Legal Times
WEEK OF MAY 29, 2006 • VOL. XXIX, NO. 22
ALM

What LuresThem Here

Changes to immigration law should focus less on the border and more on the job.

BY DAVID A. MARTIN

In his May 15 address to the nation, President George W. Bush performed the immigration balancing act more skillfully than ever before. But the various pieces of his package don't fit together nearly as well as his graceful language suggested, and one—the guest-worker program—is sharply contradictory to the rest of his message.

Although Bush claimed to offer "a rational middle ground" in his speech, the true middle ground would eliminate the guest-worker program and meet genuine needs for imported labor through changes in permanent immigration. Reform should be built on better-focused enforcement to provide assurance about the future, plus an earned-legalization program to resolve the status of those who came here illegally in the past.

Although this approach has few champions now, Congress should consider it closely as lawmakers labor to resolve the monumental differences between the House and Senate immigration bills.

REALISTIC ENFORCEMENT

The president's first try at describing his immigration reform plans, in a speech in January 2004, was naive compared to this month's address, especially about enforcement. The administration's explainers suggested then that a guest-worker program would be used by nearly everyone who might otherwise migrate illegally, thus reducing further enforcement to a small matter of catching criminals and terrorists. This program allegedly would also bring the existing population out of the shadows and give us a record of nearly all foreigners present.

That stance was never realistic, and Bush's May 15 speech tacitly acknowledges as much. Eleven paragraphs addressed enforcement; only three covered the temporary-worker program. Implicitly, the president conceded that no such program will match all the potential demand. The bill reported to the Senate initially set temporary-worker admissions at 400,000 per year (a floor amendment trimmed that to 200,000), whereas current illegal migration is estimated at something like 800,000 people per year. Serious immigration enforcement will remain a pressing necessity.

And counterintuitively, it's also in the interests of those who want a generous long-term immigration policy, including legalization for the undocumented already here. Only assurance about control of the borders will lower the political heat and win over the undecided middle to more openness. Just imagine how poisonous the public reaction will be if this year's "comprehensive reform" results in several million new illegal migrants 10 years from now.

IS HIS PLAN SERIOUS?

But is the president's enforcement plan serious? Sending the National Guard to the southern border is political symbolism—nothing more. Adding 6,000 permanent Border Patrol agents there would be more meaningful, but it still misses the point. Determined migrants and their smugglers can still evade patrols, come through Canada or by sea, or—as 40 percent of our illegal population has done—overstay a legal visa.

We should have learned from the past decade of rapid Border Patrol expansion that border policing by itself is always insufficient, particularly when those who do manage to get past know they have virtually unimpeded access to American jobs.

It's jobs that draw migrants. For this reason the most important enforcement measure Congress can enact is resolute worksite enforcement—something that has withered over the past decade. The Senate and House bills both contain serious improvements in this area, built on a computerized verification system that each employer will have to use to check the work eligibility of each new hire.

Bush is catching on. In 2004 he said very little about worksite screening. Now it's one of his five main points. His address even added a novel and potentially promising wrinkle: a new identification card with a biometric identifier for every legal foreign worker. A great deal depends on the precise details, of course, but secure worker identification (best if applied equally to citizens and foreigners), combined with required verification, really could dry up job access for those who are not here legal-

ly. That would ultimately reduce the pressure on border policing and border communities, because many fewer people will attempt the trip if they know they can't get jobs even if they reach the interior.

Despite widespread but ill-informed cynicism about such possibilities, we now have the technological capacity to make a real employment screening system work. But it will require considerable time, significant skill and determination in design and implementation, and sustained investment in the ID and verification systems. And it will require a serious commitment of resources, year after year, to ongoing enforcement—checking closely on employers' compliance and imposing stiff fines for violations.

The National Guard can't do that job, and unfortunately, we heard nothing on May 15 about adding 6,000 (or even 600) worksite inspectors over the next three years.

New enforcement money would be much better spent on the employment screening system. That is always far less popular than border enhancements—because it provides fewer photo ops and generates more resistance from well-heeled business interests. But a well-designed verification system is in the real interests of business. It would reassure honest employers about their hiring and also protect them against unfair competition from less scrupulous companies.

THEY'RE ALL DECENT PEOPLE

Now for the contradictory element, the guest-worker program. The Bush plan envisions temporary admissions of workers and their families for up to six years, to fill "jobs Americans are not doing."

That latter phrase is an improvement over the 2004 notion that there are jobs Americans are *unwilling* to do. In fact, American workers fill a majority of the places in every job category usually associated with illegal migrants: hotel and restaurant employment, landscaping, construction, even farm work.

