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# The American Dream Deferred: Family Separation and Immigrant Visa Adjudications at U.S. Consulates Abroad

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**THE AMERICAN DREAM DEFERRED:  
FAMILY SEPARATION AND IMMIGRANT  
VISA ADJUDICATIONS AT U.S.  
CONSULATES ABROAD**

*In the mid 1990's, Congress passed a series of punitive immigration laws designed to ramp up enforcement and deter illegal immigration. Among these measures are provisions know as unlawful presence bars, which prohibit immigrant visa applicants who have been unlawfully present in the United States for certain periods of time from obtaining an immigrant visa for up to ten years or more. These bars frequently result in the protracted separation of undocumented applicants from their U.S. citizen or lawful permanent resident family members.*

*After more than ten years since the passage of the unlawful presence bars, it is now appropriate to look closely at their impact and examine whether they constitute sound public policy. This Comment argues that they do not. Furthermore, it explains how the system puts families through unnecessary and unjustifiable hardship by imposing a punishment that is disproportionate to the seriousness of the immigration violation. This Comment points to the lack of evidence that the unlawful presence bars significantly deter illegal immigration, and the fact that they tear families apart or force them to move abroad. For these reasons, this Comment recommends that Congress make sensible changes that will promote family unity while imposing penalties that are more proportionate to the seriousness of being unlawfully present in the United States.*

*Specifically, Congress should eliminate the unlawful presence bars while still requiring undocumented applicants for immigrant visas to process at a consulate in their home country. This would reduce the periods of family separation while maintaining a penalty for entering the country without permission. Concomitantly, Congress should pass a new law that would allow applicants who were minors when they entered the United States, and thus had no choice in the matter, to apply for lawful permanent residence without leaving the United States.*

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## I. INTRODUCTION

The immigration system in the United States is broken and needs to be fixed. Despite this long-standing political reality, there remains widespread disagreement regarding solutions to many of the problems involved. The immigration issues that tend to garner the most attention

include border security,<sup>1</sup> high-profile workplace raids,<sup>2</sup> guest worker programs,<sup>3</sup> and the estimated twelve million undocumented people living in the U.S.<sup>4</sup> These are extremely important issues that Congress must address in any attempt to fix the broken immigration system. Although these issues are the most widely recognized, there is a lesser-known issue that is just as important and profoundly impacts the lives of immigrants and U.S. citizens alike: the lengthy or permanent separation that many families are forced to endure when applying for an immigrant visa at a U.S. consulate abroad.

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1. Border security issues, especially along the U.S.–Mexico border, are frequently addressed by Congress post-9/11 and receive widespread media coverage. The U.S. is currently in the process of constructing a 700 mile-long border fence along the U.S.–Mexico border, although the future of the project is still controversial and uncertain. See, e.g., ARMANDO NAVARRO, *THE IMMIGRATION CRISIS: NATIVISM, ARMED VIGILANTISM, AND THE RISE OF A COUNTERVAILING MOVEMENT* 302–05, 309–12 (2009); MARGARET SANDS ORCHOWSKI, *IMMIGRATION AND THE AMERICAN DREAM: BATTLING THE POLITICAL HYPE AND HYSTERIA* 158–59 (2008); Hilary Hylton, *Opponents of the Border Fence Look to Obama*, TIME, Jan. 21, 2009, available at <http://www.time.com/time/nation/article/0,8599,1872650,00.html>; Liza Porteus, *U.S. Boosts Border Security Measures*, FOX NEWS, Jan. 29, 2005, <http://www.foxnews.com/story/0,2933,145643,00.html>.

2. The most prominent of these raids in recent years was the May 12, 2008, raid of Agriprocessors Inc., the nation's largest kosher meat plant. Nigel Duara et al., *Claims of ID Fraud Lead to Largest Raid in State History*, THE DES MOINES REGISTER, May 12, 2008, <http://www.desmoinesregister.com/article/20080512/NEWS/80512012/Claims-of-ID-fraud-lead-to-largest-raid-in-state-history>. The raid took place in Postville, Iowa, and devastated the small Midwestern town. See Antonio Olivo, *Raid Leaves Town Worn, Torn*, LOS ANGELES TIMES, May 12, 2009, at A5, available at <http://articles.latimes.com/2009/may/12/nation/na-postville-iowa12>.

3. Guest worker programs have a long and controversial history in the U.S. The most significant program implemented was the “bracero” program, which began in the 1940s. ROBERT JOE STOUT, *WHY IMMIGRANTS COME TO AMERICA: BRACEROS, INDOCUMENTADOS, AND THE MIGRA 15* (2008). This program granted temporary work visas to Mexican nationals to come to the U.S. and work in agriculture and factories. *Id.* The bracero program ended in 1965. *Id.* at 26. In recent years there have been a series of proposed guest worker programs, usually as a part of comprehensive immigration reform bills, but none have materialized. See MATTHEW SOERENS & JENNY HWANG, *WELCOMING THE STRANGER* 146–47 (2009); Bill Ong Hing, *Guest Workers Program with a Path to Legalization*, 1586 PLI/CORP 291, 293 (2006).

4. The issue of what to do about the estimated twelve million undocumented immigrants living in the U.S. has spurred widespread debate. See, e.g., *Should We Welcome Undocumented Immigrants?* (NPR broadcast Oct. 17, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=15317839>. At one extreme are supporters of amnesty for the undocumented population. See, e.g., Sheila Jackson Lee, *Resident Illegal Immigrants Should Receive Amnesty*, in *IMMIGRATION: OPPOSING VIEWPOINTS* 135, 135–40 (Mary E. Williams, ed., 2004). The other extreme favors mass deportation of undocumented immigrants. See, e.g., Stephen Dinan, *Huckabee vows to deport all illegal aliens*, WASH. TIMES, Jan. 17, 2008, at A01, available at <http://www.washingtontimes.com/news/2008/jan/17/huckabee-vows-to-deport-all-illegal-aliens/>.

This situation arises when U.S. citizens or legal permanent residents (LPRs), also known as “green card” holders,<sup>5</sup> apply for their undocumented family members to gain legal status. Families that are trying to do the right thing by legalizing the status of an undocumented family member can face separation for three years, ten years, or in some cases, forever. These separations occur as a result of provisions added to the Immigration and Nationality Act (INA) when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) in 1996.

Specifically, if an unauthorized immigrant remains in the U.S. for more than 180 days but less than one year before applying for admission, the INA will bar him from admission for three years.<sup>6</sup> If he remains in the U.S. for one year or more before applying for admission, the INA will bar him for ten years.<sup>7</sup> Finally, if an individual has been in the U.S. unlawfully for more than one year and then reenters the U.S. without inspection, he is permanently inadmissible.<sup>8</sup> Collectively these three provisions can be referred to as the “unlawful presence bars.” This system is disastrous for families because the people with the deepest family ties to the U.S., those most likely to have remained in the country for more than a year, will be subject to the ten year bar or permanent bar.

For example, take the situation of Manuel and Rita.<sup>9</sup> Manuel was born in Mexico but his parents brought him across the U.S. border

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5. RANDALL MONGER & NANCY RYTINA, U.S. DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT, U.S. LEGAL PERMANENT RESIDENTS: 2008, Mar. 2009, at 1, available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_fr\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf). The relevant portion of the report states:

A legal permanent resident (LPR) or ‘green card’ recipient is defined by immigration law as a person who has been granted lawful permanent residence in the United States. Permanent resident status confers certain rights and responsibilities. For example, LPRs may live and work permanently anywhere in the United States, own property, and attend public schools, colleges, and universities. They may also join certain branches of the Armed Forces, and apply to become U.S. citizens if they meet certain eligibility requirements.

*Id.*

6. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2006).

7. *Id.* § 1182(a)(9)(B)(i)(II).

8. *Id.* § 1182(a)(9)(C)(i).

