AN ANALYSIS OF THE
Secure America and Orderly Immigration Act of 2005

July 8, 2005

INTRODUCTION

On May 12, 2005, Senators John McCain (R-AZ) and Ted Kennedy (D-MA) introduced landmark comprehensive immigration reform legislation that can best be described as an intelligent and courageous effort to address our nation's outdated immigration laws and policies. At the same time, Representatives Jim Kolbe (R-AZ), Jeff Flake (R-AZ), and Luis Gutierrez (D-IL) introduced identical legislation in the House of Representatives. This proposal, the Secure America and Orderly Immigration Act of 2005 (SAOIA), has subsequently attracted a number of important Democratic and Republican cosponsors in Congress.

The National Immigration Law Center supports SAOIA despite significant reservations about some of its features. We do so because SAOIA represents a ray of hope for millions of immigrants currently in the United States who live and work in the shadows, for millions of others whose family petitions are lost in backlogs and have been separated from family members, and for all other Americans who stand to benefit from a more rational immigration system.

Increased migration affects not only the United States; it is a worldwide phenomenon, the result of the globalized economy, ease of travel, and economic and political instability in many parts of the world. Like all major social, political, and economic phenomena, immigration has both beneficial and harmful effects. The challenge for policymakers is to maximize the benefits and to minimize the harms. Our current outdated system does just the opposite. It yields deaths and exploitation, feeds criminal smuggling rings, isolates immigrants from the rest of society, and fuels outrage and support for extreme measures by large numbers of ordinary citizens who are encouraged to blame immigrants for many of society's woes.

The promise of SAOIA is that it can begin to reverse these awful trends. Even if it is not enacted, it provides a concrete and realistic framework that can help us to envision the transition to a far better system. It gives immigrant communities and pro-immigrant organizations something tangible to rally around. And it puts anti-immigrant forces on the defensive by exposing their greatest weakness: they do not have a tenable vision for America's future that maintains our traditions of freedom, democracy, and equality. Fear, hatred, and division may be strong motivators, but they are not a plan.

SAOIA represents a bold compromise among political opposites in the name of realism, and we are grateful to the sponsors and their staffs for their willingness to take chances in the name of forward movement. At the same time, there are features of SAOIA that if enacted would severely undermine the goals of comprehensive immigration reform. Of particular note, SAOIA would not sufficiently protect workers affected by the new immigration reality, whether they are U.S.-born, permanent resident immigrants, or the new temporary class of immigrant workers who SAOIA's supporters hope and expect would replace much of the current undocumented flow.

This is a significant flaw because it would leave in place some of the incentives and circumstances that have brought us to the current situation. For example, under SAOIA, as under the current system, bad-apple employers would have an economic incentive to recruit, hire, and exploit undocumented workers because undocumented workers would continue to have fewer remedies than others and would be less able to protect themselves or fellow workers from abusive practices. In contrast, if it is to endure, any immigration reform must strive to prevent employers from manipulating the immigration system to obtain

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leverage over immigrant workers. This can be accomplished only by eliminating—or at least minimizing—distinctions in the rights and remedies available to workers with different immigration statuses.

History teaches that temporary immigrant workers are extraordinarily vulnerable to such employer manipulation, and some argue that they are even more vulnerable than undocumented workers. Therefore, any work-based temporary immigration system must be carefully scrutinized. The one envisioned by SAOIA is innovative, but, as discussed below, on balance it would likely leave the new temporary workers in a vulnerable situation.

A final critical feature of SAOIA that does not appear to have been sufficiently thought through is the new electronic employment verification system it would create. Though this new system has received little attention, it would effect a significant change in the relationship between employers and workers and between the government and all Americans. It would be massive, costly, and likely unworkable. It raises important privacy questions. And it would very likely lead to discrimination against immigrant workers—or those perceived by employers to be immigrants.

