

Texas Public Policy Foundation

The Inefficient U.S. Immigration System: A Texas Perspective

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A Note on Terminology

The terminology surrounding the immigration debate is highly contested and, entering the 2016 election cycle, will likely remain a source of confusion and controversy. With this in mind, it is useful to clarify several of the terms used throughout the paper.

- **“Alien”** will be used to describe a person who is not a citizen or national of the United States. While some advocates and scholars view this term as derogatory in nature, it remains the legal term under the Immigration and Nationalization Act and is the term used in enforcement documents and legal proceedings.¹
- **“Foreign-born”** and **“Immigrant”** will be used interchangeably to describe persons born outside of the United States to non-U.S. citizens or permanent residents. This term encompasses naturalized citizens, legal permanent residents, and unauthorized immigrants.
- **“Native born”** will be used to describe persons born inside the United States to U.S. citizens or permanent residents and to describe persons born inside the United States to one or more non-U.S. citizen(s).
- **“Legal Immigrant”** will be used to describe a person who meets one of the following criteria:
 - Legal permanent resident
 - Persons granted asylum or admitted as refugees
 - Persons granted Temporary Protected Status (TPS)
 - Persons who have acquired U.S. citizenship through naturalization.
- **“Unauthorized immigrant”** will be used to describe a person who has entered this country with the intention to remain in the following ways:
 - No documentation
 - Fraudulent documentation
 - Valid documentation that has since lapsed (i.e. H-2B temporary guest worker visa)
 - Violated the terms of legal permanent residency (i.e. conviction of an aggravated felony).
- **Removal** will be used in place of deportation. In addition to orders issued by an Immigration Judge, this term includes the following enforcement actions taken by Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP) as well as the following orders:
 - Border apprehensions and removals
 - Interior apprehensions and removals
 - Reinstatement of final removal
 - Voluntary return
 - Voluntary departure.

KEY POINTS

- The current visa system has proven woefully inadequate for those persons seeking lawful entry to the United States.
- Much of the attention on the weaknesses of the visa system focuses on high skilled workers. This is an important component but it is also necessary to examine the current visa system for low-skilled workers.
- The challenges faced by the immigration courts are especially pronounced in states with large populations of non-citizens. Of the 456,215 matters currently pending as of September 2015, over half are located in California, Texas, and New York, respectively.

Introduction

The United States is a country built on immigration. Desirous of the liberties afforded by the Constitution and seeking the opportunity to build a better life for themselves and their families, people have migrated from all parts of the world to the United States since its founding. Over the past 50 years, as the number of persons seeking entry to the United States have increased exponentially, existing mechanisms of legal entry have been overwhelmed and proven woefully inadequate.² The dismantling of guest worker programs like the Bracero Program and the switch from a national origins quota system to a family-based visa system, while rooted in good intentions, have reduced the legal options for those persons seeking work in the United States and have possibly resulted in the increase in unauthorized entry. The existing visa system is now so overwhelmed that, in spite of recent attempts at reform, processing times can exceed two decades. Put simply, the system as it currently stands does not work.

An unintended consequence of an overburdened immigration system is an increase in unauthorized immigration. This is particularly true with respect to persons from Central America seeking to gain entrance to the United States via the southern border. Between 1990 and 2014, the unauthorized population residing in the United States increased from 3.5 million to 11.3 million persons.³

Mexicans entering the country for economic reasons comprise the majority of this population. Unsurprisingly, the unauthorized population is primarily concentrated in the southwest border states although Florida, New Jersey, and New York also have significant populations.

Unauthorized immigration, particularly in those states with a higher share of unauthorized persons, is a contentious issue. The strain placed on state and federal infrastructure is significant and the concern about the impact of unauthorized immigration demonstrated by residents in these areas is understandable.

Consequently, we are left with an environment in which it is difficult for anyone to discern where the primary failures in the current system are located. The question of immigration, both legal and unauthorized, is something that demands a considered and reasoned analysis. While statistics can never purport to convey the full reality of a story, it is important to provide a detailed analysis of the available statistics regarding the current immigrant population, projected trends, and the weaknesses present in the current system of visa processing, border enforcement, and the adjudication of immigration cases. Only with this kind of analysis will policy makers have the tools necessary to provide realistic proposals regarding the reform of the immigration system on a national as well as a state level.

Upon a brief survey of pertinent legislation relating to permanent and temporary immigration over the past century, this paper examines the state of immigration (both authorized and unauthorized) on a national level and as it relates to the state of Texas specifically. Texas has one of the highest shares of foreign-born persons in the country, the second highest unauthorized population in the country, and the second largest economy in the country. As such, it is vital to understand the composition of the immigrant population in Texas (in relation to the total immigrant population nationwide) and the ways this population contributes to its economy and infrastructure. This paper examines two major weaknesses in current immigration law: visa quotas for both high- and low-skilled workers and how the immigration courts function.

