

Embracing Reality: The Guest Worker Program Revisited

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An estimated 700,000 undocumented immigrants enter the United States every year.¹ According to the U.S. government, more than 10 million undocumented immigrants currently live in this country and almost sixty percent of them came from Mexico.² In 2004, Mexican immigrants living in the United States sent home a staggering \$16.6 billion in remittances.³ This amount exceeds Mexico's revenue from foreign investment as well as tourism,⁴ and is surpassed only by the country's proceeds from oil exports.⁵ It is therefore important to recognize that if the United States sought to simply repatriate all undocumented immigrants, it would be asking Mexico to collaborate in cutting off its single greatest source of income and creating a ten percent increase in its population composed completely of unemployed deportees. However, Mexico would not be the only country to suffer from a mass deportation initiative. Experts estimate that a program that sought to deport at least eighty percent of undocumented immigrants would cost the United States more than \$200 billion over five years.⁶ In addition, the nation would only have the administrative and enforcement resources to deport approximately 150,000 people per year, less than two percent of the undocumented population.⁷ These realities highlight the need for an approach to undocumented immigration that, instead of focusing only on enforcement, would also provide proactive solutions that could both prevent undocumented immigration by making legal work alternatives available and encourage the U.S. undocumented population to come out of the shadows and take steps to seek a legal status.

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¹ JEFFREY PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 5 (2005), available at <http://pewhispanic.org/files/reports/44.pdf>.

² *Id.* at 4.

³ CONG. BUDGET OFFICE, REMITTANCES: INTERNATIONAL PAYMENTS BY MIGRANTS 2 (2002), available at <http://www.cbo.gov/ftpdocs/63xx/doc6366/05-19-Remittances.pdf>.

⁴ Alejandro Escalona, *Promises Fox Failed to Keep*, CHI. TRIB., June 15, 2004, at C21.

⁵ John Zarocostas, *Legal Migration is a Boon to All*, WASH. TIMES, Jan. 3, 2005, at A10.

⁶ REJEEV GOYLE & DAVID A. JAEGER, CENTER FOR AMERICAN PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 1 (2005), available at http://www.policypointers.org/page_2355.html.

⁷ U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2006 8 (2005) [hereinafter DHS BUDGET], available at http://www.dhs.gov/interweb/assetlibrary/Budget_BIB-FY2006.pdf.

The Senate bill introduced by Senators John McCain (R-Ariz.) and Edward Kennedy (D-Mass.), which Congress will consider in the spring of this year, is a promising first step.⁸ It would create realistic avenues for legal migration by implementing a guest worker program open to both undocumented U.S. residents and workers living abroad, and establishing an opportunity for all program participants, including those currently undocumented, to apply for legal residency.⁹ This Note will examine and evaluate the bill in light of the relevant history, alternatives, and empirical evidence.

The first Part of this Note will provide a brief overview of the history behind guest worker programs in the United States and the lessons learned from those programs. The second Part will explore the main provisions of the McCain-Kennedy bill and compare the competing proposal, a bill introduced in the Senate by Senators John Cornyn (R-Tex.) and Jon Kyl (R-Ariz.). The third Part will discuss some of the evidence that suggests that the main purposes and provisions of the bill are sound. It will also discuss some of the proposal's weaknesses and suggest potential ways of improving the provisions in question. The purpose of this Note is to provide a comprehensive analysis of the most effective and plausible avenues for the implementation of a guest worker program that addresses the realities of immigration in the United States.

I. THE HISTORY OF GUEST WORKER PROGRAMS: FROM WWI TO TODAY

The concept of a temporary migrant worker program has been in existence since 1917 when the Department of Labor, responding to a labor crisis brought about by increasingly strict immigration restrictions, created a guest worker program for agricultural laborers from Mexico.¹⁰ Approximately 72,000 guest workers participated in the program between 1917 and 1921.¹¹ However, by 1924, worsening economic conditions led the government to discontinue the program and create the United States Border Patrol to curb illegal immigration.¹² In 1931, the Department of Labor took more drastic measures by ordering a series of raids designed to locate and deport all undocumented people in the country.¹³ These raids resulted in the expulsion of thousands of people of Mexican descent, many

⁸ Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005).

⁹ *Id.*

¹⁰ KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS* 7 (1992).

¹¹ Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 426 (2005).

¹² Kiera LoBreglio, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem?*, 78 ST. JOHN'S L. REV. 933, 936 (2004).

