13. Immigration

Congress should

- allow states to regulate, operate, and run their own migrant worker programs under federal supervision;
- create a large national guest worker visa program for lower-skilled migrants;
- reform the H-1B visa program for highly skilled migrant workers by eliminating the cap, allowing more portability, and deregulating the hiring process;
- reform and simplify the Department of Labor's approval process for foreign workers;
- expand legal immigration opportunities by deregulating and expanding employment-based green cards;
- repeal legislative bars that limit illegal immigrant legalization; and
- restrict noncitizen access to means-tested welfare.

The American immigration system is unsuited to the modern economy. Too few pathways for legal migration combined with high domestic demand for workers have created a large population of 11–12 million illegal immigrants. Additionally, onerous quotas and regulations have made it impossible for them to legalize. Many legal immigrants have to wait years for their green cards if they can get them at all. These problems put a drag on U.S. economic growth and increase the scale and scope of illegal activity in black markets. Short of comprehensive reform, piecemeal changes that expand legal immigration and legalize illegal immigrants are sorely needed. The history of America's immigration system provides some context for understanding these problems and how to fix them.

Immigration History and Lessons from the Past

From 1790 to 1875, the federal immigration policy was essentially one of open borders. Any immigrant from any country could legally enter, live, and work in the United States. During that period the only regulations related to immigration controlled who could become a citizen. However, beginning in 1875 and accelerating through the Progressive Era, Congress increasingly regulated legal immigration. By the early 1920s virtually all legal immigration from outside the Western Hemisphere was impossible. Some of those restrictions made sense, like limitations on criminals and those with serious contagious diseases. Others, like the bans on Chinese immigrants, were fueled by illegitimate concerns founded on racism or labor market protectionism. During the Great Depression and World War II, immigration was not an important issue, but after the end of hostilities a new phenomenon arose: illegal immigration.

During America's first period of relatively open immigration, very little of it was illegal because legal entry was so easy. After the United States ended the period of open immigration in the 1920s, the Great Depression and World War II effectively limited U.S. immigration. The booming postwar economy demanded laborers. Because immigration was closed off, American employers began to hire immigrants who were willing to enter unlawfully. By the early 1950s there were more than 2 million illegal immigrants in the United States, mostly from Mexico, but by 1955 their numbers had fallen by over 90 percent. What happened?

Two new policies drastically reduced the population of illegal immigrants. The first affected the economic demand for illegal workers by expanding the supply of legal migrant workers through deregulation of the Bracero guest worker visa program for agricultural workers. The Bracero visa allowed an uncapped number of Mexicans to work temporarily in agriculture in the United States. The workers could go back and forth so long as they did not violate the terms of the visa or commit serious crimes. Mexicans could acquire the visa easily, and American farmers faced very few hurdles in hiring Braceros. As a result, farmers began to favor Braceros, and the number of illegal entries collapsed beginning in the early 1950s (Figure 13.1).

The second policy was a stepped-up enforcement program. Because of the creation of the Bracero visa, Border Patrol and immigration enforcement became far more effective at identifying illegal immigrants in the United States. Because farmers were guaranteed legal workers, they cooperated with the government in identifying illegal workers. The government

Figure 13.1
Apprehensions of Illegal Immigrants and Visas
### for Low-Skilled Guest Workers
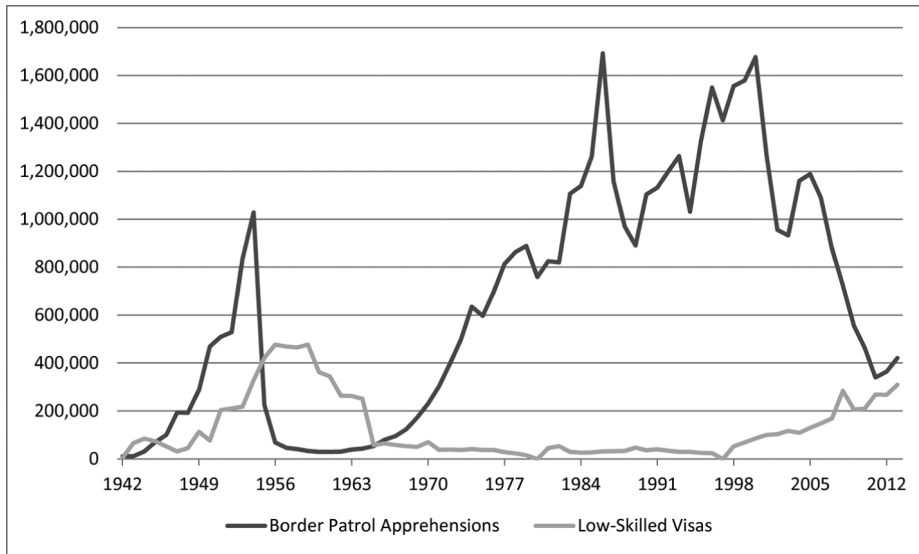
SOURCE: Customs and Border Protection and Citizenship and Immigration Services. Department of Homeland Security, "Yearbook of Immigration Statistics," Office of Immigration Statistics, 1996–2014 editions and Immigration and Naturalization Service, "Annual Reports," 1942–1986 editions.

