

# ***Democrats Introduce Comprehensive Immigration Reform Proposal***

## **Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act**

May 20, 2004

### **Introduction**

The Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act, introduced on May 4, 2004, in the Senate by Sen. Edward M. Kennedy (D-MA) (S. 2381) and in the House of Representatives by Reps. Luis V. Gutierrez (D-IL) and Robert Menendez (D-NJ) (HR 4262), would strengthen employment and labor protections for workers in the United States, including immigrant workers and workers who would be employed under a temporary worker program that the act would create. It also would reverse the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 122 S.Ct. 1275 (2002), in which the Court restricted the remedies available to undocumented workers whose employers violate laws intended to protect workers.

The inclusion of provisions such as these are essential to the success of any comprehensive immigration reform proposal, because an immigration system that makes it easier to exploit workers unfairly or illegally is both unjust and unlikely to garner the wide support necessary to sustain itself in the long term. Failure to include adequate protections for workers has been a major shortcoming of earlier reform efforts and proposals.

The SOLVE Act is the second comprehensive immigration reform proposal to be introduced in Congress this year. The first was introduced by Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD) on Jan. 24, 2004, after President Bush, with much fanfare, announced earlier that month a set of principles that he said would govern his administration's approach to immigration reform. Since the president made his announcement, however, legislators from both political parties have complained that he has done very little to move his reform program through Congress.

Even though it is unlikely that any comprehensive immigration reform bill will be enacted this year, immigrants' and workers' rights advocates would profit from staying abreast of what reforms are being proposed, so they can help advance the ones that would best serve the people for whom they advocate. Immigrant communities, too, need to be provided accurate information about new reform proposals, both so they can advocate for themselves and so they understand clearly that these are only legislative *proposals*—that *presently there is no new legalization program* for which immigrants can apply.

The SOLVE Act features the following provisions:

- It would establish an *earned adjustment program* whereby most currently undocumented workers in the U.S. could apply for lawful permanent resident (LPR) status.
- It would provide a *transitional status* for currently undocumented workers who cannot meet the requirements for earned adjustment.



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- It would facilitate *family reunification* via provisions designed to deal with the current huge backlog of family-based visa applications and other obstacles that keep families separated for many years.
- It would create a new *temporary worker program* that would feature strengthened employer attestation and worker protection provisions.
- It would reverse the Supreme Court's decision in *Hoffman*.

## **Title I: Earned Adjustment**

The SOLVE Act would create an earned adjustment program whereby undocumented workers who are presently in the U.S. could apply for LPR status if they meet certain requirements.

### ***Eligibility requirements for earned adjustment***

Under the SOLVE Act, undocumented noncitizens would be eligible for earned adjustment to LPR status if they meet the following requirements:

- They have been physically present in the U.S. for at least five years preceding May 4, 2004.
- They have been employed in the U.S. for at least two years, but not necessarily with the same employer. Individuals who are disabled, under 21 years old, or in school would be exempted from the employment requirement.
- They have paid required income taxes and registered under the Military Selective Service Act.
- They possess basic “citizenship skills,” e.g., they have a minimum understanding of English, as well as knowledge and understanding of U.S. history and government.
- They pass a security screening.

Non-U.S. citizen workers in the U.S. who have had contact with the Dept. of Homeland Security (DHS) or have been in immigration court could still apply for earned adjustment—even if they have been ordered removed from the U.S.—if they are otherwise eligible for the benefit. The SOLVE Act would require the government to terminate removal proceedings against any noncitizen in removal proceedings who could show that he or she is *prima facie* eligible for earned adjustment (i.e., a preliminary review of the noncitizen's case indicates that he or she is eligible). In addition, noncitizens with orders of deportation, exclusion, removal, or voluntary departure would be eligible to apply for earned adjustment.

### ***Spouses and children of principal applicants***

Under the SOLVE Act's earned adjustment provision, the spouse and children (unmarried and under 21 years of age) of the principal applicant could also apply for LPR status. In addition, spouses and children who otherwise would be able to adjust but whose relationship to the principal applicant has ended due to domestic violence, or those who could show that they have been battered or subjected to extreme cruelty, would also be eligible to adjust to LPR status.