What follows, then, is a summary of the bill, accompanied by NILC's analysis of the bill's context and its likely impact on low-income immigrants and their family members. In particular, we summarize and analyze (1) the new earned legalization program; (2) the new temporary worker program; (3) the new electronic employment verification system; (4) amendments to the antidiscrimination provisions of the Immigration and Naturalization Act; (5) the improved family reunification system; (6) measures to increase border enforcement; (7) restrictions on who can provide legal representation to beneficiaries of SAOIA; (8) civics integration; and (9) access to health care.[1]

The analysis is intended to clear up some misconceptions about the content of SAOIA, to provide advocates with tools for discussion of its provisions, and to better equip them to educate policymakers on the principles that must be incorporated into comprehensive immigration reform if it is to be effective. More broadly, we hope it will help all who care about these issues, as well as policymakers, to think through the implications of the choices facing our nation as we comprehensively reform our immigration system.

[1] A basic summary of SAOIA in the form of a chart is also available at www.nilc.org.

SAOIA SUMMARY AND ANALYSIS

1. Earned Legalization Program (H-5B Visa)

1.a. H-5B Program: Review of Major Features

SAOIA would provide an avenue for undocumented immigrants who are currently in the U.S. to obtain six years of temporary legal status, and ultimately permanent residence. To qualify for temporary status (an H-5B visa), immigrants must: (1) have been working in the U.S. on May 12, 2005, in a status considered "not legally present"; (2) have complied with tax requirements; (3) not be barred from legalizing their status on criminal or security grounds; and (4) understand or be studying English, U.S. civics and history. Individuals must provide evidence that they were working in the U.S., which could be official government documents as well as documentation from day labor centers, unions, or other worker advocacy organizations. Applicants also must pay a $1,000 penalty in addition to the application fees. The spouse and children of a qualifying worker would also be able obtain legal status or to enter the U.S. legally to join the worker. A special provision also would permit students and minors to qualify for the H-5B visa by showing that they have attended an institution of higher education or a secondary school instead of having to prove that they have a history of employment in the U.S.

Under the bill, individuals granted the temporary H-5B status lose any rights to adjust to permanent status under another immigration provision until the end of the six-year period. This restriction appears intended to prevent the bill from unduly advantaging currently undocumented immigrants over those who have waited outside the U.S. for a visa to become available through the backlogged visa processing system. After the six-year period, individuals who have worked (or studied) continuously and otherwise meet the requirements of the bill would be able to adjust to lawful permanent resident (LPR) status after payment of a second $1,000 fine and additional application fees.

In order to avoid procedural hoops and expenses that would ultimately be unnecessary, as well as to ensure that eligible immigrants are able to seek legalization of their status, the bill includes provisions to allow immigrants in removal proceedings to apply for H-5B status, and to allow those with final orders to apply without having to move to reopen their cases. For the same reasons, the bill also exempts undocumented immigrants applying for H-5B status from bars for prior immigration violations that would otherwise disqualify them, such as the bars for failing to comply with a voluntary departure order and for reinstatement of removal. To ensure fairness in the implementation of the program, the bill provides for appellate and judicial review of determinations regarding H-5B status and adjustment to LPR status.

Finally, the bill provides those in the temporary H-5B status with employment authorization and permission to travel abroad. They may not be detained by the government or removed from the U.S., pending final adjudication of the application, unless the applicant becomes ineligible for adjustment as a result of misconduct or criminal conviction.

1.b. H-5B Program: Analysis

The SAOIA's legalization provisions are calculated to ensure that undocumented workers who meet the law's basic requirements—that they work, pay taxes, are not barred on criminal or security grounds, and understand or are studying English and U.S. civics and history—will be able to obtain legal status. The inclusion of spouses and children, and the education alternative to the employment requirement, will encourage immigrants to complete their education and will reduce future undocumented immigration of individuals seeking to rejoin their families. The range of documents that could be used to establish that the worker was employed in the U.S. before May 12, 2005, is sufficiently broad that most low-wage workers should be able to meet this requirement. The bill also shields the employers of workers who apply for legal status from civil and criminal tax liability resulting from that employment in order to encourage their cooperation with the application process—although, as the provision is written, this shield broadly extends even to employers who refuse cooperation with their employees' applications. The bill's broad confidentiality protections address the natural fears that many undocumented workers have regarding submitting applications to immigration authorities.

