

The Case for Legalization, Lessons from 1986,
Recommendations for the Future

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The Immigration Reform and Control Act (IRCA) of 1986¹ offered a significant benefit and created what its sponsors hoped would be a formidable club.² On the one hand, it provided a path to legal status for nearly three million undocumented persons. On the other, it established sanctions against employers who hired the undocumented, in the hope that this would discourage undocumented work and migration. By the time its application period ended in December 1988, the U.S. undocumented population had fallen to between one and one-half and three million persons.³ At the time, the Immigration and Naturalization Service (INS) predicted that “[f]uture growth or decline of the resident illegal population will depend partly on [IRCA’s] effectiveness.”⁴ By this measure, IRCA has failed egregiously.

The very thought of another legalization program is anathema to immigration restrictionists who believe it would reward lawbreakers, create incentives to undocumented migration, and exacerbate the challenge of integrating the nation’s historically high population of foreign-born persons. Even if this were true, the alternative is less tenable. The task of removing millions of undocumented persons would be preclusively expensive, logistically impossible, and politically unpopular, given the draconian impact on U.S.-born family members and the U.S. labor market.⁵ Alternatively, to ignore the issue would result in a permanent underclass of disenfranchised persons, which would undermine the nation’s civic life, values, and security.

¹Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

²Parts of this article have been adapted from two earlier articles. C. Wheeler, “Lessons from Legalization,” *Catholic Legal Immigration News* (Feb. 2004); D. Kerwin, “America’s Second Class Non-Citizens: Why An Amnesty Won’t Suffice,” *Center for Migration Studies, Occasional Paper Series* (2001).

³U.S. Immigration and Naturalization Service, “1988 Statistical Yearbook” (Aug. 1989) at xliv.

⁴*Id.*

⁵In 2002, the United States formally removed 148,619 foreign-born persons (including lawful permanent residents), only a fraction of the undocumented population. U.S. Department of Homeland Security, “2002 Yearbook of Immigration Statistics” (Oct. 2003) at 187.

This article assumes that, whatever its form, a legalization program will be required in the near future. The article will discuss three aspects of this problem. The first section will outline the need for a legalization program, by describing the growing socio-economic breach between the nation's native- and foreign-born persons, particularly the undocumented. It will argue that a program is necessary from the perspectives of immigrant families, laborers, and the nation's security. The second section will analyze the successes and deficiencies of IRCA's legalization programs. The third will make specific recommendations on how to craft a future program so that it can be successfully implemented.

I. The Need for a Legalization Program

A. The Growing Breach Between Native- and Foreign-Born, Particularly the Undocumented

The United States is experiencing the greatest sustained wave of immigration in its history. By 2002, the foreign-born population reached 34 million persons, 24 million of whom had entered the United States in the 1980s and 1990s.⁶ More immigrants entered the country in these two decades than in any previous decade in U.S. history.⁷ Foreign-born children and U.S.-born children of immigrants represent 20 percent of all children in the United States.⁸ Ten percent of all children in the country live in "mixed-status" families, i.e. with at least one non-citizen parent and one citizen child.⁹ During the 1990s, the foreign-born populations in 37 non-traditional immigrant receiving states grew at twice the rate of the six largest traditional receiving states, making immigration a national phenomenon.¹⁰ The foreign-born comprise 14 percent of the U.S. workforce,¹¹ and between 1990 and 2001 they filled 50 percent of new U.S. jobs.¹² The U.S.

⁶M. Fix, J. Passel, K. Sucher, "Immigrant Families and Workers: Trends in Naturalization," Urban Institute (Sept. 2003) at 2.

⁷*Id.*

⁸R.G. Rumbaut, "Coming of Age in Immigrant America," *Research Perspectives on Migration*, Vol. 1, No. 6 (Jan./Feb. 1998).

⁹The Urban Institute, "All Under One Roof: Mixed Status Families in an Era of Reform" (June 1999) at 2.

¹⁰*Id.* at 9.

¹¹U.S. Department of Labor, Bureau of Labor Statistics, "Labor Force Status of the Civilian Noninstitutional Population 16 Years and Over by Age, Sex, Race, Hispanic Origin, Country of Birth, and Citizenship Status, 1999 Annual Averages" (2000).

¹²A. Sum, N. Fogg, and P. Harrington, "Immigrant Workers and the Great American Job Machine: The Contributions of New Foreign Immigration to National and Regional Labor Force

Department of Labor projects an increase of 21.3 million U.S. jobs from 2002 to 2012, with some of the fastest growth in “service,” “construction,” and other jobs that immigrants disproportionately fill.¹³

Immigrants play a vital role in the United States’ defining institutions, and its political, social, and economic strength will increasingly depend on their contributions. Yet without the ability to legalize status, they will not be able to become full participants and contributors to U.S. society. Nor will they be able to narrow the widening divide between themselves and the native-born.

The indicia of this divide can be seen in poverty rates, disparities between children, and poor working conditions. In 1980, the poverty rate among foreign-born persons narrowly exceeded the native-born rate.¹⁴ By 2001, 16.1 percent of the foreign born, including 20.6 percent of Latin Americans, lived in poverty, compared to 11.1 percent of natives.¹⁵ From 1970 to 2000, the poverty rate of the children of immigrants rose from 11.6 to 21.6 percent.¹⁶ During the same period, the poverty rate among non-Hispanic white children rose a fraction, from 9.1 percent to 9.2 percent.¹⁷ The ten percent of U.S. children who live in “mixed status” families represent 15 percent of the nation’s poor children.¹⁸ The children of immigrants increasingly attend ethnically segregated and “linguistically isolated” schools; roughly half of those with “limited English proficiency” attend schools where 31 percent of the students lack basic proficiency in English.¹⁹ Furthermore, federal law encourages states to charge out-of-state or international tuition to

Growth in the 1990s,” Center for Labor Market Studies, Northeastern University (Aug. 2002) at 16 and 19.

¹³D. Hecker, “Occupational Employment Projections to 2012,” *Bureau of Labor Statistics, Monthly Labor Review* (Feb. 2004) at 80-81, 87 and 91.

¹⁴M. Fix and W. Zimmerman, “The Integration of Immigrant Families in the United States,” The Urban Institute (June 2000) at v [hereinafter “The Integration of Immigrant Families”].

