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The United States Immigration Reform and Control Act of 1986: A Critical Perspective

I. INTRODUCTION

The United States Immigration Reform and Control Act of 1986 ("Act") signalled the beginning of a new era for United States immigration law.¹ The first major revision of the nation's immigration policy in twenty-one years, the Act has had, and will continue to have, a profound impact both within the United States and abroad. The Act caused an extraordinary surge of apprehension and confusion in foreign communities and domestic workplaces, and has already produced dramatic effects throughout the world barely a year after its passage.

The controversy centers on the Act's four main components: employer sanctions;² amnesty;³ temporary agricultural worker programs;⁴ and increased enforcement.⁵ In summary, the employer sanction provisions make it unlawful for employers knowingly to hire any undocumented alien. Penalties range up to a maximum of a jail term and/or a \$10,000 fine per unauthorized alien.⁶ Also directed at employers are a series of anti-discrimination provisions established to deter discrimina-

¹ Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1150-24 (Supp. 1987))(signed into law Nov. 6, 1986). Success in the passage of the United States Immigration and Control Act of 1986 ("Act") is owed to the efforts of Senator Alan Simpson, who has been the "nation's most persistent advocate" of immigration law overhaul for the last six years. *Victory on Bill Sweet for Tall, Tough Senator*, Hous. Chron., Oct. 19, 1986, § 1, at 24, col. 4. Supporters of the bill were also aided by the increasing public concern about undocumented aliens (1.8 million were apprehended in 1986) and the weariness of some of the bill's opponents. Hispanics and business representatives, believing passage was inevitable, devoted their efforts to tailor the legislation more to their liking. *Id.* For an excellent analysis of the prior immigration reform bill ("Simpson-Mazzoli") that failed to win passage, see Comment, *Employer Sanctions for Hiring Illegal Aliens: A Simplistic Solution to a Complex Problem*, 6 NW. J. INT'L L. & BUS. 203 (1984).

² 8 U.S.C. § 1324a.

³ *Id.* § 1255a.

⁴ *Id.* §§ 1160, 1161, 1186.

⁵ *Id.* § 1524(a)(1).

⁶ *Id.* § 1324a(a)(1)(A), (e)(4), (f)(1). "Unauthorized alien" refers to an alien not lawfully admitted for permanent residence, or an alien not authorized by this Act or by the Attorney General to be so employed. *Id.* § 1324a(h)(3).

tion in the workplace towards United States citizens and legal aliens.⁷ The amnesty section provides a one-year period, beginning May 5, 1987, for undocumented aliens who entered the United States prior to January 1, 1982, to apply for legal status.⁸ The agricultural worker programs allow employers to hire undocumented aliens in temporary or seasonal agricultural services when legal workers are unavailable. Lastly, the enforcement program envisions an increase in enforcement activities by 50%.⁹

Each component of the Act was envisaged as vital to the success of the others. Congress expected to curtail the influx of undocumented aliens into the United States economy through employer sanctions and increased enforcement. At the same time, Congress sought to mitigate the impact on certain undocumented aliens and employers through amnesty and agricultural worker programs.¹⁰ However, though the plan appears to establish an immigration control system, it only "send[s] out a false statement" that Congress has solved the undocumented immigration dilemma.¹¹

Although the Immigration Reform and Control Act of 1986 has experienced limited success in a number of areas, it will not accomplish its goals overall. It has threatened United States foreign relations with Latin American countries and negatively affected their economies. It has impacted on Canada's immigration policy and resulted in the tightening of Canada's refugee program. Although promising in theory, the amnesty provisions will not achieve their objectives. Moreover, the Act has caused administrative difficulties in the United States business sector due to the documentation required to avoid employer sanctions.

Both business and agriculture are experiencing significant labor shortages in certain areas. However, the shortages do not reflect the success of employer sanctions. Rather, they demonstrate a temporary lull in

⁷ *Id.* § 1324b; H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 87 (1986) [hereinafter HOUSE CONF. REP.].

⁸ 8 U.S.C. § 1255a(a)(1)(A).

⁹ *Id.* §§ 1160, 1161, 1186, 1524(a)(1).

¹⁰ The logic behind the plan is that the approximately 2.1 million undocumented aliens present in the United States will no longer displace United States citizens in the work force nor burden the economy. *Cf.* P. CAFFERTY, *THE DILEMMA OF AMERICAN IMMIGRATION* 76-80 (1983); *Hearings Before the Subcomm. of Census and Population of the House Comm. of Post Office and Civil Service*, 99th Cong., 1st Sess. 134, 146 (1985) [hereinafter *Census and Population*] (testimony of Associate Professor Teresa A. Sullivan, University of Texas at Austin). Productivity levels, consumption patterns, and stimulation of the economy by undocumented workers have not been researched, leading to untested conclusions about them. *See* S. WEINTRAUB, *THE USE OF PUBLIC SERVICES BY UNDOCUMENTED ALIENS IN TEXAS: A STUDY OF STATE COSTS AND REVENUES* (1984).

¹¹ Uehling, *Trying to Reform the Border*, *NEWSWEEK*, Oct. 27, 1986, at 32, 35.

undocumented immigration that will end once the demand for labor in the United States, and the push of poverty and political upheaval in foreign countries, overcome the fear of sanctions for breaking the law. Once this lull dissipates, the Immigration and Naturalization Service ("INS") will again be unable to control illegal immigration. Further, the wide range of litigation associated with the Act will cause frustration throughout the United States as well as abroad.

II. FOREIGN POLICY

A. Latin America

Latin American countries consider the passage of the Act "tantamount to a foreign-policy declaration" by the United States. In particular, Mexico, Guatemala, El Salvador, and Honduras fear that the law will lead to massive deportations. Such deportations would worsen these countries' already severe unemployment and eliminate a primary source of foreign revenue through the funds undocumented workers send to their families in their homelands.¹² These fears are substantial, considering the fact that about 70% of the six million undocumented aliens in the United States come from Latin America.¹³

In Mexico, the nation expected to be affected most severely, the unemployment rate currently is estimated at 40%.¹⁴ Mexico's second largest source of foreign revenue is believed to be the money sent back home by Mexican workers living in the United States.¹⁵ The fears that these figures will be adversely affected have already turned into reality. For example, Ocampo, Mexico, located in the middle of the Mexican farm belt, was noted for an economy that had been functioning successfully for years. One-fourth of its population worked in the United States and sent back over three-fourths of the town's wealth.¹⁶ After the passage of the Act, however, the northward flow of immigrants slowed tremendously,

¹² *Latin Nations, Fearing Mass Deportation, Seek to Lessen Impact of New U.S. Immigration Law*, Wall St. J., May 14, 1987, at 50, col. 1 (Midwest ed.)[hereinafter *Latin Nations*]. Even Latin American nations with few undocumented aliens in the United States, such as Costa Rica, are in fear that the return of Salvadoran and Nicaraguan undocumented aliens to the South after their failure to find work will increase the number of these refugees already in their countries. *Id.*

¹³ Approximately 20% of El Salvador's population resides in the United States, most illegally. *Id.*

¹⁴ *Id.* To keep its population employed, Mexico would require one million new jobs per year. *New U.S. Migrants Law Vexes Mexicans*, Wall St. J., June 19, 1987, at 14, col. 1 (Midwest ed.) [hereinafter *New U.S. Migrants*].

¹⁵ *New U.S. Migrants*, *supra* note 14.