deported many illegal workers but also legalized many on the spot and drove others down to the border to allow them to reenter legally on a Bracero visa—often on the same day. As a result, since Mexican workers were able to enter legally, the supply of illegal immigrants dried up. This two-pronged approach decreased the size of the illegal immigrant population by upward of 90 percent without a large increase in the size of Border Patrol—just a better migration system and a Border Patrol that guided migrants into it (Figure 13.2).

The Bracero program ultimately ended in 1964 due to a combination of intense lobbying from the United Farm Workers union and a few scandals in which Bracero workers were abused. Congress did not create a new low-skilled visa to replace the canceled Bracero program, and the handful of visas that remained in other categories could not fill the gap. The cancellation of that program did not extinguish U.S. demand for lower-skilled workers; it merely made the hiring of unlawful immigrants the only option for employers and illegal immigration the sole means of

123

Figure 13.2
Border Patrol Agents, Guest Workers, and Apprehensions
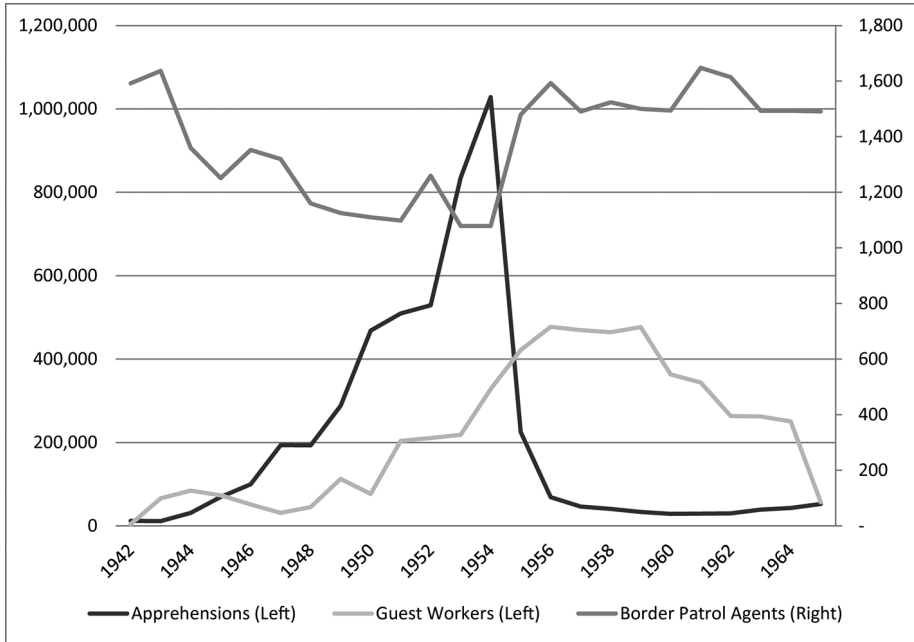
SOURCE: Department of Homeland Security and Immigration and Naturalization Service.

immigrating for lower-skilled workers. After 1964 the flow of unlawful immigrants steadily climbed as the new black market filled the void left by the canceled Bracero program (see Figure 13.1).

Creating a New Guest Worker Program

The United States needs a new guest worker visa program that is large, easy to apply for, and minimally regulated to incentivize employers and migrants to use it. Some changes from the earlier program will be needed to make a modern guest worker visa program effective. First, the migrant workers should be legally mobile among employers, a policy called "portability." Second, migrants need to be allowed to work in sectors of the economy that actually employ illegal immigrants, like construction, manufacturing, and other nonseasonal occupations. Third, the number of migrant visas needs to be uncapped to encourage migrants to use the legal system. Fourth, the regulations governing the visa need to be as inexpensive

and unobtrusive as possible. These policies will decrease the supply of illegal immigrants and employer demand for them.

