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Obama Administration Can Improve Immigration in Many Ways

By STUART ANDERSON

Fresh off the announcement that it would prioritize deportation for those with criminal records over other individuals here without legal status, the Obama Administration could take a series of other measures within its authority to rationalize U.S. immigration policy. The dozens of ideas for reform advocated in two new reports by the National Foundation for American Policy would be much less controversial than the recent Obama Administration on deportation.

First, let's take a look at the new policy on deportation, a description of which can be found [here](#). According to the response Senator Richard Durbin (D-IL) received from the Obama Administration, the new policy would work as follows: "Under the new process, a Department of Homeland Security (DHS) and Department of Justice (DOJ) working group will develop specific criteria to identify low-priority removal cases that should be considered for prosecutorial discretion. These criteria will be based on 'positive factors' from the Morton Memo, which include individuals present in the U.S. since childhood (like DREAM Act students), minors, the elderly, pregnant and nursing women, victims of serious crimes, veterans and members of the armed services, and individuals with serious disabilities or health problems." (The Morton memo, issued in June, sought to address the situation of limited enforcement resources by providing field guidance on who to prioritize in deportations.)

Again, while this policy has received praise and criticism in different quarters, it is more controversial than other measures that could be taken. In the two reports released this week by the National Foundation for American Policy, a group of organizations and legal experts recommended a variety of measures that would improve immigration policies in a variety of areas. The recommendations in the reports (found [here](#) and [here](#)) come from organizations that include the U.S. Chamber of Commerce, the American Council on International Personnel, the American Immigration Lawyers Association, the U.S. Conference of Catholic Bishops, the Hebrew Immigrant Aid Society (HIAS) and others. The goal was to find measures that did not require legislation and that, generally speaking, were unlikely to be controversial.

In January 2011, President Obama issued an [executive order](#) that called on agencies to remove outdated regulations or those that harmed competitiveness. A number of the recommendations in the reports were also submitted during a public comment period opened up by the Administration.

To improve the naturalization process, the reports recommended fee reform and streamlining that brings down the price of applying for naturalization, revising and simplifying the language in both the naturalization form and instructions, and restoring offsite naturalization interviews at local community centers. Since even critics of immigration would like those already here to integrate as well as possible and become citizens, these policy proposals should not engender much opposition.

To improve aspects of employment-based immigration, the reports advocated changes that would reduce red tape, such as allowing online advertisements rather than more expensive print ads for labor certification (a highly bureaucratic process required to secure a green card for a skilled immigrant that can cost employers \$10,000).

Other reforms recommended in the reports would achieve important policy objectives, such as providing additional labor mobility to skilled foreign nationals. That is something critics of high skill immigration have supported, since it would encourage foreign-born professionals to change employers the same as U.S. workers.

The most direct way to provide more labor mobility, including within a company, is to allow individuals waiting for green cards in the United States (often in H-1B status) to apply for adjustment of status even when a visa number is not yet available. Currently, individuals waiting for a green card often may be passed over for promotion or may hesitate to change jobs because such actions could trigger the need to re-start the green card process. As Aman Kapoor of Immigration Voice explains, “By allowing applicants to obtain an Employment Authorization Document (EAD) through the adjustment of status process, this minor fix would allow high-skilled immigrants to accept job offers and promotions, either with their current employer or other perspective employers, without having to start the entire green card application process all over again.”

In response to a question from the *Huffington Post*'s Alex Wagner, U.S. Citizenship and Immigration Services Director Alejandro Mayorkas said he thought some of the recommendations in the two reports were "well taken" but that he would need to examine them further. That's a positive response. Randel K. Johnson of the U.S. Chamber of Commerce said many of the recommendations in the reports could be easily implemented, calling them “low hanging fruit.” Let's hope the Obama Administration is willing to pick some of that fruit and, in the process, bring greater rationality to our immigration system.

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Let One, Maybe Two Flowers Bloom

By STUART ANDERSON

As discussed in earlier columns, America does not have a true entrepreneurs visa or a line for entrepreneurs to get in to start a business and create jobs in America. This past week, U.S. Citizenship and Immigration Services (USCIS, the service part of the late INS) sought to loosen some of the federal government's policies aligned against foreign-born entrepreneurs. But rather than "Let a thousand flowers bloom," the new policy could perhaps be called, "Let one or two flowers bloom."

Let's not be mistaken: Anytime an immigration agency is interested in being more welcoming toward legal immigrants it deserves attention. And one can hope the new policy will help a number of people. The problem is that the new policy does not go very far and is constrained by previous agency actions. (The announcement is [here](#).) In January 2010, U.S. Citizenship and Immigration Services released a memo designed to limit the ability of employers to place foreign nationals on H-1B temporary visas at third party sites. While the intention was primarily to restrict situations where companies leased employees to another company without directing the work of those employees, the memo ended up being much broader in its impact.