A Brief History of Immigration Legislation and Reform

Prior to the 20th century, there were sporadic attempts at legislation designed to control immigration to the United States. The vast majority of this legislation was aimed at controlling, and at times restricting, the entrance of Chinese persons. The first attempts at universal immigration regulation occurred in the 1920s under the 1921 Emergency Quota Act and the 1924 National Origins Quota

Act (also known as the Johnson Reed Act). These laws were based on nationality and restricted annual entry to 2 percent of the number of foreign-born persons of each nationality present in the United States as indicated by the 1890 census. Nationals of Western Hemisphere countries were excluded from these quotas.

In response to the possibility of labor shortages in the United States due to World War II, the U.S. entered into a migrant labor agreement with Mexico in 1942. The Bracero Agreement stipulated that American employers pay the transportation and living cost of Mexican laborers in addition to wages equal to that of U.S. nationals performing similar work. This agreement continued in various forms until 1964. During the 22 years in which the program remained in effect, approximately two million Braceros were employed (frequently under multiple contracts) by farmers and ranchers across the United States, with the majority of Braceros working in California, Texas, and Arizona.

The legacy of the Bracero Program is mixed. The program was designed with the recognition that there existed a considerable number of Mexican laborers willing to engage in seasonal labor in the United States. Consequently, both the Mexican and U.S. government saw that it would be more advantageous both to those workers and their prospective employers to provide a legal avenue of circulatory labor. It should also not be forgotten that many of these Mexican laborers collected considerably higher wages as migrant laborers in the United States than were available to them if they remained in Mexico. However, a major problem with the program lay in the enforcement of the contractual obligations agreed to by employers regarding working conditions. The Department of Labor was tasked with overseeing the enforcement of these contracts with a specific focus on the quality of working conditions (housing, food, hours per day worked, etc.), while the Immigration Service was responsible for removing braceros from those employers who violated their contractual obligations. Put simply, the antagonistic divisions and conflicting missions between the different state and federal agencies tasked with overseeing the program resulted in lax enforcement with respect to working and living conditions.⁴

Due in large part to pressure from organizations like the AFL-CIO, who claimed that the Bracero Program depressed wages and restricted collective bargaining for domestic workers, the program was terminated in 1964. However, the termination of the program did not signal a decrease in U.S. demand for foreign labor or the willing-

ness of Mexican nationals to fulfill that demand. Arguably, the abrupt termination of the Bracero Program aided in establishing the conditions for the exponential increase in unauthorized immigration (particularly from Mexico), over the next four decades.

Following the dismantling of the Bracero Program, Congress sought to reform the immigration system. In 1965, the Immigration and Nationality Act (INA), also known as the Hart–Cellar Act, abolished the national quota system and replaced it with a preference based system in which the following criteria are prioritized:

- The immigrant’s relationship to a U.S. citizen or law permanent resident
- The immigrant’s relationship with a U.S. employer.

Additionally, for the first time, an annual cap was placed on nationals seeking to emigrate from other countries in the Western Hemisphere. Over the next two decades, Congress amended the INA several times in response to increased numbers of refugees worldwide and emigration from Central America.

The 1986 Immigration and Reform and Control Act (IRCA–100 Statute 3359) sought to address the increase in unauthorized entry to the United States from Central America by increasing border patrol staffing and enforcement mechanisms. IRCA also mandated sanctions (in the form of monetary fines) against employers who knowingly employed or recruited unauthorized immigrants. Most notably, IRCA created a path to legalization and naturalization for approximately 2.7 million unauthorized persons who had resided in the United States since 1982.

Despite the path to legalization created under IRCA, unauthorized entry to the United States continued to increase. The 1990 Immigration Act (104 Statute 4978) attempted to address this by raising the number of legal admissions to 50 percent above pre-IRCA levels (primarily in the category of employment-based immigration) and easing controls on temporary/guest-workers. Additionally, the Act expanded the scope of aggravated felonies constituting a deportable offense.

Since 1990, a number of acts, including (but not limited to) the Illegal Immigration Reform and Responsibility Act (IIRIRA), the Enhanced Border Security and Visa Entry Reform Act, and the Homeland Security Act, have enacted a variety of enforcement mechanisms designed to reduce unauthorized immigration. However, there has been virtually no adjustment to or reform of the visa system.

The current limits set by the INA provide for an annual

global limit of 675,000 permanent immigrants with particular exceptions for close family members (e.g. spouses and minor children of U.S. citizens and the parents of U.S. citizens provided that the petitioner is at least 21 years old). As will be addressed in a later section, the process of applying for a visa has become so complex that the field of immigration law rivals that of tax law in terms of complexity.

