Testimony to the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law
Committee on the Judiciary
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Madame Chairman and Members of the Subcommittee: I am grateful for your invitation to speak today to discuss Comprehensive Immigration Reform with you and with the other members of the panel.

I am proud to be the son of immigrants. Both my parents came to the United States from China. They were able to enter as temporary students when the Chinese Exclusion Law prohibited their entry as immigrants and precluded their ever becoming U.S. citizens through naturalization. Chinese Exclusion was repealed by Congress in 1943. My father received his U.S. citizenship in 1945 in France, after service in the Battle of the Bulge and the Battle for Germany, as a result of special legislation enacted by Congress awarding citizenship to foreign nationals on active duty in the armed forces of the United States.

My mother was a nurse, and my father spent most of his career as a physician in the Veterans Administration. As I was growing up, much of my family's social life centered on the small and scattered community of Chinese Americans in southeastern Michigan. Despite the repeal of Chinese Exclusion, immigration from China and other Asian nations remained negligible because the national origins quota system sharply limited immigrants from Asia, and in the case of China to 100 immigrants per year. That quota system was repealed by Congress in 1965, and most Chinese Americans today trace their ancestry back to immigrants who entered the U.S. after 1965.

That the Chinese American community is composed of immigrants and their descendents is not anything special. Indeed all

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Americans are either immigrants or the descendents of ancestors who came here from somewhere else. And that includes Native Americans.

All of us who know our family histories respect and admire our immigrant ancestors, because we know that the immigrant experience is never easy. The immigrant story is always a story of hard choices and difficulties overcome by persistence and very hard work. And knowing that, we have to respect all immigrants, including illegal immigrants who have their own hard choices and difficulties to overcome. The economist Walter Williams used to teach at Temple University where I recall him saying that, "The poor people of the world may be poor, but they are not stupid. They are as capable of doing cost-benefit analysis to decide what's in their best interest as any of us."

So our respect and admiration for immigrants, including illegal immigrants, is not at issue, though some would try to poison the debate by saying that it is. The real issue instead, I submit, is whether our respect and admiration for immigrants is so great that we are willing to let everyone in the world who wants to come here do so, as the Wall Street Journal editorial board, and the Cato Institute, among others, have suggested that we should. The alternative to open borders and open immigration is limited immigration, limited to only those immigrants we choose to admit, and unavailable to all other would-be immigrants.

As a lawyer, I can argue both sides of that question. But if we opt against open borders and in favor of limited immigration, as we have in our recent history, there are two more questions we must answer: 1. What do we do with those who are excluded but who come anyway? 2. Which immigrants do we choose to admit, and which do we exclude?

If the answer to the first question is, "give them a break, give them some kind of amnesty so they can stay anyway", and especially if we set a pattern of successive amnesties, then what we really have is open immigration, where all who want to come here are in effect allowed and encouraged to do so. Which is fine if that's what we want. What do we want? And that brings us to "Comprehensive Immigration Reform".

Question 1: Probationary Status and the Pathway to Citizenship

Is it or is it not amnesty? Why does that matter so much? It matters because, as almost everyone will acknowledge, the overwhelming majority of the American people want a system of limited, not unlimited, immigration, and are opposed to "amnesty" for those who enter the U.S. in violation of our immigration laws. So the case for "comprehensive immigration reform" requires somehow distinguishing what is being proposed from "amnesty". That can be a hard sell.

To me, amnesty is anything that rewards violation of U.S. immigration law by putting illegal aliens who have done so in a better position than other would-be immigrants who have respected our laws by remaining outside our borders waiting for their opportunity to immigrate legally. The May 17 agreement among U.S. Senate conferees, for example, does this by granting illegal aliens, and only illegal aliens, "probationary" legal status as the first step on a pathway to citizenship, both of which millions of others outside our borders wish they could have, too. Those who violated our laws receive the benefit and can live and work in the U.S. openly. Those who foolishly respected our laws do not receive the benefit.