Much of the so-called Neufeld memo (found [here](#)) rests on the notion of whether an employer "controls" the employee working on an H-1B visa. Following through on this notion U.S. Citizenship and Immigration Services abandoned the long-permitted practice of allowing a company to petition for an H-1B for the founder of the company. This means many potential foreign-born entrepreneurs would have to start businesses in other countries or not start them at all.

The (somewhat) revised policy from U.S. Citizenship and Immigration Services will now allow H-1B temporary visas to be issued if an entrepreneur can show a board of directors "controls" him or her. Many startups do not have an expansive board and usually the founder is chairman of the board. In such situations would the agency approve an H-1B visa? That remains to be seen.

In an excellent [analysis](#) of the policy revision, immigration attorney Greg Siskind notes, “USCIS is still hung up on a notion of ‘control’ that is precisely opposite of entrepreneurship. Entrepreneurs want to be the boss, not the bossed, and the new H-1B memo only solidifies USCIS’ wrong-headed thinking. Unfortunately, by taking a rigid view on ‘control’ of employment, entrepreneurs are basically out of luck when it comes to using the H-1B.”

Siskind believes the Neufeld memo would need to be revoked for real progress to be made in this area. He also was unsure of the impact of the agency announcing a more liberalized attitude toward granting “national interest” waivers for entrepreneurs to obtain employment-based green cards (permanent residence): “Good luck getting USCIS examiners to view the memo in the spirit it is offered. Expect to be challenged that the job creation is not ‘national’ enough or expansive enough.”

Time and again in the immigration debate we hear it said, “People should wait in line and play by the rules.” This is good advice. The only problem is often when it comes to immigration there is no line to wait in and the rules don’t make a whole lot of sense.

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Ways to Create Jobs – Without Cost to Taxpayers

By STUART ANDERSON

Much of the economic debate over the past two years has been whether – or how much – money is needed from the federal budget to create jobs. The argument that taxpayer money is needed to save or create jobs in America was the implicit purpose of TARP (Troubled Asset Relief Program) and the explicit purpose of the auto company bailouts. The debates over stimulus packages and whether the government should invest in green technology center on using taxpayer dollars as the key to job creation.

It turns out most net job creation comes from startup companies and such companies can be founded and thrive without taxpayer dollars. The Ewing Marion Kauffman Foundation found, “It is now well established that, until the financial crisis and the Great Recession, U.S. job and output growth was driven by the formation of *new firms*, or startups. All existing firms older than five years (and possibly those older than one year) *on net* generated no additional jobs.”

There are ways for the U.S. government to facilitate startups but they primarily involve getting out of the way and letting the market function.

Preventing highly skilled foreign-born individuals from starting businesses is one of the ways the U.S. government limits startups. Up until recently, a foreign national could found a business and the company could petition for him or her on an H-1B temporary visa. Not anymore. Under a 2010 policy memorandum, U.S. Citizenship and Immigration Services prohibits approving an H-1B petition for founders of companies.

Placing new regulatory burdens on employers also makes it more difficult to start and maintain businesses. For example, a new bill in Congress, H.R. 2164, would mandate that all companies use an electronic employment verification system known as E-Verify when hiring new employees or, under a complicated set of rules, sometimes use E-Verify for existing employees. An analysis by Bloomberg estimated mandatory E-Verify would cost U.S. employers \$2.7 billion a year to comply with the system, with small businesses paying most of those costs. The legislation also includes a ten-fold increase in fines that immigration attorneys warn could put a small company or new venture out of business. The Kauffman Foundation recently released a paper – found [here](#) – that included a series of ideas to create jobs through facilitating entrepreneurship. Among the ideas:

- *Establishing an entrepreneurs visa for foreign-born individuals.* Currently there is no appropriate category for a typical foreign-born entrepreneur to start a business in the United States. Allowing such individuals to start a business on a temporary visa and then gain permanent residence (a green card) if the business creates jobs would unleash the entrepreneurial spirit that has historically been one of America's greatest strengths. (The National Foundation for American Policy released a [study](#) on this topic last year.)

- *Awarding green cards to international students with a masters degree or higher in a science, technology, engineering or math (STEM) field from a U.S. university.* Without Congressional action, the current wait for an employment-based green card can be 5 to 20 years or more, depending on the country of origin. Freeing such highly skilled individuals from the burden of waiting for many years for permanent residence will allow them to move up within their own companies or someday start businesses.

- *Allowing differential pricing for patent fees.* Immigration is not the only area with backlogs. Permitting higher fees for faster adjudication can work with patent applications the same way it works in other areas.

- *Automatic ten-year sunsets for major regulations.* The Kauffman Foundation recommends Congress allow rules with a cost of \$100 million or more to lapse after ten years. "This would regularly cleanse the books of inefficient and costly rules and, thus, barriers to business formation and growth for all businesses, including startups."