9. This scenario is based on a composite of many actual cases of this nature that the author has worked on, or come across in potential client intakes, over more than five years as an employee of an immigration law firm in Milwaukee, Wisconsin.

illegally when he was a toddler. He grew up in the U.S. and speaks perfect English. In high school, he met Rita, a U.S. citizen by birth.<sup>10</sup> They fell in love, and after graduation got married. They now have two young children. Rita works part-time and takes care of the children while Manuel works as the primary bread-winner. But lately it has become increasingly difficult for him to find a job due to his lack of lawful immigration status. Rita decides it is time to apply for Manuel to get his green card.

Rita fills out and files all of the paperwork for Manuel to get a green card based on their marriage. However, they get a response from the government stating that Manuel must leave the U.S. to attend an interview at the U.S. consulate in Ciudad Juarez, Mexico. They save up enough money for Rita and the kids to get by while Manuel is gone. Then, disaster strikes. At his consular interview, Manuel finds out that he is permanently barred from entering the U.S. because a few years ago he went to visit his sick grandmother in Mexico shortly before she died. When Manuel re-entered the U.S. illegally, he triggered the permanent bar, which prohibits him from getting a green card and returning to the U.S.<sup>11</sup> Rita and their two young children are devastated. She will have to choose either to live apart from her husband for at least ten years,<sup>12</sup> or to move the family to Mexico to be with him.

This is a choice no one should ever have to make. This form of collective punishment is anti-family and can send ripple effects throughout American communities, from home foreclosures to an increase in single parent households. It is a drastic penalty to impose considering unlawful presence in the U.S. is a civil violation that has gone largely unenforced for many years. It also discourages families from participating in the legal immigration process due to the risk of a potentially devastating separation. After more than ten years since the passage of the unlawful presence bars, it is now appropriate to look closely at their impact and examine whether they constitute sound public policy. This Comment argues that they do not.

Part II of this Comment provides context by discussing the origin of the unlawful presence bars as well as the importance of family unity in U.S. society and immigration law. In Part III, this Comment discusses

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10. Undocumented children are allowed to attend public schools. SOERENS & HWANG, *supra* note 3, at 42 (explaining that “because of the Supreme Court’s 1982 decision in *Plyer v. Doe*, children, regardless of immigration status, are allowed to attend public schools”).

11. For a more detailed explanation of the permanent bar, see *infra* note 82 and accompanying text.

12. See *infra* note 82 and accompanying text.

the unlawful presence bars in depth, focusing on particularly problematic aspects. Part IV examines several factors stemming from the unlawful presence bars that prevent undocumented immigrants from successfully reuniting with their families, or from initiating the process in the first place. Part IV also uses the example of the U.S. Consulate in Ciudad Juarez, Mexico to examine some of the practical problems presented by immigrant visa processing at consulates abroad. Finally, in Part V, this Comment proposes a two-part solution to the problem that would eliminate, or greatly reduce, the likelihood and duration of unnecessary family separation.

Currently, the system puts families through unnecessary and unjustifiable hardship by imposing a punishment that is disproportionate to the seriousness of the immigration violation. Furthermore, there is no evidence that the unlawful presence bars significantly deter illegal immigration.<sup>13</sup> Instead, they tear families apart or force them to move abroad. For these reasons, Congress should make sensible changes that will promote family unity while imposing penalties that are proportionate to the seriousness of the immigration violation. Undocumented immigrants who were brought into the U.S. as minors, and thus had no choice in the matter, should be allowed to remain in the U.S. while their applications are pending by enacting a targeted extension of the cut-off date under Section 245(i) of the Immigration and Nationality Act.<sup>14</sup> For undocumented immigrants who

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13. While it is impossible to measure the precise deterrent effect, if any, studies have shown that while enforcement measures may play a limited role, the rate of illegal immigration tends to follow economic trends. Thus, in periods of economic downturn, illegal immigration tends to decrease. See, e.g., JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 3 (2011), available at <http://pewhispanic.org/reports/report.php?ReportID=133>; Katie Leslie, *Study: Flow of illegal immigrants to U.S. declines*, ATLANTA JOURNAL-CONSTITUTION, Sept. 3, 2010, available at <http://www.ajc.com/news/study-flow-of-illegal-604876.html>.

14. The Immigration and Nationality Act (INA) was passed in 1952, originally as the McCarran-Walter Bill of 1952, Public Law No. 82-414, 66 Stat. 163 (1952), available at <http://www.uscis.gov/portal/site/uscis> (follow "LAWS" hyperlink; then follow "Immigration and Nationality Act" hyperlink). Although the INA has been amended numerous times, it is "still the basic body of immigration law" in the United States. *Id.* INA Section 245(i) was first created as a temporary provision in the FY1995 Commerce, Justice, State Appropriations Act to allow "unauthorized aliens" to obtain LPR status without leaving the country. ANDORRA BRUNO, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(i), at 1-3 (2002), available at <http://ipc.state.gov/documents/organization/10087.pdf>. Congress extended Section 245(i) in 1997 and again in 2000. *Id.* The last extension provided that applications must have been filed on or before April 30, 2001, in order to qualify. *Id.* That deadline is currently in effect. See 8 U.S.C. § 245(i) (2006).

came to the U.S. as adults, Congress should eliminate the unlawful presence bars to admissibility. This solution would still require undocumented immigrants to return to their country for an interview, but greatly reduce the duration of family separation while the applicants are processed at U.S. consulates abroad. This solution would benefit families as well as the country as a whole, while providing a reasonable measure of accountability for those who choose to break the law by entering the U.S. without permission.

## II. HISTORICAL CONTEXT

### A. IIRAIRA and the Policies of Punishment

In the early 1990s, the country began “a momentous shift toward aggressive immigration enforcement,”<sup>15</sup> due largely to an increasingly negative public sentiment toward immigrants.<sup>16</sup> Massive job losses caused economic insecurity, which led to “new citizen efforts to control ‘unauthorized’ border crossing and to limit benefits given to ‘undocumented’ residents already in the United States.”<sup>17</sup> Polls at the time showed that most Americans wanted immigration levels to be reduced.<sup>18</sup> Perhaps the clearest manifestation of this public outcry occurred in 1994 when the California voters passed Proposition 187, which “would have restricted all public benefits to illegal aliens.”<sup>19</sup> The law never went into effect after being challenged in court,<sup>20</sup> but the message its initial passage sent to the politicians was clear: restrict, and even punish, illegal immigration.

Concerns about national security and crime also clearly contributed to the shift toward tougher immigration enforcement. According to the former Immigration and Naturalization (INS) general counsel, the passage of IIRAIRA “was driven by the 1992 terrorist attack on the World Trade Center and the change of the Congressional majority control to the Republican party after the midterm elections of 1994.”<sup>21</sup>

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15. KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 48–49 (2007).

16. Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 106–07 (1999).

17. ORCHOWSKI, *supra* note 1, at 38.

18. Tsesis, *supra* note 16, at 106.

19. ORCHOWSKI, *supra* note 1, at 38–39.

20. *Id.* at 39.

21. *Id.* (quoting *Shortfalls of 1996 Immigration Reformation Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law*



Furthermore, an increased emphasis on immigration enforcement was in line with the tough stance on crime that President Bill Clinton adopted.<sup>22</sup> This combination of economic, national security, and crime concerns provided the justification for lawmakers to pass some of the most anti-immigrant legislation seen in the U.S. in generations.

First, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which “contained provisions making it easier to arrest, detain, and deport immigrants, both legal and undocumented.”<sup>23</sup> Second, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) severely restricted or eliminated access to certain federal public benefits, such as Medicaid, Supplemental Security Income (SSI), and food stamps, for legal and undocumented immigrants.<sup>24</sup>

Third, and most important for purposes of this Comment, was the passage of IIRAIRA in 1996. In addition to the unlawful presence bars, it contained a number of additional restrictive and punitive immigration measures.<sup>25</sup> For example, IIRAIRA made it more difficult to seek asylum in the U.S.,<sup>26</sup> granted the government wider latitude to detain and deport immigrants,<sup>27</sup> and imposed additional burdensome requirements for adjustment of status to permanent resident.<sup>28</sup> These drastic new laws were largely at odds with existing immigration policy, which favored family unity.