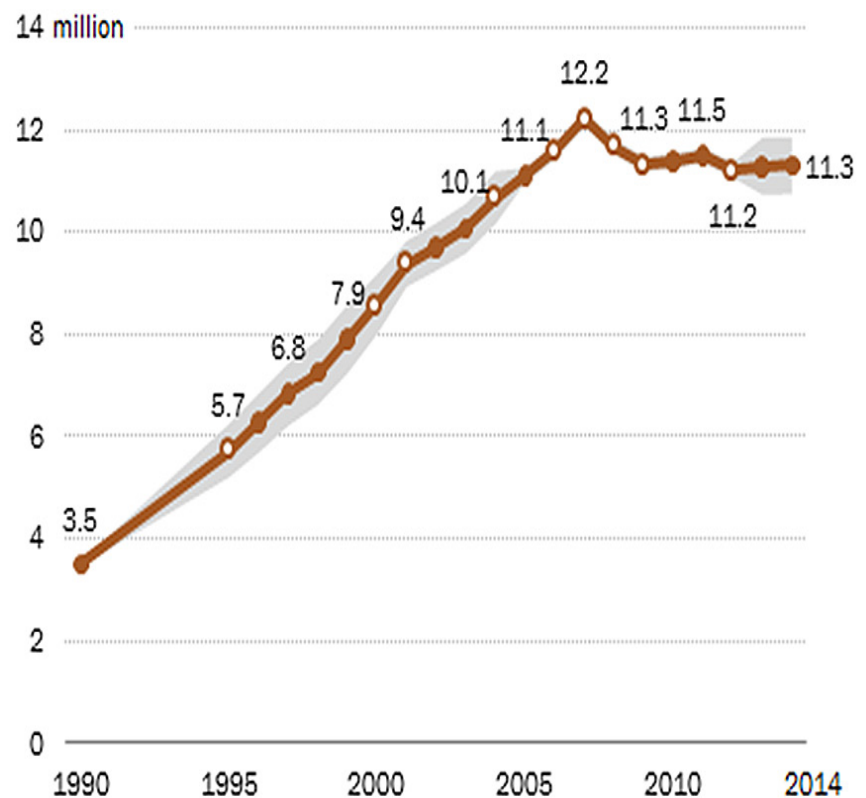
The Demographics of the Foreign-Born and Unauthorized Populations

As of 2015, the estimated number of foreign-born persons in the United States is 24 million—a figure equal to approximately 14 percent of the total population. Persons of Hispanic origin constitute approximately 46 percent of the total foreign-born population. Of the total foreign-born, population, 53.3 percent were non-citizens (a 6.4 percent decrease from 2000).⁵

In 2015, the total unauthorized population residing in the United States is estimated to be 10.9 million persons.⁶ Mexico is the largest source of this population with an estimated 52 percent.⁷ The unauthorized population peaked in 2007 at 12.2 million and has since declined, having remained constant at approximately 11 million for the past 7 years.

During this period (2007-2014), several important demographic shifts regarding the composition of the unauthorized population have occurred. It is likely that, due to the Great Recession and increased border enforcement measures, the number of persons attempting to enter the United States without proper authorization declined dramatically. The decline in border apprehensions serves as a likely indication that fewer unauthorized migrants attempted to enter the United States, particularly along the southern border. Between 2005 and 2011, border apprehensions declined from a peak of 1,189,075 (2005) to a 38-year low of 340,252 (2011).⁸ Between 2012 and 2014, border apprehensions did increase to a total of 486,651

U.S. Unauthorized Immigrant Population Levels Off



Note: Shading surrounding line indicates low and high points of the estimated 90% confidence interval. White data markers indicate the change from the previous year is statistically significant (for 1995, change is significant from 1990). Data labels are for 1990, odd years from 1995-2011, 2012, 2014.

Source: Pew Research Center estimates based on residual methodology applied to March supplements to the Current Population Survey (1995-2004, 2013-2014) and American Community Survey (2005-2012). Estimates for 1990 from Warren and Warren (2013).

PEW RESEARCH CENTER

Source: [Pew Research](#), 7/21/15.

persons. This was due in large part to the increase in unaccompanied children (UAC).⁹ Recently released statistics for FY 2015 do indicate a 30 percent decline in apprehensions.¹⁰

Another major demographic shift concerns the countries of origin of unauthorized persons. Mexicans have historically comprised the majority population of persons attempting to enter the United States without proper authorization. A