Unless many more people work for the government – an increasingly dicey proposition given our long-term budget woes – then we need to facilitate business startups to create jobs. Freeing up our immigration, patent and regulatory rules is a great way to do so without costing the taxpayers a dime.

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Only Takes 2,000 (or 3,000) Pages to Explain U.S. Immigration Rules

By STUART ANDERSON

Nothing belies the myth that it's "easy" for U.S. employers to hire foreign nationals and immigrants better than a new book produced by the American Immigration Lawyers Association (AILA). *Business Immigration Law & Practice*, by Daryl Buffenstein and Bo Cooper, both partners at Berry Appleman & Leiden, spends over 2,000 pages explaining the complexities of immigration law – and that's just to other lawyers.

Explaining the law to business owners would take many more pages, as well as hours of individual discussions. (The AILA book can be found [here](#).)

I asked Daryl Buffenstein why the book needed to be so long. "Explaining just the principal aspects for each category accounts for the more than 2,000 pages in the book," said Buffenstein. "Experienced attorneys in other areas of the law are often shocked to learn how complex immigration law can be, and how it can be fraught with negative consequences for what appear to be small and seemingly meaningless differences in approach or strategy."

It is telling that the authors must spend nearly 300 pages to explain "labor certification," one of the steps typically required to sponsor a highly skilled foreign national for permanent residence (a green card). The Department of Labor has made the process so complex – mandating placing advertisements or requiring government-led "supervised recruitment" – that it can cost an employer \$10,000 or more, according to the American Council on International Personnel.

"There is a tremendous misperception that it is 'easy' to hire a foreign worker, and that simply isn't the case," said Buffenstein.

U.S. immigration law is not getting any easier. H.R. 2164, a bill pending in the House Judiciary Committee, would mandate all employers in America use E-Verify, an electronic employment verification system, when hiring new workers. The bill would expose business owners to the genuine risk of losing their livelihoods because of a failure to follow government-mandated procedures, including under what circumstance to use E-Verify (only about 3 percent of employers now use the system). The significant increases

in fines and requirements in the bill could put small companies out of business whether or not they have hired illegal immigrants, according to immigration attorneys.

Given the push for mandatory E-Verify, it is remarkable House Republicans are offering no parallel measures to make it easier – or, in some cases, possible – to hire foreign nationals for what are commonly called “lower-skilled” jobs. It is virtually impossible to use a temporary visa in America to legally hire a foreign national long-term for such jobs.

In Georgia, officials have found that efforts to scare illegal immigrant farm workers out of the state have left a gaping hole in the workforce, one the Governor has encouraged be filled by recently released prisoners. Leaving aside the allusions to Paul Newman and “Cool Hand Luke,” elected officials are learning what farmers already knew: that even “lower-skilled” jobs like picking crops actually take skill, experience and a willingness to work under difficult conditions.

Buffenstein said his book did not even attempt to explain the bureaucratic and cumbersome process growers must endure to hire farm workers legally on H-2A visas. He said that agriculture in an immigration context “is a body of law unto itself” and he feared the book would be at least 3,000 pages if he didn’t place some limits on the topics covered.

The book needs over 100 pages to explain the complexities of the H-2B visa, which can be used for temporary, seasonal nonagricultural jobs, such as in resorts. Such visas cannot be used for year-round jobs. The category also has a low quota of 66,000 a year that has often been exhausted, leaving employers out of luck. (Americans are not lining up to pick crabs in Maryland for 3 to 6 months at a time.)

Given how difficult it is to hire foreign nationals, even highly skilled ones, perhaps next year the American Immigration Lawyers Association will publish a book titled “How Congress Made Immigration Law Easy to Use for Employers.” It would have to be placed next to *Harry Potter* in the Fantasy section.

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They Shoot Horses Don't They?

By STUART ANDERSON

Rep. Mo Brooks (R-AL) made headlines this past week when, referring to illegal immigrants, he said, "As your congressman on the House floor, I'll do anything short of shooting them, anything that is lawful." (*Daily Caller*, June 29) Defenders of the Congressman would point out he did not say he would shoot illegal immigrants. In fact, he specifically said he would do "anything short of shooting them."

Still, this type of rhetoric implies that only force can reduce illegal immigration and anything Congress can come up with that sounds tough and becomes law is the right approach. "I wanted to ensure people that I have an intensity on this subject – that we have to address the illegal alien issue," said Brooks.

There is no question Rep. Brooks feels strongly about the issue. However, we should remember something – the angriest or the loudest person in the room does not always have the right answer. In fact, a person's anger and interest in making sure he is heard can cloud someone's thinking. That seems to happen with immigration.

On his website, Rep. Brooks features excerpts from an interview he gave earlier this year on Fox News Radio. In the interview, he declared himself a believer in the free market: "That's the battle that we have on this economic spectrum, where you've got capitalism and free enterprise on one hand and socialism on the other."