¹⁶ *Id.* The households on the communal farms could easily be distinguished: those whose breadwinners worked in the United States lived in adobe houses and drove pickup trucks with United States license plates, while the others lived in wooden shacks. *Id.*

the flow of funds from the United States decreased, and sales of at least one business were off by one-third.¹⁷

Ocampo is one example of the existing economic threat to Mexico. The closure of the "safety valve" to the North only adds to the economic pressure on a nation "already burdened by foreign debt, unemployment . . . poverty, social isolation, overpopulation and the imminent danger that arable lands will be pulverized even more."¹⁸ Mexico is only one of a number of Latin American nations faced with these problems.

To reduce the detrimental impact of the Act, Latin American countries have attempted to challenge the Act or plea for help.¹⁹ Mexico has sought the aid of regional Mexican-American leaders in the United States in the hope of fostering a joint effort to repeal the employer sanction provisions.²⁰ Similarly, Central American nations are attempting to gain support in Washington for temporary refugee status for some undocumented aliens.²¹ The United States government, however, has stated that the prospects for special consideration for one country are very slim because such exemptions would undercut the Act and lead other nations to expect similar treatment.²²

However, the majority of Latin American nations are reluctant to challenge the new law and lobby for amendments because nonintervention has always been a fundamental principle of their foreign policy.

¹⁷ *Id.*

¹⁸ *Id.* It should be noted that one potential hope for Mexico is the "Maquila Industry." A twin-plant system established along the Mexico-United States border allows "non-Mexican companies to set up assembly plants in Mexico and manufacture there for immediate export . . ." The approximately 900 factories established so far have attracted a sizable number of suppliers and transport companies on the United States side of the border. At this point, however, although rapid employment growth can be seen on the United States side of the border, the system has yet to make a notable impact on the unemployment situation in Mexico. *Depressed Texas-Border Cities Adding Jobs at Healthy Rates*, Wall St. J., March 17, 1987, at 37, col. 1 (Midwest ed.).

¹⁹ *Latin Nations*, *supra* note 12. According to Mexico's Consul General Hermilo Lopez-Bassols, the United States' right to legislate is not questioned, except when it affects the interests of other nations, at which time the issue becomes international and demands consultations and negotiations. *Id.*

²⁰ *Id.*; see *infra* note 131 and accompanying text. Mexico also promises to publish a "black list" of unscrupulous attorneys and consultants. *Latin Nations*, *supra* note 12.

²¹ Guatemala tried to organize a meeting of five Central American nations to address the law, and its President, Vinicio Cerezo Arevalo, spoke with President Ronald W. Reagan. *Latin Nations*, *supra* note 12.

²² For example, the increase in the number of Latin American nations pleading for stays in deportation may lessen the chance for Salvadorans and Nicaraguans to win "extended voluntary departure" ("EVD") status. An argument can be made, however, that El Salvador and Nicaragua are in a different class than other Latin American nations because they are at war. Their situations, therefore, more closely approximate those in Poland, Ethiopia, and Afghanistan, where EVD status has already been extended. *Id.*

Moreover, it is believed that because they have entered the arena so reluctantly, any efforts may be futile.²³

B. Canada

While the new law has placed Latin American nations in a tenuous situation, it has also impacted the Canadian government. Canada is encountering a mass migration of foreign undocumented aliens who, fearing deportation from the United States, are seeking asylum in Canada. From January to February of 1987, an unprecedented 6,000 people came to Canada to make refugee claims, one-third of the entire number for 1986.²⁴ Almost half the claims were made by undocumented Guatemalans and Salvadorans from the United States.²⁵ In response, Canada implemented emergency measures, effective February 20, 1987, to counter the influx.²⁶

Canada, which previously maintained a liberal policy allowing refugees to stay in Canada until their claims were heard, decided to turn back all undocumented aliens to the United States until their claims had been heard by a Canadian immigration panel. The United States, in turn, agreed not to deport these aliens until their hearings were completed.²⁷ In addition, Canada canceled a policy that allowed people from eighteen strife-ridden countries, including Guatemala and El Salvador, to stay and work in Canada.²⁸

III. AMNESTY

Amnesty, the act of granting a pardon to a group of individuals,²⁹ has been unsuccessful thus far in bringing undocumented aliens forward. The amnesty provision of the Act was a concession to Hispanic lobbying forces represented by Democrats in Congress.³⁰ It represented an at-

²³ *Id.*

²⁴ *Canada Tightens Its Policy on Refugees After Claimants Rise Tied to U.S. Law*, Wall St. J., Feb. 23, 1987, at 8, col. 1 (Midwest ed.)[hereinafter *Canada*]. In 1986, total immigration was 100,000 with 16,000 refugees accepted. The tightened measures would reduce refugee claims to 25,000 in 1987, compared with a projected 50,000 without the changes. Canada's population is approximately 22,000,000. *Id.*

²⁵ *Id.*

²⁶ 121 Can. Gaz. (pt. 2) 777 (1987); see *Canada*, *supra* note 24.

²⁷ Canada hopes this policy will encourage aliens to "claim refugee status at Canadian embassies," where they can be "judged on a case-by-case basis" instead of at the border. *Canada*, *supra* note 24.

²⁸ *Id.*

²⁹ THE MERRIAM-WEBSTER DICTIONARY 40 (1974).

³⁰ Uehling, *supra* note 11, at 35. See also Wilentz, *Harvest of Confusion*, TIME, Nov. 3, 1986, at 28.

tempt to "wipe the slate clean" and ease the impact of employer sanctions and the enforcement program on undocumented aliens.

A one-year application period began on May 5, 1987, for undocumented aliens to attempt to gain temporary residence status.³¹ Each alien must prove, through documentation and independent corroboration,³² that he or she has lived in the United States continuously at least since January 1, 1982.³³ Thereafter, he or she can achieve permanent residence status during a one year application period beginning approximately eighteen months after temporary status is granted.³⁴

The INS expected approximately two million to four million undocumented aliens to apply for amnesty.³⁵ As of July 7, 1987, however, only 213,000 aliens had applied; the INS has conceded that this number was well below the expected level. The reasons for the slow start are numerous.³⁶ The INS attributes the problem to the lack of information in the communities and in government-selected "go between" groups called Qualified Designated Entities ("QDEs").³⁷ The INS complains that it has received fewer than one application a day from the QDEs because they are overdocumenting cases and "spending too much time processing them."³⁸ The QDEs, on the other hand, attribute the prob-

³¹ 8 U.S.C. § 1255a(a)(1)(A).

³² Employment-related documents, not only from the employer, are the "best evidence" of continuous residence, and corroboration "may be in the form of affidavits." HOUSE CONF. REP., *supra* note 7, at 92.

³³ 8 U.S.C. §§ 1255a(a)(1)(C), (2)(A). The Senate version made January 1, 1980, the cutoff date. HOUSE CONF. REP., *supra* note 7, at 92. Additional requirements include, inter alia, establishing that the alien is admissible as an immigrant and has not been convicted of any felony, or three or more misdemeanors, in the United States. 8 U.S.C. §§ 1255a(a)(4)(A), (B).

³⁴ 8 U.S.C. § 1255a(b)(1)(A). With certain exceptions, permanent status will be granted if the alien maintains the requirements for temporary status and establishes or is actively pursuing a minimum understanding of English and United States history and government. *Id.* §§ 1255a(b)(1)(B)-(D), (2). In all cases the Attorney General has the right to approve an application for humanitarian purposes, public interest purposes, or to assure family unity. *Id.* § 1255a(d)(2)(B).