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*of the H. Comm. on the Judiciary*, 110th Cong. 27–39 (2007) (statement of Paul Virtue, former INS General Counsel and Executive Commissioner Partner, Hogan & Hartson), available at <http://judiciary.house.gov/hearings/printers/110th/34759.PDF>).

22. See JOHNSON, *supra* note 15, at 49. For a detailed report on President Clinton’s “tough on crime” policies and their impact on the U.S. population, see JUSTICE POLICY INSTITUTE, *TOO LITTLE TOO LATE: PRESIDENT CLINTON’S PRISON LEGACY*, (2001), available at [http://www.justicepolicy.org/images/upload/01-02\\_REP\\_TooLittleTooLate\\_AC.pdf](http://www.justicepolicy.org/images/upload/01-02_REP_TooLittleTooLate_AC.pdf).

23. Anna Marie Gallagher, *The Situation of Undocumented Migrants in the United States*, 05-06 IMMIGR. BRIEFINGS 1 (2005).

24. *Id.*

25. See Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

26. See UNDERSTANDING THE 1996 IMMIGRATION ACT 2–1 to 2–16 (Juan P. Osuna ed., 1997) [hereinafter Osuna].

27. *Id.* at 3–1 to 5–10.

28. *Id.* at 9–11 to 11–8.

### B. A Family-Based Immigration System

The family is “the basic unit in human society” and family unity is “a very highly valued principle of law.”<sup>29</sup> From this country’s colonial beginnings, there has been an emphasis on the importance of family unity.<sup>30</sup> The vital role of family in United States society remains evident to this day, in everything from estate laws<sup>31</sup> to the complex web of family law in each state designed to preserve the integrity of the family unit.<sup>32</sup> Indeed, many early immigrants to the United States first came by themselves to find work in order to later bring the rest of their families and start a new life.<sup>33</sup> This is the essence of the “American Dream”—come to the land of freedom and opportunity, work hard, and build a fruitful life for your family.<sup>34</sup>

The societal importance of family unity is also enshrined in United States immigration laws, which allow U.S. citizens and LPRs to apply for their close family members to attain LPR status.<sup>35</sup> In fact, the family-unity principle appears to have inspired the entire quota system under

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29. GERASSIMOS FOURLANOS, *SOVEREIGNTY AND THE INGRESS OF ALIENS* 87 (1986).

[M]arriage and the family have been universally viewed as the necessary foundation of specific societies and of civilization in general – as the source and manifestation of human and divine order. This understanding of marriage and the family as the most important and abiding system of human relations, as simultaneously necessary to individuals and to society as a whole, has persisted throughout human history.

Elizabeth Fox-Genovese, *Thoughts on the History of the Family*, in *THE FAMILY, CIVIL SOCIETY, AND THE STATE* 1, 4 (Christopher Wolfe ed., 1998). For an in-depth historical examination of the importance of family in American society, see generally *AMERICAN FAMILIES: A RESEARCH GUIDE AND HISTORICAL HANDBOOK* (Joseph M. Hawes & Elizabeth I. Nybakken eds., 1991).

30. See Arshil Kabani, *Separation Anxiety: Uniting the Families of Lawful Permanent Residents*, 10 *SCHOLAR* 169, 179 (2008) (explaining that the Pilgrims organized themselves in communal settings with an emphasis on the family unit). In fact, the Thanksgiving holiday was established by President Abraham Lincoln “as a day of family unity that would emulate the ideals of the Pilgrims.” Sharma Howard, *Montville Resident’s Book Sets Facts Straight About Pilgrims*, *NORWICHBULLETIN.COM*, Nov. 20, 2009, <http://www.norwichbulletin.com/living/x1945262146/Montville-residents-book-sets-facts-straight-about-Pilgrims#axzz1FE6E5ubI>.

31. See *RESTATEMENT (THIRD) OF PROPERTY* § 2.2 (1998); *UNIFORM PROBATE CODE* § 2-102 (2008).

32. See Kabani, *supra* note 30, at 180.

33. See ORCHOWSKI, *supra* note 1, at 19–20; Valerie M. Mendoza, *They Came to Kansas Searching for a Better Life*, in *FAMILY AND SOCIETY IN AMERICAN HISTORY* 215, 215 (Joseph M. Hawes & Elizabeth I. Nybakken eds., 2001).

34. See ORCHOWSKI, *supra* note 1, at 75–77.

35. See Monger & Rytina, *supra* note 5, at 1.

American immigration law.<sup>36</sup> The INA, along with its amendments, is the bedrock of U.S. immigration law,<sup>37</sup> and one of the major goals of the INA is “the reunification of families.”<sup>38</sup> Thus, throughout United States history, the country has made it a priority to keep families, including immigrant families, together.

By far, the largest share of new LPRs each year consists of family-sponsored immigrants.<sup>39</sup> For example, in each of the last three years, family-sponsored immigrants made up about sixty-five percent of the total new LPRs.<sup>40</sup> In 2008, this meant that of the over one million new LPRs, over 700,000 were family-sponsored immigrants.<sup>41</sup> Judging from these statistics, it is quite clear that family relationships play a central role in our immigration system. It is also important to note that there are more applicants from Mexico than any other country: in 2008 alone, over seventeen percent of the total new LPRs were from Mexico, dwarfing the percentages from all other countries.<sup>42</sup>

Further evidence of these family unity policies toward immigrants can be found in the process by which a person becomes an LPR through a family member. Becoming an LPR is a multi-step process. First, a petition is filed that establishes eligibility for the family member.<sup>43</sup> The date on which the petition is filed is called the priority date.<sup>44</sup> Once the petition is approved and the priority date becomes current, the family member can apply for lawful permanent residence.<sup>45</sup> A limited number of applicants who are already in the U.S. are eligible for adjustment of status,<sup>46</sup> which allows them to remain in the U.S. during the process. However, applicants living outside the U.S., and most of those who entered the U.S. without inspection (illegally), must apply for an

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36. See FOURLANOS, *supra* note 29, at 107.

37. See MONGER & RYTINA, *supra* note 5, at 1.

38. Fernando Colon-Navarro, *Familia E Inmigración: What Happened to Family Unity?*, 19 FLA. J. INT'L. L. 491, 491 (2007).

39. MONGER & RYTINA, *supra* note 5, at 3.

40. *Id.*

41. *Id.*

42. *Id.* at 4.

43. See Kabani, *supra* note 30, at 176.

44. *Id.*

45. *Id.*

46. “[A]djustment of status” is the name for the process of becoming an LPR while remaining in the United States. See MONGER & RYTINA, *supra* note 5, at 2. For an explanation of the circumstances in which a person qualifies for adjustment of status, see *infra* Part II section C.

immigrant visa at a U.S. consulate in their country of origin.<sup>47</sup> The process of applying for an immigrant visa is commonly referred to as consular processing.<sup>48</sup> For example, all such Mexican applicants process through the consulate in Ciudad Juarez, Mexico.<sup>49</sup>

*C. The Limited Conditions for Adjustment of Status Lead to Increased Family Separation Under Current Law*

Practically, there are only two scenarios where an immigrant present in the U.S. can remain here while an application for an adjustment of status is processed. One is when an immediate family member entered the U.S. with a valid visa, such as a visitor, employment, or student visa.<sup>50</sup> These applicants may, in most cases, adjust their status to LPR based on their family relationship.<sup>51</sup> The other way to adjust one's status, while remaining in the U.S., is through grandfathering under INA section 245(i).<sup>52</sup> Under that scenario, an individual present in the U.S. who (1) was physically present on December 21, 2000, (2) was the beneficiary of a family or employment-based petition filed on or before April 30, 2001, and (3) pays a \$1000 fine, can apply for adjustment of status.<sup>53</sup> Any applicant who does not meet the above requirements for adjustment of status must apply for an immigrant visa through consular processing.<sup>54</sup>

The practical problem created by these guidelines is that so many immigrants present in the U.S. entered without a visa and did not have a petition filed before the provisions of INA section 245(i) were allowed to sunset by Congress. Recent estimates put the number of undocumented immigrants in the U.S. at between 11 and 12 million.<sup>55</sup>

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47. *Id.*; see also Maria Zas, *Consular Absolutism: The Need for Judicial Review in the Adjudication of Immigrant Visas for Permanent Residence*, 37 J. MARSHALL L. REV. 577, 577-79 (2004).