Thus, the bill contains many features that appear well designed to ensure a broad legalization of eligible undocumented workers. However, four aspects of the bill that may limit its effectiveness should also be noted.

First, the requirement that applicants for temporary status establish that they were "not legally present" in the U.S. on May 12, 2005, may disqualify many immigrants in the workforce who currently have a temporary status but who reside here and do not intend to return to their home countries. Thus, depending upon how this requirement is interpreted, immigrants who on May 12, 2005, had temporary protected status (TPS), or who had a pending asylum application, may be ineligible for legalization even though many of them in the long term are part of the undocumented workforce.

Second, the bar that would prevent H-5B workers from pursuing other avenues to adjust to LPR status during the six-year period of temporary status appears unduly stringent. The apparent purpose of this bar—to counter any argument that the bill gives an advantage to undocumented workers over immigrants pursuing permanent residence from abroad via the visa processing system—is satisfied by the six-year period that H-5B workers must wait before they can adjust through the program. In cases in which after obtaining temporary status workers become eligible for adjustment through other channels—whether as the result of a family petition filed many years ago, or due to subsequent marriage to a U.S. citizen—requiring the worker to remain in temporary status would penalize families to no purpose.

A third concern is that the substantial fines for applying for adjustment to temporary and then to permanent status are in addition to fees that likely also will be considerable. These fees would pose a significant obstacle that would delay, if not prevent, many immigrants from applying, even though they would otherwise qualify.

Finally, the bill needs stronger labor protections. The potential legalization of millions of immigrants who are currently undocumented and working in the most substandard and dangerous conditions will immediately help bring these workers out of the shadows. This bill has the great potential of leveling the playing field for many of these workers, who will be more empowered to come forward to complain of any labor

violations once they have work authorization and valid Social Security numbers (SSNs). However, obtaining legal status alone is not a panacea for the labor violations immigrant workers suffer. The bill is lacking many critical labor protections for both documented and undocumented workers that should be an essential component of comprehensive immigration reform.

While the bill provides employers immunity under tax and immigration laws for having employed a worker who was previously undocumented, workers do not enjoy comparable protections. Specifically, workers are not protected from being terminated from their jobs or from losing all seniority and benefits when they come forward to correct their records with their employers. This is a common practice now, which causes workers who legalize their status to continue to work under false SSNs for fear of being fired. This, in turn, exacerbates the inaccuracies in the SSA's records and results in those workers' earnings being posted to the Earnings Suspense File (ESF)—an unacceptable, even if unintended, probable consequence of any legalization system that fails to provide protections against this practice.

Importantly, the bill does not clarify the conflicts among current immigration, employment, and labor laws identified by the Supreme Court in its *Hoffman Plastic Compounds, Inc. v. NLRB* decision in March 2002. In *Hoffman*, the Court held that undocumented workers do not have a right to back pay under the National Labor Relations Act (NLRA) because they do not have a right to work lawfully in the U.S. Subsequently, employers have tried to expand the *Hoffman* decision to either nullify or reduce the protections available to undocumented immigrant workers under all other employment statutes, including discrimination, wage and hour, and workers' compensation laws. In essence, the *Hoffman* decision has become yet another barrier for immigrant plaintiffs trying to access the judicial system and avail themselves of their rights under employment laws, and even under case law in negligence and other tort cases. Without clarifying that all workers have the same rights and remedies despite their immigration status, this bill leaves in place the incentive for employers to seek out the tens of thousands of immigrants who will not qualify under the legalization program—or any other future undocumented workers—to exploit them.