Numerical limitations for eligibility, however, do not exist, but if the Attorney General determines that an alien is ineligible, his temporary residence status will terminate at the end of the thirty-first month of such status. *Id.* §§ 1255a(b)(2), (d)(1). Review is very limited, with no review for late filings, only a single level of administrative appellate review, and only judicial review if an order of deportation under 8 U.S.C. § 1105a (1970 & Supp. 1987) is involved. *Id.* §§ 1255a(f)(2), (3)(A), (4)(A).

³⁵ *Latin Nations*, *supra* note 12.

³⁶ *Amnesty For Immigrants Moves Slowly*, Wall St. J., July 7, 1987, at 6, col. 1 (Midwest ed.) [hereinafter *Amnesty For Immigrants*].

³⁷ Over 800 agencies were selected by the government to act as official Qualified Designated Entities ("QDEs") to offer help and provide a buffer between the immigrants and the Immigration and Naturalization Service ("INS"). *Id.*; 52 Fed. Reg. 16,200 (to be codified at 8 C.F.R. § 210.1(m)).

³⁸ *Amnesty For Immigrants*, *supra* note 36. The INS reports that private lawyers are submitting more applications than the QDEs. *Id.*

lem to the lack of cooperation by the INS and the fact that the INS has not established firm guidelines on crucial policies.³⁹ However, the failure of the amnesty plan is the result of many factors.⁴⁰

These facts include the widespread confusion regarding the amnesty provisions, which has resulted from the lack of firm INS guidelines.⁴¹ Major uncertainty exists over proper documentation. The INS has not specified exactly how many documents are required, and aliens are unsure of the consequences if they cannot document their stay due to the loss of—or lack of—information.⁴² Many have been living in fear of being identified and deported. Now they “must come up with all the documentation they have tried for so long to escape: tax, rent, heating and telephone bills, pay slips, W-2 forms.”⁴³

Aliens who have tried to live invisible lives dealing on a cash basis will have trouble providing extensive documentation, since even United States citizens have trouble gathering documents dating back five years.⁴⁴ Moreover, numerous employers have added to this documentation dilemma by refusing to provide affidavits documenting the years of work by the aliens, for fear of Internal Revenue Service prosecution for off-the-book cash wage payments.⁴⁵ Even assuming aliens succeeded in getting documentation, there would be no guarantee that it would be found valid, considering the potential for forged documents.⁴⁶ The Act consequently exposes not only ineligible undocumented aliens to the risk of deportation, but also those who cannot establish that they arrived before January 1, 1982.⁴⁷

Another major point of confusion and concern centers on whether family members will be permitted to stay in the United States when only

³⁹ *Id.*; see *infra* notes 41-51 and accompanying text.

⁴⁰ See Flores, *My Father Crossed the Border and Gave Us a Future*, Wall St. J., July 29, 1987, at 14, col. 3 (Midwest ed.).

⁴¹ *Amnesty for Immigrants*, *supra* note 36.

⁴² *Id.*; see Flores, *supra* note 40.

⁴³ Wilentz, *supra* note 30, at 28.

⁴⁴ *Id.*

⁴⁵ *New Immigration Law Brings Much Anxiety to U.S. Workplaces*, Wall St. J., June 5, 1987, at 1, col. 6 (Midwest ed.) [hereinafter *New Immigration Law*]. Most employers are unaware that the new law prevents the INS from informing the Internal Revenue Service. *Id.*; see 52 Fed. Reg. 16,223 (to be codified at 8 C.F.R. § 274a.2(b)(4)).

⁴⁶ *INS Seeks to Force Employers to Check Workers' Status Within 1 Day of Hiring*, Wall St. J., Jan. 21, 1987, at 46, col. 2 (Midwest ed.) [hereinafter *Workers' Status*]. In Houston, for example, the INS found it takes an hour to get a forged set of the necessary documents. Uehling, *supra* note 11, at 32. In June 1987, birth certificates were selling in El Paso for \$80, and passports for \$200. *New Immigration Law*, *supra* note 45, at 1, col. 6.

⁴⁷ Wilentz, *supra* note 30, at 28.

one member qualifies for amnesty.⁴⁸ It is estimated that as many as 25% of the prospective applicants are from families in which only one parent may qualify for amnesty.⁴⁹ Although three bills are now pending in Congress which would keep families united even if not all the members qualify,⁵⁰ there are no guarantees. Many aliens as well as many QDEs are holding back applications until the issue is resolved.⁵¹

An additional point of controversy centers on the fact that the application requires listing of all next of kin, including those who reside in the United States illegally and who do not qualify for amnesty.⁵² Policies are unsettled as to the actions that will be taken against the individuals listed, causing the aliens to refrain from applying due to the fear of exposing others to deportation.

The factors underlying the failure of the amnesty plan, however, extend far beyond the confusion. The significant time and money required to process applications are also a great hindrance. While the INS projected a time expenditure of two hours per case, the QDEs are finding that simple cases can take twelve hours, and complex cases over twenty hours to process.⁵³ The additional time adds additional expenses: although the INS anticipated each case would cost \$200, simple cases actually cost as much as \$350.⁵⁴ High fees discourage aliens from coming forward.

Another problem lies in the fact that the QDEs are encountering difficulties in finding and training staff and in communicating with the clients. Consequently, prospective clients have been prompted to go elsewhere or directly to the INS.⁵⁵ Proper communication is essential because the applications are printed entirely in English,⁵⁶ which many clients cannot read.

Regardless of whether the INS and the QDEs can overcome these

⁴⁸ *Amnesty for Immigrants*, *supra* note 36. The Attorney General does have the power to approve an application to assure family unity. 8 U.S.C. § 1255a(d)(2)(B); *see supra* note 35 and accompanying text.

⁴⁹ *Immigration Amnesty Begins Smoothly But with Much Anxiety for Immigrants*, Wall St. J., May 6, 1987, § 2, at 52, col. 1 (Midwest ed.)[hereinafter *Immigration Amnesty Begins*].

⁵⁰ *Id.*

⁵¹ *Amnesty for Immigrants*, *supra* note 36.

⁵² *Immigration Amnesty Begins*, *supra* note 49; *see* 8 U.S.C. § 1255a(a)(1)(C).

⁵³ *Amnesty for Immigrants*, *supra* note 36. The extra time spent can be attributed in part to the confusion around the amnesty provision. *See supra* notes 41-51 and accompanying text.

⁵⁴ *Amnesty for Immigrants*, *supra* note 36; *see* 52 Fed. Reg. 16,193 (to be codified at 8 C.F.R. § 103.7(b)). Aliens who prefer to seek private counsel may expect bills in the thousands of dollars. *The Immigration Law's Harvest*, Wall St. J., June 17, 1987, at 22, col. 1 (Midwest ed.)[hereinafter *Harvest*].

⁵⁵ *Amnesty for Immigrants*, *supra* note 36.