2012 Pew Report indicates that, since 2007, net unauthorized migration from Mexico has not only declined but may have fallen to net zero. Analyzing the total number of Mexicans entering the United States between 2005 and 2010 in conjunction with the number of Mexicans who moved from the United States to Mexico during the same period, the report concludes that the “trend lines... suggest that the return flow to Mexico probably exceeded the inflow from Mexico during the past year or two.”¹¹ The increased return flow to Mexico is most likely driven by changing economic conditions in both the United States and Mexico and an increase in the number of removals (both enforced and voluntary) enacted by U.S. authorities.¹² Reports authored by the Pew Foundation in November 2015 and by Robert Warren of the Center for Migration Studies in January 2016 confirm these earlier findings.¹³

While the number of unauthorized Mexican migrants may be declining, there has been a general increase in unauthorized migrants from Central America—particularly El Salvador, Honduras, and Guatemala. Whereas Mexican migrants have historically sought entry to the United States for economic reasons, migrants from Central America typically leave their home countries due to increased political and gang violence.¹⁴ Between FY 2011 and 2014, apprehensions of “other than Mexican” (OTM) persons on the southwest border increased from 46,996 to 252,600.¹⁵ While this number declined in 2015, the number of OTM persons seeking unauthorized entry remains well above 2012 levels.

In its 2015 Border Security Report, Homeland Security reported an overall decline in border apprehensions of 30 percent from FY 2014. Specifically, noting that border apprehensions remains a general indicator of attempted unauthorized entry, DHS reported that the apprehension of Mexican nationals fell by 18 percent and that of individuals from Central America fell by approximately 68 percent when compared to FY 2014.¹⁶

As noted earlier, apprehensions of OTM persons did decline significantly in FY 2015. This category, particularly along the Southwest border, is primarily composed of persons originating from Central America (specifically El Salvador, Honduras, and Guatemala). Between 2012 and 2014, the number of OTM apprehensions along the southwest border had increased dramatically partly due to a surge in unaccompanied children (UAC). This surge in UAC was particularly acute in Texas with the Rio Grande Valley sector recording an increase from 21,553 in FY 2013 to 49,959 in FY 2014.¹⁷ A major consequence of the increase in unauthorized entry of persons from

Southwest Border Total Apprehensions

YEAR	TOTAL APPREHENSIONS	MEXICAN	OTM
2005	1,171,396	1,016,409	154,987
2006	1,017,972	973,819	98,153
2007	865,638	800,634	58,004
2008	705,005	653,035	51,970
2009	540,865	495,582	45,283
2010	447,731	369,819	50,912
2011	327,577	280,580	47,997
2012	356,873	262,341	94,532
2013	414,397	265,409	148,988
2014	479,371	226,771	252,600
2015	331,335	186,019	145,316

Source: 2005-2011 & 2012-present: [U.S. Border Patrol Apprehensions Statistics—Sector Profile](#)

Central America is a corresponding increase in political asylum claims and credible fear claims. A major consequence (that will be discussed in a later section) of such an increase in political asylum and credible fear claims has been the exponential growth in the backlog of pending cases before Immigration Courts, particularly those located in Texas and other southwestern border states.

As a border state, Texas has a higher share of both foreign-born and unauthorized populations when compared to many other states. Texas has the fifth largest share of foreign-born persons after California, New York, Florida, and Nevada. After California, Texas has the second largest unauthorized immigrant population.¹⁸ In 2013, the number of foreign-born persons in Texas was estimated at 4.3 million, or 16.5 percent of the total population. Persons of Latino origin constituted 69.5 percent of the total foreign-born population. It is worth noting that, in keeping with nationwide trends, persons of Asian origin constitute a growing percentage (17.4 percent) of the foreign-born population in Texas. Of the total foreign-born population, 65.9 percent were noncitizens (a 2.6 percent increase from 2000).¹⁹

In 2013, the unauthorized population in Texas was esti-

mated at between 1,464,000 and 1,720,000. The majority of the population (78 percent) is estimated to have originated from Mexico.²⁰ Given the lack of incentives for unauthorized persons to participate in surveys, a disparity in accounts is to be expected. The majority of Texas' unauthorized population has resided in the U.S. for over 5 years (53 percent) and is between the ages of 16 and 44 (70 percent).²¹

Economic Participation by the Foreign-Born Population

As of 2010, an estimated 75 percent of the entire foreign-born population between the ages of 18 and 65 were in the labor force.²² Members of the foreign-born population start businesses at a higher rate than the native born. It is estimated that in 2010, new businesses started by foreign-born owners had a total net income of \$121.2 billion.²³

In 2012, unauthorized immigrants comprised 5.1 percent of the nation's labor force and accounted for a high share in the following occupations: Farming/Fishing/Forestry (26 percent); Building/Ground Cleaning/Maintenance (17 percent); Construction and Extraction (14 percent) and Food Preparation and Serving (11 percent).²⁴ Additionally, according to Institute on Taxation and Economic Policy, in 2012, the unauthorized population contributed \$11.84 billion to state and local taxes (roughly 8 percent of state and local tax nationwide).²⁵

