Available research confirms that existing labor certification rules rarely lead to the hiring of U.S. workers. For example, a 1988 study found that the Permanent Labor Certification (PERM) process led to job offers for U.S. workers in just 0.05 percent of cases,⁴⁷ and a 2003 audit of H-2A certifications found that recruitment requirements results in U.S. workers being hired for just 2 percent of the positions advertised.⁴⁸ More generally, many labor economists are skeptical that the United States faces a true low-skilled labor shortage; taking additional steps to reduce U.S. unemployment and under-employment, clearing existing visa backlogs and legalizing current unauthorized workers could go a long way to meeting current and future employment demand.⁴⁹

Existing programs also fail to adequately protect immigrant workers, leading to downward pressure on wages and working conditions throughout the affected industries and thus harming U.S. workers. Exploitation of temporary workers often begins during the workers' recruitment process, as many U.S. employers rely on recruitment agencies to contract with foreign workers,⁵⁰ and labor recruiters often charge workers thousands of dollars in illegal fees.⁵¹ Temporary workers therefore

⁴⁶ See, for example, testimony of Bruce Goldstein, Executive Director, Farmworker Justice, *Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hire From Abroad?*, before the House Education and Labor Committee, 110th Cong., 2nd sess., May 6, 2008; testimony of Javier Riojas, Attorney/Branch Manager, Texas RioGrande Legal Aid, *Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hire From Abroad?*, before the House Education and Labor Committee, 110th Cong., 2nd sess., May 6, 2008. Also see Farmworker Justice, *Litany of Abuses: More – Not Fewer Labor Protections Needed in the H-2A Guestworker Program* (Washington, DC: Farmworker Justice, 2008).

⁴⁷ Demetrios G. Papademetriou and Stephen Yale-Loehr, *Balancing Interests: Rethinking US Selection of Skilled Immigrants* (Washington, DC: Carnegie Endowment for International Peace, 1996).

⁴⁸ Labor Department, Office of the Inspector General, *Overview and Assessment of Vulnerabilities in the Department of Labor's Alien Labor Certification Programs Office*, Office of Audit, Report No. 06-03-007-03-321 (Washington, DC: Labor Department, Office of the Inspector General, 2003), www.oig.dol.gov/public/reports/oa/2003/06-03-007-03-321.pdf.

⁴⁹ See for example, Ray Marshall, "Migration and Domestic Labor Markets: Auctions and Employer Demand versus Public Policy" (EPI Briefing Paper No. 350, Economic Policy Institute, Washington, DC, November 2012), <http://s4.epi.org/files/2012/bp350-adjusting-migration-domestic-labor-markets.pdf>. As Marshall observes, a 2011 McKinsey Global Institute analysis projects a year 2020 *surplus* in the United States of 5.9 million workers without high school degrees and 800,000 high school graduates; also see James Manyika, Susan Lund, Byron Auguste, Lenny Mendonca, Tim Welsh and Sreenivas Ramaswamy, *An Economy That Works* (McKinsey Global Institute, 2011), www.mckinsey.com/insights/mgi/research/labor_markets/an_economy_that_works_for_us_job_creation.

⁵⁰ Centro de los Derechos del Migrante Inc. and American University, Washington College of Law, *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry* (Washington, DC: Centro de los Derechos del Migrante Inc. and American University, Washington College of Law, 2010), www.cdmigrante.org/wp-content/uploads/2012/01/PickedApart.pdf.

⁵¹ International Labor Recruitment Group, *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse* (International Labor Recruitment Group, 2013),

arrive in debt, and are especially dependent upon their employers for continuing employment.

This dependence is exacerbated by H-2 visa rules, which tie workers' immigration status to a specific employer, and thus prevent visa holders from changing jobs or leaving an abusive employer. The resulting imbalance of power is further exacerbated by employer abuses, such as seizures of workers' Social Security cards and passports.⁵² Indeed, many of the same labor abuses affecting unauthorized workers are also found in the H-2 programs, including wage theft and abusive recruitment practices.⁵³ In fact, a 2008 study of forestry workers found no real difference in the working conditions of unauthorized immigrants and H-2 workers.⁵⁴ Retaliation, including the threat of deportation, and blacklisting are also problems in the H-2 programs, so workers often fail to assert their rights for fear of being unable to find work elsewhere.⁵⁵

Recommended Reforms to Low-Skilled Temporary Worker Programs: How to better meet employer needs and better protect U.S. and foreign workers.