⁵⁶ *Immigration Amnesty Begins*, *supra* note 49.

problems, a more difficult obstacle to surmount is the aliens' widespread distrust of "the system." Aliens who have always avoided contact with the government have difficulty believing that the amnesty plan is not a clever way to round them up and deport them.⁵⁷ Many aliens, therefore, are waiting to see what happens to their peers who do apply.⁵⁸

The final problem with the amnesty plan centers on the fact that most undocumented aliens will not meet the criteria. Overlooked was the fact that the majority of Central American war and economic refugees fled their homelands after 1981, and therefore, many of them will not qualify for amnesty.⁵⁹

Thus, even though the new law provides a tremendous opportunity that may never come again, the opportunity cannot be taken advantage of due to difficulties with the plan's implementation. Furthermore, since each of the four main components are closely interrelated, the difficulties with the amnesty component impact on the other provisions.

IV. EMPLOYER SANCTIONS

A. Documentation Process

The employer sanction provisions are one of the most perplexing areas of the new Act. The provisions make it unlawful for any person or entity knowingly to hire, recruit, or refer for a fee an undocumented alien after November 6, 1986.⁶⁰ The premise underlying this rule is that since most undocumented aliens have entered the United States to work, the one entity with whom they must have contact is the employer. The Act, therefore, shifts the burden of enforcing immigration laws on the employer.⁶¹ This burden includes the employer's examining any one of a

⁵⁷ *At Freddy's Cafe, Cuisine Is Mexican, Clientele Is Nervous*, Wall St. J., June 15, 1987, at 1, col. 4 (Midwest ed.)[hereinafter *Freddy's Cafe*].

⁵⁸ *Immigration Amnesty Begins*, *supra* note 49. Some undocumented aliens believe that only the rich with connections will succeed in obtaining amnesty, and therefore they will not even contemplate coming forward. *Freddy's Cafe*, *supra* note 57.

⁵⁹ *Latin Nations*, *supra* note 12. Many refugees have fled to Canada because they cannot meet the qualifying time period for amnesty. See *supra* notes 24-28 and accompanying text.

⁶⁰ 8 U.S.C. § 1324a(a)(1)(A). The Senate version penalized employers who referred for a fee, "or other consideration," but this phrase was removed to allow employers to rely on such referrals for compliance without violating any "contrary contractual provisions with union hiring halls." HOUSE CONF. REP., *supra* note 7, at 85. Each subdivision of an entity that does its own hiring, recruiting, or referring for employment is considered a separate person or entity. 8 U.S.C. § 1324a(e)(4). Included are those who use a contract, subcontract, or exchange, knowingly to obtain labor of an undocumented alien when the agreement was entered into, renegotiated, or extended after the enactment date. *Id.* § 1324a(a)(4).

⁶¹ P. CAFFERTY, *supra* note 10, at 186. Placing such responsibility on an employer (as opposed to a landlord, grocer, or utility company) is a questionable choice. Undocumented aliens do enter the United States to work, but such employment incentives would disappear if the aliens were unable

number of proper documents,⁶² filling out an I-9 form, signing it, and having an employee attest to its accuracy by signature.⁶³

Although this system appears simple, confusion has resulted due to changing regulations, lack of information, and lack of crucial policies. The first area of confusion centers on the fact that the INS changed the enforcement date of the sanctions. The sanctions were scheduled to commence June 1, 1987. However, the INS recognized several serious problems, such as the failure to distribute the required forms and handbooks to the over seven million businesses in time. As a consequence, enforcement was postponed until July 1, 1987.⁶⁴ For the first year, the INS will only issue citations for the first offense.⁶⁵ Thereafter, the full range of penalties will apply for all violations.⁶⁶ After numerous complaints arose that the regulations would unduly burden businesses, the agency also agreed to require verification within three days for all new hires, instead of twenty-four hours as previously required.⁶⁷

Confusion has also emerged regarding how the INS intends to en-

to obtain food or shelter. Employers are bearing the cost of enforcement because of the "growing trend to shift the burden of enforcing social policy to the private sector of the economy. . . ." *Id.*

⁶² The proper documents include: a United States passport, citizenship certificate or naturalization certificate; a foreign passport; an alien authorization card; or a combination of an employment authorization document (i.e., social security account number card or United States birth certificate) and an identity document (i.e., driver's license). 8 U.S.C. § 1324a(b)(1).

⁶³ *Id.* § 1324a(b)(1)(A); 52 Fed. Reg. 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(1)(i)(A)). "Good faith" compliance is an affirmative defense to any allegations that the employer knew the employee was an undocumented alien. 8 U.S.C. § 1324a(a)(3).

⁶⁴ *Harvest*, *supra* note 54; see 8 U.S.C. § 1324a(i)(1); 52 Fed. Reg. 16,199 (to be codified at 8 C.F.R. § 210.1(b)); *Simpson—Volstead—Mazzoli*, Wall St. J., July 3, 1987, § 1, at 8, col. 1 (Midwest ed.). The enforcement date, however, only applied to employers who hired workers after July 1, 1987. For employers who hired workers between the Act's enactment date (November 6, 1986) and July 1, 1987, sanctions did not begin until September 1, 1987. See *Employers Given to Sept. 1 to Check Legality of Workers*, Wall St. J., May 1, 1987, at 22, col. 3 (Midwest ed.) [hereinafter *Employers Given to Sept. 1*].

⁶⁵ Following receipt of a citation, employers are "subject to civil penalties even though the citation period has not expired." HOUSE CONF. REP., *supra* note 7, at 86.

⁶⁶ 8 U.S.C. § 1324a(i)(2). These federal penalties will preempt state and local sanction laws. *Id.* § 1324a(h)(2).

⁶⁷ *Employers Given to Sept. 1*, *supra* note 64. A three day grace period presents a dilemma to employers: the need for work to begin immediately versus the lack of time to produce and examine the documents properly. Although not true in all cases, the probability is greater that such individuals are undocumented aliens. Nevertheless, not all United States citizens will have the proper documents on hand. "Many U.S. citizens don't carry around their . . . birth certificates and would have to obtain them before they could start work." *Fees for Aliens Could Reach \$250*, N.Y. Times, Jan. 21, 1987, at 11, col. 1 (nat'l ed.).

Employers may be tempted to circumvent the Act's documentation requirement. By hiring undocumented aliens as day laborers rather than creating long-term jobs, employers can use the three day grace period to their advantage. The deterrent effect will be weakened because of the difficulty in apprehending employers and workers during a brief employment period. *Id.*

force the provisions. In June 1987, the INS announced that enforcement would be eased in with "informational visits" to encourage voluntary compliance with the law."⁶⁸ In July 1987, the INS explained that it was not ready to start enforcing the Act, but rather intended to remain in an informational and educational mode.⁶⁹ Then, two weeks later, the INS announced that it would begin issuing citations to employers as early as August 1987, but that it would focus on the blatant violators in order to set a precedent.⁷⁰ Rumors also circulated that employers could initially expect a "modest enforcement presence" with only a "couple of hundred" investigators.⁷¹

Employers, therefore, have not known whether the INS will be educating them or penalizing them. The only certainty at this point is that Congress expects the INS to target its enforcement resources on repeat offenders and to consider the size of the employer's workplace as a factor in allocating such resources.⁷² The INS, therefore, intends to pursue those who are in the best position to absorb the cost of any violations—the large-scale employers.

Furthermore, employers are faced with several types of violations. Minor violations include requiring employees to secure employers against liability⁷³ and more common "paperwork violations."⁷⁴ Major violations consist of employment violations. As a penalty, the employer must cease and desist from such practices and pay a civil penalty.⁷⁵ For a pattern or practice of such violations, the employer must pay a criminal penalty.⁷⁶ Employers, however, are unsure of the best way to document workers in order to protect themselves from these violations.

