

## WHAT IS COMPREHENSIVE IMMIGRATION REFORM?

By Bonnie Stern Wasser © 2007, updated 11/2008

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Comprehensive Immigration Reform (CIR) is a multidisciplinary approach to immigration legislation that addresses some of the root causes of illegal immigration and provides a path to legal status for the millions of immigrants already here illegally, while at the same time enhancing border and national security. By contrast, "enforcement only" legislation promotes building walls between neighbors, militarization of the border, criminal prosecution of illegal immigrants and their US citizen and green card holding supporters, indefinite separation of mixed status families, limitations on due process and increased violations of civil liberties. Enforcement only approaches do nothing to fix the problem of illegal immigrants already here; nor does it deal with the reasons immigrants arrive illegally or become illegal in the US.

CIR means legislation that is fair to immigrants of all types, their families and employers. CIR also balances their needs with the needs of our economy, our national security and cross-border concerns. We hear a lot of talk about immigrants breaking laws and how they should not be rewarded. Readers should be aware that our current system of immigration law is civil in nature. That is, all the grounds of deportation or removal and exclusion are civil. The procedures to exclude or remove an immigrant from the US is civil in nature. Proceedings are before a unique administrative immigration court or there may be no hearings at all in some situations. While an immigrant in removal proceedings has a right to counsel and due process, there is *no* right to court appointed counsel at government expense as there is for criminal defendants. Most immigrants in proceedings are unrepresented as there simply are not enough lawyers and legal organizations that offer pro bono or low cost services to meet their needs.

There are a few categories of crimes that deal with repeated illegal entrants, smugglers and document fraud. However, these criminal defendants *are* entitled to government appointed counsel, the right to appeal, and other due process protections. Finally, readers should be aware that applicants outside the US seeking visas or entry are not entitled to a review hearing *at all*. Nor are they entitled to legal counsel or the right to appeal. Their rights are subject to the unfettered discretion and power of government employees without the possibility of review by an appellate level or another branch of government. So, when we hear proposals to make illegal immigrants and their supporters criminals, consideration about the cost and rights of criminal defendants and the burdens on federal courts must likewise be considered.

The components of any CIR program should include the following:

- 1) **Realistic avenues for legal immigration** that include labor rights for immigrants, the ability to change employers (portability), and a path to permanent residence while protecting the jobs of US workers. Our current system of immigration laws is based on the two tracks of temporary nonimmigrant status and permanent, long-term residence. Most often, legal immigrants enter for a temporary stay in any number of nonimmigrant visa categories in the alphabet soup of “A” to “V” status. They may either go home or eventually switch to a different nonimmigrant or permanent category and later to US citizenship.

Currently, there are NO legal immigration categories for semi-skilled and low skilled workers. While there is a seasonal worker category called H-2A (for non-agricultural workers) and H-2B for agricultural workers to fill short term positions, for unskilled workers, generally, this category is insufficient to meet employers’ needs because of low annual quotas that are reached early in the fiscal year. The seasonal worker category does not help employers who need essential workers (whether low skilled or unskilled) to fill long-term positions for more than one year. Many workers who want to come temporarily and be able to go back and forth simply cannot use this program at this time.

A permanent residence category for unskilled workers (3<sup>rd</sup> preference “other workers”) allocates 10,000 visas per year which translates to current quota backlogs of 5 years during which time the worker has no temporary visa available while waiting for the quota. This makes the category useless to most employers who cannot hold a job open for five years even though as a preliminary step the employer had to conduct a labor market test to show there were no qualified workers. By making unskilled and low skilled workers wait for years for what amounts to a false hope to fill a position years from now is simply unrealistic. Instead, it encourages workers for whom the process is hopeless, to “jump the line” and enter the US illegally. It also encourages employers who need the workers *now* to unlawfully hire them. Consequently, we need more temporary categories for a range of worker qualifications, and we need more numbers added to the permanent categories that makes them more timely and useful for employers. A realistic system of legal immigration categories and numbers can help immigrants come and go in an orderly fashion and we can track whom they are.