As the preceding discussion makes clear, facilitating legal migration would help reduce illegal immigration flows, and moving unauthorized workers into the legal economy would benefit the U.S. economy and U.S. workers; the current H-2A and H-2B programs, however, have not met employers' labor demands or protected U.S. workers.

<https://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrvg-report.pdf>. This abuse occurs even though there are regulations that prohibit employers from knowingly charging or permitting recruiters to charge recruitment fees. Also see testimony of Miguel Angel Jovel Lopez, former H-2B guestworker with Cumberland Environmental Resources Co., *The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers*, House Committee on Oversight and Government Reform, Domestic Policy Subcommittee, 111th Cong., 1st sess., April 23, 2009, www.gpo.gov/fdsys/pkg/CHRG-111hhrg51324/html/CHRG-111hhrg51324.htm; Dovelyn Rannveig Agunias, *Migration's Middlemen: Regulating Recruitment Agencies in the Philippines-United Arab Emirates Corridor* (Washington, DC: MPI, 2010), www.migrationpolicy.org/research/migrations-middlemen-regulating-recruitment-agencies-philippines-united-arab-emirates.

⁵² U.S. Government Accountability Office (GAO), *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers* (Washington, DC: GAO, 2015), www.gao.gov/assets/670/668875.pdf; Centro de los Derechos del Migrante Inc. and American University, Washington College of Law, *Picked Apart: The Hidden Struggles Of Migrant Worker Women In The Maryland Crab Industry*.

⁵³ Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (Washington, DC: Farmworker Justice, 2011), www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf. Also see Human Rights Watch (HRW), *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (New York: HRW, 2000), www.hrw.org/reports/pdfs/u/us/uslbr008.pdf.

⁵⁴ Brinda Sarathy and Vanessa Casanova, "Guest Workers or Unauthorized Immigrants? The Case of Forest Workers in the United States," *Policy Sciences* vol. 41, no. 2 (2008): 95-114.

⁵⁵ HRW, *Unfair Advantage*.

Thus, Congress should consider the following reforms to existing low-skilled temporary worker programs as part of a program to reduce illegal immigration, strengthen the U.S. economy and protect U.S. workers:

- ***Develop a mechanism to adjust visa limits up or down in response to changing economic conditions.*** The 66,000 visa annual cap on the H-2B program was established by Congress in 1990, and has remained in place through 25 years of dynamic changes to the U.S. economy; limits on other temporary and permanent visas are equally inflexible. MPI has long recommended that Congress establish a federal immigration and labor markets research agency that reports to an independent, bipartisan expert panel charged with making bi-annual recommendations to Congress and the president about visa numbers, and that the panel's recommendations go into effect unless Congress acts to override them.⁵⁶ Employers should have access to more visas during years of economic expansion, and the number of available visas should be proportionally reduced during years of recession or slow-growth periods. Whether through such an expert panel, commission or comparable mechanism, it is essential that Congress develop a system that introduces needed flexibility into a visa system that is currently frozen and outdated, changing only once every few decades.
- ***Permit foreign workers to change jobs and provide them with additional labor protections.*** Making employers the owners of their workers' visas invites exploitation and reduces economic growth by preventing workers from moving into more competitive positions. Visa portability would permit immigrants to leave bad jobs and abusive employers, allowing more room for market forces to set wages and working conditions.⁵⁷ One way to allow visa portability would be to create a two-track system, in which employers are approved for the right to hire foreign workers, workers are approved for the right to work in the United States and both sides are free to contract with any approved party.⁵⁸ An

⁵⁶ Doris Meissner, Deborah W. Meyers, Demetrios G. Papademetriou and Michael Fix, *Immigration and America's Future: A New Chapter* (Washington, DC: MPI, 2006),

www.migrationpolicy.org/research/immigration-and-americas-future-new-chapter; Demetrios G. Papademetriou, Doris Meissner, Marc R. Rosenblum and Madeleine Sumption, *Harnessing the Advantages of Immigration for a 21st-Century Economy: A Standing Commission on Labor Markets, Economic Competitiveness, and Migration* (Washington, DC: MPI, 2009), www.migrationpolicy.org/research/harnessing-advantages-immigration-21st-century-economy-standing-commission-labor-markets.

