IMPORTANT COMPREHENSIVE IMMIGRATION REFORM BILL INTRODUCED BY SENATORS HAGEL AND DASCHLE

January 24, 2004

On Wednesday, January 21, 2004, Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD) introduced legislation to comprehensively reform our nation's broken immigration system (S. 2010). In broad strokes, this new bill would:

* Provide a mechanism for most currently undocumented workers to earn permanent legal status;

* Significantly reduce the waiting time for immigrants coming to join U.S. citizen and legal permanent resident family members; and

* Create a new temporary worker program including a path to permanent status for temporary workers who set down roots in the U.S. and choose to stay.

Analysis

The announcement is an important and welcome development because it represents the first time that members of Congress have been willing to take the political risks and make the hard choices necessary to create a serious and appropriately detailed bipartisan proposal. No immigration bill has a chance of becoming law in the foreseeable future without support from members of both parties. Unfortunately, S. 2010 also includes serious flaws that must be addressed in the years that remain before comprehensive reform is likely to be enacted. It is expected that other similarly comprehensive bills will be introduced in coming weeks that will define the parameters of a debate that will likely last years.

In the meantime, it still remains the case that more limited proposals are the only ones with a reasonable chance to be enacted this year. Among these are the DREAM Act (S 1545, HR 1684) and the AgJOBS proposal (S 1645, HR 3142), each of which is bipartisan and enjoys majority support in the Congress.

One serious flaw in S. 2010 is its failure to adequately protect U.S. workers--including immigrants--from employers who seek to abuse the new temporary worker program. For example, the bill leaves in place the damaging Supreme Court decision in Hoffman Plastic Compounds v. NLRB, in which the Court restricted the remedies available to an undocumented worker whose employer violates worker protection laws.

It is important not to promise worker protections that will not be enforceable or actually available in practice. S. 2010 relies too heavily on employer attestations and administrative remedies. It does not permit a worker to go to court to redress a violation.

Another flaw in S. 2010 is that it leaves a hole in the earned legalization program that could prevent as many as a million or more undocumented immigrants from obtaining legal status, undermining the intention of creating a clean slate under the new rules. In addition, the bill fails to provide for such needs as English language instruction, basic health care, and economic development to rapidly increase immigrant productivity in the U.S. economy, and to help states and communities adjust to the uneven distribution of needs and opportunities that immigrants provide.

Despite these flaws, the bill is more than the "message bills" or principles we have seen to date from both political parties. It is thoughtfully constructed and its introduction initiates a new phase in the struggle for real reform.

Summary of provisions

The following are some of the highlights of S. 2010. Following our summary are the official announcement and press release provided by Senators Daschle and Hagel.

TITLE I: FAMILY REUNIFICATION

S. 2010 would reclassify the spouses and minor children of legal permanent residents (LPR's) as "immediate relatives" not subject to per-country immigration limits. It would provide that visas issued to immediate relatives would no longer be counted against the worldwide 480,000 cap for family-based immigration. And it would make more visas available to other family categories. According to the authors, State Department data suggests that these changes would eliminate the visa backlog in family immigration categories within about four years.

TITLE II: WILLING WORKER PROGRAM

Overview

S. 2010 would significantly modify the current H-2b temporary worker program and create a new H-2c program. Together the two programs would provide up to 350,000 temporary visas each year, a more than five-fold increase over the current H-2b program visa availability. The spouse and children of a participating worker would be permitted to accompany the worker, though they would be ineligible to work unless they qualify independently for temporary worker status. The temporary visas would not be available to undocumented immigrants who have lived illegally in the U.S. for more than 6 months (because the temporary visa applications would have to be made from abroad and undocumented immigrants would be subject to the 3 and 10 year bars).

A key feature of the new program—and one which strongly differentiates it from the President's guestworker plan—is that the employer or the worker's union would be permitted to petition at any time for a temporary worker to remain in the U.S. permanently. In addition, after three years of temporary status the worker would not need to rely on the employer because she would be eligible to petition for herself.

Employer requirements and worker protections

An employer wishing to make use of the program would pay a per-worker fee and would be required to abide by certain regulations designed to protect U.S. workers. For example, participating employers would be required to attest that they are not involved in a labor dispute, that they have tried and failed to recruit U.S. workers, and that they will pay the prevailing wage to the temporary workers. S. 2010 provides an administrative complaint procedure for violations of these provisions that could result in a fine against the employer and equitable relief for the aggrieved worker, plus the employer could be barred from participating in the guestworker program for one or more years. Importantly, though, workers would have no access to court to enforce their rights.

Temporary workers would be entitled to the full protection of federal, state, and local labor laws enjoyed by other workers and there are some important provisions such as whistleblower protections intended to address the particular vulnerabilities faced by guestworkers who endeavor to enforce these rights. But unfortunately labor laws are notoriously insufficient to protect all workers in the sectors where immigrant workers are concentrated, and S. 2010 provides no additional resources to improve enforcement of workplace protections such as minimum wage and worker safety.

Sadly, because labor law enforcement is so ineffective, the only practical solution available to an exploited worker is often to change jobs. S. 2010 includes a limited implementation of an important feature known as "portability" under which temporary workers would be permitted to change employers without losing their right to remain in the U.S. Under S. 2010, the new employer would have to meet the qualifications and paperwork requirements for participation in the temporary worker program, and would have to file the same petition as the original employer. In some cases the worker would also be required to obtain a waiver from the Department of Homeland Security before switching jobs.

TITLE III: EARNED ADJUSTMENT

S. 2010 would provide legal permanent residence to workers who can show continuous physical presence (other than brief, casual, or innocent absences) for at least five years before the date of introduction, who pay a $1,000 fine plus fees, and can meet certain other requirements such as payment of taxes, knowledge of English and civics (or enrollment in classes), and clearance of a law enforcement and criminal background check. To qualify, individuals would also have to prove that they worked during at least three of the five years before introduction, and that they worked at least one year after the bill was enacted. Exceptions to the work requirement include

children under 20, the worker's spouse, and persons granted humanitarian waivers for such reasons as pregnancy or disability.

An additional "transitional worker" program would be available to some undocumented immigrants who do not satisfy the continuous residence and/or work requirements and have worked in the U.S. for at least two of the five years before introduction of the bill. An apparent drafting error makes the specific requirements necessary to qualify for this provision a little murky. Upon application, payment of fine and fees and security clearance, whose eligible would be granted a 3-year temporary status and would eventually qualify for permanent residence if they work for at least two years after enactment of the bill.

Note that depending on how the transitional worker program is interpreted, it is likely that a million or more persons who have been in the U.S. in undocumented status would be unable to qualify for either the earned adjustment or the temporary worker visas.