¹³ Gilbert, *supra* note 11, at 427.

of whom were later found to be American citizens who had been wrongly deported.¹⁴

With the labor shortages of World War II came a new wave of demand for migrant labor. This spurred the 1942 creation of the second Mexican Labor Program, which became known as the “Bracero” program.¹⁵ The program allowed for the temporary admission of unskilled workers to fill U.S. job openings, most of which were in agriculture. By 1959, the Bracero program had grown significantly; that year alone, 450,000 Mexicans were admitted into the United States under the program.¹⁶ However, by the early 1960s, the program began to face strenuous opposition both from the labor sector and from civil rights groups that protested the poor treatment of workers by employers.¹⁷ Inquiries by the media and Congress revealed that the strong dependency of the Bracero workers on their employers resulted in grave violations of workers’ rights including illegally low wages, miserable living conditions, and abuse at work.¹⁸ Employers that hired Braceros routinely disregarded contract obligations, by, for example, housing workers in stables, refusing them medical care, and charging them excessive amounts for the shelter and round-trip transportation the employers were required to provide for free.¹⁹ In addition, there were numerous reports of physical abuse of workers and other violations of human rights. However, due to both the lack of government supervision of Bracero employers and the employers’ absolute control over workers’ immigration status, these abuses were seldom reported or discovered.²⁰ Instead, the abuses were uncovered by an independent Congressional inquiry and by the efforts of activists that documented and exposed them.²¹ Furthermore, Congress worried that the program had diminished employers’ incentives to provide reasonable wages and working conditions since they could always hire migrant workers who would accept whatever conditions they were given. In response to this situation, Congress ended the Bracero program in 1963.²²

The Bracero program was replaced in part by the H-2 visa for temporary workers, which allowed employers to hire workers from abroad for both agricultural and non-agricultural jobs.²³ However, like the Bracero

¹⁴ See Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 661–63 (2004) (discussing class action litigation that challenged government repatriation practices).

¹⁵ Gilbert, *supra* note 11, at 427–29.

¹⁶ LoBreglio, *supra* note 12, at 937.

¹⁷ *Id.*

¹⁸ Kimi Jackson, *Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Sheepherding Industry*, 76 CHI.-KENT L. REV. 1271, 1276 (2000).

¹⁹ Lorenzo Alvarado, *A Lesson from My Grandfather, the Bracero*, 22 CHICANO-LATINO L. REV. 55, 63 (2001).

²⁰ *Id.* at 64.

²¹ Jackson, *supra* note 18, at 1276.

²² *Id.*

²³ *Id.* at 1277.

program, the H-2 visa program gave employers almost complete control over the workers and their status and was consequently plagued by many of the same problems of worker abuse.²⁴ Congressional investigations revealed that, partly due to the high dependence of workers on their employers, guest workers often experienced many of the abuses associated with the Bracero program ranging from unpaid wages to physical abuse and virtual slavery.²⁵ As a response, Congress revamped the H-2 visa program in 1986 by dividing it into agricultural and non-agricultural visas, instituting strict requirements for employers, and implementing a certification process designed to combat employer abuse.²⁶ However, the new H-2 visa program is greatly limited and has many of the dependency problems associated with prior programs. Since the visas are employer-specific and must be requested by the employer, they create a situation of dependency similar to that of past programs.²⁷ In addition, the program only admits around 100,000 temporary workers per year, which is equivalent to fourteen percent of the inflow of undocumented migrants.²⁸ The demand for temporary workers so exceeds the availability through the program that, in 2004, the H-2 visa limit was exhausted by February 1.²⁹ Commentators argue that this approach to the employment of foreign workers is not only an inadequate response to the true supply of and demand for immigrant la-

²⁴ *Id.*

²⁵ A 1982 investigation of the conditions of immigrant guest workers culminated in a House of Representatives report outlining many of the abuses faced by workers. The report listed the following as illustrative cases:

Evidence received by the Committee confirms that many migrant and seasonal agricultural workers remain today, as in the past, the most abused of all workers in the United States. The Committee has learned: of the Haitian migrant who after a full day's work was told that instead of being paid that he owed the camp money for a week's rent, and since he was unable to pay was left penniless at the Trailways Bus station; of the forty-seven teenage farm workers who were seriously injured when the flat-bed grain truck in which they were being transported overturned; of migrant workers who were forced into debt, beaten and held as virtual slaves . . . how a vice president of a major canning company admitted that he had changed many of the workers' daily pay records kept by the company timekeepers . . . to reduce workers' hours so that the company would not have to pay the minimum wage; of excessive and automatic pay deductions for food, housing and electricity, which was only turned on when the workers were in the field, as well as exorbitant transportation costs which often left workers owing the company or crewleader money.

Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 BERKELEY J. EMP. & LAB. L. 175, 186 n.64 (1998) (quoting H.R. Rep. No. 97-885).

²⁶ See generally *id.*

²⁷ *Id.*

²⁸ U.S. DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 103 (2006), available at <http://uscis.gov/graphics/shared/statistics/yearbook/Yearbook2004.pdf>.