### ***Other provisions of the proposed earned adjustment program***

The other earned adjustment-related provisions of the SOLVE Act include the following:

- ***Exemption from yearly caps.*** Principal and derivative applications under the earned adjustment provision would not be subject to the yearly caps on the number of visas that can be issued each year.

- **Confidentiality.** The government would not be permitted to use information provided in earned adjustment applications for any purpose other than adjudicating the applications.
- **Safe harbor for employers.** The employers of undocumented workers applying for earned adjustment would *not* be subject to civil or criminal liability for having employed the workers. However, they still would be subject to all other labor and employment law provisions.
- **Judicial review.** Applicants for earned adjustment would have access to the courts to contest adverse determinations.
- **Legal assistance.** Current restrictions that prevent Legal Services Corporation–funded legal aid organizations from representing undocumented noncitizens would be waived so they could provide legal assistance directly relating to adjustment to LPR status. Under current restrictions, generally an LSC-funded organization can represent an applicant for adjustment of status only if he or she is the parent, spouse, or child of a U.S. citizen.

### ***Transitional status for immigrant workers not covered by the earned adjustment program***

The SOLVE Act would provide for a transitional status for undocumented workers who are currently present in the U.S. (as of May 4, 2004) but who cannot meet the other earned adjustment requirements.

- This transitional status would be good for a maximum of five years and would provide the people to whom it was granted work authorization and permission to travel outside the U.S.
- Persons granted transitional status would be eligible to adjust to LPR status if they could show that they had worked two years after receiving work authorization and if they could meet the other requirements for earned adjustment.
- The spouse and children of persons who adjusted from transitional status to LPR status would also be eligible to adjust to LPR status.

## **Title II: Family Reunification**

The SOLVE Act proposes reforms to the current family-based immigration system, addressing the unconscionable backlogs in this system that keep families separated for years. The act's proposals include:

- Reclassifying the spouses and children (unmarried and under 21 years of age) of LPRs as “immediate relatives,” which would mean that such family members would not be subject to per-country immigration limitations.
- Making a visa immediately available to family members who have been waiting for more than five years, thereby limiting family immigration backlogs that currently can extend to a decade or more for certain categories and countries.
- Repealing the three-year and ten-year bars to reentry for persons who are seeking admission to the U.S. after having been previously unlawfully present in the U.S. and having departed voluntarily, and removing the permanent bar for having unlawfully reentered the U.S. after previously having been unlawfully present in the U.S.
- Amending the income test for the I-864 affidavits of support so that sponsors would have to show that they have enough income to support both themselves (and any dependents) as well as the person(s) immigrating at or above 100 percent (instead of 125 percent, as the requirement is currently) of the federal poverty income guidelines.
- Amending the age until which derivative U.S. citizenship can be acquired to 21 years of age (currently it is 18 years of age). Derivative U.S. citizenship is citizenship derived

automatically by children from their parents' U.S. citizenship, either because the parents are or were U.S. citizens by birth, or because the parents became citizens via naturalization.

### **Title III: Temporary Worker Program**

The SOLVE Act would amend the current H-2B nonagricultural seasonal worker visa program and create a new H-1D program for workers employed in low-skilled positions other than agriculture. These two programs would differ from existing programs and other temporary worker proposals in two critical respects: (1) They would provide temporary workers a path toward permanent lawful status in the U.S., and (2) they would bolster labor protections for immigrant and U.S. workers.

#### ***Temporary worker visa programs***

***H-2B program.*** Under the revised H-2B program, 100,000 visas would be available for nonagricultural migrant workers. Each visa would be valid initially for 9 months and be renewable for up to 40 months.

***H-1D program.*** The SOLVE Act would create a new program, H-1D, through which employers could hire foreign workers to fill longer-term positions that they could not find U.S. workers to fill.

- The act would make 250,000 visas available for such H-1D workers.
- Each visa would be valid for two years and would be renewable for two additional two-year terms (i.e., it would be valid and renewable for up to six years).

***Maintenance of family unity.*** Members of H-1D and H-2B workers' immediate families would be allowed to accompany the workers to the U.S., but they would be eligible to be employed in the U.S. only if they, too, qualified for a temporary worker visa.

***Job portability.*** Under the SOLVE Act, temporary H-1D and H-2B workers would have "job portability," meaning that they would be allowed to move to another H-1D or H-2B job after three months on the job through which they acquired their visa. However, the three-month requirement could be waived for any worker who showed that his or her employer violated a term of the visa sponsorship, that the employer violated any other law or regulation relating to the worker's employment, or that the worker's personal circumstances had changed so as to require a change of employer.

