

The Immigration Reform Debate

Sonya Olds Som and Eileen Momblanco

The number of undocumented foreign nationals living in the United States today is estimated at more than 12 million. The lack of adequate economic opportunities in other countries continues to inspire foreign nationals to come to the United States, either legally or illegally. The economic advantages to U.S. employers in hiring foreign workers, both legal and illegal, continues to inspire American companies to welcome these workers with open arms. However, increased enforcement of existing laws against American companies who knowingly welcome undocumented employees, together with efforts in Congress to impose new restrictions on illegal immigrants, may have a major impact on immigration in the years to come.

The current debate on immigration has moved to the front of the national consciousness with little warning. Helping to ignite and sustain it, however, have been bills introduced in both the House and Senate, as well as indications that the executive branch, through the Department of Homeland Security and Immigration and Customs Enforcement, plans to increase enforcement of existing immigration laws.

Proponents of increased legalized immigration cite the goals of family unification, the business community, and general societal reliance upon immigrant labor to perform low-income jobs in the manufacturing and service industries that native-born workers shun. They

also point out the overall value that the United States has generally placed on immigration, based on the nation's "melting pot" history. Opponents to increased legalized immigration cite the drain on national resources (such as schools and healthcare), the lowering of job opportunities and wages for U.S. workers, and "rewarding lawbreaking" amongst their principal reasons for opposing increased legalized immigration. American public opinion appears to be split down the middle. The Senate and House each announced "listening tours" that were scheduled to take place during the summer of 2006 to determine the true will of the American public on this issue.

This article looks at recent government actions that have contributed to the immigration debate, and then considers a number of the key issues. Should the United States grant some sort of legal process, or "amnesty," to undocumented workers already in the U.S. who wish to seek permanent residency and, perhaps, citizenship? What is the current system for documenting workers and how effectively does it work? Should the government more vigorously enforce immigration laws? Should individuals who claim to have been economically harmed by the hiring of undocumented workers be able to hold employers of those workers liable for monetary damages?

Government Action and the Current Debate

The current debate over immigration

erupted late last year. In December 2005, the House of Representatives passed an immigration bill, HR 4437, which focused on strict enforcement measures against illegal immigrants, such as construction of a 700-mile-long fence along the U.S. southern border and severe penalties for employers who hire undocumented workers. The passing of HR 4437 is largely credited with inspiring the many rallies, marches, and protests, both pro- and anti-immigration, seen across the country in the first half of 2006.

Then, on April 20, 2006, the heads of the Department of Homeland Security and its interior enforcement branch, Immigration and Customs Enforcement, held a press conference announcing the results of a nationwide worksite enforcement operation targeting IFCO Systems North America, Inc., the largest pallet services company in the United States. Immigration and Customs agents had arrested seven current and former managers of IFCO under criminal complaints issued in New York. All of the arrested managers were charged with conspiring to transport, harbor, encourage and induce undocumented workers to reside in the United States for commercial advantage and private financial gain, in violation of federal law. Two other IFCO employees were arrested on criminal charges relating to fraudulent documents. In addition to the criminal arrests, Immigration and Customs agents conducted "consent" searches or executed

criminal search warrants at more than 40 IFCO plants and related locations in 26 states that resulted in the detention of approximately 1,187 undocumented IFCO workers.

At the same press conference, the Department of Homeland Security and Immigration and Customs Enforcement announced a more aggressive federal interior immigration enforcement campaign intended to hold all U.S. employers more strictly accountable, both civilly and criminally, for employing undocumented workers.

The press conference came just days before the Senate was due to reconvene and resume a debate over a comprehensive rewriting of immigration laws during the week of April 24. It also came less than two weeks before planned nationwide rallies and boycotts on May 1, which some supporters called “A Day Without Immigrants.” Many immigration advocates felt that the announcement of greater enforcement against undocumented immigrants and their employers was deliberately timed to discourage pro-immigration activities, a charge that the Department of Homeland Security has denied.