If that's his view on economic issues, it's not clear why he has failed to come to the conclusion that illegal immigration is largely an economic issue and the federal government is preventing a solution. Simply put, by, in effect, prohibiting foreign-born individuals from coming to America to work legally on temporary visas to fill lower-skilled jobs, the federal government is imposing the type of policy he decries in other areas.

In the 1950s, even with the imperfect Bracero program, we saw the illegal entry of Mexican farm workers, as measured by apprehensions, decline by over 90 percent between 1953 and 1959. However, today, America has only a bureaucratic H-2A visa category that pleases neither growers nor the farm workers union, and a cumbersome H-2B visa for short-term seasonal work outside of agriculture.

Rep. Brooks has not yet signed on as a co-sponsor of H.R. 2164, a bill that would require all employers in America to use an electronic employment verification system called E-Verify. It's possible that Rep. Brooks' belief in free enterprise will cause him to think twice about supporting legislation that would make all employers and Americans trying to start a new job first obtain a sign-off from the federal government. (For more information, see a new study on E-Verify [here](#).)

Members of Congress have passed numerous provisions over the past 25 years aiming to reduce illegal immigration and instead these enforcement-centered approaches have not worked. Without the safety valve of legal visas, making it harder to cross the border has mostly succeeded in encouraging people to stay (rather than cross back and forth) once they make it across the Southwest border.

The best way to address the issue is for Congress to provide more visas for individuals to work legally in the United States, while also considering some way to make it so those already here long-term can pay fines and get right with the law.

Using a market-based approach with a reasonable supply of legal visas can reduce illegal immigration. And, best of all, it meets Rep. Brooks' standard of a policy that stops "short of shooting."

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Should Americans Get Permission from the Federal Government Before Being Allowed to Start a New Job?

By STUART ANDERSON

Did you know that as early as next year you might not be able to start a new job unless you are first cleared by a federal database?

Some background: E-Verify is an electronic employment verification system that employers can use to determine if a new hire (or current employee) is eligible to work in the United States. While a significant minority of employers use the system either voluntarily or as a government requirement (federal contractors, employers in certain states), new legislation in Congress, H.R. 2164, the Legal Workforce Act, would require all employers to use the system within two years or face possible criminal prosecution. The largest employers must use the system for all new hires within 6 months, while agricultural employers have 3 years. All the current co-sponsors of the bill are Republicans.

There is considerable debate about how many Americans would get caught up in database errors when they seek a new job. Particularly since, rightly or wrongly, employers may choose to pre-screen applicants before a job is offered, even E-Verify supporters must concede it is possible individuals may not know why they were not hired or not have a chance to contest a “tentative nonconfirmation” of their eligibility to work in the United States.

Rather than engage in the traditional op-ed format, it’s better instead to ask some questions to be answered by supporters of making E-Verify mandatory for all employers and newly hired individuals in the United States:

Do you believe there are limits to any burdens placed upon individual Americans and employers in the cause of trying to prevent illegal immigrants – approximately 4 percent of the U.S. population – from working in the United States? If so, what are those limits?

Given the failure to reduce illegal immigration after adding new restrictive enforcement measures in 1986, 1996 and approximately once annually over the past decade, what assurances can you give that mandatory E-Verify will significantly reduce illegal immigration?

Today, there are approximately 11 million illegal immigrants in the United States. What will be the level of illegal immigration within 3 years after passing a bill to make using E-Verify mandatory?

What is the response to a government-commissioned report on E-Verify (Westat, December 2009) that stated, “[T]he inaccuracy rate for unauthorized workers is approximately 54 percent . . . just over half [of illegal immigrants] are found to be employment authorized”?

If E-Verify is unsuccessful in reducing illegal immigration in a significant fashion, then will you require Americans to have a national ID card (or its equivalent) in an attempt to make the system work better?

If there is no guarantee E-Verify will significantly reduce illegal immigration, then should we impose a new mandate that will have at least some negative impact on the operation of businesses across America, as well as on the lives of individual workers unable to quickly convince the government they are legally authorized to work?

Would you be willing to put in your legislation a sentence such as the following?: “If the illegal immigrant population of the United States, as measured by the Department of Homeland Security, is not reduced by half within 3 years of the passage of this bill to make E-Verify mandatory, then the legislation is repealed.”

Is your view that employers who currently employ illegal immigrants are purposely breaking the law? If so, then won't they be able to get around the E-Verify mandate simply by not submitting the names of possible illegal immigrants to the federal computer database?

Do you believe there are founding fathers who voted for ratification of the U.S. Constitution who would have approved of the federal government requiring Americans to first obtain affirmative permission from government authorities before starting a new job?

One final question: Do you believe in smaller government if the issue is not immigration?