48. U.S. Citizenship and Immigration Servs., Consular Processing, <http://www.uscis.gov/portal/site/uscis/> (last visited May 18, 2011) (follow "Green Card" hyperlink; then follow "Green Card Processes and Procedures" hyperlink; then follow "Consular Processing" hyperlink).

49. See Consulate General of the United States, Ciudad Juarez, Mexico, Immigration Visas, [http://ciudadjuarez.usconsulate.gov/immigrant\\_visas.html](http://ciudadjuarez.usconsulate.gov/immigrant_visas.html) (last visited May 18, 2011).

50. 8 U.S.C. § 1255(a) (2006).

51. *Id.*; see also BRUNO, *supra* note 14, at 2-3.

52. 8 U.S.C. § 1255(i) (2006).

53. *Id.* Applicants with petitions filed before January 14, 1998, need not meet the physical presence requirement. See BRUNO, *supra* note 14, at 5.

54. See *supra* notes 47-48 and accompanying text.

55. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, at i, available at <http://pewhispanic>

But the undocumented population increased from 8.4 million in the year 2000 to the current level.<sup>56</sup> Thus, approximately 3 to 4 million of the more recent arrivals cannot meet the physical presence requirement under INA section 245(i). It is impossible to say exactly how many of these undocumented individuals have qualifying family members that could file a petition for LPR status. However, it is likely a very large number. The problem is that anyone within this large group of individuals who are eligible to apply for LPR status will have to leave the U.S. for consular processing, which can lead to prolonged separation from their U.S. citizen or LPR family members.

*D. Consular Processing of Immigrant Visas:  
The “Touchback” Requirement*

If an immigrant must comply with consular processing to obtain LPR status, the applicant must leave the U.S. to attend an immigrant visa interview at the consulate.<sup>57</sup> There, a consular officer will adjudicate the application.<sup>58</sup> In recent years, this process became referred to as the “touchback” requirement, since the intending immigrant must touch ground in their country of origin.<sup>59</sup>

The “touchback” requirement can place a heavy burden on a family, especially if the trip abroad results in the loss of employment. The requirement’s controversial nature was a focal point of the debate regarding a provision to legalize the undocumented population in the proposed immigration reform legislation of 2007.<sup>60</sup> The bill was ultimately unsuccessful partially because many Americans, including some lawmakers, believe that touchback in the home country is a fair requirement in light of the fact that the applicant entered the U.S.

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.org/files/reports/107.pdf [hereinafter PASSEL & COHN, *A Portrait of Unauthorized Immigrants*]; JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR, U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE, at iii, available at <http://pewhispanic.org/files/reports/126.pdf> [hereinafter PASSEL & COHN, *U.S. Unauthorized Immigration Flows*].

56. PASSEL & COHN, *U.S. Unauthorized Immigration Flows*, *supra* note 55, at iii.

57. See *supra* notes 50–54 and accompanying text.

58. *Id.*

59. See Editorial, *Progress on Immigration*, N.Y. TIMES, Apr. 22, 2007, available at <http://www.nytimes.com/2007/04/22/opinion/22sun1.html?scp=1&sq=Progress%20on%20Immigration&st=cse>.

60. See Jonathan Weisman, *GOP Backers Offer Immigration Bill Change*, WASH. POST, June 26, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/25/AR2007062501637.html>.

without permission in the first place.<sup>61</sup> Thus, when looking at the touchback requirement, lawmakers must balance potential harm to the families with public perceptions of accountability for the undocumented. The punitive aspect of the touchback requirement makes sense when applied to immigrants who chose to enter the U.S. illegally. However, it makes less sense to require those who entered the U.S. as minors to return to a country they have not been to since they were children and may not even remember.

### III. FORCED SEPARATION DUE TO BARS TO ADMISSIBILITY

Whenever someone applies for LPR status, be it through adjustment of status, or consular processing, that person must show that he or she is admissible to the U.S.<sup>62</sup> Congress has created numerous grounds of inadmissibility, or bars, ranging from health-related factors<sup>63</sup> to criminal grounds<sup>64</sup> and terrorist activity.<sup>65</sup> The bar that most commonly prevents immigrants from achieving legal immigration status through consular processing, however, is unlawful presence—the mere act of previously being present in the U.S. unlawfully.<sup>66</sup> Section A describes the three and ten year bars, as well as the limited circumstances in which they can be waived. Section B describes the rigid permanent bar and its especially harsh effects on families.

#### *A. The Three and Ten Year Bars for Unlawful Presence Affect Most Applicants and are Difficult to Waive*

The unlawful presence bars are triggered when an individual is unlawfully present in the U.S. for certain periods of time after April 1, 1997, then voluntarily departs the U.S. and applies for admission.<sup>67</sup> As a result, virtually all applicants for immigrant visas through consular processing who have been in the U.S. unlawfully are subject to the bars.

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61. See, e.g., Robert Pear, *Proposals From Both Sides Fail in Immigration Debate*, N.Y. TIMES, June 28, 2007, at A18, available at <http://www.nytimes.com/2007/06/28/washington/28immig.html>.

62. See SOERENS & HWANG, *supra* note 3, at 68.

63. 8 U.S.C. § 1182(a)(1) (2006).

64. *Id.* § 1182(a)(2).

65. *Id.* § 1182(a)(3)(B).

66. *Id.* § 1182(a)(9)(B)(ii); see also Chris Gafner & Stephen Yale-Loehr, *Unlawful Presence: An Update*, 14 BENDER'S IMMIGR. BULL. 1280 (2009) (providing an in-depth definition of unlawful presence and discussing its application under current government guidelines).

67. OSUNA, *supra* note 26, at 1–3.

Most immigrants who enter the U.S. without inspection—by way of a dangerous journey through the desert to cross the U.S.–Mexico border or otherwise—do not immediately return home.<sup>68</sup> Most immigrants find jobs, and many start families here.<sup>69</sup> However, if they remain in the U.S. for more than 180 days they are subject to an unlawful presence bar and need a waiver.

The INA provides for a waiver of the three and ten year bars. However, the bars can be waived only if the applicant can demonstrate that refusal of admission would result in “extreme hardship” to the applicant’s spouse or parent who is either a U.S. citizen or LPR.<sup>70</sup> There is no further articulation of the standard for extreme hardship within the statute itself. However, the Board of Immigration Appeals (BIA) provides some guidelines for determining extreme hardship in the context of a waiver in another section of the INA that uses the same standard.<sup>71</sup> As the name of term suggests, many experts consider the extreme hardship standard for waivers difficult to meet.<sup>72</sup>

This relatively amorphous standard creates a system where bureaucrats have absolute authority to decide which of these families are allowed to live together in the U.S. and which will have to remain separated or live outside the U.S.<sup>73</sup> Consular officers, acting on behalf of

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68. See STOUT, *supra* note 3, at 4 (explaining that temporary or “circular” migration has decreased as border security has increased, resulting in more undocumented immigrants remaining in the U.S. permanently).

69. See SOERENS & HWANG, *supra* note 3, at 105 (“Immigrants do not come to the United States specifically to birth children here, but rather to improve their economic lot by working. In the normal course of their lives, of course, many do fall in love and have children.”).

70. 8 U.S.C. § 1182(a)(9)(B)(v).