***Path to LPR status.*** The H-1D and H-2B programs proposed in the SOLVE Act would include a path to lawful permanent residence status for the workers who participated in them. Either the temporary worker's employer could immediately file a permanent resident visa petition on behalf of the worker, or the worker could self-petition after two years of employment. Spouses and children of such workers would be eligible for derivative permanent resident status, and such adjustment applications would not be subject to the caps on the number of permanent resident visas that may be issued each year.

#### ***Employment and labor law protections***

***Would restore remedies to illegally exploited undocumented workers.*** SOLVE would reverse the Supreme Court's decision in *Hoffman* by establishing that neither back pay remedies nor any other monetary relief for unlawful employment practices shall be denied a wronged employee even if the employee was hired in violation of immigration laws.

***Would regulate raids and workplace enforcement during labor disputes.*** The act also would require that the DHS, which is charged with enforcing immigration law, check with the Dept. of Labor (DOL) or the National Labor Relations Board (NLRB) whenever it receives

information from any source that would create a suspicion that enforcing the law in a particular situation or site may involve the DHS in a labor dispute (e.g., between an employer and immigrant employees who believe the employer has treated them unfairly). The act lays out questions the DHS should ask the informant, including whether there is a labor dispute in progress at the work site and if the subjects of the information have raised workplace complaints or grievances. The SOLVE Act would *not* prohibit the DHS from acting on such information, even if it determined that there may be a labor dispute in progress at the site. It *would*, however, require the DHS to ensure “to the extent possible” that any immigrant worker arrested or detained as a result of such an enforcement action is not removed from the U.S. without the DHS first notifying the appropriate enforcement agency that has jurisdiction over the workplace violation.

**Whistleblower protections.** Under the SOLVE Act, noncitizens who have filed a workplace claim or who are material witnesses in any pending or anticipated proceeding involving a workplace claim would be granted a stay of removal plus work authorization unless the DOL could prove to the immigration judge (by a preponderance of the evidence) either that the removal proceedings are unrelated to the workplace claim or that the claim was filed in bad faith.

**Anti-displacement provisions.** The act also would strengthen the requirements an employer must meet in order to hire workers through a temporary worker program. In particular, the SOLVE Act would require such employers to attest to the following:

- That the H-1D or H-2B job position pays the prevailing wage as determined in a collective bargaining agreement, or if no collective bargaining agreement exists, as determined under the provisions of the appropriate statute (i.e., either the Davis-Bacon Act or the McNamara-O’Hara Service Act). The act would require that, if none of these methods for determining the prevailing wage apply to the job in question, the employer must calculate the prevailing wage to be the mean of “the highest 66 percent of the wage data provided by the Department of Labor’s Bureau of Labor Statistics, Occupational Employment Survey.”
- That the employer will offer the same wages, benefits, and working conditions for H-1D or H-2B temporary workers as those provided to its other workers employed in the same occupation and place of employment.
- That the employer will impose no restrictions or obligations on temporary workers that it does not impose on U.S. workers.

Along with this attestation, the employer would have to submit to the DOL a copy of the job offer describing the wages and other terms and conditions of employment.

**Full labor rights, anti-retaliation provisions, and private right of action.** The SOLVE Act would confer on H-1D and H-2B workers all rights and remedies available under federal, state, or local labor and employment laws. The act would make it unlawful for employers to intimidate, threaten, or discriminate against a worker because the worker disclosed information about or cooperates or seeks to cooperate in an investigation of the employer’s compliance with the requirements of the temporary worker program. Finally, the SOLVE Act would give H-1D and H-2B workers a private right of action (i.e., the ability to file lawsuits) against employers who fail to comply with the provisions and requirements of the temporary worker program.

More information on the SOLVE Act that advocates might find useful is available on the website of the American Immigration Lawyers Association: [www.aila.org](http://www.aila.org). A summary of the first comprehensive immigration reform bill introduced in Congress this year, the Hagel-Daschle bill, is available on NILC’s website ([www.nilc.org](http://www.nilc.org)), as is NILC’s response to President Bush’s immigration reform principles.

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**FOR MORE INFORMATION, CONTACT**

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