¹⁵D. Schmidley, “The Foreign Born Population in the United States: March 2002,” U.S. Census Bureau, Current Population Reports, P20-539 (2003).

¹⁶J. Van Hook, “Poverty Grows Among Children of Immigrants in U.S.,” *Migration Information Source* (Dec. 1, 2003), available at <http://www.migrationinformation.org/USfocus/print.cfm?ID=188>.

¹⁷*Id.*

¹⁸“The Integration of Immigrant Families” at 17.

¹⁹Ruiz-de-Velasco and Fix, “Overlooked and Underserved: Immigrant Students in U.S. Secondary Schools,” The Urban Institute (Dec. 2000) at 14.

undocumented, in-state residents.²⁰ This will prevent tens of thousands of children from continuing their educations beyond high school.

In 2001, 31.1 percent of “full-time, year round” foreign-born workers earned less than \$20,000, compared to 17.4 percent of native workers.²¹ Two-thirds of undocumented workers earned less than 200 percent of the minimum wage,²² compared to 48 percent of all immigrant workers and 32 percent of native workers.²³ Lower-end, predominantly undocumented workers fare particularly poorly. In Los Angeles, the average garment worker earns less than \$8,000 a year.²⁴ Florida farmworkers earn 40 cents for every 32 pounds of tomatoes they pick, a rate that has remained steady for 30 years.²⁵ Day laborers surveyed in Southern California earned a mean salary of \$568 a month.²⁶ Not coincidentally, 18 percent of foreign-born workers have less than a ninth-grade education, compared to one percent of the native-born.²⁷

Most immigrants fail to receive basic benefits through work. Only 47 percent of foreign-born workers, for example, received health insurance in their jobs in 1999, 37 percent of Hispanic men and 34 percent of Hispanic women, compared to 59.2 percent of the native-born.²⁸ In a

²⁰Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), §507.

²¹“The Foreign-Born Population: March 2002” at 6.

²²J. Passel, R. Capps, and M. Fix, “Undocumented Immigrants: Facts and Figures,” Urban Institute Immigration Studies Program (Jan. 12, 2004).

²³R. Capps, M. Fix, J. Passel, J. Ost, and D. Perez-Lopez, “A Profile of the Low-Wage Immigrant Workforce,” Urban Institute, Immigration Studies Program (Nov. 2003) at 2 [hereinafter “The Low-Wage Immigrant Workforce”].

²⁴P. Liebhold and H. Rubenstein, *Between a Rock and a Hard Place: A History of American Sweatshops, 1820-Present*, UCLA Asian American Studies Center and Simon Wiesenthal Center Museum of Tolerances (1999) at 56-57.

²⁵B. Maxwell, “Someone to Fight for Farmworkers’ Rights,” *St. Petersburg Times* (Feb. 21, 2001).

²⁶A. Valenzuela, “Day Laborers in Southern California: Preliminary Findings from the Day Labor Survey,” Center for the Study of Urban Poverty (May 30, 1999) at 11.

²⁷“The Low-Wage Immigrant Workforce” at 3.

²⁸“The Integration of Immigrant Families” at 24.

1999 study, not a single one of 481 day laborers in Southern California had health insurance.²⁹ Immigrants also suffer from occupational hazards and perilous working conditions. These include pesticide poisoning,³⁰ dangerous construction sites,³¹ exposure to chemicals,³² repetitive stress injuries and cuttings,³³ and even involuntary servitude.³⁴ Mexican nationals, who represent an estimated 58 percent of the U.S. undocumented,³⁵ are 80 percent more likely to suffer fatal injuries on the job than native-born workers.³⁶ Legal status will be crucial to improving the work prospects and conditions of immigrants. The precedent is clear. In the four to five years after IRCA, the wages of legalized workers increased 15 percent.³⁷ The program also spurred an increased investment by its beneficiaries in training, education, and development of language

²⁹N. Cleeland, "Many Day Laborers Prefer Their Work to Regular Jobs," *Los Angeles Times* (June 19, 1999).

³⁰U.S. General Accounting Office, "Pesticides: Improvements Needed to Ensure the Safety of Farmworkers and Their Children," GAO/RCED-00-40 (Mar. 2000) at 5-6, 23.

³¹U.S. Department of Labor, "National Census of Fatal Occupational Injuries in 2002" (Sept. 17, 2003) at 8 (In 2002, 1,121 workers were fatally injured in construction jobs, the largest total by industry in the nation.); J. Forero, "Immigrant Laborers Say They Know of Job Risks," *New York Times* (Nov. 24, 1999).

³²Public Justice Center, "The Disposable Workforce: A Worker's Perspective" (1999) at 15-24; U.S. General Accounting Office, "Meatpacking Plant Workforce and Safety," GAO/RCED-98-62 (Feb. 27, 1998); U.S. Department of Labor, "Poultry Processing Compliance Survey Fact Sheet" (Feb. 10, 1998).

³³D. Kerwin, "The Fight for Dignity: Immigrant Laborers in the Restructured American Economy," *In All Things* (Mar. 2000) [hereinafter "The Fight for Dignity"] at 18.

³⁴J. Bowe, "Nobodies: Does Slavery Exist in America," *The New Yorker* (Apr. 21 & 28, 2003); D. France, "Slavery's New Face," *Newsweek* (Dec. 18, 2000); Catholic Legal Immigration Network, Inc., "Work Without Justice: Low-Wage Immigrant Laborers," (2000) at 7-8, 16-21; Human Rights Watch, "Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards" (Aug. 2000) [hereinafter "Unfair Advantage"] at 176-178.

³⁵B.L. Lowell and R. Suro, "How many undocumented: The numbers behind the U.S.-Mexico Migration Talks," The Pew Hispanic Center (March 21, 2002) at 6.

³⁶J. Pritchard, "Mexican Worker Deaths Rise Sharply," *Associated Press* (Mar. 12, 2004).

³⁷U.S. Department of Labor, "Effects of the Immigration Reform and Control Act: Characteristics and Labor Market Behavior of the Legalized Population Five Years Following Legalization" (May 1996) at 43.

skills.³⁸

B. Immigrant Families

Three laws passed in 1996 -- the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“the 1996 Immigration Act”),³⁹ the Antiterrorism and Effective Death Penalty Act of 1996,⁴⁰ and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“the 1996 Welfare Act”)⁴¹ – make it impossible for most undocumented persons to legalize their status or otherwise establish themselves in the United States. A legalization program, with a broad waiver for immigration violations, will be necessary to remedy their cumulative effect.