71. See Gafner & Yale-Loehr, *supra* note 66, at 1287–88.

The BIA has held that the factors to consider when determining extreme hardship in that context include: (1) the presence of an LPR or U.S.-citizen spouse or parent in this country; (2) the qualifying relative’s family ties outside the United States; (3) the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; (4) the financial impact of departure from this country; and (5) significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

*Id.*

72. See, e.g., Leslie Berestein, *Couples Separated by False Assumptions; Some Binational Spouses Unable to Return to U.S.*, SAN DIEGO UNION-TRIB., July 28, 2009, at A1.

73. See generally Zas, *supra* note 47 (providing a detailed critique of the doctrine of consular absolutism and the lack of judicial review over the decisions of consular officers).

the Attorney General, have sole discretion to make the determination as to whether a particular applicant has met the extreme hardship standard.<sup>74</sup> Furthermore, there is no jurisdiction for any court to review these determinations.<sup>75</sup> Problematically, the extreme hardship standard combines this delegation of authority with complete inflexibility, since it can be met only if the applicant has a spouse or parent who is an LPR or a U.S. citizen.<sup>76</sup> Hardship to the immigrant himself is not a factor; nor is hardship to his children, even if they are U.S. citizens.

The existence of various family-sponsored immigrant categories does little to assuage the rigidity of the extreme hardship standard.<sup>77</sup> Applicants within these categories are eligible for an immigrant visa. However, many of these applicants are explicitly excluded from eligibility for a waiver, since they do not have a U.S. citizen or LPR spouse or parent. For example, if a U.S. citizen over twenty-one years of age applies for his undocumented parent, the parent will not qualify for a waiver if she does not have a spouse or parent that is a U.S. citizen or LPR.<sup>78</sup> Similarly, a U.S. citizen can petition for his undocumented brother or sister, but that sibling will be ineligible for a waiver if they are not married to, or the child of, a U.S. citizen or LPR. This contradiction is a glaring example of how current law belies the tradition of encouraging family unity in U.S. immigration law.

The limited scope of the family relationships considered under the extreme hardship standard simply precludes a large segment of the family-sponsored immigrant categories from getting a waiver. People in these groups have no way around the bars. The problem is exacerbated by the fact that they are not deemed ineligible at the beginning of the process.<sup>79</sup> Rather, applicants can initially have their petitions approved and be scheduled for an interview at the consulate.<sup>80</sup> They are allowed to make it all the way to the end of the process, when they have paid all

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74. 8 U.S.C. § 1182(a)(9)(B)(v).

75. *Id.*

76. *See supra* note 70 and accompanying text.

77. Aside from immediate family members of U.S. citizens, there are four family-sponsored preference categories: (1) unmarried sons and daughters of U.S. citizens, (2) unmarried sons and daughters of legal permanent residents, (3) married sons and daughters of U.S. citizens, and (4) brothers and sisters of U.S. citizens aged 21 and over. MONGER & RYTINA, *supra* note 5, at 1–2.

78. *See* SOERENS & HWANG, *supra* note 3, at 104 (explaining this scenario in response to the charge that undocumented immigrants come to the U.S. to have “anchor babies” in order to gain legal status).

79. *See* Zas, *supra* note 47, at 584.

80. *Id.*



fees and are already outside of the U.S., before the inevitable denial is issued and a protracted separation begins.<sup>81</sup>

*B. The Permanent Bar: An Extreme Punitive Measure*

The three- and ten-year bars to admission are not the most extraordinary measures applied to immigrants unlawfully present in the U.S. A common example of the permanent bar is when an undocumented person has been living in the U.S. for more than a year, and then travels back home to visit a sick or dying relative. As the earlier example involving Manuel illustrated, when the person returns to the U.S. (again entering without inspection), he triggers the permanent bar. However, the person is unlikely to know that he has a permanent bar until he attends his immigrant visa interview and a consular officer delivers the bad news. The reason this bar is deemed permanent is because, unlike the three- and ten-year bars, the permanent bar cannot be waived. However, despite it being termed a “permanent” bar, the law does provide for an exception whereby the Secretary of the Department of Homeland Security (DHS) may grant consent for the person to reapply for admission after the person has been outside the U.S. for at least ten years.<sup>82</sup>

This exception is problematic for at least two reasons. First, there is at least a ten-year period where the applicant cannot enter the U.S. This means either a ten-year separation, or the family members in the U.S. (who are often U.S. citizens) moving abroad in order to be united—a painful, life-altering event under either scenario. Second, the exception does not articulate a standard that DHS is to apply in deciding whether to allow admission.

The harsh reality of the permanent bar is that it presents a life-altering obstacle to family unity. Whether there is a decade-long separation, or a forced move abroad, the result will be turmoil and hardship for families. The permanent bar punishes people for traveling outside the U.S., even in emergency situations, such as the illness or death of a family member. Likewise, the families of those applicants who cannot meet the extreme hardship standard for a waiver of the three- or ten-year bar must endure the resulting punishment.

With the unlawful presence bars in place, immigrants and their families are left to navigate a confusing immigration system full of penalties and risk. Many families seek assistance with their applications

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81. *Id.*

82. 8 U.S.C. § 1182(a)(9)(C)(ii) (2006).

while many others file applications pro se.<sup>83</sup> In either case, immigrants and their families often encounter a multitude of challenges, especially those relating to access to accurate information about the immigrant visa process and the risks involved. Families are faced with difficult decisions that can result in life-long benefits or consequences. Some of the most pressing challenges families encounter are discussed in Part IV.

#### IV. LACK OF INFORMATION AND MISINFORMATION ABOUT IMMIGRANT VISAS

##### A. Pro Se Applicants are at a Disadvantage

Many immigrants apply for immigrant visas without the assistance of an attorney.<sup>84</sup> Some may not have sufficient income to pay legal fees, while others may simply believe that hiring an attorney is not necessary. In any case, pro se applicants are often unaware of the complexities of United States immigration law.<sup>85</sup> Many applicants believe they can complete the process on their own because the forms are available to the public; thus, they are able to access and fill out the forms themselves.<sup>86</sup> Even if the forms are filled out correctly, many of these pro se applicants will arrive for their immigrant visa interviews unaware that they are subject to a bar.<sup>87</sup> Furthermore, if they are eligible for a waiver, many will be unprepared or unable to file a waiver that will meet the extreme hardship standard.<sup>88</sup>

##### B. “Notarios” and Some Attorneys Provide Misinformation

Immigration law is complicated. Even a well-meaning but under-informed attorney can misread the law or send an applicant to his or her immigrant visa interview unprepared for what might occur. Most disturbing is the prevalence of notarios who are not attorneys, but frequently charge fees to file immigration applications.<sup>89</sup> In many Latin

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83. See Pat Schneider, *A Tangled Web: Immigration Law Is Confusing and Complex. What's Worse, Good Legal Advice Is Out of Reach for Many*, CAP. TIMES (Madison, Wis.), Jan. 20, 2010, at 20.

84. See *id.* at 21–22.

85. See *id.*; see also Berestein, *supra* note 72, at A1.

86. See U.S. Citizenship and Immigration Servs., <http://www.uscis.gov/portal/site/uscis/> (last visited May 18, 2011).

87. See Berestein, *supra* note 72, at A1.

88. *Id.*

89. See Chi-an Chang, *Online Extra: Cracking Down on Notorious Notarios*, BUSINESS WEEK, July 23, 2007, available at [http://www.businessweek.com/magazine/content/07\\_30/b4043081.htm](http://www.businessweek.com/magazine/content/07_30/b4043081.htm); see also G.M. Filisko, *Notoriety for Notarios*, ABA JOURNAL, Dec. 1, 2009,

American countries, notario is the term for a specialized lawyer.<sup>90</sup> However, notaries public or other non-lawyers in the U.S. frequently pose as notarios, offering immigration and other legal services and often committing fraud.<sup>91</sup> Many notarios (and some attorneys) simply do not know the laws and thus commit grave errors, such as allowing applicants they assist to leave the U.S. unprepared, putting the applicants at risk of being barred from re-entry.<sup>92</sup>

The most unscrupulous notarios actually know the basics, including the existence of the bars, but send applicants that are subject to bars to their immigrant visa interviews uninformed of their exposure to the bars and unprepared to file a waiver.<sup>93</sup> These are truly sad cases, as the applicants think they are getting help from professionals and pay for their services, but end up separated from their families with little recourse.