²⁹ Press Release, Congressman Bart Stupak, H-2B Changes in Supplemental Bill (May 5, 2005), available at http://www.house.gov/apps/list/press/mi01_stupak/050505h2b.htm.

bor, but also suffers from the same lack of protections that has led to the endemic abuse of workers in the past.³⁰

When the North America Free Trade Agreement (NAFTA) was signed in 1994, many saw it as a potential response to illegal immigration.³¹ The argument was that by stimulating economic development in Mexico, NAFTA would ameliorate the economic conditions that motivated workers to emigrate in the first place. Despite its economic success, however, NAFTA seemed to have little effect on immigration and, some argue, actually worsened the undocumented worker problem by displacing Mexican workers and increasing the demand for unskilled labor in the United States.³²

In February 2001, President Bush and newly elected President Vicente Fox of Mexico introduced an initiative that would work toward the creation of “an orderly framework for migration that ensures humane treatment [and] legal security, and dignifies labor conditions.”³³ They created a high-level working group which met in the summer of 2001 and reviewed proposals from a number of private groups on ways to reform the immigration system.³⁴ In June 2001, the Mexican government introduced its proposal, which called for the legalization of the undocumented Mexican citizens then living in the United States and the creation of a guest worker program.³⁵ In August 2001, the American and Mexican negotiators reached a preliminary agreement for a program that would authorize temporary workers in certain sectors of the economy that have traditionally employed immigrants.³⁶ The plan also would have allowed the guest workers to apply for legal residency status after a certain period of time in the United States.³⁷

On September 5, 2001, the presidents held a press conference where President Bush announced cautiously that a “complex process” would have to be completed before a guest worker program could be implemented.³⁸ President Fox, on the other hand, called for an agreement on the program by the end of that year.³⁹ However, with the attacks of Sep-

³⁰ *Id.*

³¹ Philip Martin, *New NAFTA and Mexico-U.S. Migration: The 2004 Policy Options*, 8 AGRIC. & RES. ECON. UPDATE 1, 2 (2004).

³² Lisa Bauer, *The Effect of Post-9/11 Border Security Provisions on Mexicans Working in the United States: An End to Free Trade?*, 18 EMORY INT'L L. REV. 725, 740 (2004).

³³ Agustin Escobar et al., *Mexico-U.S. Migration: Moving the Agenda Forward*, 41 INT'L MIGRATION 1, 2-3 (2003).

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, 80 FOREIGN AFF. 117, 117 (2001).

³⁷ *Id.*

³⁸ Escobar et al., *supra* note 33, at 3.

³⁹ *Id.*

tember 11, the White House shifted its focus to the war on terror and negotiations on a guest worker program were postponed indefinitely.⁴⁰

In July 2003, the Senate revived the debate over the guest worker program. It was spurred in part by the introduction of two new bills that would create temporary worker visas. Senator John McCain and Representatives Jim Kolbe and Jeff Flake, all Arizona Republicans, introduced a guest worker plan that would create temporary work visas corresponding to the number of jobs left unfilled by Americans in a Labor Department job registry.⁴¹ The plan also would allow guest workers to apply for citizenship after three years. That same month, Senator John Cornyn introduced a plan to create temporary worker visas in which applicants would receive authorization to work for three years and then would return to their home countries.⁴² Although Congress did not take action on either proposal, President Bush introduced his own proposal in January of 2004.⁴³ His proposal included a plan to give temporary legal status to undocumented workers living in the United States and those applying from abroad. Under his plan, the workers would be given a three-year permit with the possibility of renewal.⁴⁴ In his program, the President emphasized that although he opposed amnesty, he wanted applicants to have the opportunity to apply for legal status. To that end, his proposal included a measure that would increase the number of permanent residency permits available.⁴⁵

In May 2005, Senator John McCain, this time joined by Senator Edward Kennedy of Massachusetts, again introduced an immigration bill that included a guest worker component.⁴⁶ Senate Bill 1033, entitled the "Secure America and Orderly Immigration Act," soon gained support from a variety of groups ranging from the U.S. Chamber of Commerce to the Mexican American Legal Defense and Education Fund.⁴⁷ In July of that year, Senator John Cornyn, joined by Senator Jon Kyl, introduced a new version of his own bill—Senate Bill 1438, the Comprehensive Enforcement and Immigration Reform Act of 2005, which, although resembling the McCain-Kennedy bill in some respects, differs in that it offers no ave-

⁴⁰ *Id.*

⁴¹ *Kolbe, Flake Introduce Border Security and Immigration Improvement Act; McCain Drops Companion Bill in the Senate*, STATES NEWS SERV., July 25, 2003, available at http://www.house.gov/kolbe/press2003/Immigration_Bill_Introduction_32507.html.