Nor does the bill codify the internal guidance that ICE agents must follow when conducting worksite raids or audits in the midst of a labor dispute. It is common practice for employers to bust union organizing efforts or to retaliate against workers who are courageous enough to come forward and complain of labor violations by reporting them to immigration authorities. Finally, the bill does not provide undocumented workers with the much-needed whistleblower status when they have been retaliated against and placed in removal proceedings. Providing these workers with work authorization while they assist the government in the prosecution of ruthless employers or while they pursue their retaliation claims against these defendants will serve as a deterrent to other such employers who are tempted to abuse the immigration system to gain an unfair advantage over employers who play by the rules.

2. New Temporary Worker Program (H-5A Visa)

2.a. H-5A Program: Review of Major Features

SAOIA creates a new temporary worker program for individuals who are currently outside of the U.S. and are interested in entering the U.S. to work on a temporary basis. In order to qualify for the new "independent worker" (H-5A) visa, foreign workers must provide the consular office in their home country evidence of a job offer in the U.S. and show that they are capable of performing the work qualifying them for the visa. The H-5A visa will be available for workers to fill any job, except in the agricultural or high-skilled work industries, that U.S. workers are unwilling to fill. Before employers can seek to employ an H-5A worker, they must attest that they have attempted to recruit U.S. workers for the position they are seeking to fill. One of the most important features of this visa is full portability, meaning that H-5A temporary workers would not be tied to any particular employer and would be free to change employers at any time while maintaining their H-5A visa status.

This visa would be valid for three years, so long as the worker remains employed, and could be renewed for one additional three-year period. During the duration of the visa's validity, the worker would be authorized to work for any U.S. employer. H-5A visa–holders would be permitted to travel outside the U.S. and would be able to return with the same visa if its term had not ex-

pired. H-5A visa holders who are unemployed for more than 45 consecutive days would fall out of status and would have to return to their home countries or risk deportation.

The bill builds some basic worker protections into the H-5A program. For instance, it specifically provides that H-5A workers be treated as "employees" under the Fair Labor Standards Act (FLSA), and not as independent contractors. It also establishes that H-5A workers are entitled to the same wages, benefits, and working conditions as U.S. workers similarly employed in the same occupation and the same place of employment. In addition to addressing the rights of H-5A workers and the responsibilities of their employers, the bill also sets rules for foreign labor contractors who recruit H-5A workers.

Significantly, the bill creates two ways in which H-5A workers can adjust to LPR status. H-5A workers will be eligible to adjust to LPR status through a petition by the employer at any time during the period of the visa's validity. Workers also will be able to self-petition for LPR status after maintaining their H-5A status for a cumulative period of four years.

2.b. H-5A Program: Analysis

This new temporary worker visa program would enable a wider range of migrants with job offers to enter the U.S. lawfully, thereby likely reducing the number of workers who come to the U.S. unlawfully to seek work,[2] and the number of employers who unlawfully recruit such workers. It is critically important that this objective be achieved while also protecting temporary workers from exploitation and preventing employers from using the H-5A program as a means of displacing U.S. workers. To this end, the bill does provide some important safeguards.

One safeguard is to make the visas portable, in order to ensure that workers do not have to choose between keeping their visas and leaving an exploitative workplace. However, this is a limited protection, since it presumes that employers and workers have equal bargaining power and that workers will be able to exercise their rights freely. The reality is quite different for foreign workers, many of whom face language and cultural barriers and are unaware of their workplace rights.

Another critical component of this temporary worker program is that it provides a path to legalization for H-5A workers, a provision that is both humane and practical. It is anticipated that a majority of the temporary workers will return to their country of origin, but those who set down roots in the U.S. will not be forced to break the law in order to stay and continue working and paying taxes.

The proposed H-5A program, however, also contains provisions that may undermine the objectives it seeks to meet. The required job offer, for example, may be difficult to obtain and may result in unscrupulous employers, subcontractors, or recruiters promising jobs to less-skilled workers with all sorts of strings attached, including transportation fees to jobs in the U.S. that are likely to be characterized by substandard working conditions. This is of particular concern because SAOIA does not require employers to offer the prevailing wage, which means that H-5A workers will be hired at the lowest possible wages, thereby threatening to drive down wages for U.S. workers. Such a result should be unacceptable to all workers. Another consequence may be that only highly skilled workers—who may have better access to job opportunities and the listing of job offers—may be more able than less skilled workers to benefit from the program, a result that would undermine the goal of replacing the undocumented flow with a legal one. In such a case, the initial limit of 400,000 visas for the first fiscal year and subsequent increases may be insufficient to accommodate the future flow of lower-skilled nonimmigrant workers.