Most legal immigrants come to join U.S. citizen or lawful permanent resident family members, who petition on their behalf. Under the 1996 Immigration Act, petitioners must demonstrate the means to maintain an income of 125 percent of the federal poverty guidelines and must agree to maintain their family member at the same level.⁴² The petitioner bears this responsibility until the family member naturalizes or works for 40 “qualifying quarters,” normally ten years.⁴³ Until then, the federal or state government can sue the sponsor to reimburse the cost of any “means-tested” public benefit used by the immigrant.⁴⁴ If the petitioner cannot meet the 125 percent level through his or her own income or assets, he or she must obtain a co-sponsor who agrees to assume these responsibilities and liabilities.⁴⁵ Twenty percent of U.S. citizens and permanent residents who seek legal assistance at charitable immigration programs cannot satisfy these requirements, meaning that their family members have no avenue to lawful status.⁴⁶

These restrictions attempt to screen out persons who might eventually need public benefits. Yet, the 1996 Welfare Act barred many immigrants who entered the country after August 22, 1996

³⁸*Id.* at 45.

³⁹Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

⁴⁰Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996).

⁴¹Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996).

⁴²Immigration and Nationality Act (“INA”) §§213A(f)(1)(E) and 213A(a)(1)(A).

⁴³ INA §213A(a)(2)-(3).

⁴⁴ INA §213A(b).

⁴⁵INA §213A(f)(5).

⁴⁶Catholic Legal Immigration Network, Inc., *The Affidavit of Support and Its Effect on Low-Income Families* (Aug. 2000) at 7.

from obtaining “means-tested” benefits for five years.⁴⁷ After this time, “deeming” (attributing the sponsors’ income to the immigrant) disqualifies most immigrants from receiving benefits until they naturalize or work for ten years.

The 1996 Immigration Act also created a series of bars to admission based on undocumented status, past removals, illegal re-entries, and other offenses that the law previously treated as forgivable. Those who have been unlawfully in the United States for more than 180 days face a three-year bar to re-entry; those who have been unlawfully present for more than one year face a ten-year bar.⁴⁸ This provision can be waived if the immigrant’s exclusion would result in “extreme hardship” to his or her U.S. citizen or lawful permanent resident spouse or parent, but not to his or her child.⁴⁹ Those who have been unlawfully present for more than one year or who were ordered removed, and who illegally reenter or attempt to reenter face a permanent bar, with a waiver possible only after residing ten years outside the United States.⁵⁰

The law reserves particularly harsh treatment for persons who were once removed or ordered removed, regardless of whether they have families in the United States. It bars the return for five years of “arriving aliens” who were ordered removed,⁵¹ for ten years for persons ordered removed in standard removal proceeding,⁵² for 20 years for those removed a second or subsequent time,⁵³ and forever for those convicted of an “aggravated felony.”⁵⁴ Immigrants who illegally re-enter or attempt to re-enter after being removed face severe criminal and immigration sanctions. The latter includes reinstatement of the prior removal order, with no possibility to remain based on family ties.⁵⁵

Undocumented persons often use false documents in order to work. U.S. law imposes severe penalties on immigrants who use, purchase, possess, or accept false documents, or put false information on a valid document, in order to gain an immigration-related benefit. The

⁴⁷8 USC §1613; 1996 Welfare Act §403(a).

⁴⁸INA §212(a)(9)(B)(i)(I)-(II).

⁴⁹INA §212(a)(9)(B)(v).

⁵⁰INA §212(a)(9)(C).

⁵¹INA §212(a)(9)(A)(i).

⁵²INA §212(a)(9)(A)(ii).

⁵³*Id.*

⁵⁴*Id.*

⁵⁵INA §241(a)(5).

consequences can include fines, permanent inadmissibility,⁵⁶ deportation,⁵⁷ and even incarceration.

Finally, immigrants approved for family-based visas, who overcome the law's many barriers to reunification, still face multi-year waits before they can become lawful permanent residents. Backlogs in visa preference categories vary based on the intending immigrant's nationality and relationship to the sponsor. For example, a Mexican spouse or minor child of a permanent resident would currently face nearly an eight-year backlog. A Mexican adult son or daughter of a permanent resident would face nearly a thirteen-year wait.⁵⁸

Once the visa become available, the family member can apply to become a permanent resident. This occurs through either the "adjustment of status" process in the United States or "consular processing" abroad. In either case, he or she faces yet another delay. In FY 2003, the average processing time for an adjustment of status application was 33 months.⁵⁹ The total number of immigration applications in the processing backlog grew from 3.9 million in FY 2000 to 6.2 million in FY 2003.⁶⁰ Absent a legalization program or significant immigration reform, many undocumented persons who have been approved for family-based visas will nonetheless spend years, if not the remainder of their lives, in undocumented status.

C. Immigrant Laborers

A legalization program would strengthen the position of undocumented workers and allow for a more stable and productive workforce. As stated, IRCA failed in its goal of preventing undocumented migration through employer sanctions. The threat of sanctions has, instead, operated as a tool for predatory employers who, in return for assuming a minimal risk that they will be fined, demand that their undocumented employees work for low wages in poor

⁵⁶INA §212(a)(6)(F).

⁵⁷INA §237(a)(3)(C)(i).

⁵⁸Department of State, *Bureau of Consular Affairs Visa Bulletin* (Feb. 2004).

⁵⁹General Accounting Office, "Immigration Application Fees: Current Fees Are Not Sufficient to Fund U.S. Citizenship and Immigration Services' Operations," GAO-04-309R (Jan. 5, 2004) at 40.