⁴² *Cornyn Applauds President's Call for Immigration Reform*, STATES NEWS SERV., Jan. 7, 2004.

⁴³ Press Release, White House Office of the Press Secretary, President Bush Proposes New Temporary Worker Program: Remarks by the President on Immigration Policy (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Members of Congress Introduce Comprehensive Border Security and Immigration Reform Bill*, U.S. FED. NEWS, May 12, 2005, available at 2005 WLNR 7700341.

⁴⁷ See *Business Leaders Applaud Sens. Kennedy-McCain Plan to Fix Our Broken Immigration System*, U.S. FED. NEWS, Oct. 18, 2005, available at 2005 WLNR 16908504.

nues for undocumented people residing in the United States to apply for permanent residency.⁴⁸ These two bills—the McCain-Kennedy S.B. 1033 and Cornyn-Kyl S.B. 1438—remain the main competing guest worker proposals in Congress. Meanwhile, in his latest State of the Union address, President Bush urged Congress to adopt a “rational, humane” guest worker program, setting the stage for what will likely be a resolution to the debate before the end of the year.⁴⁹ The McCain-Kennedy bill is slated to be at the center of the debate that will determine whether a guest worker program will indeed be the rational, humane approach that defines the contours of America’s future immigration policy.

The following Part will discuss the main provisions of the McCain-Kennedy bill and will compare them to the Cornyn-Kyl proposal to show the ways in which the former addresses some of the important risks, challenges, and realities ignored by the latter.

II. THE MCCAIN-KENNEDY PROPOSAL

A. Main Provisions

1. The Essential Worker Program’s Basic Elements

The McCain-Kennedy bill, S.B. 1033, amends the Immigration and Nationality Act (INA)⁵⁰ by creating the Essential Worker Visa, which would allow foreign workers to apply for a temporary work permit with a duration of three years that could be renewed for three more years for a total of six years of work authorization.⁵¹ The visa is available to both workers living abroad and those undocumented workers living in the United States at the time of the Act’s adoption; however, in order to qualify for application, undocumented workers have to pay a \$1,500 penalty fee.⁵²

The temporary visa can be used by any employer in the United States and workers are allowed to change jobs once they are working under the visa, as long as they find new employment within forty-five days.⁵³ The portable feature of this visa eliminates the employee’s complete dependency on one single employer, which has been cited as one of the main factors behind guest worker abuse in the past. Since the worker’s legal status does not depend upon one employer, participants in the guest worker program will have greater leverage to enforce their rights. The bill dictates a set of requirements for eligibility including evidence of em-

⁴⁸ *Sens. Cornyn, Kyl Introduce Comprehensive Border Security, Immigration Reform Bill*, U.S. FED. NEWS, July 19, 2005, available at 2005 WLNR 11341852.

⁴⁹ President George W. Bush, State of the Union Address (Jan. 31, 2006).

⁵⁰ Immigration and Nationality Act, 8 U.S.C.A. §§ 1101–1537 (2006) [hereinafter INA].

⁵¹ Secure America and Orderly Immigration Act, S. 1033, 109th Cong. § 302(d) (2005).

⁵² *Id.* § 302(c)(2).

⁵³ *Id.*

ployment, a medical examination, a \$500 fee, and, for workers living abroad, evidence that they have a foreign residence to which they intend to return.⁵⁴ Additionally, the bill sets out a variety of grounds for automatic ineligibility, including conviction for crimes and national security concerns.⁵⁵ It proposes to create 400,000 visas with a possible increase of up to twenty percent annually if the visas are exhausted early in the year.⁵⁶

2. *Protection of Workers' Rights*

Section 304 provides a comprehensive explanation of the rights and protections available to workers under the program.⁵⁷ The bill provides that program participants are entitled to all the labor and employment rights available to American workers.⁵⁸ In addition, it requires employers to provide guest workers with the same benefits and tax treatment available to regular employees.⁵⁹ This section also includes other provisions outlawing threats to employees and protecting whistleblowers and striking workers.⁶⁰ Section 304 also proposes specific requirements for recruiters of guest worker program participants abroad. Every Foreign Labor Contractor (FLC), defined as anyone who recruits, solicits, or hires a guest worker, would be required to provide full information to workers about the terms and nature of the work agreement as well as any other potentially relevant information, such as whether the FLC works on commission from the employer and whether the employer is involved in ongoing labor disputes.⁶¹ FLCs would also have to undergo a comprehensive certification process designed to ensure their compliance with the law's requirements and prevent unauthorized contractors from profiting from the recruitment of workers.⁶²

The section also proposes a complaint mechanism and penalties for enforcement of guest workers' rights.⁶³ The responsibility for collecting and addressing complaints from workers who allege that their rights have been violated falls on the Secretary of Labor.⁶⁴ The process includes a deter-

⁵⁴ *Id.* § 301(4).