Finally, in May 2006, the Senate passed S. 2611, which provides for greater border protection, temporary visas and a multi-year path to permanent residence status for undocumented workers (in line behind those who have applied before them) who learn English, commit no crimes and pay taxes. The Senate bill also provides for adding more temporary visas (such as the popular H-1B visa) and permanent visas for highly educated and skilled documented foreign national workers. An insufficient number of readily available visas to the U.S. for college-educated workers under the H-1B visa program leads many highly-skilled workers around the world to employ their skills abroad instead of in the U.S.

Reconciliation of the House and Senate’s competing immigration bills appears unlikely prior to the fall 2006-midterm congressional elections. The debate on immigration, however, is



likely to continue through the fall and be a significant issue in the November elections.

The Question of Amnesty

One significant difference between the House and Senate immigration bills is the question of whether undocumented workers currently in the United States should be offered “amnesty,” or some process by which they can gain legal status. House conservatives liken any attempts to legalize undocumented workers to an unacceptable “amnesty,” which would allow undocumented workers to come forward and acknowledge law breaking without fear of negative legal consequences.

Opponents of the legalization of undocumented workers today often point to the perceived failure of the last amnesty for illegal immigrants in the U.S., which occurred pursuant to the Immigration Control and Reform Act of 1986. The 1986 Act established a one-year amnesty program for undocumented foreign nationals who had already worked and lived in the U.S. since January 1982. Those eligible could apply for legalization of their status and, eventually, for full U.S. citizenship. Over 2.7 million undocumented workers and others not otherwise qualifying for a U.S. visa were provided with legal status

and an opportunity to become U.S. citizens under the 1986 amnesty. The 1986 amnesty is considered a failure, however, because it is estimated that four undocumented foreign nationals appeared to replace every one worker legalized by the 1986 Act.

At the same time, many of the estimated 12 million undocumented workers currently in the U.S. have resided here for many years, pay taxes, have children who are U.S. citizens, and are well integrated, contributing and (immigration status notwithstanding) otherwise law-abiding members of their communities. Supporters of more open immigration policies note that under the current system, which makes no provision for legalizing the status of undocumented workers, or under House proposals to criminalize the status of undocumented workers, the law creates an unacceptable underclass of undocumented workers in the U.S.

Documenting Workers

As a condition of the amnesty granted by the Immigration Reform and Control Act of 1986, U.S. employers became responsible for verifying the identity and U.S. employment eligibility of any worker hired after November 6, 1986. Completion of the Form I-9 is the primary method for an employer

to demonstrate that it has complied with this requirement. All employees hired since November 6, 1986, must complete the I-9 form.

Violations of the 1986 Act can result in both civil and criminal penalties. The government can pursue monetary damages for “knowing” violations of the law, and employers who are found to have engaged in a “pattern or practice” of knowing violations may be fined and sentenced to prison for up to six months. If it is determined that an employer has actual knowledge that 10 of its employees are undocumented, the criminal penalty can be up to five years in prison. Convictions in cases of harboring or smuggling undocumented workers can lead to 10 years in prison. In both civil and criminal cases the burden of proof is on the government to demonstrate that the employer knew (or was willfully blind to the fact) that an employee was unauthorized to work.

Notwithstanding its requirements for documenting workers, the 1986 Act does not provide for a mandatory system that employers must use to verify the legitimacy of documents with the government. The law criminalizes only those employers who “knowingly” employ workers who lack work authorization, and the burden of proof rests squarely upon the government to prove that the employer knew that its workers were undocumented. A thriving underground market exists so that undocumented workers can receive plausibly realistic-looking permanent residence cards (commonly called “green cards”), drivers’ licenses and Social Security Cards. These may be kept on file by the employer with its completed I-9 forms and used in a government audit as proof that the employer made a good faith effort to review the documentation and verify workers’ authorized status. Proposed new legislation would create a mandatory, electronic system for verification of documents by employers.