The foreign-born share of the population has increased from 9 percent in 1990 to approximately 16 percent in 2013.²⁶ As the foreign-born members of the population increased, so did their participation in the economy. Using the IMPLAN input-output model of Texas' economy (based on 2010 Census records), Hinojosa-Ojeda estimates that, in 2010, "immigrant workers as a whole added \$191 billion to Texas' gross state product" and that the unauthorized "workforce accounted for \$77.7 billion of this GSP."²⁷ He additionally estimates that foreign-born persons pay approximately \$33 billion in taxes to Texas with the contribution from unauthorized persons being approximately \$14.5 billion.²⁸

Foreign-born persons constitute a considerable percentage of business owners in Texas. Between 2006 and 2010, the American Immigration Council estimated that by 2010, approximately 25 percent of all business owners in the state were foreign born. These business owners had a net business income of approximately \$10 billion—roughly 16 percent of all net business income in the state.²⁹

Finally, unauthorized workers represent the highest share of the labor force in the following industries in Texas: Construction (25 percent); Agriculture (21 percent); and

Leisure and Hospitality (15 percent).³⁰

The following sections examine two key components of the existing immigration system: the process by which both high and low skilled workers may acquire visas (both permanent and temporary) to legally enter the United States and the challenges faced by the immigration courts as existing enforcement mechanisms result in increased apprehensions and removals. These components are particularly important in the context of how the immigration system works in Texas given its expanding economy and the high percentage of foreign-born persons (both authorized and unauthorized) in the state.

The Visa System

Much of the current debate about immigration focuses on the questions surrounding border security and the apprehension and removal of persons who seek entry to the United States without proper authorization. However, there is less discussion of the ways in which the current visa system has proven woefully inadequate for those persons seeking lawful entry to the United States. The preference based system introduced in 1965 under the Immigration and Nationality Act has made it difficult for both high- and low-skilled workers to obtain employment in the United States. The following section examines some of the challenges posed by the current visa system.

Visas for High-Skilled Workers

There are several different kinds of visas available under the system for U.S. firms seeking to hire high-skilled foreign workers. The method most frequently utilized by a U.S. firm petitioning on behalf of a foreign national with a bachelor's degree or higher is the H-1B visa. This visa is valid for 6 years and is renewable after 3 years. There are 65,000 H-1B visas available each year plus an exemption of 20,000 visas for applicants with a master's (or higher) degree granted by a U.S. university.³¹ However, as of 2012, "[t]he supply of H-1B visas has been exhausted during or before each of the past 8 fiscal years, meaning that during that period—sometimes several months at a time—no one new (as opposed to a renewal or a current H-1B visa holder changing employers) could be hired on an H-1B visa."³²

In his exploration of the different failings and weaknesses of the U.S. immigration system, Stuart Anderson outlines four additional key problems:

- U.S. employers are required to pay, as part of the application process, extraordinarily high fees. Data obtained by the National Foundation for American

Policy demonstrated that between FY 2000 and FY 2011, employers paid was approximately \$4 billion (includes scholarship/training fees, anti-fraud tax, visa adjudication levies, and processing fees). This does not include legal fees that typically run between \$1,800–\$2,500 per H-1B visa. Finally, sponsoring an individual for a green card can cost as much as \$35,000 per person.³³

- Excessive government oversight, particularly in the form of audits, consumes an extraordinary amount of a company's time and resources.
- In order to obtain a green card for a foreign employee, the company must obtain labor certification—a process that can take several months and cost up to \$25,000.³⁴
- There is a lack of green cards. Employment-based green cards are limited to 140,000 per fiscal year. Embedded within this is a per country limit of no more than 7 percent of visas being granted to any one country. This has disadvantaged job applicants from countries with an emphasis on technology (like India).³⁵

The role played by foreign-born employees in the growth of companies located in Texas is significant. In 2011, approximately 74 percent of the patents from the University of the Texas system had at least one foreign-born inventor. These patents brought in approximately \$38 million in terms of licensing and royalty revenues.³⁶

Reform and Expansion of Visas for Low-Skilled Workers

Much of the attention on the weaknesses of the visa system focuses on high skilled workers. This is an important component but it is also necessary to examine the current visa system for low-skilled workers, especially the ways in which it de-incentivizes employers to follow legal mechanisms when hiring low-skilled workers. This is particularly apparent in the agricultural sector and is pertinent to the Texas economy given the fact that, as discussed earlier, unauthorized workers constitute a 21 percent share of the state's agricultural sector.