⁵⁵ *Id.* § 302(c)(1)(B).

⁵⁶ S. 1033 § 305(1)(c).

⁵⁷ *Id.* § 304.

⁵⁸ "A non-immigrant alien described in section 101(a)(15)(H)(v)(a) shall not be denied any right or any remedy under Federal, State, or local labor or employment law that would be applicable to a United States worker employed in a similar position with the employer because of the alien's status as a nonimmigrant worker." *Id.* (amending INA § 218(h)(3)).

⁵⁹ *Id.* (amending INA § 218A(h)(4)).

⁶⁰ "It shall be a violation of this section for an employer who has filed a petition under section 203(b) to threaten the alien beneficiary of such a petition with withdrawal of the application, or to withdraw such a petition in retaliation for the beneficiary's exercise of a right protected by the Secure America and Orderly Immigration Act." *Id.* (amending INA § 218A(h)(8)).

⁶¹ S. 1033 § 304 (amending INA § 218A(i)).

⁶² *Id.* (amending INA § 218A(i)(7)).

⁶³ *Id.* (amending INA § 218A(j)).

⁶⁴ *Id.* (amending INA § 218A(j)(1)).

mination of reasonable cause followed by a hearing and decision.⁶⁵ The process of adjudication is designed to take no longer than 150 days from the date the complaint is submitted.⁶⁶ The section outlines a series of penalties associated with violations, including a fee of up to \$25,000 for a violation of workers' rights and \$35,000 for a violation of the Foreign Labor Contractor provisions.⁶⁷ The maximum fees apply only if the guest worker is physically harmed as a result of the violation.⁶⁸

3. Eligibility for Permanent Residence

Perhaps the most controversial part of the bill is that which outlines the process for workers to either self-petition or petition through their employers for permanent residency status.⁶⁹ This eligibility for permanent residence applies both for foreign workers and undocumented workers who were living in the United States prior to participating in the program. The section requires that workers apply while present in the United States and that they either demonstrate knowledge of the English language and understanding of the history and government of the United States, in accordance with the requirements of the INA, or demonstrate that they are undertaking a course of study that will allow them to develop that knowledge.⁷⁰

The bill sets additional requirements for workers who were previously undocumented residents.⁷¹ It requires that applicants for adjustment of status also prove that they were present and employed in the United States at the time the bill was adopted and that they undergo a security and background check.⁷² The section also specifies that, once a currently undocumented worker applies for status, he will be granted an employment permit, permission to travel abroad, and immunity from detention or deportation while his application is pending.⁷³ For all applicants, regardless of their previous status, the permanent residence authorization, if granted, applies to their spouse and children as well.⁷⁴

The program establishes a limited remedy for unsuccessful permanent residency applicants.⁷⁵ It authorizes one level of administrative review and subsequent judicial review by a federal court.⁷⁶ The standard for

⁶⁵ *Id.* (amending INA § 218A(j)(4)).

⁶⁶ S. 1033 § 304.

⁶⁷ *Id.* (amending INA § 218A(k)(2)).

⁶⁸ *Id.* (amending INA § 218A(k)(2)(B)(iii)).

⁶⁹ *Id.* § 306.

⁷⁰ *Id.* (amending INA § 245(n)(2)).

⁷¹ S. 1033 § 304 (amending INA § 245(n)(2)).

⁷² *Id.* § 701(a) (amending INA § 250(e)(1)(A)).

⁷³ *Id.* (amending INA § 250(h)).

⁷⁴ *Id.* (amending INA § 250(c)).

⁷⁵ *Id.* (amending INA § 250(k)).

⁷⁶ S. 1033 § 701(a).

judicial review requires that the applicant establish either abuse of discretion or a conclusion that the findings of the administrative judge are “directly contrary to clear and convincing facts contained in the record.”⁷⁷

4. *Safeguards and Forward-Looking Strategies*

In addition to setting out the initial parameters of the program, the bill also creates a system for its evaluation and continued development. It creates the Essential Worker Visa Program Task Force to analyze the measures as they are implemented and to make regular recommendations to Congress regarding the program.⁷⁸ In addition, the bill creates a system to give U.S. workers an opportunity to have first choice of jobs by requiring all employers hiring guest workers to first list the job for thirty days in a recruitment system to be administered by the Department of Labor that will target U.S. citizens and permanent residents.⁷⁹ The bill also authorizes the Secretary of State to enter into agreements with foreign governments to develop strategies that facilitate their citizens’ participation in the program, provide economic incentives for workers to return to their home countries, and facilitate the reintegration of workers upon their return, among other things.⁸⁰

These additional safeguards and strategic initiatives designed to ensure the success of the program are evidence of the bill’s holistic, balanced approach to the guest worker challenge. The bill not only offers a viable legal alternative to undocumented work and a realistic opportunity for the 10.3 million undocumented people in the country to legalize their status, but it also provides long-term initiatives to ensure that workers have attractive options once the program ends. These aspects of the bill provide solutions to combat undocumented migration in both the short and long term in a way that takes into account the realities that motivate migrant workers.