⁶⁰*Id.* at 36.

conditions.⁶¹ Employers also use the threat of deportation to suppress organizing efforts.⁶²

Despite recent organizing victories, membership in labor unions declined from 39 percent of the overall U.S. workforce in 1954,⁶³ to 12.9 percent in 2003.⁶⁴ Only 8.2 percent of private sector employees now belong to labor unions.⁶⁵ Yet the financial benefits of union membership are manifest; the median earnings of union members significantly exceed those of unrepresented workers.⁶⁶ In recent years, labor unions have targeted undocumented workers in their organizing drives.⁶⁷ This shift in strategy reflects the growing immigrant work force and the level of abuses in industries that rely heavily on undocumented workers.⁶⁸

Undocumented workers also bear the brunt of the deficiencies and loopholes in the U.S. system of labor protections. The National Labor Relations Act (NLRA)⁶⁹ prohibits employers from interfering with the rights to organize, bargain collectively, strike, pressure employees to support a particular union, or discourage them from joining a labor organization. While the NLRA's protections apply to undocumented workers, millions of workers in immigrant-dominated industries fall outside its definition of "employees,"⁷⁰ including an estimated three million

⁶¹P. Kwong, "Forbidden Workers: Illegal Chinese Immigrants and American Labor," W.W. Norton & Company, Inc. (1997) [hereinafter "Forbidden Workers"] at 172-174.

⁶²R.H. Taylor, "Undocumented Hotel Workers Who Formed Union Are Released," *Star Tribune* (Oct. 20, 1999); S. Greenhouse, "Immigrants in the Middle of Union Push at Bakery," *New York Times* (Oct. 9, 2000); N. Cleeland, "Unionizing Is Catch-22 for Illegal Immigrants," *Los Angeles Times* (Jan. 16, 2000).

⁶³"Unfair Advantage" at 7, footnote 11.

⁶⁴U.S. Department of Labor, Bureau of Labor Statistics, "Union Members in 2003," USDL 04-53 (January 21, 2004), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷S. Greenhouse, "Foreign Workers at Highest Level in Seven Decades," *New York Times* (Sept. 4, 2000); "Teamsters Put New Focus on Immigrants: An Interview with James P. Hoffa, President of the International Brotherhood of Teamsters," *San Jose Mercury News* (Sept. 4, 2000); M. Fan, "Unions' Latest Organizing Push: Immigrants," *San Jose Mercury News* (Jan. 21, 2000); T. Burns, "Unions Halt Decline in Membership," *Washington Times* (Jan. 20, 2000).

⁶⁸"Forbidden Workers" at 14-17.

⁶⁹29 USC §§151-169.

⁷⁰29 USC §152(3).

agricultural laborers, one million domestic employees, and seven million independent contractors.⁷¹ Agricultural laborers and domestic workers – who are heavily undocumented – suffer from some of the worst conditions in the U.S. labor force, including indentured servitude and slavery.⁷²

The NLRA's enforcement remedies are weak, and its strongest remedy does not apply to the undocumented. The NLRB can order an employer to pay back wages and benefits, reinstate an employee, obey the law, and undo the illegal steps taken.⁷³ These penalties do not dissuade anti-organizing efforts, including firing labor organizers.⁷⁴ In addition, under a 2002 U.S. Supreme Court decision, undocumented workers who are illegally fired for union organizing cannot receive back pay.⁷⁵

Title VII of the Civil Rights Act of 1964 precludes discrimination based on national origin in hiring, firing, classification, recruitment, compensation and provision of benefits.⁷⁶ However, its protections do not extend to undocumented workers in the five states subject to the jurisdiction of the Fourth Circuit Court of Appeals.⁷⁷

Apart from the groups not covered by these laws, remedies for violations typically do not dissuade employer misconduct. This goes partly to the remedial purposes of the laws. The FLSA, for example, aims to make mistreated employees financially whole, rather than to punish employers. Thus, remedies for minimum or overtime wage violations include back pay and liquidated damages equal to the amount owed.⁷⁸ Repeated or willful violations of these

⁷¹"Unfair Advantage" at 189.

⁷²J. Bowe, "Nobodies: Does Slavery Exist in America," *The New Yorker* (Apr. 21 and 28, 2003); D. France, "Slavery's New Face," *Newsweek* (Dec. 18, 2000); Catholic Legal Immigration Network, Inc., "Work Without Justice: Low Wage Immigrant Laborers" (2000) at 7-8, 16-21; "Unfair Advantage" at 176-178.

⁷³29 USC §160(c).

⁷⁴"Unfair Advantage" at 18.

⁷⁵*Hoffman Plastics Compound, Inc. v. NLRB*, 122 S. Ct. 1275 (2002).

⁷⁶42 USC §2000e-2(a).

⁷⁷*Chaudhry v. Mobil Oil Corporation*, 186 F.3d 502, 504-05 (4th Cir. 1999); *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 186-188 (4th Cir. 1998), *cert denied*, 525 U.S. 1142 (1999).

⁷⁸29 USC §216(b).

provisions carry fines no greater than \$1,000 per violation.⁷⁹ The penalties for firing or discriminating against employees who bring complaints or institute FLSA legal actions include reinstatement, promotion, payment of lost wages, and liquidated damages equal to lost wages.⁸⁰ Willful violations of these provisions carry potential criminal liability.⁸¹ Even assuming consistent reporting of violations, these penalties lack the teeth to serve as a meaningful disincentive to violations.⁸² State laws do not significantly bolster protections against employer misconduct.⁸³

Finally, federal and state governments lack the resources to enforce existing laws. The number of unfair labor practice cases has tripled since 1950, but the National Labor Relations Board staff has fallen to 2,000 people, slightly above 1950 levels.⁸⁴ Likewise, the U.S. Department of Labor (DOL) employs 850 “wage and hour” investigators, who must cover more than seven million work establishments, and roughly 100 million full- and part-time workers.⁸⁵ States employ an estimated 500 additional investigators.⁸⁶ A 1997 survey of 46 state labor departments found 26 with 10 or fewer compliance officers.⁸⁷ These states employed (in total) less than nine full-time compliance officers to investigate child labor violations. Typically, only a fraction of these

⁷⁹29 USC §216(e).

⁸⁰29 USC §216(b).

⁸¹29 USC §216(a).

⁸²Similarly, under Title VII, courts may enjoin unlawful practices or order the payment of back-pay, reinstatement, hiring, or other equitable relief. 42 USC §2000e-5(g)(1). Undocumented persons cannot be reinstated.

⁸³J. Gordon, “The Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law,” Carnegie Endowment for International Peace, International Migration Policy Program, Working Paper, No.4 (Sept. 4, 1999); North Carolina Occupational Safety and Health Project and the Association of Latino Workers of North Carolina, “Abuse of Immigrant Workers: Exposing the Injustices Committed by Area Employers” (Nov. 16, 1999).