⁵⁷ Papademetriou, Meissner, Rosenblum and Sumption, *Aligning Temporary Immigration Visas with U.S. Labor Market Needs*, 16.

⁵⁸ This approach was proposed in S.744, the Border Security, Economic Opportunity and Immigration Modernization Act that passed the Senate in June 2013.

alternative approach would be to continue permitting employers to sponsor specific workers but to permit workers to change jobs if another approved employer buys out the time on the visa contract by reimbursing a pro-rated portion of the original sponsor's visa fees. In any case, foreign workers who are hired for ongoing positions should have full visa portability (i.e., the ability to take any job they want) after a specified but relatively short period of time.⁵⁹ At a minimum, whether or not portability provisions such as these are enacted, foreign workers should be able transfer their visas to another employer if they have a legitimate complaint about illegal employer behavior or if they are involved in a labor investigation or dispute that has been found to be bona fide by a local, state or federal agency. This will reduce foreign workers' vulnerability to being retaliated against for making such complaints.

- ***Restructure most temporary visas as provisional visas*** that allow visa holders to qualify for permanent residence after a given time period, assuming certain additional criteria have been met. Along with visa portability, provisional visas would give immigrants clear ownership of their visas within a reasonable time frame. Provisional visas are good for employers because they would be able to retain valued workers for longer periods rather than suffering high turnover and repeatedly enduring a burdensome recruitment process. And by attaching sensible requirements to a provisional workers' adjustment process—that they remain employed, learn English and maintain a clean criminal record, for instance—a provisional visa system would promote immigrant integration. Temporary or circular visas should remain in use only for genuinely seasonal work.⁶⁰
- ***Create a licensing requirement for foreign labor contractors.*** At present, the large foreign labor recruitment sector is largely unregulated—despite the fact these gatekeepers between an abundant supply of workers and a scarcer supply of U.S. vacancies hold significant power over foreign workers. Under a licensing system, labor contractors and primary employers would be jointly responsible for the enforcement of wages and working conditions, and jointly liable for unlawful behavior. Labor recruiters who expose foreign workers to exploitative working conditions, who charge excessive fees, who misrepresent the terms of employment to their clients or who retaliate against workers who complain or report unlawful or prohibited activities would be sanctioned and

⁵⁹ Papademetriou, Meissner, Rosenblum and Sumption, *Aligning Temporary Immigration Visas with U.S. Labor Market Needs*.

⁶⁰ For a fuller discussion of provisional visas, see Papademetriou, Meissner, Rosenblum and Sumption, *Aligning Temporary Immigration Visas with U.S. Labor Market Needs*.

could lose their license. Employers who colluded with recruiters in such illegal or prohibited activities or failed to prevent them would be fined and barred from participating in employment-based visa programs. Since many contractors are based in countries of origin, cooperation with Mexico and other major sending countries would be required to make a licensing system effective.

- ***Simplify and streamline the foreign worker hiring process.*** Employers recruiting new employment-based immigrants from abroad should be required to advertise positions for a set period of time and to make a good-faith effort to recruit native workers but they should not be required to have their recruitment efforts certified on an individual, case-by-case basis by a government agency or court.⁶¹ As long as the system provides clear incentives to favor U.S. workers—such as through higher visa fees, as discussed below—employers should not be required under most circumstances to favor a minimally qualified native worker over an immigrant who is more qualified from the employer’s perspective. Employers should be able to file labor certification and visa petition applications at the same time online and to track the status of their applications through a single interface.
- ***Raise employment-based visa fees.*** Current visa fees are quite low as a percentage of salary, ranging from \$325 for an H-2A visa and \$475 for an H-2B visa, up to \$2,325 for some H-1B visas (for high-skilled workers), while many employers spend many times this amount on immigration-related legal fees and advertising. In exchange for a simpler recruitment process, employers should pay a higher visa fee, with fees set at about 10 percent of salary for workers in a given visa category: about \$1,500 for a low-skilled worker ranging up to \$10,000 or more for the most highly skilled workers. High visa fees would create clear and transparent incentives for employers to favor U.S. workers, and visa fees could be used to improve workforce development and job-matching mechanisms for U.S. workers.
- ***Expand the entry-exit system to track foreign workers.*** An estimated 40 – 50 percent of unauthorized immigrants enter as legal non-immigrants and then overstay their visas,⁶² and this proportion likely has increased in recent years as

⁶¹ Most advanced industrialized nations require employer advertising for at least some visa types. However, most also do not attempt to verify whether qualified candidates applied and/or were rejected, on the basis that this process is quite burdensome and is unlikely to increase the hiring of natives. See OECD, *International Migration Outlook SOPEMI – 2008 Edition* (Paris: OECD Publishing, 2008), 159, www.oecd.org/migration/mig/41275373.pdf.