- 2) **Reduce quotas and backlogs.** Not only are the quotas for unskilled workers backlogged for temporary and permanent immigration; so too are the quotas for skilled and professional workers. As of this writing, they are backlogged for five and a half years. Indian and Chinese nationals with Masters degrees or who are of exceptional ability, the top people that our country needs, must wait almost two to four years for permanent

residence. Luckily, they usually can qualify for temporary work visas. However, even the commonly used H-1B temporary visa used by employers to hire university educated workers in specialty occupations have been unavailable in FY 2009 before the fiscal year even started! By making skilled and professional workers wait so long for immigration, it encourages illegal immigration by either jumping the line or overstaying visas. In addition, these employees can be subject to removal for simply changing employers unlawfully or inadvertently falling out of status while they wait for the quota. Furthermore, skilled and professional workers have already had their jobs tested by the employer against the US workforce that makes that process nonsensical for a permanent job not available for two to four years later. Because the opportunity is job and location specific, employers cannot transfer or promote immigrant workers for years until permanent residence is granted or their applications have been pending sufficiently long to meet portability standards. Finally, a cumbersome and lengthy process for the best and brightest talent can only encourage foreign talent to go to other countries where immigration is less of a hassle, thereby making the US less competitive.

Similarly, family based immigration in the preference categories is severely backlogged causing beneficiaries to jump the line, fall out of lawful status or wait abroad for years and years separated from family members. Immigration through the preference categories currently ranges from 5 to 13 years! Preference categories include minor children and spouses of green card holders, adult children of US citizens and permanent residents, and siblings of US citizens. The legislative fix needed here is an increase in the annual numbers in the categories we have and/or to make the children and spouses of permanent residents immediate relatives who are not subject to a quota.

- 3) Regularize or legalize the status of the millions of undocumented immigrants already here in the US.** Call it what you will: regularize, legalize, amnesty, earned adjustment, whatever. The political rhetoric that these are bad words and outcomes simply ignores the reality of the situation. Our country needs to make a very big decision: will we have unprecedented mass deportations nationwide that will cost trillions of dollars and disrupt the lives of millions of legal immigrants, US citizens and employers associated with illegal immigrants, or will we bring these folks out of the shadows and underground economy? Polls consistently show that most Americans do not want to see mass deportations.

If we do nothing, the socio-economic gap and societal ills we face from unchecked illegal immigration will only worsen. What we can do is normalize the status of millions of people by providing them with a way to get lawful social security numbers, drivers licenses, health and auto insurance, and encourage payment of taxes, and undergo security checks, perhaps for payment of hefty filing fees or fines, However, any

program that leads only to a temporary status with no avenue for permanent residence will fail since there will be few takers. A program that requires leaving the US first and then re-entering at some indefinite time will also fail. So, too, will a program that leads to status but not for years and years. Finally, if we have such a program, it needs to be cost-effective and efficient. It must be fully funded and adequately staffed. DHS can barely say it can do that now with existing programs. If we do nothing, we will continue to have an underground economy of exploited individuals.

- 5) **Other fixes to the legal immigration system.** Years ago, if someone entered illegally or became illegal after an initial lawful entry, and subsequently found a way to immigrate through a family member or a job, there was a means to eventually become legal by completing one's immigration process at a US consulate abroad. We actually had less illegal immigration then. But in the last two decades, fewer and fewer people have been able to correct their status because of imposition of the three and 10 year and permanent bars to immigration enacted by Congress in 1996. The bars are triggered when the person leaves the US after being here unlawfully for six months or longer. This has caused many people not to qualify for waivers of the bars. Many [formerly] illegal immigrants with a way to legalize are either stuck outside the US separated from their families, or they are essentially trapped indefinitely inside the US unable to become legal.

Since 1996, Congress has aggressively increased the range of criminal activity that now disqualifies immigrants from legal status. In addition, the look-back period or retroactivity for crimes is lifetime in most cases even though the immigrant may have served a sentence, paid a fine and lived an exemplary life in the decades since his or her brush with the law as a young person. The range of excludable/deportable offenses expands now to misdemeanors as well as felonies, many of which are non-violent offenses involving no injuries to people or property. As a result, long time permanent residents are being deported and mixed status families are being split up, in some cases forever. We know that single parent families are more likely to need social services; so, there is a huge societal cost imposed on US citizens when our immigration laws split up families involuntarily. We need to remove the three and 10 year and permanent bars, and reduce the list of disqualifying crimes to those that make sense to protect individuals and our country while helping families to stay together.