Allowing States to Create Their Own Guest Worker Systems

Congress should also pass enabling legislation that allows states to create and regulate their own guest worker visa programs under federal supervision. In 2015, the California and Texas legislatures both proposed bills to create their own state-based programs, while Utah already has such a system on its books awaiting federal approval. The local demand for a state-based migration system exists; the federal government must merely allow it.

A state-based migration program could work in a few different ways. Under a state-based visa program, the states would establish methods by which local businesses or other entities petition for migrants. The state would submit those migrant petitions to the federal government, which would clear the migrants for admission and guarantee they meet the other criteria for admission into the United States. The workers would then be able to work and live in the state that is sponsoring them. States could form compacts with other states to share workers, select the skill or education level of future guest workers, or even use the program to grant some guest worker visas to current unlawful immigrants in important occupations.

Such a program could be modeled on Canada's highly successful Provincial Nomination Program or a similar state-based Australian system. A system of bonds, whereby workers or employers pay a fixed amount that they recoup if they follow the rules of the program, could also incentivize state governments, migrants, and employers to follow the rules of the program. The current low overstay rate for federal low-skilled guest worker visas of about 2 percent should calm the worries about state-based guest workers overstaying their visas. Allowing states to create their own guest worker visa programs could result in 50 different programs. Competition between them will reveal which migration systems are best, giving guidance to Congress on how to reform the national system.

Expanding and Deregulating the Employment-Based Green Card System and H-1B Visas

In addition to temporary worker programs, the permanent immigration system also needs reform. The employment-based green card, largely

designed for highly skilled workers, has an annual cap of 140,000 green cards. It imposes enormous fees and country-of-origin regulations that make the system costly to use for both immigrants and their prospective American employers. Worse, the administration's incorrect interpretation of statutory language guarantees that fewer than half of the green cards issued actually apply to workers, while the rest are allocated to family members.

Congress should pressure the administration to issue employment-based green cards only to the actual workers—without denying their families legal status. Enforcing the correct interpretation of the statute would effectively double the number of employment-based green cards. Furthermore, the types of workers that can enter on an employment-based green card should be expanded and the quotas removed. Since employers have to prove that they can't feasibly hire similarly skilled Americans for the jobs they are offering, they should not face a numerical cap. In particular, the arbitrary country-of-origin quotas that cause enormous backlogs for skilled immigrants from India, China, and other countries should be removed.

The employment-based green card is not the only way for highly skilled immigrants to work in the United States. The H-1B visa provides another avenue. The H-1B is a temporary visa that allows American firms to hire skilled foreign workers in specialty occupations. The number of H-1Bs issued annually for American firms is capped at 85,000: 65,000 from abroad and 20,000 for foreign graduates of American universities. When the economy is growing, these few H-1B slots for businesses frequently fill up within days of becoming available. (H-1Bs are uncapped for research occupations at nonprofit research institutes affiliated with colleges and universities, but it's businesses that are feeling the pinch.) The duration of the H-1B visa is three years, but it can be renewed for an additional three-year term. Unlike other guest worker visas, H-1B holders can apply for a green card while they are working in the United States if they find an employer willing to sponsor them. If the green card approval process takes longer than the maximum six-year duration of the H-1B visa, then the worker is allowed to work until the green card is approved or denied.

The number of H-1B visas should be uncapped, workers should be perfectly portable among occupations without ex ante government approval, their foreign-born spouses should be able to work, and the burden of onerous H-1B wage and labor market regulations should be significantly reduced. Furthermore, migrants on H-1B visas, student visas,

or other nonpermanent work visas who adjust their status to permanent residency should not be counted against the numerical caps for those categories. The history of work visas and the Department of Labor's (DoL) involvement in approving them shows how small legal tweaks can produce big, positive outcomes.

In 1952, the government created a labor certification system to guarantee that migrant workers did not affect the wages of native-born American workers. Under the original system, to deny a green card on labor market grounds, the DoL had to prove that the migrant worker would adversely impact the economic prospects of similar American workers. That institutional arrangement created a passive approval process such that the DoL denied only 10 green card applications from 1952 to 1962. The Immigration Act of 1965 reversed the process. It replaced the DoL's passive veto over green card applications with a system that forced the department to certify that every migrant worker issued a green card would not adversely impact an American worker and that the immigrant was entering an occupation with insufficient Americans able, willing, and qualified to do the job. Labor unions had lobbied for this reversal of DoL tasks because they were concerned about immigrants competing with their members for jobs. The reformed labor certification approval procedures made labor immigration far more expensive and, de facto, limited green cards to only highly skilled foreign workers.

