WebMemo
Published by The Heritage Foundation
No. 1522
June 26, 2007

The Senate Amnesty Bill: A Muddled Legal Morass

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The comprehensive immigration bill before the U.S. Senate (S. 1639) has been roundly and justly criticized for what it would do up front: grant immediate amnesty to virtually all illegal aliens now in the country and jeopardize U.S. national security. However, that is only half of the problem. S. 1639 would also create a legal morass that would entangle immigration courts, as well as newly created administrative courts, for years to come.

Background. S. 1639 would grant immediate amnesty (in the form of a "probationary" Z visa) to between 12 million and 20 million illegal aliens. According to Section 601 (f)(2) of the bill, the amnesty *must* begin within 180 days after the bill is signed—no border enforcement triggers need to be met. Under Section 601 (h)(1), the bill allows the government only one business day to conduct a background check to determine whether an applicant is a criminal or a terrorist. Unless the government can find a reason not to grant it by the end of the next business day after the alien applies, the alien receives a probationary Z visa.

The 24-hour requirement is particularly inexplicable, considering that the ombudsman for U.S. Citizenship and Immigration Services (USCIS)—the agency that would implement the amnesty—recently released a report revealing that, even without the tripling of the workload that the amnesty will bring, FBI name checks on aliens seeking benefits routinely take 90 days or more to complete.

A Legal Mess. Legal snares are scattered throughout the 400-plus-page bill. The most pernicious of them include:

1. **Reopening the Absconder Files.** The amnesty under S. 1639 extends even to absconders—fugitives who had their day in court, were issued an order of removal by an immigration judge, and ignored the order. Approximately 636,000 absconders now roam the country, having defied the law twice—first when they broke immigration laws and again when they ignored the removal orders. That number has grown by an average of 68,184 a year from September 2003 to September 2006.

   Since 2001, tracking down and removing these absconders has been a top priority of Immigration and Customs Enforcement (ICE). The agency has made recent progress by increasing its Fugitive Operations Teams from 18 in 2005 to 61 at present. S. 1639 would bring this effort to an end, rewarding absconders who have successfully evaded federal law enforcement with another bite at the apple.

   Section 601 (d)(1)(I) of the bill would allow USCIS to grant Z visas to absconders, provided

This paper, in its entirety, can be found at:
www.heritage.org/Research/Immigration/wm1522.cfm

Produced by the B. Kenneth Simon
Center for American Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

that the recipient can demonstrate that his departure from the United States "would result in extreme hardship to the alien or the alien's spouse, parent or child."

The flexible term "extreme hardship" has long been the subject of interpretation in immigration law. For more than 30 years, courts have wrestled with its meaning. Extreme hardship can include consideration of the alien's age, health, length of residence in the United States, family ties in the United States and abroad, position in the community, financial status, occupation, and possibility of other means of adjustment of status, immigration history, as well as the political and economic conditions of the alien's home country. It is a fact-intensive inquiry into circumstances that vary from case to case.

The bill not only allows the absconder to obtain amnesty if he can show extreme hardship to himself, but it also allows him to receive amnesty if he demonstrates that his removal would cause extreme hardship to his *spouse, parent, or child*. This is a wide loophole. For example, immigration attorneys representing absconders could argue that, if any member of an absconder's family is a U.S. citizen, that family member *must* remain in the United States, and then the separation of family members would constitute extreme hardship.

Perhaps most troubling is the fact that this offers a massive reward to aliens who have defied immigration courts. Successfully fleeing justice can win absconders the most generous visa ever created, as well as de facto permanent residence in the United States. Aliens who obeyed their removal orders and left the country, however, are not eligible. This perverse incentive system, rewarding those who disregard the rule of law, may already be having an effect, simply by virtue of the bill's introduction. Because leaving the country renders an illegal alien ineligible for the amnesty, few can be expected to obey their removal orders while this bill is pending in Congress.

2. **Creating a New Court of Amnesty Appeals.** As the Government Accountability Office (GAO) reported in 2006, USCIS is already overburdened. It labors under a backbreaking annual workload of more than 6 million applications for immigration benefits (asylum, green cards, etc.) and faces a backlog of several million additional cases. Its operation is a bureaucratic sweatshop with an informal "six minute rule" in place—adjudicators are urged to spend no more than six minutes looking at any application. Adjudicators are offered cash rewards for processing applications quickly, and perhaps most tellingly, a supervisor's signature is required to deny an application but not to approve one. As a result, fraudulent applications sail through.

S. 1639 would triple the workload of an agency that is already at the breaking point. The vast majority of amnesty applications would be approved after receiving only a few minutes of scrutiny.

Moreover, virtually every denial would be appealed, for two reasons. First, the alien has nothing to lose by pursuing an appeal, and second, the alien cannot be deported while his amnesty application is pending. Even if only 1 percent of the 12 million-plus amnesty applications are denied, that is at least 120,000 appeals.