- 6) **Effective and streamlined border screening and inspections.** Better screening and inspections is a goal everyone shares. However, we must be able to achieve national security needs using appropriate technology that works and appropriate personnel levels. We must balance that with our economic and geopolitical needs to promote regional border

economies and the economy of our nation through the orderly flow of goods and people. We should not be in the business of alienating our neighbors and future visitors when along both borders we have economies, communities and families that are intertwined. We must work with our neighbors on issues to resolve the causes of illegal immigration, and we must share law enforcement assets to stem the tide of drug and people smuggling.

- 7) **Ensure due process and fair proceedings.** Since 1996, Congress and the President, through Executive Orders or agency directives, have managed to expand mandatory and indefinite detentions (despite US Supreme Court rulings otherwise); enacted rules allowing for secret courts and secret evidence that immigrants cannot contest; stripped immigration and federal courts of jurisdiction to hear a variety of matters including habeas corpus (the right to challenge one's unlawful detention). Congress has raised the evidentiary standards and shifted the burden of proof for asylum applicants, made it more difficult for US citizens and immigrants to get drivers licenses, and eliminated discretionary relief in immigration proceedings.

We must not lose sight of our constitution and its provisions that call for due process and fair hearings. We must stop stripping our courts of authority to hear immigration cases and we must make our immigration courts accountable and independent. We must not deny immigrants the right to challenge in a court of law the government's incarceration or removal of immigrants. The case law books are filled with thousands of cases in each of the federal circuit courts of appeal in which immigration officers or judges made inappropriate decisions. In addition, arriving asylum applicants, surely the most vulnerable of any immigrant population, are currently detained indefinitely until their asylum cases can be decided. Unlike any other immigrant applicants for benefits, they are denied the ability to join family and to work for at least six months because current law presumes de facto that all asylum applicants are making fraudulent applications for asylum. We need to ensure our immigration laws are humane and fair, especially for the most vulnerable.

- 8) **National security features that make sense.** Since 9/11, every single applicant for a visa, green card and US citizenship undergoes a security check. Various government officials have reported that after screening millions of people every year, there are still hundreds of thousands of applicants for benefits waiting for resolution of their cases while an extremely small percentage of applicants have turned out to be suspected terrorists or criminals. Yet, hundreds of thousands of law-abiding immigrants and would-be US citizens are unable to have their cases resolved because of long delayed pending background checks, often taking two years or more. When we have immigrants in valid status with pending benefits applications *who are already in the US*, it makes no

sense whatsoever to not complete their cases in a timely manner. If they are threats to US citizens, we need to know this immediately, not two years later. Congress needs to provide funding and oversight of the security check process so that it is timely and has meaning insofar as our national security interests are involved. In addition, we need a fair and workable system for immigrants and US citizens who are falsely accused of being criminals or terrorists to correct their records in government databases.

- 9) Penalize law-breaking employers.** Since November 1986, we have had laws on the books that penalize US workers for knowingly hiring unauthorized workers and for failing to document the work permission status of every employee hired, including US citizens. The penalties for failure to comply have increased several times over the decades. Therefore, if employers who hire undocumented workers are the driving force behind the growth of illegal immigration, then the Congress must fund the appropriate agencies tasked with enforcement of these provisions. Better yet, however, to prevent employers from relying upon illegal workers, Congress needs to provide temporary and permanent worker categories in sufficient numbers to meet employers' needs. And, if wage protections are built into those requirements, Americans must expect that the cost of goods and services will increase.

**While CIR can address many of the issues above, US foreign policies must also be viewed with an eye toward what we can do abroad to prevent mass migrations and illegal immigration to the US.** Whether it is environmental destruction or calamity, disease, famine, war, poverty, organized crime or other causes, Congress and the President must consider the role US foreign policies have in causing or promoting migration from other countries. What can the US do to help other countries improve their economies, work and living conditions that would encourage their people to stay in their homelands?

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