The unlawful presence bars, therefore, impose an extremely harsh penalty on those who are taken advantage of by notarios or who are unintentionally misinformed by a lawyer. Without the bars, the results of these scams or genuine mistakes could be rectified without too great an impact on families. However, under current law, once an applicant has left the U.S. he is subject to the applicable unlawful presence bar regardless of the circumstances.

### *C. Getting Accurate Information May Actually Discourage Applicants*

When immigrants who want to apply for an immigrant visa (or have begun the process) get accurate information about the risks involved, they may decide not to leave the U.S. or not to apply at all.<sup>94</sup> Certainly, an immigrant who finds out that she will be subject to the permanent bar is unlikely to travel to the consulate or even bother filing an application. Those who know beforehand that they will be subject to the three- or ten-year bar may also consider whether it is worth the risk to leave and file a waiver.<sup>95</sup> The very real possibility of a prolonged family separation that would result from the denial of a waiver may prove too frightening. In those cases, our punitive system actually

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available at [http://www.abajournal.com/magazine/article/notoriety\\_for\\_notarios/](http://www.abajournal.com/magazine/article/notoriety_for_notarios/).

90. Chang, *supra* note 89.

91. *See id.*

92. *See id.*

93. *See* Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 1-3 (2004).

94. *See* Colon-Navarro, *supra* note 38, at 495.

95. *Id.*

deters undocumented immigrants who qualify for legal status from attempting to obtain it.<sup>96</sup> Section D provides a concrete example of what awaits a majority of the applicants who do decide to go forward with their applications for an immigrant visa.

#### *D. Immigrant Visa Applicants are Targets for Crime*

The U.S. consulate in Ciudad Juarez processes all immigrant visa applications for Mexican applicants.<sup>97</sup> In fact, the consulate in Ciudad Juarez has in recent years been the largest issuer of immigrant visas in the world.<sup>98</sup> This large number includes both applicants living in Mexico and those who live in the U.S. and must touchback. The majority of the undocumented population in the U.S. is Mexican, constituting about 59% of the total,<sup>99</sup> suggesting that there are likely many more Mexican consular applicants with families in the U.S. than applicants from any other country. Therefore, it is also likely that the unlawful presence bars disproportionately impact Mexican applicants for consular processing. Since the consulate in Ciudad Juarez processes the largest pool of applicants subject to the unlawful presence bars, it provides the perfect example of the family separation problem in consular processing in general.

Due to the practical necessities of the consular application process, the unlawful presence bars may actually promote crime. Aside from the dangers of cartel-related violence and general crime,<sup>100</sup> visa applicants in particular have been targeted for muggings.<sup>101</sup> The Department of State has recommended that applicants traveling to the consulate for interviews exercise caution and do not carry cash.<sup>102</sup> However, applicants are sure to have either cash or some other access to money since they must pay for visa fees at the consulate, food, and unless they

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96. Bryn Siegel, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291, 298–99 (2008).

97. See sources cited *supra* note 49.

98. See U.S. GOV'T ACCOUNTABILITY OFFICE, BORDER SECURITY: STATE DEPARTMENT IS TAKING STEPS TO MEET PROJECTED SURGE IN DEMAND FOR VISAS AND PASSPORTS IN MEXICO 1 (2008), available at <http://www.gao.gov/new.items/d081006.pdf>.

99. PASSEL & COHN, *A Portrait of Unauthorized Immigrants*, *supra* note 55, at i.

100. E.g., Alfredo Corchado, *In Juárez, Message Stirs Hope: Former Mayor from Columbia Tells Ways to End City's Violence*, DALLAS MORNING NEWS, Sept. 23, 2009, at 10A; Mathew Price, *Inside Mexico's Most Dangerous City*, BBC NEWS, Mar. 23, 2009, available at <http://news.bbc.co.uk/2/hi/7959247.stm>.

101. U.S. DEP'T OF STATE, TRAVEL ALERT-MEXICO (2009), available at [http://monterrey.usconsulate.gov/acs\\_warden\\_022009.html](http://monterrey.usconsulate.gov/acs_warden_022009.html).

102. *Id.*

have family or friends to stay with, a hotel. Thus, the longer applicants are required to remain outside the U.S., the greater the risk that they will be targeted for theft or other crimes. In light of the extreme danger they face in traveling to Ciudad Juarez, potential applicants have even more incentive to avoid the process altogether. Regardless of the country or location of the consulate, applicants are likely to be targeted because they are coming from the U.S. to a known location, have access to money, and have relatives in the U.S. from whom more money could be extorted.

V. ALLOWING MINORS TO ADJUST STATUS AND ELIMINATING THE BARS FOR UNLAWFUL PRESENCE WOULD GREATLY REDUCE FAMILY SEPARATION WHILE MAINTAINING ACCOUNTABILITY

As a matter both of morality and sound public policy, the United States must find a way to avoid the prolonged family separation that harms immigrants and U.S. citizens alike under the current scheme. In a society that promotes individual liberty and family unity, U.S. citizens and LPRs should not have to suffer the indignity and pain of being separated from their loved ones. Practically speaking, family separation destabilizes communities.<sup>103</sup> The unlawful presence bars also deter eligible undocumented immigrants from legalizing their status. In fact, current law even leads to an absurd and likely unintended result: applicants who were not caught at the border and lie about their entry or entries can be rewarded with a green card while those who tell the truth are penalized.<sup>104</sup> Therefore, keeping the current system in place is not only unfair to individuals; it is unwise policy for the country as a whole.

The system should be reformed to benefit people like Fred, a Vietnam veteran born and raised in America.<sup>105</sup> Fred was divorced and living alone for a number of years when he met Maria. Maria was an

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103. See David Popenoe, *A Demographic Picture of the American Family Today—and What it Means*, in *THE FAMILY, CIVIL SOCIETY, AND THE STATE*, at 69, 74 (explaining that children in single-parent families statistically suffer an array of disadvantages including increased drop-out rates, worse poverty, and higher involvement in crime).

104. For example, refer to the earlier illustration of Manuel and Rita. See *supra* Part I. Had Manuel not told the consular official about his subsequent entry, the government would never have known about it since he was not caught at the border. Withholding this information would allow him to avoid the permanent bar. However, since he told the truth and disclosed the entry he was permanently barred.

105. This scenario is based on a composite of many actual cases of this nature that the author has worked on, or come across in potential client intakes, over more than five years as an employee of an immigration law firm in Milwaukee, Wisconsin.

undocumented immigrant from Mexico. They fell in love and decided to get married. Fred is now in his sixties and is experiencing health problems. His children are now adults and have moved away, so Maria is his only family in the area. Fred applied for Maria to obtain LPR status, but did not realize she would need a waiver to overcome the ten-year bar. Initially, they failed to submit enough evidence of extreme hardship to convince the consular officer to grant the waiver. This resulted in Maria being stuck in Mexico for several months.

Eventually the waiver was granted, but during their separation, Fred struggled without Maria's help due to a chronic back condition. He was outraged that he and his wife had to be separated. As a veteran who had served his country admirably, he could not understand how his government could be putting him through this. As a U.S. citizen wasn't he entitled to have his wife by his side? Many U.S. citizens and LPRs feel the same indignation about our current immigration system. Fred and Maria's situation demonstrates that even when the current system "works," in that the waiver was granted, family separation can cause serious problems. If the waiver had been denied, or if Maria were subject to the permanent bar, the problem would be exponentially worse.

There is a practical solution to the problem of family separation in the immigrant visa process, which would not require drastic changes in either the law or the government agency infrastructure necessary to process applications.