⁸⁴“Unfair Advantage” at 26.

⁸⁵Information provided by U.S. Department of Labor, Office of Public Affairs (March 17, 2003).

⁸⁶G. Anderson, “Fighting Sweatshop Abuses: An Interview with Charles Kernaghan,” *America* (May 27, 2000) at 7, 12.

⁸⁷The Child Labor Coalition, “Highlights of The Child Labor Coalition’s 1997 Child Labor State Survey” (Jan. 1997).

officers speak Spanish or any language other than English.⁸⁸ Legal status would provide low-wage laborers an indispensable tool in attempting to protect themselves in the workplace.

D. National Security

The U.S. immigration system plays an important role in the fight against terrorism. It can, in theory, prevent a terrorist from entering the country and can track immigrants who have been legally admitted. The security-related immigration reforms since September 11th have focused on expanded use of detention, closed deportation hearings, inter-governmental information sharing, tightening visa procedures, registering and tracking temporary visitors, conducting raids in select work-sites, and expanding identity and security checks.⁸⁹

Many of these measures affect only legal immigrants. The others reach only a fraction of the U.S. undocumented population. There is no evidence that Al Qaeda has yet to infiltrate the country in undocumented migrant streams. The September 11th terrorists entered on temporary visas. In addition, Al Qaeda tries to use “clean” operatives; i.e. those without criminal records or immigration problems and who do not otherwise meet terrorist profiles.⁹⁰ Nonetheless, a legalization program would bring the nation’s undocumented out of the shadows, allowing the government to conduct stringent identity and security checks. It could also reduce the number of illegal border crossers so that the United States could focus its enforcement efforts on security threats.⁹¹

II. Lessons from IRCA

IRCA allowed for the legalization of persons who had been unlawfully present since before January 1, 1982 (general amnesty)⁹² and for special agricultural workers who had worked 90 days in certain types of agriculture during a 12-month period in 1985-86 (SAW program).⁹³ Looking back, the experience provides lessons in how to craft meaningful legislation, prepare for its implementation, and conduct an effective application process.

⁸⁸“The Fight for Dignity” at 18.

⁸⁹D. Kerwin, “Migrants, Borders, and National Security: U.S. Immigration Policy Since September 11, 2001,” Center for Migration Studies, Occasional Papers Series (2002).

⁹⁰Migration Policy Institute, “America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11th” (2003) at 9-11.

⁹¹C.J. Karamargin, “Temporary-Worker Plan Seen as Aid to Enforcement,” *Arizona Daily Star* (Mar. 17, 2004).

⁹² INA §245A.

⁹³INA §210.

A. During the Legislative Process

IRCA was at least ten years in the making and the result of many competing forces finally reaching a compromise. In conflict were growers' desire for a cheap and reliable source of farm labor and farmworkers' need for protection from exploitation. Growers feared that a program that offered undocumented aliens job portability and permanent residence would lead to labor shortages, since workers would gravitate to higher paying, non-agricultural jobs. They argued for an expanded and streamlined guest-worker program where temporary laborers would be allowed to enter and work for a specific employer at a designated wage. Advocates fought against this and held out for amnesty programs that would legalize the work force while allowing for future "replenishment workers" in the event of labor shortages. IRCA also introduced immigration verification requirements, employer sanctions for unlawful employment, and tougher border and other enforcement measures. To counter this increased enforcement, advocates pushed for and obtained two amnesty programs and an updating of the registry date so that undocumented aliens who had been living and working in the United States for a certain number of years could obtain permanent residence.

The law Congress ultimately passed set realistic standards for establishing eligibility. General amnesty applicants needed to prove unlawful residence since before January 1, 1982⁹⁴; SAWs had to establish employment in seasonal agricultural services during the one-year period ending on May 1, 1986.⁹⁵ While the INS preferred receiving some form of documentary evidence for each year of claimed residence, general amnesty applicants were allowed to use declarations from friends or employers to cover large periods of time.⁹⁶ SAW applicants were allowed to submit a single declaration from a farm labor crewleader to document prior employment.⁹⁷ In fact, once the SAW submitted the declaration, the burden shifted to the federal agency to establish its unreliability.⁹⁸ Congress recognized that by the nature of their work and their need to migrate, few undocumented farmworkers would have maintained employment records indicating where they had worked, the number of hours, and the type of crops picked, during the relevant period.

Congress also recognized that undocumented workers would be reluctant – at least at first – to file their applications directly with the INS due to fear of possible arrest and deportation. Therefore, they were allowed to file with "qualified designated entities" that would in turn

⁹⁴INA §245A(a)(2)(A).

⁹⁵INA §210(a)(1)(B).

⁹⁶INA §245a.2(d)(3).

⁹⁷INA §210.3(c)(3).

⁹⁸INA §210.3(b)(1).

forward the applications to the Service.⁹⁹ Creating this buffer helped encourage applicants to file with one of the QDEs and work with that agency's staff in the application process. Unfortunately, Congress failed to establish firm standards for the designation of QDE status, resulting in "notarios" and other for-profit consultants obtaining designation. Ultimately, a total of 977 QDEs were designated, many of which were not BIA-recognized, attorney-staffed, or even nonprofit. The INS should have limited QDE status to those nonprofit agencies that had evidenced a capacity, in both experience and expertise, to run a successful and high-volume legalization program. It should then have advertised the names of those QDEs and encouraged applicants to contact them.

IRCA limited the implementation stage to six months. This required the federal agency to gear up quickly to implement both employer sanctions, general amnesty, updated registry, SAW legalization, and other IRCA programs. In hindsight, there was simply too much for INS to do in the six-month period between IRCA's passage and the start of the application period: launch campaigns publicizing the terms of the amnesty programs; draft preliminary, interim, and final regulations; develop a system for multi-level adjudication; hire adjudicators; develop working relations with local community-based organizations, most of which they had previously considered adversaries; and try to mitigate the "fear factor" that would make eligible aliens wary of applying. But the time pressure did force the agency to act, and it ultimately met the statutory deadline. It decided on a "hierarchical review" approach to adjudication where intake and initial recommendations were made at the district level. Final adjudication was made at the regional level. Appellate review took place at the national level. It established new legalization offices (LO), regional processing facilities (RPF), and a legalization appeals unit (LAU).¹⁰⁰ This general regional/local model remains in effect today for the adjudication of many types of immigration benefits.