It is false to claim that illegal aliens must "go to the back of the line" for benefits. There may be some delay under the May 17 Senate compromise in granting illegal aliens permanent residence and citizenship beyond the delay for those qualified legal immigrants now waiting in a queue. But the principle benefit aliens seek is immediate legal residence and work authorization, which will be awarded under "comprehensive immigration reform" only to unqualified illegal aliens, not to qualified immigrants waiting in a queue for their chance to enter, or to other would-be immigrants outside the U.S. who have not violated our laws. As in the case of the 1986 Amnesty, temporary residents such as students who have properly maintained and renewed their immigration status will not qualify for amnesty benefits, while those who violated their status by overstaying, and illegal entrants, will.

Just as the 1986 Amnesty set off the dramatic increases in illegal immigration we have experienced since then, and more than two decades of litigation as disqualified aliens challenged their disqualification for the amnesty in court, the May 17 amnesty compromise can be expected to attract new and even larger waves of illegal immigrants to the U.S., and more decades of litigation. Every amnestied alien has relatives, friends, neighbors, and acquaintances who also want to live and work in the U.S.,

and who suddenly know someone legal who can help them after they enter the U.S. illegally. Those outside the U.S. have new incentive to enter the U.S. illegally to await the next U.S. amnesty, having seen previous violators of U.S. law rewarded.

Requiring payment of back taxes due hardly negates a finding of amnesty, since those taxes are already due and payable in any event. Similarly, requiring payment of a "fine" does not remove the taint of amnesty when that fine is in lieu of the normally substantial processing fees that are required for legal immigration and citizenship.

The alleged benchmarks or triggers in the May 17 amnesty agreement do not require any prior reduction in the number of illegal aliens in or entering the United States each year, only that additional tax money be spent to hire personnel and attempt to improve border and technical infrastructure. A more meaningful benchmark or trigger would require actual reduction in both the number of illegal aliens in the U.S. and those entering the U.S. each year illegally. Without such clear evidence that U.S. immigration law is actually being enforced and the number of illegal aliens actually reduced by deportation and voluntary repatriation, consideration of amnesty is a mistake. Such actual reduction need not be to zero, and the warning that "we can't deport all 12 million" is a straw man and not a valid argument for amnesty.

Finally, anyone who has had to deal with the federal immigration bureaucracy recently understands that the bureaucracy is already overwhelmed by its current workload, with backlogs in everything from visa processing, to security screening, to naturalization. To add millions of applications for amnesty, or "probationary status", as well as subsequent adjustment to permanent resident, and then naturalization, is a formula for disaster. How exactly do illegal aliens prove they were in the U.S. prior to January 1, 2007? How does the government prove they were not? The May 17 compromise seems to acknowledge that the fees and "fines" to be paid by applicants will be insufficient to cover additional costs, and that substantial new appropriations will be required.

Question 2: Who Should We Admit and Exclude?

The U.S. is currently admitting historically high numbers of legal immigrants, each year admitting more legal permanent residents with a

clear path to full citizenship than all the rest of the nations of the world combined. The single largest category of immigrant visas has been for family-sponsored immigrants. The balance between this category and the second largest category of employment-based immigrants has increasingly tilted towards family-sponsored immigrants, making our legal immigration system increasingly nepotistic. Reasons for this include the enormous demand for family-sponsored immigration and the difficulty in qualifying for employment-based immigration. The current expansiveness of the family immigration categories also accounts for its increasing demand through an expanding process of chain migration.

The backlogs in all the family-sponsored preference categories have called into question whether such categories are too broad, and whether family immigrant visas should instead be focused primarily on the nuclear family, consisting of spouse and minor children of the citizen or permanent resident sponsor. The May 17 Senate compromise moves in this direction, and I generally support the elimination of preferences for adult children and siblings of citizen and resident sponsors, and the awarding of points instead for such relationships in the proposed merit-based evaluation system. The May 17 Senate compromise places a cap on the number of visas for qualifying parents. I would go further and abolish the category as such, replacing it with points in the merit-based evaluation system as for adult children and siblings.