*A. Applicants who Entered the U.S. as Minors  
Should be Allowed to Adjust Status*

For applicants who entered the U.S. as minors, the family separation problem would virtually disappear if they were allowed to apply for adjustment of LPR status rather than required to go through the consular process. This change could easily be accomplished through Congressional action by a targeted extension of INA section 245(i), limited to only those who can prove they came to the U.S. while minors.<sup>106</sup> Applicants would still have to pay a \$1000 fine, pass all

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106. This change would also necessitate the elimination of the permanent bar since the Board of Immigration Appeals has held that Section 245(i) adjustment of status applicants who have triggered the permanent bar are inadmissible and cannot adjust their status. *Matter of Diaz-Castaneda*, *Matter of Lopez-Lopez*, 25 I&N Dec. 188, 190 (BIA 2010). Alternatively, Congress could explicitly state in the extension of Section 245(i) that the permanent bar does not apply in Section 245(i) adjustment of status applications. To leave the permanent bar in place under the *Matter of Diaz-Castaneda* precedent would undermine the purpose of the

standard screenings and background checks, and be otherwise admissible under existing law. Such a change would constitute a much more proportionate penalty for this group of applicants since they likely had no choice in breaking the law.

There is also evidence that Congress already intended to treat minors less harshly under the unlawful presence bars since unlawful presence does not begin to accrue until a person turns eighteen years of age.<sup>107</sup> Yet, it seems unrealistic to believe that an individual who was brought to the U.S. as a minor could, on his own initiative, return to his country of origin within 180 days of his eighteenth birthday in order to avoid an unlawful presence bar. Further, the deterrent effect of the unlawful presence bar is inapplicable to minors, since they likely had no choice in coming to the U.S.

### 1. Cost-Neutral Implementation

Practically speaking, the government could accommodate this change relatively easily. Applications for adjustment of status are currently adjudicated by the U.S. Citizenship and Immigration Services (USCIS).<sup>108</sup> These additional INA section 245(i) applications would simply be adjudicated by USCIS along with all other adjustment of status applications. There would likely be a need for additional officers to adjudicate applications domestically. However, the corresponding reduction in consular processing would allow for a shift of resources and officers away from the consulates and into the domestic USCIS offices. The consulates would continue to process all other immigrant visa applications, and any further costs from an overall increase in applications filed would be offset by the increased revenue from the filing fees and \$1000 fine each applicant pays.

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extension of Section 245(i), which is to avoid family separation. The three and ten year bars would become irrelevant under an extension of Section 245(i) since they are triggered upon only the applicant's departure from the United States and subsequent application for admission. *See supra* notes 6–7 and accompanying text. Since Section 245(i) applicants are not required to leave the United States and apply for admission, the three and ten year bars are not applicable. Applicants could prove they entered the country as minors by providing school, medical, or other records from within the U.S.

107. 8 U.S.C. § 1182(a)(9)(B)(iii)(I) (2006).

108. U.S. Citizenship and Immigration Servs., Adjustment of Status, <http://www.uscis.gov/portal/site/uscis/> (last visited May 18, 2011) (follow “Green Card” hyperlink; then follow “Green Card Processes and Procedures” hyperlink; then follow “Adjustment of Status” hyperlink).

## 2. Beneficial to Immigrant Families and the Country

No longer deterred by the risks of traveling abroad, undocumented immigrants who qualify would be encouraged to become LPRs rather than living in the shadows. There are many obvious benefits to families and to the country when undocumented immigrants become LPRs. For example, it is much easier to find work and support a family, which could lead to reductions in poverty. It is also more likely that taxes will be properly paid and returns filed (although most undocumented workers already have payroll taxes deducted and many file tax returns).<sup>109</sup> It is also beneficial to national security and the prevention of terrorism when the government knows who is living in the country.<sup>110</sup> Public safety could improve in several regards. For example, LPRs are able to get driver's licenses in states where the undocumented cannot.<sup>111</sup> Licensed drivers are less likely to be involved in accidents and more likely to carry insurance.<sup>112</sup> Undocumented immigrants are also less likely to report crime or assist local law enforcement efforts.<sup>113</sup>

Allowing adjustment of status would also allay due process and general fairness concerns. As discussed *supra* Part III in section A, a consular officer's decision is not subject to judicial review.<sup>114</sup> Unlike consular processing, denials of adjustment of status applications can be reviewed by an immigration judge.<sup>115</sup> The judge's decision can in turn be appealed to the Board of Immigration Appeals (BIA), whose decisions are subject to limited review by the U.S. Circuit Courts of Appeal.<sup>116</sup>

Allowing the process to occur inside the United States also reduces the harm done when notarios or attorneys give poor advice or commit fraud. If the adjustment application is initially denied, there is another chance in front of a judge, which provides the opportunity to seek other counsel. The applicant will not necessarily be separated from his family

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109. SOERENS & HWANG, *supra* note 3, at 34–35.

110. See JOHNSON, *supra* note 15, at 34.

111. See DMV.org, <http://www.dmv.org/news-alerts/real-id.php> (last visited May 18, 2011).

112. NAT'L IMMIGRATION LAW CTR., FACT SHEET: WHY DENYING DRIVER'S LICENSES TO UNDOCUMENTED IMMIGRANTS HARMS PUBLIC SAFETY AND MAKES OUR COMMUNITIES LESS SECURE 2 (2008), available at [http://www.nilc.org/immspbs/dls/FactSheet\\_DLs\\_2008-01-16.pdf](http://www.nilc.org/immspbs/dls/FactSheet_DLs_2008-01-16.pdf).

113. *Id.* at 3.

114. See *supra* notes 73–75 and accompanying text.

115. Zas, *supra* note 47, at 582.

116. U.S. DEP'T OF JUSTICE, FACT SHEET: BIA RESTRUCTURING AND STREAMLINING PROCEDURES 2 (2006), available at <http://www.justice.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf>.



due to faulty advice, as would be the case under consular processing.

Of course the most obvious benefit to families is the stability of remaining together and having legal status. No longer would the onerous possibility of a prolonged separation hang over the heads of these families. Loved ones would no longer be forced to travel to dangerous, and often unfamiliar, places like Ciudad Juarez. Eliminating family separation would benefit numerous U.S. citizens and LPRs.

### 3. Counterarguments Against Policy Change Mischaracterize and Generalize the Issue

The main argument by opponents to this type of change would likely be that it rewards lawbreakers. This argument has frequently been used to argue against legalization, or amnesty, for the undocumented.<sup>117</sup> Under this rigid point of view, all immigrants who enter the U.S. illegally should be deported.<sup>118</sup> By allowing lawbreakers to gain an immigration benefit, we would be encouraging the inflow of more undocumented people. In considering this argument, critics must keep in mind that the proposed change is not amnesty. It would apply to only those undocumented immigrants with close family members who are U.S. citizens or LPRs, and who already qualify to apply for LPR status under current law. Since undocumented immigrants who enter the U.S. as minors are usually brought by their families and have no choice in the matter, they do not have the same level of culpability we would normally associate with a lawbreaker.

Furthermore, allowing adjustment of status could actually reduce the total number of undocumented immigrants by providing a safer, more accessible way to gain legal status than the current system of consular processing offers. In other words, there are already millions of undocumented immigrants in the country, and the risk of family separation acts as a disincentive for eligible undocumented immigrants to apply for LPR status. By allowing some of them to adjust status in the U.S., we remove any risk of family separation, and with it, the disincentive to apply to become an LPR.

Another likely argument is that allowing undocumented immigrants to adjust their status skips those who have not entered the U.S. illegally and are waiting in line. This is largely a misperception, since all applicants are subject to the same waiting periods based upon the particular family relationship. Spouses of U.S. citizens and other

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117. See, e.g., Lee, *supra* note 4, at 146.