Enforcement Issues

Despite the many penalties possible under the Immigration Reform and

Control Act of 1986, the perception has been that threats of prosecution are, by and large, idle ones. In the four years after President George W. Bush first took office, the former Immigration and Naturalization Service (predecessor to the Department of Homeland Security) scaled back its enforcement efforts 95 percent, according to a recent article in the *Washington Post*.¹ By 2003, the number of employers prosecuted dropped from 182 to four, attributed in no small part to lobbying efforts by pro-business and pro-immigrant organizations.

Increased, highly publicized enforcement efforts against such companies as IFCO, Wal-Mart, and Tyson Foods may signal a shift in what has been a lax enforcement of the 1986 Act. These actions have been viewed as an effort to show the public that, post 9/11, Immigration and Customs Enforcement will be making worksite enforcement of the 1986 Act a top priority, even as it focuses most of its energies on protecting U.S. borders and infrastructure from terrorism.

Indeed, Immigration and Customs has linked its recent worksite enforcement of immigration laws and terrorism prevention objectives in its public statements by pointing to the risk presented by undocumented foreign nationals working in highly sensitive areas such as food and chemical production and transportation. According to Immigration and Customs, while such workers may not themselves be terrorists, living under the cloud of possible deportation from the U.S. could make them more susceptible to blackmail attempts by terrorists.

Threatened Civil Liability under RICO

Employers face an additional threat of liability from ingenious attempts in recent years to apply the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”) to violations of immigration law. At the time Congress passed RICO in 1970, its goal was to eliminate the ill effects of organized crime on the nation’s economy. Throughout the 1970s, RICO was

seldom used outside of the context of organized crime, and civil claims under RICO were generally not brought.

In the 1980s, however, lawyers noticed section 1964(c) of the RICO Act, which allows civil claims to be brought by any person injured in their business or property by reason of a RICO violation. Any person who succeeds in establishing a civil RICO claim automatically receives judgment in the amount of three times their actual damages and is awarded his or her costs and attorneys’ fees. The financial windfall available under RICO inspired the creativity of lawyers across the nation, and by the late 1980s, RICO was a (if not the most) commonly asserted claim in federal court.

Lawyers have now begun to bring civil actions using RICO to target companies that allegedly hire undocumented workers for the purpose of driving down wages. One of the most closely watched of all of the RICO immigration actions has been the case against Mohawk Industries. Mohawk is a Calhoun, Georgia-based carpet and rug manufacturer, and one of the largest such manufacturers in the United States. Four plaintiffs, current and former Mohawk employees, alleged that Mohawk, the defendant, had engaged in a practice of knowingly and recklessly hiring illegal aliens in an effort to keep costs of labor as low as possible.

Several examples of the furtherance of the alleged scheme were described. For example, upon being informed by some undocumented workers that they would have to return to their countries of origin, plaintiffs alleged that Mohawk encouraged those employees to return to the U.S. illegally and reapply to work for Mohawk. The plaintiffs further alleged that Mohawk has had employees destroy I-9 documents indicating that workers have different names and identification papers, and that Mohawk has driven to the border to recruit undocumented foreign nationals and transport them back to work. Other alleged illegal practices of Mohawk include providing incentives to its employees and other recruiters for locating undocumented workers that the

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Resources

National Public Radio offers The Immigration Debate, a website featuring questions and answers on major topics in the current immigration debate, a “Voice in the Debate” feature, and audio feeds of NPR news reports on the immigration debate from the past several months, www.npr.org/templates/story/story.php?storyId=5310549

The Constitutional Rights Foundation has created Current Issues in Immigration, 2006, and made it available free of charge to educators on its website. Also on the site are links to numerous resources and lessons on historical and contemporary immigration issues, www.crf-usa.org/immigration/immigration_links.htm.