Given that we will be admitting only a limited number of those who would like to immigrate to the U.S., I find it reasonable to focus immigrant visas on reunification of the nuclear family and immigration which is most beneficial to the nation as determined by a Canadian-style merit-based evaluation system. The scandal of spouses and minor children of legal permanent residents having to wait for visas while adult children and siblings and parents are receiving them has always struck me as indefensible. Persons who place a high priority on living in close proximity to their extended families, including parents, siblings, and adult children, should probably not be thinking about leaving their extended family to immigrate elsewhere. The Canadian points system has always seemed easier to administer and less burdensome than our system of employment preferences and labor certifications.

The proposed transitional acceleration of visa processing for adult children and siblings already in the queue strikes me as unnecessary

and an undesirable increase in the overall level of legal immigration which is not merit-based, does not clearly benefit the nation as a whole, and may in fact have adverse consequences in increased entitlements and lower wages for American workers than they might otherwise earn. Current backlogs could fairly be processed as scheduled until eliminated and the categories abolished. If amnesty recipients are truly required to "go to the back of the line" for permanent residence, they would consequently have to wait longer, too.

Question 3: What About a Temporary Worker Program?

The May 17 Senate compromise provides for a huge and complicated new temporary worker program with an initial cap of 400,000 new visas in the first year. The hope is that low-skill workers would enter this program instead of entering illegally, and then voluntarily depart the country after two years. I think it's more likely that this program will be a new pathway for illegal and permanent immigration into the U.S.

I question whether the government ought to be in the business of supplying employers with cheap labor. The alternative might be rising wages and a more secure work environment for American workers. Or it might be a process of automation, innovation, and creativity if the price of labor seems high, as has occurred in the past

I also think it's un-American to bring indentured workers to the U.S. to be worked and then expelled, without allowing them any stake in the country. This system of contract labor has been described as a Saudi Arabian-style work program since such practice is widespread in the Middle East. It's one thing to run such programs for college-educated highly skilled workers who can change employers and eventually qualify for permanent residence. It's quite another thing to bring in temporary workers because they are unskilled and unable to change employers, and then expel them after two years.

In Conclusion

When I worked at the Immigration and Naturalization Service from 1990 to 1993, the consequences of the 1986 Amnesty, and in particular how it would accelerate illegal immigration to the U.S., were not yet apparent. I thought of what the INS did as at least partially "smoke and

mirrors" to convey the impression that we were enforcing the law, when our actual capability to do so was limited. As the problem of illegal immigration has grown, the inadequacy of our immigration enforcement has become more apparent.

The solution to insufficient enforcement of our immigration laws is, I believe, not amnesty, but more enforcement. So I support the enforcement initiatives in the Senate's May 17 compromise. I also support the re-balancing of legal immigration as proposed in the May 17 compromise between family and merit-based categories. But I oppose the temporary worker program which will add to the burdens of enforcement. And I oppose the amnesty which, if enacted, will only encourage more illegal immigration.

What immigrant communities most want is not to be discriminated against. And so I applaud the proposed elimination of the so-called diversity visa lottery contained in the May 17 compromise. In 2004 I testified before this subcommittee against the diversity visa lottery because of the way it discriminates against would-be immigrants from Mexico, China, India, the Philippines and other high-admission states who are barred from participation. The proposed demise of the diversity visa lottery is welcome.

But the 7% per-country cap, which makes qualifying immigrants from those countries wait in longer queues solely because of nationality, remains, only slightly ameliorated in the May 17 compromise up to 10%. The effect on certain immigrant communities of eliminating certain family-immigration preferences, as proposed in the May 17 compromise, can be at least partially offset by eliminating the discrimination inherent in the continuation of the per-country cap on legal immigration. I urge its complete repeal.