If the document "reasonably appears on its face to be genuine," em-

⁶⁸ *Immigration Law Will Be Enforced as of Wednesday*, Wall St. J., June 29, 1987, at 26, col. 5 (Midwest ed.). This policy has been seen by some lawmakers as a misallocation of resources which detracts from other enforcement initiatives. Half of all investigative resources are used to make these visits. *Plans to Phase in Immigration Law Hit by Lawmakers*, Wall St. J., July 13, 1987, at 44, col. 1 (Midwest ed.). Other methods, such as "advertising campaigns and toll-free telephone answering services," would be "more efficient." *Id.*

⁶⁹ See *Simpson—Volstead—Mazzoli*, *supra* note 64.

⁷⁰ *Immigration Law's Enforcement Near, Commissioner Says*, Wall St. J., July 21, 1987, at 18, col. 3 (Midwest ed.).

⁷¹ *New Immigration Law*, *supra* note 45.

⁷² HOUSE CONF. REP., *supra* note 7, at 86.

⁷³ If an employer requires an applicant to post a bond or security as a guarantee against liability, it will be subject to a civil penalty of \$1,000. 8 U.S.C. §§ 1324a(g)(1), (2).

⁷⁴ "Paperwork violations" occur when an employer fails to comply with the employment verification/record keeping system requirement. *Id.* § 1324a(a)(1)(B). Employers are subject to civil penalties ranging from \$100 to \$1,000. *Id.* § 1324a(e)(5).

⁷⁵ Civil penalties range from \$250 to \$2,000 per unauthorized alien for the first offense, and from \$2,000 to \$5,000 for the second offense. 8 U.S.C. § 1324a(e)(4)(A).

⁷⁶ Criminal penalties per unauthorized alien may reach \$3,000, six months imprisonment, or

ployers basically are protected from being fined.⁷⁷ The Act does not require employers independently to verify that such documents are valid,⁷⁸ and it does not specify the amount of certainty required in examining the documents. Any properly forged document could reasonably appear on its face to be genuine.⁷⁹ Nevertheless, the hope is that employers will inspect papers more carefully. This complicated verification system, however, leaves a large leeway for inadvertent mistakes, which, if found and successfully prosecuted, will subject employers to fines.⁸⁰

Furthermore, employers do not know whether they should retain copies of the documents provided to them by the employees. Although employer retention of document copies is not required by the INS,⁸¹ labor authorities are divided as to whether it could demonstrate a good faith effort to verify the employee, or whether it could reveal the documents as fakes.⁸²

Most companies do not fully understand the documentation process.⁸³ Employers know of the new law, but they are unaware of the "fine print."⁸⁴ For example, many employers do not realize how expan-

both. *Id.* § 1324a(f)(1). In addition, the Attorney General may request a permanent or temporary injunction or a restraining order in a district court. *Id.* § 1324a(f)(2).

The Senate version established a multi-tiered civil penalty structure: \$100-\$2,000 for the first offense; \$2,000-\$5,000 for the second offense; and \$3,000-\$10,000 for "pattern or practice" violations; then criminal penalties of \$3,000 and/or six months imprisonment for "pattern or practice" violations following a civil fine. The House version established a two-tiered civil penalty structure: \$1,000-\$2,000 for the first offense; \$2,000-\$5,000 for subsequent offenses; and criminal penalties of \$1,000 and/or six months imprisonment for "pattern or practice" violations. The Act is a modification of the Senate version without a civil fine as a prerequisite to a criminal penalty. HOUSE CONF. REP., *supra* note 7, at 86.

⁷⁷ See 8 U.S.C. § 1324a(b)(1).

⁷⁸ *Workers' Status*, *supra* note 46.

⁷⁹ Uehling, *supra* note 11, at 32.

⁸⁰ Any individual or entity may file a written complaint with respect to a potential employment violation. After advanced notice, the Attorney General may impose a final unappealable order if the employer does not request a hearing. 8 U.S.C. §§ 1324a(e)(1)(A), (3)(B). Upon request, however, the employer is entitled to a hearing before an administrative law judge. The administrative order will be final unless: 1) the Attorney General substitutes his order as the final order; or 2) a person adversely affected by the order files a petition in the Court of Appeals. *Id.* §§ 1324a(e)(3)(A)-(C), (6)-(7).

⁸¹ *Id.* § 1324a(b)(4).

⁸² *Immigration Cops: New Law Puts Task of Enforcement on Employer*, Wall St. J., May 7, 1987, at 29, col. 4 (Midwest ed.) [hereinafter *Immigration Cops*].

⁸³ *Id.* Exceptions do exist. Levi Strauss & Company, for example, has instituted its own amnesty-assistance program to help maintain employment in its plants in Texas and New Mexico. Approximately 33% of its 10,000 workers in those locations are undocumented workers. *New Immigration Law*, *supra* note 45.

⁸⁴ *New Immigration Law*, *supra* note 45 (statement of Rev. Gregory Boyle). The "fine print" may be why some employers view the I-9 form as just one more form to complete, while others see the three day limit as a real hardship. Wall St. J., July 28, 1987, at 1, col. 5 (Midwest ed.).

sive the new law is. Most see the sanctions as a way for the government to curtail the employment of menial unskilled labor in manufacturing and service industries. They forget that the provisions apply equally to foreign professional staff. Before the enactment of the law, visas "theoretically" were required upon hiring. Despite this, companies would hire a foreign expert with the requisite skill but lacking a visa, put him or her to work, and *then* apply for a visa without fear of sanctions.⁸⁵

Now, the Act has transformed this "matter of routine personnel processing to a vexing, often urgent, issue requiring . . . a high level of coordination among top management."⁸⁶ Most corporations, however, are not prepared for or aware of this need, and it is especially urgent due to the fact that the Act generally holds parent corporations responsible for the violations of their subsidiaries or divisions.⁸⁷ Thus, the only way towards compliance will be for the documentation process to become a routine management responsibility for every employer in the United States.⁸⁸ Until then, the administrative burden of the employer sanction provisions will remain one of the most perplexing areas of the Act.

B. Labor Shortage

In addition to the administrative burden, employer sanctions have produced an additional, though temporary, effect. Isolated labor shortages, due to the loss of cheap labor resulting from the departure of undocumented workers, are causing production cutbacks that could eventually increase certain consumer prices and possibly cause economic stagnation.⁸⁹ Approximately 10% of the workers in the service indus-

⁸⁵ *Immigration Law May Alienate Your Foreign Professional Staff*, Wall St. J., May 11, 1987, at 22, col. 3 (Midwest ed.).

⁸⁶ *Id.* For example, a major foreign company saw a carefully planned multi-million-dollar research and marketing program jeopardized because 15 key executives and professionals with specialized knowledge had not yet obtained work visas." *Id.*

⁸⁷ *Id.* An exception exists only if the subdivisions are distinct, physically separate, and do their own hiring under their own control. 8 U.S.C. § 1324a(e)(4).

⁸⁸ "The only employers excluded are those who hire a worker for casual or sporadic labor, such as babysitting." *Immigration Cops*, *supra* note 82. The Act does not exclude the government. Wall St. J., May 15, 1987, at 1, col. 5.

Employers, however, might be able to lessen the burden of sanctions by hiring a labor contractor to supply the workers. Labor contractors who recruit or refer for a fee must verify the legal authorization of those actually hired and therefore carry the burden of verification and sanctions (this burden, however, can be shifted to the employer if it consents). If the employer "knows" the alien is undocumented, the employer still is subject to fines. *Immigration Cops*, *supra* note 82; see 8 U.S.C. § 1324a(a)(4).