Congress should remove the DoL's active approval role for labor certifications and labor condition applications and replace it with a passive veto. Doing so would make labor immigration less costly and streamline the current system.

Removing the 3- and 10-Year Bars

Another reform that could help legalize many illegal immigrants through the existing legal system would be the repeal of the 3- and 10-year bars. The 3-year bar states that any immigrant who stays in the United States illegally for more than six months but less than one year and then leaves the United States cannot reenter or apply for a green card for three years. The 10-year bar states that any immigrant who stays in the United States illegally for more than a year and then leaves the United States cannot reenter or apply for a green card for 10 years. Any immigrant who is subject to those bars and who tries to reenter the United States in violation of them faces a 20-year ban on reentering the United States for any reason. This is a problem because virtually all applicants for a green card or visa

have to visit a U.S. embassy or consulate abroad to apply, which, in the case of illegal immigrants, requires them to leave the Untied States, thus triggering the bars. The 3- and 10-year bars prevent between 20 percent and half of all unauthorized immigrants from using the legal immigration system *if* they find a way to regularize their status.

Building a Higher Wall around the Welfare State

Immigrant use of welfare benefits and other public services is an important problem that Congress should address. Estimates of the fiscal impact of immigration on the United States hover around zero, and immigrants and their descendants tend to pay for the government-provided services that they consume. However, this fiscal calculus can be improved by building a higher wall around the welfare state and denying means-tested welfare benefits to noncitizens. Doing so is perfectly constitutional, relatively easy to accomplish, and politically popular. Currently, poor immigrants are much less likely to consume means-tested welfare than poor Americans, but noncitizens should not have access to begin with. Cato's policy analysis, "Building a Wall around the Welfare State, Instead of the Country," provides a clear legislative path forward to achieving that goal while identifying the federal statutes that would have to change.

Conclusion

Immigration is an important public policy issue that will not be resolved with harsher enforcement or higher walls but with expanded legal immigration opportunities, legalization, and welfare reform. Congress can tackle these issues through either a piecemeal approach that addresses each of these issues individually or through comprehensive legislation that seeks to solve them all at once. Regardless of the legislative strategy, Congress should pursue fiscally prudent, market-based immigration reform that reduces illegal immigration and allows the American economy to grow.

Suggested Readings

Anderson, Stuart. "The Impact of Agricultural Guest Worker Programs on Illegal Immigration." National Foundation for American Policy, November 2003.

Bier, David. "The Government Has Cheated Legal Immigrants for Decades." *Cato at Liberty,* August 10, 2016.

Bier, David, and Matthew La Corte. "Privately Funded Refugee Resettlement: How to Leverage American Charity to Resettle Refugees." Niskanen Center, March 22, 2016.

Fuller, Brandon, and Sean Rust. "State-Based Visas: A Federalist Approach to Reforming U.S. Immigration Policy." Cato Institute Policy Analysis no. 748, April 23, 2014.

Ku, Leighton, and Brian Bruen. "Poor Immigrants Use Public Benefits at a Lower Rate Than Poor Native-Born Citizens." Cato Institute Economic Development Bulletin, March 4, 2013.

Nowrasteh, Alex. "Declining Deportations and Increasing Criminal Alien Releases—The Lawless Immigration Policies of the Obama Administration." Testimony before the Senate Committee on the Judiciary, May 19, 2016.

Nowrasteh, Alex, and Sophie Cole, "Building a Wall around the Welfare State, Instead of the Country." Cato Institute Policy Analysis no. 732, July 25, 2013.

Powell, Benjamin, ed. *The Economics of Immigration: Market-Based Approaches, Social Science, and Public Policy*. New York: Oxford University Press, 2015.

Vargas Llosa, Alvaro. *Global Crossings: Immigration, Civilization, and America*. Oakland, CA: Independent Institute, 2013.

Zong, Jie, and Jeanne Batalova. "Frequently Requested Statistics on Immigrants and Immigration in the United States." *Migration Information Source*. Migration Policy Institute, April 14, 2016.

—Prepared by Alex Nowrasteh