At issue is the H-2A temporary agricultural workers program. The agricultural sector requires a high number of laborers at seasonal intervals. The H-2A temporary visa is designed to fulfill the need for labor without granting permanent resident status. Under the INA, employers are required to “provide housing at no cost to H-2A workers... If the employer elects to secure rental (public) accommodations for such workers, the employer is required to pay all housing related charges directly to the housing's

management.”³⁷ This stipulation can be viewed as a well intentioned regulation that has had unintended negative consequences. Intended to make sure that foreign-born persons coming to work on a seasonal basis on farms were not subject to exploitation by their employers, the stipulation has actually served to de-incentivize employers in the agricultural sector from correctly or fully utilizing the guest worker visa program. It is also unclear whether this regulation has achieved its goal of better living conditions for seasonal workers.

A panel discussion held at the Migration Policy Institute

If authorized circulatory migrant work was made more readily available as an option to employers based in the United States, there would also be more of an incentive for foreign-based workers to seek legal entry to the United States.

on September 16, 2015, focused largely on the effect that this stipulation has on the agricultural sector. Labor cost constitutes the largest significant percentage of a farm's total production cost at approximately 30 percent.³⁸ The stipulation that the employer must pay for housing and food adds an undue financial burden to the employer. Dr. Philip Martin, a professor at the University of California Davis Comparative Immigration and Integration Program, identified this stipulation as having two long-term consequences. The first is that farms may apply for fewer H-2A visas, as only 65,345 such visas were issued in 2012.³⁹ The second concerns the fact that many farmers, rather than employing foreign-born workers directly, have increasingly turned to intermediaries who recruit and deploy farm crews. The use of intermediaries allows for farmers to circumvent the food and housing provision. However, these intermediaries may not be using proper channels mandated by IRCA (such as E-Verify) to verify the authorization status of the workers.⁴⁰

Specialists in migrant labor and the agricultural sector have posited that the removal of the stipulation requiring that employers bear the cost of food and housing for

all temporary agricultural workers would likely result in increased usage of and compliance with the H-2A visa program. This, in conjunction with the expansion of the H-2A visa program, in conjunction with the H-2B visa program (temporary non-agricultural workers) could very well reduce the number of unauthorized immigrants attempting to take up permanent residence in the United States.

The primary historical reason for movement from Mexico to the United States has been economic. Many seasonal or temporary workers from Mexico displayed no real desire to settle permanently in the United States. Instead, these workers (primarily young men) expressed a preference to work in the United States for a given period of time and then, upon completion of the contract, returned with their earnings to Mexico. The Bracero Program served to facilitate this pattern of circulatory migration. The dismantling of this program in 1964 combined with the introduction of numerical limitations on legal immigration from the Western hemisphere did not end the demand for Mexican labor. It did, however, change the nature of it: Mexican laborers continued to enter the United States without authorization. As Douglas Massey of Princeton University explains, rather than returning to Mexico upon the completion of a job, these laborers saw the cost of being apprehended at the border as being too high and increasingly choose to remain in the United States despite possessing no authorization.⁴¹

The Bracero Program as it existed between 1942 and 1964 had significant problems resulting from contrary inter-agency interests. However, the template of a temporary guest-worker program is not without merit. Recognizing the desire of foreign workers (primarily Mexican) to engage in seasonal work in order to send remittances to family in their country of origin and the need for labor, particularly in the agricultural sector, it is reasonable to hypothesize that an expanded temporary worker visa program with a reduced regulatory burden on employers could make a significant contribution in decreasing the number of unauthorized persons attempting to reside permanently in the United States. If authorized circulatory migrant work was made more readily available as an option to employers based in the United States, there would also be more of an incentive for foreign-based workers to seek legal entry to the United States.

Immigration Courts

Under current immigration law, once apprehended, an unauthorized person may request a hearing to determine his eligibility for relief from removal. The common

reasons for such claims of relief concern the applicant's assertion that, if returned to his country of origin, he faces a credible fear of persecution. To determine if a credible fear of persecution does exist and if asylum should be granted, the person must be granted a hearing in front of one of the nation's immigration courts. As apprehension of unauthorized persons, both at the border and in the interior, increased, so have credible fear claims. Additionally, the increase of unauthorized persons from Central American countries, many of whom leave their country of origin due, in part, to political and gang violence, has also contributed to an increase in political asylum and credible fear cases. Due to these factors, the number of pending cases on the docket of immigration courts nationwide has increased exponentially.⁴²

Created in 1983, the Executive Office for Immigration Review (EOIR) is housed within the Department of Justice (DOJ). The EOIR oversees the Bureau of Immigration Appeals (BIA) and 59 immigration courts in the United States, Puerto Rico, and Saipan. The EOIR adjudicates immigration cases "including cases involving detained aliens and aliens seeking asylum as a form of relief from removal."⁴³ Accordingly, immigration courts determine:

"whether or not an individual is a citizen of the United States, whether or not that person is here in violation of our immigration laws, and if so, whether or not that immigrant qualifies for some kind of immigration status that would allow the person to remain here legally."⁴⁴

Frequently compared to tax law in terms of its complexity, immigration law has the added burden of ruling over cases concerning the physical safety of the claimant if returned back to his country of origin. Additionally, as the number of unaccompanied children has increased over the past five years, and their cases are referred to immigration courts, judges must familiarize themselves not only with the specifics of immigration law and country conditions but also family law. One judge reported the following: "The law has gotten exponentially more complex while the time pressures and resources (like law clerks) inversely diminished to the point of being almost nonexistent."⁴⁵ The result is an incredibly high burden on a small number of judges. As of the writing of this paper, there were approximately 211 active judges nationwide.