⁸⁹ *New Immigration Law*, *supra* note 45; *Immigration Amnesty Begins*, *supra* note 49. Congress "open[ed] the lid to a full Pandora's box of unforeseen problems when it tamper[ed] with the laws of supply and demand . . ." *Harvest*, *supra* note 54.

tries, especially textiles and restaurants, are affected.⁹⁰ For example, in California a garment factory owner has reported a loss of one-third of his workers. Another employer's plant was running at only 45% capacity and faced millions of dollars in lost revenue.⁹¹

As predicted, the greatest burden of the sanctions inevitably fell upon the United States manufacturing industries. Of the 2.1 million undocumented aliens who were present in the United States (60% of whom entered from Mexico), 1.9 million of them were employed. Forty percent of those employed worked in the manufacturing industry, while about 25% of those employed worked in business, repair, or personal services.⁹²

Undocumented aliens fall into one of two categories: unskilled or skilled. Unskilled undocumented aliens make up the bulk of a labor pool of low-skilled persons who are willing to work for low wages at undesirable jobs. They often fill a large regional or metropolitan demand for labor.⁹³ Many of these workers remain in the United States temporarily producing a statistic known as circular migration.⁹⁴ Skilled undocumented aliens, on the other hand, tend to receive higher wages. They include workers in the building trades as well as professionals and visa overstayers.⁹⁵ The employer sanction provisions affected each group differently.

Many skilled workers are eligible for amnesty. Those who are ineligible will face the same alternatives as the unskilled aliens. Any shortage arising from skilled workers leaving their jobs will not cause an increase in wages for these jobs because the jobs will be filled by domestic workers.

Due to the transitory nature of the unskilled aliens, however, the majority are not eligible for amnesty. The ineligible unskilled aliens may be deported or forced to seek employment in one of the agricultural

⁹⁰ *Harvest*, *supra* note 54.

⁹¹ *Id.*; *New Immigration Law*, *supra* note 45. Employers have requested referrals from state unemployment agencies and have run newspaper ads, but to little avail. *Id.* It has been estimated that about 2,000,000 people have crossed the Rio Grande River back to Mexico after being fired north of the border. *Harvest*, *supra* note 54. Unfortunately, due to the confusion about the new law, some employers laid off workers even though they were hired before November 6, 1986, and therefore could not be prosecuted. *Scrambling to Cope with New Law on Immigration*, N.Y. Times, Dec. 28, 1986, at 2, col. 1 (nat'l ed.).

⁹² *See Census and Population*, *supra* note 10, at 148. The other major sector is the agriculture industry; *see infra* notes 98-118 and accompanying text.

⁹³ Passells & Woodrow, *Geographic Distribution of Undocumented Immigrants: Estimates of Undocumented Aliens Counted in the 1980 Census by State*, 18 INT'L MIGRATION REV. 642, 643 (1984).

⁹⁴ *See* P. CAFFERTY, *supra* note 10, at 104.

⁹⁵ *See id.* at 78.

worker programs. Either outcome will result in a shortage of unskilled workers, and create a hole that must be filled by domestic workers demanding higher wages.

This labor shortage in the business community may be a signal that the employer sanctions are acting as successful deterrents. However, it can be argued that the sanctions may not be successful, and the labor shortage will only be temporary.⁹⁶ Until then, many service and manufacturing industries will be faced with a labor shortage crisis which may adversely affect United States businesses and cause economic consequences abroad.

V. TEMPORARY AGRICULTURAL WORKER PROGRAMS

The temporary agricultural worker programs specified in the Act were a concession to corporate farming interests who wanted a dependable and cheap supply of farmworkers to help them stay afloat and compete with foreign growers.⁹⁷ The farmers believed that these provisions were vital to counter the effects of the amnesty and employer sanctions.⁹⁸

The Act created three programs: an H-2A agricultural worker program, a special agricultural worker program, and a replenishment agricultural worker program. The H-2A agricultural worker program is an expansion of the existing H-2 agricultural worker program under which employers hire undocumented aliens to perform temporary or seasonal agricultural labor only when there is an insufficient number of legal workers available.⁹⁹ The special agricultural worker program provides for the admission of, and possible legal status for, up to 350,000 special agricultural workers to perform seasonal agricultural work in perishable commodities.¹⁰⁰ Finally, the replenishment agricultural worker program will admit foreign workers to perform seasonal agricultural work in perishable commodities on the basis of need triggered by a determination

⁹⁶ See *infra* notes 118-124 and accompanying text.

⁹⁷ Wilentz, *supra* note 30, at 28; Uehling, *supra* note 11, at 35.

⁹⁸ Wilentz, *supra* note 30, at 28. It was estimated that some 300,000 undocumented workers were employed, mostly on a seasonal basis, on farms and ranches. Farmers argued that employer sanctions would cause them to refrain from hiring these undocumented workers due to the risks of economic loss. Similarly, farmers argued that those workers who were successful in achieving amnesty were unlikely to remain as seasonal workers on farms. For the aliens to live here permanently, as opposed to returning to their native lands during the off seasons, year-round employment would be required. *Immigration Reform and Control Act of 1985: Hearings on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 176-77 (1985)[hereinafter *Senate Hearings*](statement of Henry Voss, President, California Farm Bureau).

⁹⁹ 8 U.S.C. §§ 1186(a)-(i).

¹⁰⁰ *Id.* §§ 1160(a)-(h).

that a shortage of special agricultural workers exists.¹⁰¹

These programs have had difficulty succeeding. In June 1987 the INS relaxed its procedures in order to allow migrant workers to enter the United States to pick perishable crops because of farm labor shortages in the western states.¹⁰² The problem: crops were rotting because special agricultural workers were held up by the regulations.¹⁰³ The government had received only 11,300 applications for special ninety day work permits, which were far below their 200,000 estimate.¹⁰⁴ The INS blamed this failure on farmers who did not gear up for the change. The farmers argued that the paperwork was too inflexible and slow for the changing needs of perishable crops.¹⁰⁵

The program has deterred potential workers. In order to apply for the program, workers must pay a \$185 processing fee. Their spouses and children are not protected from deportation.¹⁰⁶ Moreover, the risk of the worker's being jailed or deported is high once a worker's temporary permit expires. Other workers have avoided the program because the new plan stirs memories of the Braceros Program, in which Mexican workers imported to offset labor shortages during World War II were subjected to fumigation and other humiliations.¹⁰⁷

Before the relaxed procedures were implemented, an alien could adjust to temporary residence status during an eighteen month period only if he or she were admissible as an immigrant. The alien also needed to reside in and perform seasonal agricultural services in the perishable commodities industry in the United States for at least ninety days during a twelve month period.¹⁰⁸ He or she then could adjust to permanent

¹⁰¹ *Id.* §§ 1161(a)-(g).

¹⁰² *Immigration Rules Eased so Migrants Can Harvest Crops*, Wall St. J., June 30, 1987, at 21, col. 1 (Midwest ed.) [hereinafter *Immigration Rules Eased*].