The Federal Judicial Center (FJC) is developing a series of historical units on landmark cases that examine the role the federal courts have played in key public controversies that have defined our constitutional and other legal rights. Available now on the FJC website is the unit on *Chew Heong v. United States* and the Chinese Exclusion Acts, which represented some of the earliest efforts to restrict immigration to the United States. Follow the “Teaching Judicial History: Notable Federal Trials” link on the FJC’s History of the Federal Judiciary site, www.fjc.gov/history/home.nsf.

In 1999, the ABA Division for Public Education produced an issue of its *Focus on Law Studies* publication devoted to immigration policy, laws, and values. The issue includes a discussion of immigration and American values, what levels of immigration the United States should encourage and the proper criteria for legal entry, the complex relationship between legal and illegal immigration, the impact of key congressional legislation in 1986 and 1996, the courts’ reviews of immigration controversies, the role of bilingual education in the debate about immigrants in America, and the future of immigration in a volatile global environment. It is available free of charge online at www.abanet.org/publiced/focus/spr99.html.

Teaching Activity

James H. Landman

Introduction

The United States is aptly described as a nation of immigrants. The overwhelming majority of Americans are the descendants of individuals who came to the United States from other countries in the eighteenth, nineteenth, and twentieth centuries. Different groups came at different times in our nation’s history, for different reasons. This activity asks students to compare reasons for immigration to the United States today with reasons for immigration in other periods in U.S. history.

Step 1: Class Brainstorm

Ask students to brainstorm responses to the question “What brings immigrants to the United States today?” Responses should be recorded and saved for future discussion (see Step 4 below).

Step 2: Individual Student Research

Ask each student to research a personal story of immigration to the United States. Students might ask family members, neighbors, friends, or other members of the community about their experiences, or they might draw upon their own personal experience of immigration or an experience that has been described in the media. Students should try to answer the following questions in their research:

- A. At what time in U.S. history did this immigrant experience take place?
- B. What country did the individual emigrate from?
- C. What reasons did the individual have for immigrating to the United States?

- D. Did the individual face any unexpected hardships or challenges after arriving in the United States? What were they?
- E. Did the individual seek, or does he or she plan to seek, United States citizenship? Why or why not?

Step 3: Students Share Research

After students have completed their individual research, ask them to share their stories with the class. Record responses to the five questions students were asked to research so elements of the different stories can be easily compared.

Step 4: Classroom Discussion

After all the students have shared their stories of immigration, discuss the results of their research. Are there significant points of consistency among the stories? Are there significant points of difference?

After students have discussed the results of their research, go back to the responses students gave to the initial brainstorm question, “What brings immigrants to the United States today?” Are the reasons the students gave for immigration today similar to reasons for immigration that were discovered in the student research? Do the results of the students’ research suggest other possible reasons for immigration today? 🌐

JAMES H. LANDMAN is associate director of the American Bar Association Division for Public Education in Chicago, Illinois.

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company goes on to employ and harbor; terminating undocumented workers discovered during an I-9 self audit only to rehire them under a new name (called “recycling”); and assisting undocumented workers in evading law enforcement authorities during raids.

In April 2004, a federal court in the Northern District of Georgia denied a motion brought by Mohawk to dismiss the lawsuit. The manufacturer had sought to have the charges tossed out, claiming the plaintiffs had not stated a viable claim under RICO. The District Court disagreed and was affirmed by the 11th Circuit in *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (2005).

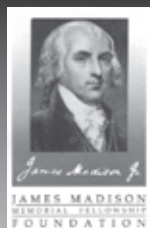
There are four requirements in a RICO suit: The defendant must have engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The 11th Circuit said that the plaintiffs easily met two

of the four requirements to bring a federal RICO suit—alleging a pattern of racketeering activity. “Racketeering activity” has been defined by statute to include bringing in and harboring certain aliens if done for financial gain, and the plaintiffs have alleged such activity. A pattern of racketeering activity can be established with evidence of two distinct acts—the Mohawk plaintiffs allege many more than two.