⁶² Pew Hispanic Center, “Fact Sheet: Modes of Entry for the Unauthorized Migrant Population,” (fact sheet, Pew Hispanic Center, Washington, DC, May 22, 2006), www.pewhispanic.org/files/factsheets/19.pdf. This

U.S. Customs and Border Protection (CBP) has strengthened border security. DHS has taken steps to address this problem by establishing data-sharing programs with Canada and with private air and sea carriers to track exits at the northern border and at air and sea ports; but no system exists to track southern border land exits, a population which should have consisted of about 180 million people in 2014.⁶³ Any temporary worker program should include a mechanism for workers to “check out” upon departure. Such a system may also serve as a pilot program for broader exit tracking of other potentially high-risk overstay groups.

- ***Publish more and better data on low-skilled temporary foreign worker programs.*** At present, the Departments of Labor, Homeland Security and State collect useful data on the occupations, wages and work locations of workers in the various non-immigrant visa programs that authorize employment but publish only a small fraction of it. The limited public data that are available to policymakers and their staff, researchers and the general public, makes it nearly impossible for them to understand the impact the programs have on the U.S. labor market. The DHS Office of Immigration Statistics should collect and publish these data on an annual basis, so that Congress can make informed decisions about how to best manage temporary foreign worker flows in ways that discourage unauthorized immigration while protecting the interests of native workers.

Worksite Enforcement: *Improvements to employment-based visas cannot succeed without more effective worksite enforcement.*

Ultimately, rules designed to protect the wages and working conditions of U.S. (and foreign) workers require effective worksite enforcement. One reason employers under-utilize the H-2A program is that it is unwieldy; arguably more important is the fact that they face almost no chance of being sanctioned for hiring an unauthorized worker, as noted earlier. Similarly, any effort to encourage employers to make a priority of hiring U.S. workers—whether in the form of recruitment requirements, higher visa fees or some other mechanism—is fundamentally limited by the ability of enforcement agencies to hold employers accountable for meeting such requirements.

estimate is somewhat dated in light of recent improvements to border security, but no reliable estimate has been published since 2006.

⁶³ Calculation based on the total number of southern border entries (including trucks, bus passengers, passengers in private vehicles and pedestrians), January-December, 2014, according to U.S. Department of Transportation, Bureau of Transportation Statistics, “Border Crossing/Entry Data,” http://transborder.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BC_Index.html, accessed March 23, 2015.

Holding employers accountable must begin with a universal E-Verify system, along with additional improvements to combat its vulnerability to identity fraud. But even with a universal and accurate E-Verify system, effective enforcement will still require physical worksite inspections to guard against off-the-books employment and workers misclassified as independent contractors. In the absence of these capabilities, visa fees or other incentives for employers to favor U.S. workers are likely to be undermined by the availability of unauthorized workers.

In addition to immigration-related worksite enforcement, protection of U.S. workers requires more robust enforcement of U.S. labor law overall. The Labor Department's Wage and Hour Division, which administers and enforces the Fair Labor Standards Act, is severely understaffed. From 1997 to 2007 the number of Wage and Hour investigators decreased by more than 20 percent, from 942 in 1997 to 732 in 2007.⁶⁴ During the same time period the number of Wage and Hour enforcement actions decreased by over one-third, from approximately 47,000 actions in 1997 to fewer than 30,000 in 2007.⁶⁵ At present, the Wage and Hour Division is responsible for policing more than 7 million employers, but only has 1,000 investigators.⁶⁶ This insufficient oversight of wages and working conditions has extended to the current guest worker programs. For example, in 2013 the Labor Department certified more than 8,000 employer applications for H-2A workers but investigated and found only 270 H-2A violations.⁶⁷ Investigations of H-2B violations have been much lower than investigations of H-2A violations, consisting of only 6 percent of all employers investigated by the Wage and Hour Division from fiscal years 2009 through 2013.⁶⁸ In that same time period 250,685 H-2B visas were issued, but only 60 H-2B employers were investigated.⁶⁹ In order to improve compliance with temporary worker program requirements, appropriations for the Wage and Hour Division should be increased substantially from current levels. The Labor Department Inspector General has also found the department's use of suspension and debarment tools in administering the

⁶⁴ GAO, *Fair Labor Standards Act: Resources and Consistent Reporting Could Improve Compliance* (Washington, DC: GAO, 2008), www.gao.gov/new.items/d08962t.pdf.