The burden on the immigration courts has increased over the past 20 years as the number of offenses and conditions constituting grounds for removability or inadmissibility have expanded. In 1996, the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRI-

RA) added new grounds of inadmissibility and removal while expanding the list of crimes constituting an aggravated felony. The expanded definition of what actions might result in the removal of legal alien from the United States, combined with increasing levels of unauthorized immigration along the southwest border, has contributed to an exponential increase in case receipts and backlogs for immigration courts nationwide. Between FY 1998 and 2016 the number of pending cases increased by 252.2 percent from 129,505 to 486,206.⁴⁶

Immigration judges have cited lack of sufficient resources as one of the primary causes for the increase in pending cases.⁴⁷ Funding for the EOIR has not kept pace with the increased number of unauthorized persons or with the expanded list of removable offense. For example, between 2003 and the present, funding for immigration enforcement increased from approximately \$9.1 billion in FY 2003 to \$18.2 billion in FY 2015.⁴⁸ During this period, as ICE and CBP increased their enforcement efforts, funding for the Immigration Courts increased from \$199 million to \$347.2 million.⁴⁹ Put simply, as the number of persons apprehended increases, so does the number of people scheduled to appear before an immigration judge.

The president of the National Association of Immigration Judges, the Honorable Dana Leigh Marks, argues that result of such a discrepancy in funding for border enforcement and for immigration courts is abundantly apparent upon examination of the number of judges tasked with presiding over these cases.⁵⁰ There are currently 233 judges nationwide, with approximately 211 serving fulltime.⁵¹ Of this number, approximately 100 are eligible to retire as of September 30, 2015.⁵² This number is down from an all-time high of 272 in 2011 and is widely attributed to attrition due to burnout and budget cuts.⁵³

There have been numerous calls to allocate further resources for the EOIR. In 2006, former Attorney General Gonzalez, following a comprehensive review by the DOJ of the immigration courts, committed to a long-term hiring plan for judges and other personnel as well as to modernizing the tape recording system, and providing for increased number and certification of staff interpreters.⁵⁴ Despite these assurances, the DOJ has not hired at a rate that keeps pace with an annual 5 percent attrition rate for immigration judges.⁵⁵ Additionally, immigration judges report that the purchase of essential resources such as *Kurzban's Immigration Law Sourcebook* and recording equipment has been either eliminated or not updated.⁵⁶

In FY 2014, the current pool of active immigration

Pending Cases Before Immigration Courts (September 2015)

STATES	NUMBER OF IMMIGRATION JUDGES	PENDING CASES	AVERAGE DAYS
California	58	90,633	742
Texas	31	84,761	689
New York	34	69,049	655

Source: [TRACImmigration](#)

judges was responsible for completing over 306,045 matters: 225,896 removal cases (73.8 percent); 60,446 (19.8 percent); and 19,703 (6.4 percent).⁵⁷ This averages to more than 1500 completions per judge per year compared to the average number of matters completed by a federal judge (566 cases/year in 2011).⁵⁸ Additionally, while an average district judge has two to three clerks, four immigration judges typically share one clerk (FY 2010).⁵⁹ The lack of personnel and resources combined with the ballooning number of pending matters has resulted in a nationwide average of 643 days for a matter to be heard by the court.

Immigration judges report intense pressure from the DOJ to meet certain “case completion goals.”⁶⁰ Upon a review of publicly searchable documents, it is not clear what these completion goals are.⁶¹ The matter is further complicated by the fact that immigration judges are not independent and instead are directly accountable to the attorney general. Consequently, these judges do not feel that they are insulated from “retaliation or unfair sanctions for judicial decision making.”⁶²

The challenges faced by the immigration courts and immigration judges are even more pronounced in states with large populations of noncitizens. Of the 486,205 matters currently pending as of September 2015, over half are located in California, Texas, and New York, respectively. (At the end of FY 2015, immigration courts in California, Texas, and New York had 233,373 pending cases.)⁶³

California and New York have experienced high levels of immigration for decades. However, even though the levels of unauthorized entry into the United States have either decreased or leveled off, the number of cases pending, particularly in Texas, have increased considerably due to the expanded scope of removable offenses and increased enforcement efforts at and near the U.S./Mexico border.