B. *The Cornyn-Kyl Alternative*

While there have recently been several other proposed bills introduced in the Senate that would create some type of guest worker program, the bill that has emerged as the main alternative to the McCain-Kennedy proposal is Senate Bill 1438, spearheaded by Senator John Cornyn and Senator Jon Kyl.⁸¹ While this bill shares many of the purposes of the McCain-Kennedy proposal, some of its elements would compromise the

⁷⁷ *Id.*

⁷⁸ *Id.* § 307.

⁷⁹ *Id.* § 308 (amending the “Willing worker—willing employer electronic job registry”).

⁸⁰ *Id.* §§ 501–502.

⁸¹ Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong. (2005).

effectiveness of a guest worker initiative by providing significantly fewer incentives for undocumented workers currently living in the country to apply.

The main difference between the Cornyn-Kyl and McCain-Kennedy bills is that the former would provide no path to permanent residency for undocumented workers. In fact, the bill would require undocumented workers to return to their home countries and apply from the same pool as applicants living abroad. The bill introduces a Deferred Mandatory Departure status, which gives undocumented migrants currently living in the United States up to five years to leave the country and makes them eligible to apply for the guest worker program only after they return to their home countries.⁸² This provision would require applicants to undertake the risk of having to leave permanently if they are not admitted in exchange for the possibility of up to six years of work authorization. The lack of a legalization option would likely make the program much less appealing to immigrants since it would require them to trade the opportunity to live and work in the United States indefinitely without authorization for only a chance of obtaining a short-term visa for work and then returning to their countries permanently.⁸³

In addition to the significant downside of having no long-term options for workers, the application process proposed by S.B. 1483 is itself plagued with uncertainty and lack of continuity for participants. For example, the initial visa secures work authorization for a period of two years. If the worker decides to re-apply, he must first return to his home country, wait one year, and then obtain a new job offer.⁸⁴ While S.B. 1483's total period of work authorization of six years is the same as that provided for in the McCain bill, S.B. 1483 would require applicants to return twice to their country between re-application and stay there for significant periods of time in order to be eligible for the full visa authorization. Considering that the applicant would have to secure a job offer from abroad each time, this process would make renewal cumbersome and unpredictable.

The bill's provision that limits participation to a specific set of employers authorized by the government to hire immigrants could also compromise the safety and fairness of the program.⁸⁵ This provision would make it much more difficult for employees to change jobs once they arrive in the United States and could therefore leave guest workers vulnerable to the same sort of excessive control by their employers that led to many of the abuses associated with the Bracero programs of the past. With only a limited set of employers from whom to seek jobs, guest workers might feel

⁸² *Id.* § 601.

⁸³ For a discussion of other factors that would make this type of approach unappealing to undocumented people living in the United States, see *infra* Part III.

⁸⁴ S. 1438 § 501.

⁸⁵ *Id.*

compelled to remain in a job with poor working conditions rather than risk losing their work authorization altogether.

III. EVALUATING THE PROPOSAL

A. *Supporting Factors*

1. *The Impossible Cost of Enforcement-Only Approaches*

One reason the guest worker program must have a legalization option that provides sufficient incentives for undocumented workers currently in the country to self-identify is that the theoretical alternative, simply trying to deport all those who are undocumented, is both financially and practically impossible. Estimates that the deportation of all undocumented immigrants would cost between \$206 billion and \$230 billion over five years⁸⁶ are actually conservative because they assume that ten to twenty percent of the undocumented workers currently living in the country would chose to leave on their own.⁸⁷ Several members of Congress have already indicated their belief that the cost alone makes this an infeasible alternative. Senator Cornyn himself, as chairman of the Subcommittee on Immigration of the Senate Judiciary Committee, recently expressed his view that “the dirty secret is that we couldn’t deport 10 million illegal immigrants if we wanted to.”⁸⁸

In addition to the financial barrier to a deportation-only approach, there are also several other resource-related factors that would make such a strategy impossible. For example, a mass deportation approach would require at least temporary detention for most deportees while the official deportation process is completed.⁸⁹ Under the current process, each immigrant undergoing deportation procedures spends an average of 42.5 days in detention.⁹⁰ However, currently the United States only has the capacity for the pre-deportation detention of 19,400 migrants, which is less than one percent of the total population of undocumented people in the country.⁹¹ In addition, an enforcement-only approach would require an unrealistically large increase in the number of immigration officials available to conduct investigations and apprehensions. At present, the Department of Homeland Security employs approximately 13,600 immigration officials, a force made up of approximately 11,000 Border Patrol agents and 2600 interior enforcement officials responsible for the detection and deporta-

⁸⁶ GOYLE & JAEGER, *supra* note 6, at 2.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1.