¹⁰³ *Id.* In Northern California, for example, cherries were rotting off the branches, and labor contractors were short hundreds of workers. Thus overripe produce was sold as lower priced by-products. *New Immigration Law*, *supra* note 45. Similarly, in Oregon it was estimated that some regions had two-thirds of their jobs vacant, causing large portions of crops (especially strawberries) to rot. *Id.*

¹⁰⁴ *Immigration Rules Eased*, *supra* note 102. See 8 U.S.C. § 1160(a). The shortage of applications persisted even after the INS made two extensions for alien farm workers to apply for special worker status. Originally they were required to apply before November 6, 1986. The time limit was then extended to May 1, 1987, and finally to June 26, 1987. *Employers Given to Sept. 1*, *supra* note 64; *Immigration Rules Eased*, *supra* note 102.

¹⁰⁵ *Immigration Rules Eased*, *supra* note 102.

¹⁰⁶ *Simpson—Volstead—Mazzoli*, *supra* note 64; 52 Fed. Reg. 16,193 (to be codified at 8 C.F.R. § 103.7(b)).

¹⁰⁷ *New Immigration Law*, *supra* note 45.

¹⁰⁸ 8 U.S.C. § 1160(a)(1). Continuous residence is not required; rather, six months per year in the aggregate is the minimum. HOUSE CONF. REP., *supra* note 7, at 96.

residence status after one or two years.¹⁰⁹

It is doubtful that even the relaxation of these procedures will significantly impact problem areas. The new rules allow aliens to obtain these work permits without first having to provide documentation of previous employment in the United States, as was required by the Act.¹¹⁰ Although the workers may begin working, they will still have to provide documents within the ninety day period in order to qualify for special agricultural worker status.¹¹¹ Thus, the workers will be faced with the same risk of deportation and the same processing fees.

Farmers, aware that the relaxed procedures will not end the labor shortage, have instituted actions of their own to obtain workers. Some growers have flown to Mexico to recruit workers, while others have raised wages as much as 8%. Oregon tried to get media in Southern California to publicize the need for workers. A commercial airline even received a proposal from one southern state to sell United States vacations to foreigners who would spend part of their holiday filling jobs left by undocumented workers.¹¹²

Nevertheless, growers argue that only the implementation of an unstructured, flexible free market system will be successful in ensuring that perishable goods are harvested.¹¹³ Previously, workers followed the harvesting of each of the many perishable crops as they ripened in a south-to-north path and were not restricted to a particular grower (as is the case under the H-2 programs).¹¹⁴ Unfortunately, it is impossible to predict with any degree of certainty when crops will be ripe; a delay of even a few days could make the difference to an unexpected harvest time.

¹⁰⁹ 8 U.S.C. § 1160(a)(2). If more than 350,000 aliens meet these requirements, an adjustment is granted on a first come-first served basis. *Id.* § 1160(a)(2)(C). Proof of eligibility includes records supplied by employers or collective bargaining programs or other reliable documents. *Id.* § 1160(b)(3).

Proof of eligibility, however, is governed by the Fair Labor Standards Act case law. In a line of cases leading from *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), "courts have dealt with fact patterns involving employee loss of records, destruction or falsification of records by employers, and other difficult circumstances where precise evidence of hours worked is lacking." HOUSE CONF. REP., *supra* note 7, at 97. This problem is compounded in agriculture because pay records may only show piece rate units completed. Therefore, although evidence of hours worked is required, fairness dictates a presumption created in favor of worker evidence. If an alien is able to produce evidence showing only piece rate units picked, then any day where such work was performed shall satisfy the workday requirements of this Act. *Id.*

¹¹⁰ *Immigration Rules Eased*, *supra* note 102; see 8 U.S.C. 1160(a)(1)(B).

¹¹¹ *Immigration Rules Eased*, *supra* note 102. The relaxed procedures only apply to immigrants seeking to enter the United States. *Id.*

¹¹² *New Immigration Law*, *supra* note 45.

¹¹³ *Senate Hearings*, *supra* note 98, at 184 (statement of Michael V. Durando, President, California Grape and Tree Fruit League, Farm Labor Alliance).

¹¹⁴ *Id.* at 186.

"[T]here is extreme volatility in demand under normal circumstances, not to speak of what happens during a weather emergency."¹¹⁵ In an emergency there would not be time to produce the necessary paperwork and means of travel.¹¹⁶

These programs do not provide growers with the flexibility to assure that they can secure enough workers in time to harvest the perishable crops. According to Michael Durando, President of the Farm Labor Alliance, "[f]resh fruit and vegetable farmers are suffering the same economic pressures as the rest of United States agriculture, and we simply cannot afford to gamble on a program that does not have that kind of flexibility."¹¹⁷ Thus, while farmers were successful in obtaining programs intended to counter the effects of employer sanctions and amnesty, the perishable commodities industries have suffered due to the inflexibility of the programs.

VI. TEMPORARY SUCCESS

The labor shortages in the service and manufacturing industries and the agricultural sector do not exemplify the success of employer sanctions. Rather, they mark a temporary lull in undocumented immigration that will end once the demand for labor in the United States and the push of poverty and political upheaval in foreign countries overcome any fear of evading the law. In fact, the temporary lull in undocumented immigration has already begun to turn around. After a seven month decline ending in June 1987, undocumented immigration is on the rise.¹¹⁸ This surge has led many "to speculate that growing Latin American poverty has overpowered the new law's disincentive to immigrate illegally," which has coincided "with the widespread reports of labor shortages in [United States] farm fields and garment factories."¹¹⁹

These facts are not coincidental; they result from problems in the Act's implementation. Aliens are willing to take risks because of economic and political factors in their own countries.¹²⁰ Similarly, when crops are rotting or service and manufacturing businesses are negatively

¹¹⁵ *Id.* at 189, 190-92.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 193.

¹¹⁸ *Illegal Immigration Seems to Rebound, Fueling Doubts About New Law's Impact*, Wall St. J., July 7, 1987, at 2, col. 3 (Midwest ed.). Previously, undocumented immigration was in sharp decline, and border arrests were down 50%. In June 1987, the number of apprehensions was up 33% over May. *Id.* Other factors that might have contributed to the previous decrease include: increased border violence and the fact that the Rio Grande River (the Texas-Mexico border) was flowing at its highest level in 45 years, discouraging crossings. *Id.*

¹¹⁹ *Id.*

¹²⁰ The death of 18 Mexicans in a boxcar in July 1987 symbolizes this reality. *Id.*

affected, United States employers may risk paying fines. In the long run, the law cannot stop the simple economics of supply and demand.¹²¹

A basic problem in implementing the Act is that the INS will not be able to seal the United States' southern border, due to its physical length. While most countries have immigration controls at their borders, they do not share a 2,000 mile permeable southern border with the country from which most undocumented aliens come.¹²² The size of the current Border Patrol numbers in the hundreds to cover these 2,000 miles. A thousand persons, even assisted by sensing devices, would probably not be effective due to the vast size of the border.¹²³ Similar physical problems exist along the northern border, but the United States has paid little attention to it.¹²⁴ Border enforcement, no matter how sophisticated, cannot stop undocumented immigration. The INS faces a losing battle.

