

**S 744: Amnesty before enforcement**

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There may be circumstances under which an amnesty for certain illegal aliens would make sense. Given the pervasive and deliberate non-enforcement of the immigration laws for so many years, and the resulting large population of illegal aliens, one could make a case for clearing the decks, as it were, and making a fresh start. This would be a distasteful proposition, to be sure, given that virtually all illegal aliens are guilty of multiple felonies, among them identity theft, document fraud, tax evasion, and perjury. Nonetheless, for practical reasons conferring legal status on established, non-violent illegal aliens may well, at some point, be a policy option worth discussing.

But only *after* the problem that allowed the mass settlement of illegal aliens has been addressed.

S 744 takes the opposite approach. It legalizes the illegal population *before* the necessary tools are in place to avoid the development of yet another large illegal population. As such, it paves the way for yet more demands for amnesty a decade or so in the future, as those who entered in, say 2015, are so well-established by 2023 that we will be told that we have to permit them to stay as well.

What's more, the legalization provisions of the bill make widespread fraud very likely.

Much has been made of the so-called triggers in Sec. 3 that would permit the Registered Provisional Immigrants (RPI) to receive permanent residence. Tying the green card to achievement of these benchmarks – which include an employment authorization system for all employers, biographical exit tracking at airports and seaports, and substantial completion of two border strategies – is presented as a guarantee that this scenario of serial amnesties would not happen. Unfortunately, those triggers are, in a very real sense, beside the point.

The other triggers mentioned in Sec. 3 – those allowing the granting of the initial RPI status – are the submission by the Department of Homeland security of two plans: A "Comprehensive Southern Border Security Strategy" and a "Southern Border Fencing Strategy". Since similar plans have been frequently offered over the years, this isn't much of a hurdle.

And yet it's the only hurdle that matters because receipt of Registered Provisional Immigrant status *is* the amnesty – that is to say, it represents the transformation of the illegal alien into a person who is lawfully admitted to the United States.

RPI status brings with it work authorization, a legitimate Social Security account, driver's license, travel documents – in effect, Green Card Lite. It is only the upgrade of this status to that of lawful permanent resident – Green Card Premium, if you will – that is on hold until the enforcement benchmarks are satisfied. But the political and bureaucratic incentives to press for the achievement of those enforcement benchmarks are blunted by the fact that the amnesty has already happened. With people "out of the shadows" and no longer "undocumented", the urgency to meet enforcement deadlines

would evaporate, especially in the face of determined opposition to enforcement by business and civil liberties groups.

To use an analogy, if you're flying to the West Coast, it doesn't ultimately matter whether you're in coach or first class – your destination is the same. By the same token, whether or not the beneficiary of the RPI amnesty is upgraded to a green card, the destination is the same – the ability to live and work in the United States. An upgrade from coach to first class may actually be more consequential than the upgrade from RPI to permanent residence; while the former results in wider seats and free drinks, all a green card offers that RPI status does not is the right to apply for citizenship, something most recipients of green cards from the IRCA amnesty had not done a quarter century after the enactment of the law.

And many of those who receive the RPI amnesty are likely to do so fraudulently. Reading Sec. 2101 harkens back to the 1986 Immigration Reform and Control Act's Special Agricultural Worker program, which the *New York Times* called "one of the most extensive immigration frauds ever perpetrated against the United States Government". The Justice Department's Office of Inspector General described it this way:

To be eligible for adjustment of status under the SAW provisions, the applicant had to prove with documentation that he or she had worked in an agricultural enterprise in the United States for 90 days in each calendar year from 1984 through 1986, or for 90 days between May 1985 and May 1986. The evidence of having engaged in such work, INS employees believed, was often forged and sold to undocumented individuals seeking U.S. residency. **Given the crush of applications under the program and the relative fewer investigative resources, INS approved applications absent explicit proof that they were in fact fraudulent.**