⁸⁹ *Id.* at 6.

⁹⁰ *Id.*

⁹¹ GOYLE & JAEGER, *supra* note 6, at 5.

tion of undocumented people already living in the United States.⁹² That means that there are approximately 4000 undocumented people in the country for every currently employed interior enforcement agent. This is particularly striking in light of the Department of Homeland Security's recently reported "record-high" deportation levels of 150,000 per year, amounting to a meager average of twelve deportations per immigration official per year.⁹³ This would mean that, even if all of the currently employed immigration officials, including Border Patrol agents, focused only on deporting undocumented people already living in the United States, it would take approximately sixty-four years to complete the mass deportation of the 10 million undocumented people in the country, not counting new undocumented immigrants arriving during the process. These numbers demonstrate that the current immigration enforcement system would be vastly under-equipped to respond to an enforcement-only approach that sought the deportation of all undocumented immigrants.

The above-mentioned barriers to mass deportation highlight the importance of having a program that creates a legalization alternative that would make self-reporting desirable enough for undocumented migrants for them to risk having to return to their country if not admitted into the program. If the program only allows the beneficiary to work in the country for six years and then forces him to leave the United States, that will likely not be much of an incentive for most undocumented workers for whom the alternative is a chance at being able to continue working in the country indefinitely. While some argue that what is needed is to raise the stakes on the enforcement side and thereby make illegal employment a less desirable alternative, the unfeasibility of mass deportation highlights why greater enforcement alone cannot be the answer.

2. *Undocumented Migrants, American Families*

The McCain-Kennedy bill addresses the reality that many of the undocumented migrants currently living in the United States have raised families in this country and have deep social and economic roots in their communities. In addition, many of their children have been born and raised in this country.⁹⁴ For those children, "returning" to their parents' country of origin would amount to being ousted from their home and sent to a foreign land. While citizen-children do have the right to remain in the country, this program would force their parents to choose between leaving their

⁹² DHS BUDGET, *supra* note 7, at 8; ICE OFFICE OF DETENTION AND REMOVAL, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FACT SHEET (2004), available at <http://www.ice.gov/graphics/news/factsheets/dro050404.htm>.

⁹³ DHS BUDGET, *supra* note 7, at 2.

⁹⁴ PASSEL, *supra* note 1, at 19 (explaining the study's findings that twenty-four percent of undocumented families have only U.S. citizen children and an additional seven percent have both U.S. citizen and undocumented children).

child in the United States in the care of others and bringing the child with them into deportation. There are 3.2 million citizen-children currently in the United States whose parents are undocumented.⁹⁵ In fact, more than thirty percent of all undocumented people in the United States have at least one child that is a U.S. citizen.⁹⁶ Under the INA, the child's status as a citizen is rarely sufficient to authorize his or her parents to remain in the country.⁹⁷ Alternatives to the McCain-Kennedy bill that do not provide a path to legal residency would force the mass *de facto* deportation of millions of citizen-children who are not immigrants themselves.

B. A Critique and a Proposed Solution

Although the bill provides a number of remedies to protect the rights of employees enrolled in the program, it is vital that effective, realistic measures be implemented to prevent situations of abuse and mistreatment like those that surrounded the Bracero and H-2 visa programs. While the laws that created those programs also contained protections and safeguards for employees, the protections were rendered ineffective by the workers' fears of losing their guest worker status, lack of information about their rights, complete dependency on their employer, and poor enforcement mechanisms.⁹⁸ For this reason, in order for a guest worker program to be effective, the government must create an entity that can proactively investigate and prosecute violations of the guest workers' rights.

The McCain-Kennedy bill only provides for the Secretary of Labor to create methods for the "receipt, investigation, and disposition of complaints by an aggrieved person respecting a violation of this section."⁹⁹ However, such a system would put the burden on workers to initiate the complaints. There is extensive historical evidence that passive, reactive protection programs are ineffective in guest worker programs.¹⁰⁰ For example, in 1963, Congress introduced the Farm Labor Contractor Registration Act (FLCRA), designed to protect the rights of guest workers by requiring employers to comply with certain labor standards, fully disclose employment terms, and disseminate information regarding workers' rights.¹⁰¹ However, ten years later, Congress declared the program a failure, con-

⁹⁵ *Id.* at 18.