Why don't Americans fill more of these jobs? The wages are too low. And they are kept low, in part, by the very availability of foreign labor, a problem that would be exacerbated by a guest-worker program unless wage levels were policed with a stringency no one really anticipates.

Bush insisted in his May 15 address that these temporary workers "must return to their home country" when their temporary-work period is completed. But serious interior enforcement, not more Border Patrol agents, will be required if that is to materialize. And the May 15 speech reveals why this expectation for invited guest workers is both unrealistic and actually out of keeping with the president's own instincts.

In another part of his speech, Bush wisely seeks a middle ground for dealing with the "reality that millions of illegal immigrants are here already." He points out that "the vast majority . . . are decent people who work hard, support their families, practice their faith, and lead responsible lives." He seems genuinely committed to fostering assimilation into our society, so that newcomers can "go from picking crops to opening a grocery, from cleaning offices to running offices, from a life of low-paying jobs to a diploma, a career, and a home of their own."

As a result, he would draw the line between "an illegal immigrant who crossed the border recently, and someone who has worked here for many years, and has a home, a family, and an otherwise clean record." The latter should have a chance to apply for permanent legal status after paying some "meaningful penalty."

But nearly every guest worker admitted from now on under the Bush plan will exactly match that latter description. They will have worked here for many years, they will have the right to bring their families (who presumably won't be homeless), and nearly all will keep their records clean. To top it off, they won't have come illegally to begin with.

Bush seems to know that these too will be "decent people." The most charitable way to understand this disconnect is that enforcing their return will wind up as some other president's problem.

A guest-worker program is a bad idea. If it works as Bush initially advertised—that is, all workers leave after a few years of employment—it will impose an unwelcome stratification in an otherwise fluid, entrepreneurial economy. And it will change America more profoundly than its proponents admit, undermining key foundations of a successfully unified society.

But a true temporary-worker program probably won't work. On the world scene, guest-worker programs have stayed temporary only when implemented with a harshness that is (thankfully) far beyond this society's capacity. Mexico's assurances about "circularity" of migration and polling data showing that most migrants say they want to come only for a few years are misleading.

European countries relied on such understandings in running guest-worker programs after World War II. But when they called a halt after the oil crisis of 1974, few workers actually left. The workers hadn't necessarily lied to the pollsters; their plans had simply changed, a fully normal response after many years of living in a new home, with the kids in school and the employment prospects more attractive. Workers aren't just cogs in an economic machine. They are human beings, and humans naturally sink roots.

HARD QUESTIONS

We need to ask ourselves some hard questions. Why not let enforcement and transitional worker shortages force up the wages for our fellow Americans at the bottom of the economic scale? If a fear of offshoring, genuine lingering labor shortages, or some other factor leads to the conclusion that we still want foreign workers in some fields, we need to make a disciplined and narrow choice of just which fields.

And then we should bow to reality and admit the workers with permanent status. (The grudging, obstacle-strewn course toward permanent residency for future guest workers in the final Senate bill doesn't answer this need, and it seems unlikely to survive negotiations with the House anyway.) Not all workers will want to stay, but we can't predict which ones will, and we shouldn't try.

Eliminating the guest-worker component would bring other pragmatic benefits. The temporary-worker program would require government officials to review employer applications and screen workers to fill several hundred thousand slots a year. That task would overwhelm an immigration bureaucracy that

had fallen way behind on processing other immigration benefits and is only now getting close to timely responses.

Let's permit the officials to concentrate on designing the worksite verification system instead. Setting up multiple complicated systems all at once is a recipe for doing none of them well.

We also need to rethink the political mix. The central focus of the immigration advocacy community is the people already here, who have become functioning parts of the community (plus their immediate families, wherever located), rather than hypothetical future migrants. Authorized status for current workers is likewise the primary legitimate need for employers—though, of course, many business interests salivate at the prospect of ongoing access to temporary workers, which would keep labor costs low.

Meanwhile, those on the restrictionist side (some of them anyway) might find it easier to swallow a compromise containing earned legalization for a finite group of current undocumented workers if they don't also have to buy an ongoing guest-worker program whose beneficiaries will be hard to deport in the end.

And the final component, in the real interests of all sides, is serious—not symbolic—enforcement focused on well-funded and sustained workplace screening. Ultimately, this is the genuine political middle ground.

David A. Martin, professor of law at the University of Virginia, served as general counsel of the Immigration and Naturalization Service in the mid-1990s. He is a fellow of the Migration Policy Institute.