⁶⁵ Ibid.

⁶⁶ U.S. Department of Labor, *FY 2015 Department of Labor Budget in Brief* (Washington, DC: Labor Department, 2014), <http://www.dol.gov/dol/budget/2015/PDF/FY2015BIB.pdf>.

⁶⁷ Office of Foreign Labor Certification, *Foreign Labor Certification Annual Report FY 2011* (Washington, DC: Office of Foreign Labor Certification, 2011), www.foreignlaborcert.doleta.gov/pdf/2011AR_FINAL.pdf; Labor Department, Wage and Hour Division, *FY 2013 Congressional Budget Justification* (Washington, DC: Labor Department, Wage and Hour Division, 2013), www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-09.pdf.

⁶⁸ GAO, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers* (Washington, DC: GAO, 2015), 47-51, www.gao.gov/assets/670/668875.pdf.

⁶⁹ Ibid, 47-8.

foreign labor certification programs to be insufficient,⁷⁰ which suggests an overly lenient approach has been taken toward program violators.

The Limits of Low-Skilled Temporary Worker Programs: *Many current and future legal and unauthorized immigrants may not be good candidates for a temporary worker program, and the system also requires many additional reforms.*

While expanding and improving existing low-skilled temporary worker programs could divert certain unauthorized immigrants into legal channels, such programs cannot solve many other immigration policy challenges, and additional changes to the U.S. immigration system are also needed. First, temporary worker programs are not an appropriate solution for regularizing the status of existing unauthorized immigrants; immigration reform should include a broad legalization program for both practical and humanitarian reasons. With 7.6 million unauthorized immigrants already working across a variety of industries, the existing unauthorized workforce is simply too large and diverse to address through H-2 reforms—not to mention the 3.6 million unauthorized immigrants outside the labor force. The size and history of this population—890,000 children, 807,000 adults ages 55 and over, 4.2 million parents, 8.7 million people who have lived in the United States for five years or more—also rule out mass deportations as a real policy solution.⁷¹ Yet the continued presence of millions of unauthorized immigrants jeopardizes all other efforts to fix the employment-based visa system by leaving in place the backbone of the underground economy, making legalization a fundamental component of any successful reform effort.

Lower-skilled employment-based visas also do not address numerous other shortcomings in the current visa system. Family-based visa backlogs, for example, now number 4.3 million people, as noted above. Many middle- and high-skilled employers also claim labor shortages. More generally, employment-based flows are only a fraction of the U.S. immigration system, and low-skilled immigrants a subset of employment-based flows; getting immigration policy right will involve far more than rethinking H-2 visas.

Conclusion

The United States has been the world's leading immigration destination throughout its history, a quality that has been and remains one of the country's most important social

⁷⁰ Labor Department Office of the Inspector General, *Debarment Authority Should Be Used More Extensively in Foreign Labor Certification Programs* (Washington, DC: Labor Department Office of the Inspector General, 2010), www.oig.dol.gov/public/reports/oa/2010/05-10-002-03-321.pdf.

⁷¹ Calculations based on MPI, “Estimates of the Unauthorized Population: United States.”

and economic assets. Immigration markets are dynamic, with millions of individuals who travel to better their lives. A well-designed U.S. immigration policy can be a powerful tool to shape and channel these flows to meet the country's economic needs and legally reunite relatives under the long-held primacy of family reunification in U.S. immigration law, as well as to promote immigrants' successful integration in this country.

Immigration enforcement policies will always be an essential component of a well-functioning immigration system—and enforcement has improved substantially in recent years—but the historical record shows that policy choices about the legal immigration system are at least as important: how many may enter, based on what criteria and under what conditions? As long as immigration policy fails to offer answers to these questions that match the economic and demographic realities of today—and tomorrow—our efforts to secure the border and control immigration flows will remain expensive and much less effective than they need to be. Sensible reforms to the employment-based visa system that introduce flexibility to visa numbers and workers' career paths, improve worker recruitment and protect worker rights should be high priorities for Congress and for the nation.