To further ensure that eligible persons would not be intimidated from applying, Congress added language guaranteeing the confidentiality of the applicant and protecting against civil enforcement should the application be denied.¹⁰¹ Basically, the INS was prohibited from initiating deportation proceedings against an unsuccessful applicant unless the agency was also seeking criminal prosecution for fraud, which it rarely did. This proved a very effective tool in persuading persons to come forward and apply, even though certain agency officials later sought ways around this provision.

Congress failed to provide benefits for the ineligible dependents of the amnesty alien. This resulted in certain family members living in fear of detection. When the legalized aliens obtained permanent residence and filed family-based visa applications for their spouses and children, the backlogs in the second preference category swelled. The administration tried to

⁹⁹INA §§210(b)(2), 245A(c)(1)(B).

¹⁰⁰8 CFR §§245a.1(j), (k), 245a.2(p), (r).

¹⁰¹INA §§210(b)(6)(A), 245A(c)(5).

address the problem by allowing for the granting of work authorization and protection from deportation for family members who did not qualify for one of the legalization programs but who had nevertheless been in the United States for a certain period of time. This “family fairness” program ultimately led to the formal Family Unity program in 1990 when Congress passed subsequent legislation.¹⁰² Congress has now recognized that dependents must be provided some form of protection and has made this a part of later programs, such as Nicaraguan Adjustment and Central American Relief Act¹⁰³ and the Haitian Refugee Immigration Fairness Act.¹⁰⁴

B. After Passage and Before Implementation

Congress mandated that the INS cooperate with QDEs in conducting an outreach and publicity campaign to advertise the general amnesty program’s requirements and benefits. It later appropriated and allocated funding for this purpose. However, most of the publicity funds were contracted to one national media company, and little of it trickled down to the local community-based organizations. Although local advertising and outreach proved very successful, the costs were mostly borne by the CBOs. Also, most of the advertising about legalization targeted the Hispanic market, leaving the non-Hispanics largely in the dark.¹⁰⁵ The lesson is that more money should have been appropriated for outreach to a wider range of ethnic groups and that at least some of that money should have gone to the local CBOs for their efforts. They played a vital role in broadcasting the message about legalization, and they will be in a similar position in the implementation of any future earned legalization.

Final regulations set amnesty application fees at \$185 (\$50 for a child) with a family cap of \$420.¹⁰⁶ This amount of money proved difficult to raise for many applicants, but the agency did allow for the filing of fee waiver requests. These fees now seem small in comparison to those recently proposed for more routine immigration applications (e.g., \$185 for an I-130; \$320 for an N-400).

A coalition of national nonprofit organizations formed in Washington, DC and worked closely together during the six-month planning stage. They met regularly as a group with INS, provided

¹⁰²Immigration Act of 1990, Pub. L. No. 101-649 (Nov. 29, 1990), §301; 8 CFR §236.10-16.

¹⁰³Pub. L. No. 105-100, 111 Stat. 2160 (Nov. 19, 1997), as amended by Pub. L. No. 105-139, 111 Stat. 2644 (Dec. 2, 1997), §202(d).

¹⁰⁴Pub. L. No. 105-277, 112 Stat. 2681-538 (Oct. 21, 1998), as amended by Pub. L. No. 106-386, §902(d).

¹⁰⁵S. Baker, *The Cautious Welcome: The Legalization Programs of the Immigration Reform and Control Act*, the Rand Corporation and the Urban Institute (1990) at 7, 120-131.

¹⁰⁶8 CFR §103.7(a)(1988)

input during the regulatory comment period, disseminated information to their affiliates throughout the country, received feedback from them, and advocated for a generous interpretation of the statutory provisions. Once the regulations were published, these groups divided up the labor for writing instruction manuals, conducting training, providing technical assistance, creating community education materials, and initiating class action challenges. Many of these same groups are still active in the DC area and perform some of the same functions. The process of implementing IRCA strengthened the alliances among each other and to some extent their future relationship with INS officials. Input into IRCA later evolved into advocacy for future reform legislation and administrative actions at the national level, and organizing/civic empowerment at the local level.

At this local level, many faith-based and other organizations sprang up or expanded to address the community's need for competent, low-cost immigration assistance. Many of these organizations continued providing other immigration services long after amnesty was over; some are still active today. As a result of IRCA, many grassroots organizations providing services to immigrants are now better connected at both the local and national levels.

During the period before applications were accepted, many local service providers hired more staff, rented additional space, and purchased new computers and other equipment. They sent their staff to training and purchased legal reference materials. These agencies benefitted from their investments in personnel and infrastructure during the application period and thereafter. But in some cases it caused short-term financial strains when revenue derived from the applicants was lower than expected and the bulk was received toward the end of the application period.

Many local programs launched their own outreach and publicity campaigns using self-generated materials and bilingual staff. They met with local media; provided information and quotable statements; and contributed articles, letters, and editorials. They met regularly with INS district office staff and worked together in advertising the legalization programs. These relationships – with both the media and the INS – continued after legalization ended.

C. During the Implementation Stage

Agencies developed different models to deal with the legalization, depending on the size of the agency, their prior experience and knowledge of immigration law, the anticipated number of applicants, their financial resources, and their ability to recruit volunteers. Some of the more successful faith-based programs worked with local priests or other religious leaders to encourage participation of both applicants and volunteer staff. These agencies conducted interviews in churches and community centers and relied on the trained volunteers to screen applicants, complete the forms, assemble documents, and photocopy the applications. Final review and quality control was performed by a staff attorney or experienced immigration counselor. Most programs charged applicants \$100 for the service, which covered their costs and encouraged client “buy-in.” The challenges included training and supervising the volunteers and extra staff, coordinating all the group sessions and after-hours work, staying abreast of legal interpretations,

and meeting client expectations. Every program reported working long hours and experiencing tremendous stress.