Under a more reasonable amnesty policy, the illegal alien would be immediately placed in removal proceedings following the denial of the amnesty application. He would then have to argue for his eligibility before an immigration judge. If he lost, he could appeal to the Board of Immigration Appeals and the U.S. Court of Appeals. If he lost in those courts, he would be deported.

However, S. 1639 would give the alien the opportunity to appeal the denial of amnesty in a separate, newly created court within the Department of Homeland Security. The court would have to be massive to deal with at least 120,000 amnesty denials in the first two years. Still, it would take years for a court to sift through so many appeals, but that imposes no burden on the alien, because he is protected from deportation while his case is pending. From the illegal alien's perspective, justice delayed is just fine.

The bill is vague on the details of the new tribunal. Section 603 (a) states simply that "an appellate authority" will be established. The appeal process would be a permissive one, allowing the alien to introduce "newly discovered" evidence and to file a motion to reconsider previous decisions in light of additional legal arguments.

If the alien loses before the newly created appeals court, he still gets a break. Inexplicably, the bill does not require that the government place illegal aliens who are twice denied the amnesty into removal proceedings. Rather, the government has the option of doing so, but only if the denial was for past criminal convictions. Illegal aliens who are denied the amnesty on appeal for any other reason can walk. If they want to seek further review, they can *voluntarily* place themselves into removal proceedings under Section 603 (b)(1). Otherwise, they are free to disappear back into the fabric of American society.

3. **Fraud in the Agricultural Fields.** Because S. 1639 is a slapdash effort created by stitching various amnesty bills together, the previously proposed "Ag Jobs" amnesty appears under the guise of a special "Z-A visa" for agricultural workers. Under Section 622 (b) of the bill, agricultural workers would qualify for this special amnesty by showing that they have performed agricultural work in the United States for at least 863 hours or 150 workdays during the two-year period ending on December 31, 2006. The alien must prove "by a preponderance of the evidence that the alien has performed the requisite number of hours or days of agricultural employment."

   Few employers of unauthorized aliens in the fruit and vegetable fields keep such detailed records. The bill gets around this problem by allowing the alien to offer an "inference" rather than actual documentation. To meet this burden of proof, the alien can offer evidence to show that he worked the required hours or days "as a matter of just and reasonable inference." In other words, the alien could present or even fabricate a pay stub for one day's work at the end of the season and simply assert that he was in the fields for the entire season.

   In this way, the strict-sounding standard of the "preponderance of evidence" is transformed into a standard of virtually no evidence whatsoever. Furthermore, the adjudicators would spend only a few minutes on each application. Under the status quo, they rarely demand additional information from aliens seeking benefits. With their workload tripled, there would be no time for such inquiries. Growers need not worry about receiving inquiring phone calls from USCIS.

   If the unauthorized alien worker who speaks little English found this legal charade challenging, the American taxpayer would actually be required to help him out. Section 622 (b) allows Z-A amnesty applicants to receive free legal services at taxpayer expense. Under current law, illegal aliens are not eligible for federally funded legal services. That prohibition would end if S. 1639 becomes law. It is difficult to estimate the cost precisely, but it is likely to be in the hundreds of millions of dollars each year.

4. **Permanent Jobs for Agricultural Workers.** S. 1639 offers an especially sweet deal for illegal agricultural workers once they obtain their Z-A visas. In Section 622 (b), the bill states, "No alien granted a Z-A visa may be terminated from employment by any employer during the period of a Z-A visa except for just cause."

   Employers who dare to fire newly legalized aliens holding Z-A visas would do so at their own peril. The bill would create yet another administrative court system to review complaints by Z-A agricultural workers "who allege that they have been terminated without just cause." If the administrative hearing officer finds that the alien has established reasonable cause to believe that he was fired without just cause, the alien and the former employer must enter binding arbitration proceedings supervised by an arbitrator whose fees are paid by taxpayers. The burden is on the employer to demonstrate by a preponderance of the evidence that he fired the alien for just cause. To give the alien yet another legal boost, this special administrative process is non-exclusive. In other words, the alien may sue the employer at the same time in state or federal court for damages if any relevant causes of action are available.

Conclusion. On top of an already complicated immigration court system, S. 1639 would layer a complex mix of parallel administrative courts with nebulous standards and vulnerabilities to fraud. This new system would be an immigration lawyer's playground. Absconders would see their cases reopened, and the addition of poorly drafted new statutory language to already voluminous immigration laws and regulations would make the Internal Revenue Code look simple.

Aside from the 12 million to 20 million illegal aliens who would receive amnesty, the biggest beneficiaries of this legal morass are the immigration lawyers who would bill millions of dollars representing their clients as the cases drag on. That is not entirely surprising, because the American Immigration Lawyers Association reportedly played a central role in drafting the Senate bill. It is also a natural consequence when a bill is drafted behind closed doors and shielded from the normal process of committee scrutiny.

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