("An Investigation of the Immigration and Naturalization Service's Citizenship USA Initiative", USDoJ OIG, July 2000, <http://www.justice.gov/oig/special/0007/listpdf.htm>, p. 72; emphasis added)

When Sec. 2101 of S 744 is considered in this light, the sources of fraud become apparent:

- If IRCA created a "crush" of applications when only 3 million people applied, what should we call the workload that DHS will face when triple the number of people – at least – apply for the RPI amnesty? The administrative capacity does not exist to handle this properly, which all but guarantees that most applications will be rubber-stamped by overwhelmed DHS staff.
- The bill says DHS "may interview", not "shall interview", applicants for the RPI amnesty. Given the aforementioned crush, it is unlikely many will be interviewed. In fact, the current DACA amnesty (Deferred Action for Childhood Arrivals) is a good model for how the administration would manage S 744's amnesty provisions. DACA processing is almost entirely paper-based, with few interviews, resulting in the approval of 99.5 percent of applications. And yet the number of cases so far decided amounts to perhaps one-fiftieth the number likely to apply for the RPI amnesty.
- S 744 allows affidavits by non-relatives regarding the work or education history of RPI amnesty applicants. Fraudulent affidavits were common among IRCA applicants, with some small farmers claiming to have employed hundreds of illegal-alien farmworkers. The temptation to fraud will be great in any program giving away something as valuable as the RPI amnesty, but the ability to investigate fraudulent affidavits will be extremely limited given the millions of applicants. And there is no realistic level of fees or penalties that could raise enough money to hire enough staff to follow up on questionable affidavits. They will be approved, as in the 1980s, absent specific proof that they're fraudulent.

- The current bill also contains a confidentiality clause, prohibiting the use of any information provided by illegal alien applicants for other purposes. This means illegal aliens with little likelihood of approval are free to apply and try their luck, knowing that there's no downside, and a significant upside.
- As a corollary to this, there is no requirement that rejected applicants be immediately taken into custody and deported. In fact, the bill specifically says that failure to qualify does not require DHS to commence removal proceedings. Again, unqualified applicants would have nothing to lose in applying, in the hope that they could fall through the cracks and get approved, something certain to happen to a significant number of people.
- As an additional incentive to fraudulent applicants, S 744 provides de facto work authorization to those merely *applying* for the RPI amnesty, pending the adjudication of the application. Application alone also forestalls removal, making a frivolous application an attractive option for illegal aliens with no chance at amnesty.

We don't have to speculate about the consequences of such widespread fraud. Mahmoud "The Red" Abouhalima was an Egyptian illegal alien driving a cab in New York when he fraudulently – and successfully – applied for amnesty as a farmworker. This legal status allowed him to travel to Afghanistan for terrorist training, which he put to use in the first World Trade Center attack in 1993. A co-conspirator, Mohammed Salameh, also applied for the 1986 amnesty but was, remarkably, turned down. But since that amnesty, like the one in S 744, did not mandate the removal of failed applicants, Salameh was able to remain and assist in the 1993 bombing.

S 744 thus places amnesty before enforcement, and ensures an amnesty process that would reward fraud. A better approach would be to make the *initial* legalization dependent on the bill's enforcement

provisions, rather than a future upgrade in status. The enforcement provisions themselves would have to be strengthened by requiring, for instance, biometric exit-tracking at all ports of entry, not just airports and seaports – as it already required in current law and as was recommended by the 9/11 Commission. Another trigger for initial legalization would have to be an explicit statement by Congress that states and localities are not preempted from enforcing civil immigration law.

And any future amnesty would need to be constructed differently. Not only should all lies, however small, be punished with criminal prosecution, but the amnesty might best be conducted piecemeal, rather than addressing millions of people effectively all at once. That is to say, candidates might be considered as they are apprehended for traffic stops or factory raids or what have you, with those who fail to qualify be removed.

Thank you for the opportunity to speak on this important matter and I look forward to any questions you might have.