118. See Dinan, *supra* note 4, at A01.

immediate family members, whether unlawfully present in the U.S. or not, can immediately apply for LPR status.<sup>119</sup> Likewise, family members in one of the preference categories get their turn based upon the priority date assigned when they filed their petition.<sup>120</sup> The question is where and how the process occurs, rather than when. At some point, an officer would adjudicate the application and decide whether to approve it, whether at a consulate abroad or at a USCIS office in the U.S. Thus, allowing adjustment of status for family members present in the U.S. would not skip other applicants the way amnesty can; it would simply avoid separation from family members while the applications are pending.

*B. Eliminating the Bars for Unlawful Presence would Promote Family Unity by Reducing the Frequency and Duration of Family Separation in Consular Processing*

Congress should also repeal the unlawful presence bars. Under this scenario, undocumented applicants who entered the U.S. as adults would still be required to travel to the consulate abroad for an immigrant visa interview. However, eliminating the three-year, ten-year, and permanent bars for unlawful presence would greatly reduce the amount of time that family members are separated. It would also greatly improve the chances of the immigrant visa being approved, since no waiver would be needed for unlawful presence. Other grounds of inadmissibility, such as criminal and national security, would still apply, ensuring that public safety concerns remain a priority. Maintaining the touchback requirement would be a way to impose some punishment for immigrants who choose to enter the U.S. without inspection, while eliminating the bars would minimize harm to family units.

1. Implementation would be Seamless and Cost-Effective

Under this solution, the basic structure currently in place would not change. Applicants who cannot adjust their status would apply for an immigrant visa through consular processing. All applicants would need to be found admissible to the U.S., except that unlawful presence would no longer be a ground of inadmissibility. All of the other bars, such as those for fraud, terrorist activity, and criminal convictions, would remain

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119. The spouses and children of U.S. citizens, as well as the parents of adult U.S. citizens aged twenty-one and over, are considered immediate family members. MONGER & RYTINA, *supra* note 5, at 1–2.

120. *See supra* note 77.

in place. Most of the officers currently adjudicating waivers could be reassigned to domestic USCIS offices to adjudicate the additional adjustment of status applications discussed above.

## 2. Balances Need to Deter Illegal Entry with Desire to Ameliorate Harshness of the Current Policy

Without the unlawful presence bars, more eligible undocumented immigrants would be encouraged to apply for LPR status, and more applicants would be approved. Allowing more qualifying undocumented immigrants to become LPRs provides many benefits to families and the country.<sup>121</sup> However, this option would be slightly less beneficial to families since there would be some separation period to attend the immigrant visa interview. In some cases, this could result in a lost job or other financial and emotional effects. There are also safety concerns for the traveling family member, especially when traveling to Ciudad Juarez.<sup>122</sup> However, it is only fair that there be some punishment imposed for entering the country illegally. In addition, most families would likely accept these trade-offs for the undocumented family member gaining LPR status, which allows them to legally live and work in the U.S. permanently.<sup>123</sup>

However, eliminating the unlawful presence bars would not address the due process and fairness concerns that would be rectified if a policy allowing for adjustment of status were adopted. Significantly, there is no judicial review of consular officers' decisions.<sup>124</sup> Therefore, there is still the risk that a bureaucrat will improperly apply the law or make an unfair decision that cannot be challenged in court. Furthermore, applicants who receive bad advice from a notario or attorney could still end up in a prolonged separation, although this would presumably be a less frequent occurrence without the unlawful presence bars.

Notwithstanding these drawbacks, eliminating the unlawful presence bars would be a huge improvement over the current law. Countless families would benefit from reunification rather than separation. Recall the example of Manuel and Rita from Part I. Instead of being separated for a decade or relocating the family to Mexico, they would be able to continue building a life together in the U.S. While this solution is not perfect, it would swing the pendulum of U.S. immigration policy

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121. *See supra* notes 109–113 and accompanying text.

122. *See supra* notes 100–102 and accompanying text.

123. MONGER & RYTINA, *supra* note 5, at 1.

124. Zas, *supra* note 47, at 586.

towards a more acceptable balance between family unity and maintaining accountability for those who choose to break the law.

### 3. Deterrent Effect of this Harsh Policy is Illusory

The main argument in favor of the unlawful presence bars is that the law was not harsh enough on illegal entry, and thus no one took it seriously.<sup>125</sup> Putting the bars in place acts, in theory, as a deterrent to immigrants entering without inspection.<sup>126</sup> However, this rationale has not borne out in reality. After the bars were created in 1996, illegal immigration continued to grow rapidly.<sup>127</sup> Studies show that the rate of illegal immigration tends to mirror ups and downs in the economy to a greater extent than other factors such as increased enforcement.<sup>128</sup> Also, there appears to be a general lack of awareness about the unlawful presence bars, borne out in the many applicants that arrive at their interviews unaware of the bars' existence.<sup>129</sup> Therefore, the bars have been ineffective in achieving their original purpose of deterring illegal immigration.

Another argument is that eliminating the bars, like allowing adjustment of status, rewards lawbreakers instead of punishing them. Yet, this argument would be much more difficult to justify under this proposal since the applicant would have to touchback in his home country. The true irony of this argument is that the unlawful presence bars do not actually punish most immigrants that enter the U.S. illegally. It punishes only those who come forward to apply for an immigrant visa through a qualifying family member. Furthermore, the bars punish not only the undocumented person, but his U.S. citizen or LPR family members as well. In light of these facts, it is clear that the proposed solution makes more sense than the current system from both public policy and moral standpoints.

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125. See Siegel, *supra* note 96, at 298–99.

126. *Id.*

127. See PASSEL & COHN, *A Portrait of Unauthorized Immigrants*, *supra* note 55, at i (stating that “the undocumented immigrant population grew rapidly from 1990 to 2006”).

128. *Id.*

129. See, e.g., Berestein, *supra* note 72, at A1; as further anecdotal evidence, the author has encountered scores of cases while working in an immigration law firm in which applicants were denied visas due to lack of awareness of, or preparedness for, the unlawful presence bars.

## VII. CONCLUSION

Immigrants have played an important role in this country's history and are a vital part of the fabric of U.S. society. Traditionally, our society encourages and promotes the value of family unity. Yet during the 1990s, immigration policy began to shift course by imposing harsh restrictions and penalties on immigrants and their families. Clearly, IIRAIRA and its policies of punishment create devastating results for many families. According to Dede Howell, director of immigrant services at Catholic Charities in San Diego, IIRAIRA "has been one of the most onerous pieces of legislation ever for family unity."<sup>130</sup> It is equally clear that these policies have failed in their objective to discourage illegal immigration.<sup>131</sup> Furthermore, when Congress passed IIRAIRA, it could not have foreseen the extent to which applicants for consular processing would be taken advantage of by notarios and targeted for crime. More than a decade of hindsight has shown that it is time for a change in policy.

There is an urgent need for comprehensive immigration reform to address illegal immigration and the multitude of other problems in the broken immigration system. Whether there is the political will in this country to pass comprehensive immigration reform remains unclear. Inclusion of the solution proposed in this Comment in a comprehensive bill would be ideal; however, I believe that the problem of family separation is also serious enough for separate and immediate Congressional action.

The solution proposed in this Comment attempts to strike a fair and more nuanced balance between family unity and punishment. Undocumented immigrants should be punished in a way that is proportionate to the seriousness of the immigration offense while taking into account their degree of culpability. At the same time, family units should be allowed to remain intact. The infrastructure is already in place to adjudicate some additional adjustment of status applications here in the U.S. and to continue issuing immigrant visas without the bars for unlawful presence. After fifteen years of a failed policy, it is time to change the law in order to keep immigrant families together instead of tearing them apart. The question becomes whether lawmakers will continue to view immigration policy in a detached, reactionary manner, as we saw under IIRAIRA, or in a more humanitarian, compassionate

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130. *Id.* at A1.

131. *See supra* notes 126–129 and accompanying text.

way. Adopting the proposed solution would go a long way towards keeping families together, as well as restoring and preserving the American Dream that has brought so many immigrants to America's shores.

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