The national or regional support organizations, such as Migration and Refugee Services and Immigrant Legal Resource Center, prepared model intake/client interview forms and detailed legal reference materials. They also provided ongoing technical assistance. Much of the written material was geared for inexperienced agency staff and tried to cover all possible legal complications. Local programs used these materials extensively – at least in the beginning – and appreciated the thought and legal expertise that went into their development. The materials and training encouraged local practitioners to screen applicants carefully for a full range of possible problems and to submit as much documentation of residency as reasonably possible. This erring on the side of caution, however, resulted in longer interviews and fatter applications than proved necessary, given the adjudication standards that INS applied. Some agencies stopped using the model intake forms and just worked off the application form itself, and submitted less documentation, which speeded up the process considerably.

QDEs were supposed to receive \$15 from the INS for every legalization application they submitted (\$16 if they were operating under a national umbrella organization).¹⁰⁷ This figure should have been set higher – at least \$25 – given the amount of work involved in assembling each application. However, the INS was also authorized to advance funds to agencies that entered into these “cooperative agreements” based on the number of applications they expected to turn in. The INS didn’t recoup the difference when agencies failed to meet expectations, but it did withhold payment to agencies that submitted more applications than they were compensated for in the up-front moneys. A bigger problem was that many applicants went to the QDEs for initial consultation and advice – even help in assembling documents and filling out the application – and then filed directly with the INS. Some went to notarios who promised speedier results. Many of the QDEs were not fully reimbursed for their efforts. Roughly 18 percent of the applications filed with the INS were submitted by QDEs,¹⁰⁸ a figure that does not reflect all the work they did through outreach, community education, “charlas,” group sessions, and one-on-one initial client interviews. Some QDEs should have taken better steps to retain clients, file more applications, and obtain higher reimbursement.

The general amnesty program was designed to pay for itself in application fees, which it ultimately did. However, receipts flowed into the INS more slowly than anticipated, and then surged during the last month. Rather than request a specific Congressional appropriation to implement the program, the agency borrowed from other INS programs. The federal agency went through the same growth spurt and spending spree as some local CBOs. But anticipated revenue was off by 25 percent by the end of the first fiscal year, resulting in belt-tightening and staff reductions. During the last couple months of the application period, when filings were at

¹⁰⁷*The Cautious Welcome* at 4, 63.

¹⁰⁸*Id.* at 20.

their highest, the INS was understaffed. This proved unfortunate, since the agency needed to encourage people to file and facilitate their filing in order to increase revenues. Ultimately, the agency collected \$189 million in application receipts from the general amnesty program and \$137 million from the SAW program, which surpassed their expectations.¹⁰⁹ But to encourage earlier filing and generate more timely revenue, the INS should have allowed the filing of skeletal applications and the later submission of supporting documentation.

With some important exceptions – such as its interpretation of “known to the government” and “brief, casual, and innocent departures”¹¹⁰ – the INS adjudicated applications for the general amnesty program in a generous fashion. The adjudicatory system, where there was intake and interview at the local level and adjudication at the higher level, worked well. Out of the 1.75 million applications for temporary residence, the agency granted 1.65 million, resulting in an overall approval rate of 94 percent.¹¹¹ But far fewer people applied for general amnesty than the four million the agency had anticipated, and a disproportionate percentage of Hispanics applied than other ethnic groups. The agency failed to set forth clear standards for the adjudication of applications that were based largely or exclusively on affidavits. And the agency was also overly narrow in its interpretation of some of the statutory provisions, resulting in confusion, reluctance on the part of potential applicants, and protracted litigation, most of which ultimately succeeded in broadening eligibility. Two of the major class action lawsuits filed in 1987 were just recently settled.¹¹²

In contrast, the agency quickly suspected widespread fraud in the SAW program, and this belief pervaded the adjudication process. The RPFs took procedural shortcuts and applied the wrong standard in adjudicating SAW applications, resulting in court-mandated re-adjudications and delay.¹¹³ Some local LOs mounted their own anti-fraud efforts and turned interviews into interrogations. Far more aliens applied for SAW legalization (1.3 million) than were projected (250,000)¹¹⁴. The final approval rate did not reflect the long delays that many applicants

¹⁰⁹*Id.* at 71-72.

¹¹⁰INA §§245A(a)(2)(B), 245A(a)(3)(B); 8 CFR §245a.1(d), (g).

¹¹¹“Immigration Reform and Control Act: Report of the Legalized Alien Population,” U.S. Department of Justice, Immigration and Naturalization Service (1992) [hereinafter IRCA Report] at vii, 5.

¹¹²*Catholic Social Services, Inc. v. Ridge*, No. Civ. S-86-1343-LKK (E.D. Cal. Jan. 23, 2004) (order approving settlement); *Newman v. USCIS*, Civ. No. 87-4757-WDK(CWx) (C.D. Cal. Feb. 18, 2004) (order approving settlement).

¹¹³*See, e.g., Haitian Refugee Center v. Nelson*, 872 F.2d 1555 (11th Cir. 1989), *aff’d*, *McNary v. HRC, Inc.*, 498 U.S. 479 (1991).

¹¹⁴IRCA Report at 5.

experienced. Four years after the application period began, the agency had yet to adjudicate a quarter of the applications. Nor did it reflect the wholesale denial of applications containing declarations from certain crew leaders believed to have committed fraud. For example, some crew leaders signed both legitimate and fraudulent declarations. SAW applicants who had worked the required number of days in seasonal agricultural employment were treated the same as those who didn't if the same crew leader signed their declarations. The agency believed the standard of proof and documentary evidence – one crew leader declaration – was too low and difficult for the agency to refute. This resentment can now be seen in pending farm worker legalization where Congress is raising the bar for applicants and requiring more specificity and proof of past agricultural labor.

III. Recommendations for the Next Program

A generous legalization bill could be crafted in various ways. Eligibility could turn primarily, as it did under IRCA, on time in the country. Similarly, the U.S. “registry” program provides a path to lawful permanent residency for those who have resided continuously in the United States since before January 1, 1972.¹¹⁵ This date could be moved forward. “Earned legalization” programs typically turn primarily on employment for a period of time. IRCA’s Special Agricultural Worker (SAW) program provided status based on time in a particular job (farm labor). The Agricultural Job Opportunity, Benefits, and Security Act of 2003 would do the same. Other programs, like the Nicaraguan and Central American Relief Act (NACARA)¹¹⁶ and the Haitian Refugee Immigration Fairness Act (HRIFA),¹¹⁷ offered country-specific relief. The Development, Relief, and Education for Alien Minors (DREAM) Act would provide status to a specific group (immigrant students) based on their equitable ties to the United States. Whatever its ultimate form, the primary eligibility criteria for legalization should be simple, clear, and generous. The following specific recommendations should be considered in crafting the next program.