The harder questions, the court said, were whether the plaintiffs have sufficiently established the first two requirements of a RICO suit, “conduct” and “of an enterprise,” which includes the question of whether the enterprise had a common goal. The court decided that the “enterprise” prong was met because Mohawk is alleged to have worked with distinct third-party recruiters and agents. The court also found that the common-goal test was met because the plaintiffs clearly allege that the members of the enterprise stand to gain sufficient financial benefits from Mohawk’s employ-

ment of illegal workers. Finally, the court found that the complaint sufficiently alleges that Mohawk was engaged in operating the enterprise, satisfying the “conduct” prong. But the judges added that the question of whether Mohawk had some part in directing the affairs of the enterprise would have to be established at trial.

The Mohawk case has attracted attention in part because the Supreme Court granted certiorari in the case on the issue of whether a defendant corporation and a placement agency, acting as the agent of the defendant corporation, can truly constitute an “enterprise” under RICO. Ultimately, however, the Supreme Court found that certiorari was improvidently granted and remanded the case to the Eleventh Circuit for reconsideration in light of another RICO case the Supreme Court decided on the same day, which did not involve undocumented workers. With the Mohawk case remanded for additional fact-finding, corporations around the country remain alert to the



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possibility that their relationships with placement agencies could lead to liability under RICO as well as charges for violations of the Immigration Reform and Control Act.

Increased immigration enforcement actions and RICO actions against employers attempting to hire low-skilled, low-paid foreign national workers in the U.S. are likely to lead to the increased exporting of these low-skilled jobs abroad. And while the reduction of economic opportunities in the U.S. might seem to be a possible fix for illegal immigration, the outcome is not so certain. Several multinational corporations, seeking even greater economic returns on their investments, have already moved low-skilled operations that were based in Mexico to countries like China and India. But this has contributed to increased Mexican immigration to the U.S. The lack of visas for low-skilled workers means that their entry into the U.S. must be, by and large, illegal.

Conclusion

With the country so deeply divided and midterm congressional elections looming, definitive action by Congress in approving an immigration reform bill this year is unlikely. The one point on which all parties seem to agree, however, is that the nation's current immigration system is broken and in bad need of repair. The social and economic direction of the U.S. in the next 20 years and in generations to come will depend largely upon the next, overarching piece of immigration legislation that is enacted.

As a practical matter, all moral arguments both pro and con aside, a quick fix is impossible. A wholesale amnesty for the 12 million undocumented workers currently present in the U.S. would wreak havoc upon the Department of Homeland Security's immigration case processing abilities, as well as upon federal, state, and local government resources and would, almost certainly, encourage an ever-increasing flow of unmanageable illegal immigration. Conversely, the building of a wall around

the nation's borders, seeking to fine or imprison all employers who knowingly employ (and depend upon for their livelihoods) undocumented workers, and attempting to locate and deport 12 million people is also highly impracticable, if not downright impossible.

Although the current debate on immigration has arisen precipitously, it should not be precipitously resolved. Only a careful, bi-partisan and dispassionate analysis of all of the issues involved can lead to immigration legislation that will properly address all of the myriad challenges posed by the existing immigration system. ☞

Note

1. Spencer S. Hsu and Kari Lydersen, "Illegal Hiring Is Rarely Penalized: Politics, 9/11 Cited in Lax Enforcement," *The Washington Post* (June 19, 2006): A01.

The views expressed in this article are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

SONYA SOM is a partner and EILEEN MOMBLANCO is an associate in the business immigration group of the Chicago-based law firm Laner Muchin Dombrow Becker Levin and Tominberg, Ltd., which has been representing and counseling employers for more than 60 years in labor relations, employment litigation, employee benefits, and business immigration matters.



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