⁹⁶ *Id.*

⁹⁷ INA § 240(a)(3)(b) reads: "The Attorney General may cancel removal of, and adjust the status of an alien unlawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien . . . establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

⁹⁸ See generally LeRoy, *supra* note 25.

⁹⁹ S. 1033 § 304.

¹⁰⁰ See generally LeRoy, *supra* note 25; CALAVITA, *supra* note 10; Gilbert, *supra* note 11 (all discussing the historical failures of laws designed to protect migrant workers).

¹⁰¹ Farm Labor Contractor Registration Act of 1963, 7 U.S.C. §§ 2041–2053 (1983).

cluding that it provided “no real deterrent for violators” and citing as evidence the fact that, during the ten-year period of its existence, only four employers had been prosecuted for non-compliance.¹⁰² One of the Act’s most apparent failures was that it required employers themselves to inform workers about their rights, something that employers who knew they were violating those rights would be unlikely to do, thereby creating a cycle of worker misinformation and acquiescence. Although Congress attempted to strengthen the enforcement power of the FLCRA in 1974 by creating a cause of action allowing aggrieved workers to bring suit against employers, Congress found that “many of the abuses which were the subject of the 1963 legislation continued unabated.”¹⁰³ Commentators on the FLCRA and subsequent measures that rely largely on employee reporting cite workers’ fear of retribution and overdependence on employers as some of the main reasons why complaint-based enforcement is ineffective.¹⁰⁴ In addition to the failures in method, there were also structural defects inherent in the FLCRA that may prove instructive when viewed in relation to the McCain-Kennedy bill. Congressional evaluators of past migrant worker protection programs have expressed “serious doubt” about the capacity of the Department of Labor to implement such programs and were particularly concerned with the low levels of violation investigations that the Department conducted under previous migrant worker protections laws.¹⁰⁵ These findings suggest that there may be institutional barriers to the effective protection of guest workers by the Department of Labor. The unique dangers affecting guest workers and the complex set of legal dynamics that apply to them require that the group in charge of informing guest workers of their rights and investigating employer violations be specially designed to address those particular circumstances. Instead, by instructing the Department of Labor to create a system that relies on unprompted worker complaints, the McCain-Kennedy bill replicates the main weakness in the worker protection programs of the past.

One way to address this challenge would be for the bill to create an independent enforcement group. This group would be in charge of informing guest workers about their legal rights and how to enforce them before they begin work under the visa. The agency would also be responsible for providing resources to encourage workers to report abuse, and conducting periodic audits and independent investigations of guest worker employers in order to combat unreported abuses proactively. These solutions would need to be specifically tailored to counter the obstacles to report-

¹⁰² LeRoy, *supra* note 25, at 184.

¹⁰³ *Id.* at 185.

¹⁰⁴ See Jackson, *supra* note 18, at 1285–86 (describing how the black-listing by employers of guest workers who complain about violations of their rights creates a culture of complacency); see also Alvarado, *supra* note 19, at 61–63 (discussing the reasons behind the lack of abuse reporting by Braceros).

¹⁰⁵ LeRoy, *supra* note 25, at 197 n.47.

ing that have been explored in this Note. For example, the orientation process informing workers about their rights should include the fact that employers would not be permitted to “blacklist” complaining workers or bar their eligibility. In addition, the enforcement system would need to create avenues for anonymous reporting to ease workers’ fear of retaliation. Finally, the investigative arm of the enforcement group could collaborate with local non-governmental organizations and community organizations to document abuses that might be reported by workers themselves.

By addressing the most common barriers to enforcement, this approach would help create a culture of accountability, transparency, and collaboration that could prevent a future resurgence of the historical problem of temporary worker abuse.

IV. CONCLUSION

The McCain-Kennedy bill is an effective response to the financial and practical barriers that would make an enforcement-only approach unfeasible because it creates real incentives for undocumented people currently in the United States to take steps to legalize their status. Unlike the Cornyn-Kyl bill, it recognizes that, in order to be sustainable, a guest worker program has to look beyond temporary, dead-end solutions and focus instead on long-term, robust legal alternatives. However, in light of the numerous possibilities for endemic guest worker abuse that past programs have demonstrated, it is vital that the bill incorporate a stronger, more proactive approach to protecting workers that does not rely solely on worker complaints but rather seeks out and investigates complaints independently. In addition, since the bill would create portable visas that enhance the worker’s independence and leverage, it is important that workers be informed of their legal rights so that they may exercise that independence if it becomes necessary to enforce them. Once the bill incorporates greater protections, it will have the potential to revolutionize America’s immigration policy by creating a preventive solution to undocumented immigration that embraces the realities of the immigrant population and provides incentives for present and future migrants to come out of the shadows and take the path of the law.