First, the program should attempt to address future migration flows. A rolling registry, for example, would automatically move forward the “entry” date that triggers lawful permanent residence. An increase in employment- or family-based immigration visas would also have prospective effect. Immigration enforcement measures have proven ineffective in stemming undocumented migration. Expanded legal avenues for migration -- which reflected labor, economic, and family realities -- would be more effective.

Second, given the terrorist threat, any program will lack credibility and support if it does not include a “good moral character” requirement, and rigorous identity and security clearance

¹¹⁵INA §249.

¹¹⁶Pub. L. No. 105-100, 111 Stat. 2160 (Nov. 19, 1997), as amended by Pub. L. No. 105-139, 111 Stat. 2644 (Dec. 2, 1997).

¹¹⁷Pub. L. No. 105-277, 112 Stat. 2681-538 (Oct. 21, 1998).

procedures. A legalization program should be designed to enhance national security.

Third, persons who apply but who do not ultimately qualify should not be subject to arrest or deportation. Applicant information should be kept confidential. Without this guarantee, few immigrants will come forward. The requirement also protects employers who have been complicit in document fraud. Confidentiality should be preserved, except in cases that raise criminal issues that are not associated with undocumented status.

Fourth, credible charitable agencies should be supported and written into the bill. They can play a crucial role in public education, outreach, convincing applicants to come forward, preparing strong applications, and liaising with the government. These agencies should be attorney-driven or BIA-recognized, tax-exempt agencies. Any legalization program will invariably be complicated and will require legal expertise. Funding should not be available to unqualified notaries or even nonprofit agencies that are not authorized to practice immigration law. This will create an incentive for legitimate non-profits to apply to the Board of Immigration Appeals for legal “recognition” and staff “accreditation” so that they can legally practice law. A coordinated effort should be instituted to create charitable legal capacity in places where it does not exist or needs to be increased.

Fifth, any program must include adequate funding for outreach, which should be widely available to immigrant rights groups, BIA-recognized agencies and other community-based organizations. This funding should not be used exclusively for Spanish-speaking persons. Successful community-education models, like the Office of Special Counsel’s anti-discrimination program, should be explored.

Sixth, there should be more than six months between passage of the bill and the program’s implementation. Many, if not most, of the pressing programmatic and interpretive issues will need to be resolved by regulation. Congress should mandate an expedited rule-making process. If key issues are not resolved at the program’s outset, this will lead to inefficiencies and litigation. Establishing an appropriate adjudication system will also be time-consuming. The need for a high-level non-governmental/government liaison group during this period (and even before) to tackle these issues will be crucial. Time will also be needed for publicity and outreach.

Similarly, the actual application or registration period should be longer than one year. An additional few months would significantly increase the number of persons who would register or file for this relief. These timing issues – length of set-up and application periods – need to be considered together. A shorter start-up period, for example, argues for a longer application period.

Seventh, given its size and complexity, a legalization program will require a separate core of specially trained adjudicators, similar to the asylum corps. A program that attempted to operate through existing systems would worsen the backlog and customer service problems that plague DHS. An operationally distinct program within DHS will cost money. Given the likelihood of

low filings at its outset, a significant appropriation will be needed to support it. It would be disruptive if DHS borrowed from its other revenue sources and resources to fund a legalization program, even for a short period of time.

Eighth, any program must provide derivative benefits to the immediate family members of applicants. These are family members who would not themselves qualify for legalization. IRCA and SAW did not provide derivative benefits. The Immigration Act of 1990¹¹⁸ Act created a “family unity” program, allowing the spouses and unmarried children of legalization beneficiaries to stay in the United States and work legally until they received a family-based visa. Once IRCA beneficiaries became lawful permanent residents, they began to petition for second preference visas, leading to the current multi-year backlogs in this preference category. A similarly disruptive scenario would be avoided with a derivative benefit provision.

Derivative benefits should not turn on the ability of the beneficiary to support the family member. This requirement would effectively bar those most in need of legalization and would constitute a barrier to family unity (akin to the “affidavit of support” requirement under current law) based only on income.

Ninth, the burden of proof and evidentiary standards must be sufficiently generous. IRCA used a “preponderance of the evidence” standard. Eligibility criteria like length of time in the country or in a particular job, combined with the fact that undocumented do not typically generate a significant paper trail, argues for a generous standard. A more stringent standard, “clear and convincing evidence,” would exclude many bona fide applicants. In addition, the kinds of documentation that will suffice must be broader than official government documents. The Violence Against Women Act,¹¹⁹ for example, established an “all credible evidence” standard.

Tenth, a two-step legalization program – conditional residence, then non-conditional permanent residence – is inefficient and unnecessary, provided the first step includes rigorous adjudication standards and background checks. A two-step process allows the government a second review of the applicant, but an adequate review could be accomplished in one step.

Eleventh, the bill must define its operative terms as unambiguously as possible, both for the applicants and to avoid the kind of litigation that left so many IRCA cases unsettled for so long. In the intervening years, terms like “brief, casual and innocent,” “known to the government,” and “continuous residence” have been defined with more precision. This should benefit any legalization program.

Finally, as stated, undocumented persons commit a range of immigration violations that preclude

¹¹⁸Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

¹¹⁹Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1953 (Aug. 31, 1994).

their re-entry into the country and their permanent residency. Without a broad waiver for these offenses, a program would not succeed in its primary purpose. A legalization program should make some grounds of inadmissibility inapplicable, allow others to be waived on a discretionary basis, and maintain a limited few as non-waivable. Refugees, for example, are not subject to the public charge, documentation, and labor certification grounds of inadmissibility.¹²⁰ All other grounds – except controlled substance, national security, terrorism, genocide, and Nazi party membership – can be waived for humanitarian, family unity or public interest reasons. An expanded refugee waiver – which also made inapplicable the unlawful presence and related grounds of inadmissibility – would greatly benefit a legalization program.

In our view, a legalization program must resolve the status of the undocumented, address future flows, enhance security, and include the specific provisions set forth above. Without these features, the program will not be successful, either in its implementation or in its ultimate goals.

¹²⁰INA §209(c).