VII. LEGAL ISSUES

A wide spectrum of legal issues and litigation has developed which will hinder implementation of the Act, with repercussions both in the United States and abroad.¹²⁵ The Act affects seven million employers and an estimated two to four million undocumented immigrants, leaving many "high stake" issues to be solved.¹²⁶ These issues include: 1) separation of alien families if all members do not qualify for amnesty; 2) employer termination of undocumented workers seeking legalization; 3) technicalities of legalization; 4) confidentiality of the process; 5) equal protection and due process concerns of aliens infected with Acquired Im-

¹²¹ As the baby boom generation ages, there are fewer United States citizens between the ages of 15 and 29 (especially in entry level jobs), thus exacerbating the labor shortage. *Immigration May Fill Labor Gap*, Wall St. J., May 14, 1987, at 27, col. 3 (Midwest ed.). The future demand for labor will be another driving force for immigration, both legal and illegal. *Id.*

¹²² S. WEINTRAUB & S. ROSS, "TEMPORARY" ALIEN WORKERS IN THE UNITED STATES 92 (1982).

¹²³ *Id.* There is some theoretical number of Border Patrol personnel that could effectively shield the border against clandestine entry. However, such shielding would be prohibitively expensive and would adversely affect the relationship between the United States and Mexico. *Id.*

¹²⁴ P. CAFFERTY, *supra* note 10, at 173. There is a well-organized pipeline for smuggling undocumented Chinese entrants through British Columbia. The Canadian provinces of Ontario and Quebec are also reported to provide crossing points for many undocumented entrants from Europe and the Caribbean. *Id.* at 173-74. Aliens cross by land and sea, and there are also visa overstayers. *Id.*

¹²⁵ Attorneys appear to be the chief beneficiaries of the Act. The Act is said to have created an "immigration industry," for it "is at once a labor law, a civil-rights act and a de facto declaration of U.S. foreign policy." *Immigration Reform Provides a Fertile Field for Lawyers*, Wall St. J., July 14, 1987, at 1, col. 1 (Midwest ed.) [hereinafter *Fertile Field*].

¹²⁶ With confusion widespread, however, employers and immigrants have become targets for profiteering, civil rights crusading, and fraud. *Id.*

mune Deficiency Syndrome ("AIDS");¹²⁷ and 6) fourth amendment protection against unreasonable searches at places of employment.¹²⁸

Other important issues stem from the implementation of the anti-discrimination provisions, which were established to lessen the discriminatory impact of employer sanctions.¹²⁹ Basically, the provisions make it unlawful for an employer, with at least four employees, to discriminate against any individual (other than an unauthorized alien) in employment. The discrimination provisions cover hiring, recruiting, referring for a fee, or discharging an individual because of his or her national origin.¹³⁰ Certain civil rights groups are already active in documenting abuses of these provisions, hoping ultimately to achieve the repeal of employer sanctions.¹³¹

Debates have begun over the scope of the provisions. Will the provisions apply in unforeseen ways, such as the failure of an employer to ask "Anglo-appearing" applicants for proof of residency while requesting the same of foreign-appearing applicants?¹³² The anti-discrimination provi-

¹²⁷ The United States Justice Department currently has the authority to keep aliens out of the country if they have Acquired Immune Deficiency Syndrome ("AIDS"). However, it also wants authority to deport undocumented aliens infected with the disease and is considering asking Congress for such authority. Congressional approval is necessary because the Act prohibits the deportation of undocumented aliens residing in the United States "based on any information—including the results of AIDS tests—provided to the government as part of an application for citizenship." *Administration May Seek Authority to Deport Illegal Aliens with Aids*, Wall St. J., June 9, 1987, at 56, col. 1 (Midwest ed.).

If Congress grants such authority, the rights of aliens who do meet the test for permanent residency would be at issue. If Congress does not grant such authority, these aliens' rights would still be at issue because the current Attorney General intends "to deny permanent legal status to aliens who test positive for AIDS." *Id.*

¹²⁸ *Fertile Field*, *supra* note 125. If the INS gives three days warning, it will not need a subpoena or search warrant. If it has "probable cause" to believe the employer is violating the law, it can enter without a warning after obtaining a subpoena or search warrant. *Id.*

¹²⁹ HOUSE CONF. REP., *supra* note 7, at 87. The provisions broaden "the Title VII protections against national origin discrimination" due to the concern that foreign appearing individuals might be made more vulnerable by the imposition of sanctions. There is "some concern that some employers may decide not to hire 'foreign' appearing individuals to avoid sanctions." *Id.*

¹³⁰ 8 U.S.C. §§ 1324b(a)(1)-(3).

¹³¹ *Double Bind: Employers Who Shun Illegals Risk Discrimination Charges*, Wall St. J., June 5, 1987, at 8, col. 2 (Midwest ed.) [hereinafter *Double Bind*]. For example, as of June 1987 over 350 immigration-related complaints had been filed with the California, Illinois, and Texas offices of the Mexican American Legal Defense and Education Fund, a Latino civil rights group. *Id.*

The repeal of the employer sanctions could possibly occur if the civil rights groups succeed in their challenges. The General Accounting Office will make three reports analyzing whether the provisions are being carried out satisfactorily, whether a pattern of employment discrimination exists against United States citizens, nationals, or eligible workers, especially on the basis of national origin, and whether an unnecessary regulatory burden is being imposed on employers. 8 U.S.C. § 1324a(j). If negative results are reported, Congress has the authority to repeal the employer sanction provisions as well as the antidiscrimination provisions. *Id.* §§ 1324a(k)-(n).

¹³² *Double Bind*, *supra* note 131.

sions prohibit discrimination on the basis of national origin or citizenship, but allow an employer to show a preference for hiring citizens over documented aliens if the applicants are equally qualified.¹³³ These issues will remain unsolved, however, until the United States Department of Justice defines the legal test of discrimination. The United States government proposes that proof of intent to discriminate should be required, while civil rights groups prefer the "traditional EEOC [Equal Employment Opportunity Commission] standard of proving that hiring practices have a discriminatory effect."¹³⁴ A relaxed test can pose potential problems to innocent employers.

These are only some of the issues that have surfaced with respect to the Act. More are bound to arise. In the meantime, as United States citizens and foreigners face these issues, the achievement of the Act's goals will be hindered.

VIII. CONCLUSION

Through its four main components, employer sanctions, amnesty, agricultural worker programs, and increased enforcement, the Immigration Reform and Control Act of 1986 attempted to establish a system of control on immigration. However, the Act negatively affected foreign policy relations with Latin America and Canada. These countries took affirmative action to lessen the impact of the Act on their countries. The Act has also fallen short of expectations for amnesty, and implementation of employer sanctions has proved problematic.

Furthermore, the Act has created labor shortages in certain business and agricultural sectors, reflecting a temporary lull in undocumented immigration which will terminate once the laws of supply, demand, and desperation equalize. The legal arena will challenge and define the Act's intent and scope, with potential negative impact upon its effectiveness.

Congress required General Accounting Office reports on the implementation of the Act, so regular information will be available on which to base revisions.¹³⁵ After the initial impact has been assessed, the

¹³³ 8 U.S.C. § 1324b(a)(4). Employers may proceed with less fear of a discrimination charge under this powerful defense. As long as a competitor is present, the employer need not choose the individual who appears foreign. The decision not to take a chance that even a fifth generation Mexican-American is a citizen can thus be legally defended. A foreign appearance or surname might be used by employers to disqualify citizens and legal resident aliens from jobs. P. CAFFERTY, *supra* note 10, at 187. The burden would then shift to the individual to prove that he or she was more qualified than his or her competitor.

¹³⁴ *Double Bind*, *supra* note 131.

¹³⁵ See *supra* note 131 and accompanying text.

United States Government once again will have the opportunity to address the concerns raised in the first year of the Act's existence.

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