The addition of 23,478 cases between FY 2013 and 2014 may be due in part to the influx of UAC during that period. However, the extraordinary increase in the number

of pending cases in a relatively short period of time without a commensurate increase in the number of judges or court resources (clerks, bailiffs, translators, and recording

Increase in Cases Pending in Texas

YEAR	CASES PENDING
2005	26,014
2006	10,980
2007	10,008
2008	11,927
2009	17,603
2010	27,136
2011	33,916
2012	40,051
2013	48,626
2014	72,104
2015	78,709
2016	84,761

Source: [TRACImmigration](#)

Pending Cases According to Court Location

HEARING LOCATION	NUMBER OF JUDGES	CASES PENDING
Dallas	5	7,948
El Paso (including the El Paso Service Processing Center)	6	6,551
Harlingen	2	4,532
Houston (including the Houston Service Processing Center and Detention Facility)	9	39,464
Pearsall	1	1,870
Port Isabel	2	222
San Antonio	6	24,158

Source: EOIR; [TRACImmigration](#)

equipment) is striking.

The extraordinary burden placed on the immigration court personnel in Texas is more sharply defined when we examine the distribution of cases according to hearing location and the number of immigration judges assigned to each location.

In some cases, particularly in Houston, it is likely that some judges may have an average of 6,000 cases on their docket at any given time. Finally, the backlog is so extreme in Texas, that some non-priority cases are being assigned a “parking date” of November 2019.⁶⁴

As enforcement efforts have increased, particularly apprehensions at the border and in the interior, immigration judges in states with a high foreign-born population have witnessed an exponential increase in the number of persons scheduled to appear before the court. There are several possible outcomes of an overburdened, under-resourced judiciary that are startling:

- Persons who **do not** qualify for relief may continue to remain in the United States, without authorization for months or years before a final order of removal is issued.
- Persons who **do** qualify for relief—particularly political asylum claimants and claimants under the Convention Against Torture—may be denied relief due to the lack of time and/or resources given a judge’s docket.
- The cost to apprehend, detain, and remove one person is (on average) \$12,500.⁶⁵ Regardless of whether or not the person qualifies for relief or not, the longer a person remains in detention prior to their hearing before an immigration judge, the higher the cost to the federal government and the state.
- If the claimant is not detained, he may not be eligible to apply for work authorization prior to appearing before an Immigration Judge. During this time, the person is effectively removed from the labor force and from the tax base.

To further compound the problems facing immigration courts, both the Second and Ninth Circuit Court of Appeals issued rulings on October 28, 2015 that will have a significant impact on the burden placed upon the immigration courts. The Second Circuit Court ruled that a detained immigrant should be given a bail hearing within six months of being detained.⁶⁶ In a similar ruling, the Ninth Circuit Court ruled that immigration judges must provide bond hearings every six months for immigrants who are detained longer than a year.⁶⁷ These rulings while important

decisions regarding due process will increase the number of hearings scheduled without increasing the number of judges. While these rulings only initially apply to Immigration Courts located within the jurisdiction of the Second and Ninth Circuit Courts, it is likely that there will be significant pressure for this policy to be applied nationwide.

Enforcement of existing immigration laws is extraordinarily important. The ability of immigration courts to efficiently determine whether or not a person can be granted relief from removal constitutes a crucial component of the enforcement of these laws.

CONCLUSION

The immigration system as it currently stands is not working. There has been some progress in discouraging unauthorized entry over the past five years. However, the current requirements of the visa system, for both high- and low-skilled workers, continue to create a strong incentive for foreign nationals to pursue unauthorized entry. Additionally, complicated and tenuous requirements of relief for those who have entered without authorization have led to the exponential increase in pending cases before immigration courts and made it increasingly difficult to efficiently deal with the problem.

These system breakdowns are particularly apparent in

Texas, which has one of the highest populations of unauthorized persons in the country. While there has been some progress in discouraging persons from entering via the Texas/Mexico border, there remain a high number of people who have entered the state without proper authorization. While many people enter for economic reasons, an increasing number of people from Central America are entering the United States, via the Texas/Mexico border, in order to escape violence and political oppression in their home countries. The backlog of pending cases in immigration courts is particularly heavy in Texas. A current backlog of approximately 85,000 cases (a number which is set to increase over the next several years) in front of 31 judges has resulted in an average wait time before a hearing of just under two years.

Texas is in a unique position of offering the nation a better way of fixing our nation's broken immigration system. However, the federal regulatory apparatus of the visa system and the lack of efficiency in addressing the legal claims of existing unauthorized persons pose a considerable challenge. What is needed are a series of innovative, state-based policy solutions that address these particular issues in order to reduce the problems we face with unauthorized entry into our country. ★

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