In addition, the restriction that H-5A workers cannot be unemployed for more than 45 consecutive days is an unrealistic one that will result in those workers being pushed into the underground economy, undermining the goal of the temporary worker program. At the very least, the period during which a person may be unemployed should be extended to 90 consecutive days to allow workers ample time to seek new employment,

[2] Experts argue that the increases in border enforcement of the last two decades have actually led to increased net immigration, because the previous circular flow between the U.S. and Mexico has been disrupted. Undocumented workers who previously would have returned to Mexico have been trapped in the U.S. because of the difficulties of crossing the border, and the increased length of their stays in the U.S. has meant that more of their spouses and children have come to join them. The goal of a temporary worker program is to reestablish the circularity of the flow and also to substitute a predominantly legal flow for the current undocumented one.

particularly if they lost their jobs due to unfair employment practices by their last employer, who may "blacklist" temporary workers and make it even more difficult for them to find other jobs. In addition, there must be reasonable exemptions from any unemployment prohibition so that workers who are unemployed due to an illness (including a work-related injury), pregnancy, disability, or other verifiable reason are not at risk of losing their H-5A visa status.

While the bill provides for visa portability, H-5A workers whose employers may immediately file a petition for adjustment of status have a distinct advantage over workers who must wait four years to self-petition. Workers with such employers will have a much quicker route to permanent legal status and the ability to bring their families to the U.S. legally. While allowing employers to sponsor H-5A workers at any point provides a benefit to workers, it does present a danger that unscrupulous employers could pay the fees up front but deduct the "fees" from the temporary workers' wages, often with interest and other strings attached, possibly resulting in violation of minimum wage laws. This possibility highlights the importance of having strong worker protections in the bill.

Moreover, the basic worker protections the bill intends to provide are severely undermined by its lack of stronger provisions to enforce the protections. Specifically, the bill places the burden on an H-5A worker who has a complaint to prove to the U.S. Dept. of Labor (DOL) that there is "reasonable cause" to assert the investigative authority given to it by SAOIA before the DOL can even initiate an investigation. This administrative remedy is ineffective, since workers rely on governmental agencies to conduct whatever investigation is needed to reveal whether an employer has violated the law. The lack of enforcement mechanisms in the bill places the worker at a serious disadvantage, especially since the bill does not provide H-5A workers access to Legal Aid lawyers funded by the Legal Services Corporation, who would often be the only attorneys available to assist workers with such claims.

Finally, from a practical perspective, workers may find the fees required for the H-5A visa prohibitively expensive. The $500 application fee, costs for the medical exam and security checks, and the $1,500 fine for a waiver potentially add up to thousands of dollars.

3. New Employment Eligibility Confirmation System (EECS)

3.a. EECS: Review of Major Features

The bill requires the commissioner of the Social Security Administration (SSA), in consultation with the Dept. of Homeland Security (DHS), to establish an Employment Eligibility Confirmation System (EECS) that allows employers who have hired individuals under the temporary worker (H-5A visa) program to electronically verify their identity and employment eligibility through machine-readable documents. To the maximum extent practicable, SSA and DHS must implement an interim system to confirm employment eligibility before implementation of the EECS. SSA must also establish by regulation a process to require employers to conduct annual reverification of the employment eligibility of all individuals, using machine-readable documents or telephone or electronic communication. The bill requires that the EECS eventually replace the Form I-9 employment eligibility verification process as the procedure to be used to verify the employment eligibility of all workers.

The EECS is to provide a confirmation or tentative nonconfirmation of the individual's identity and employment eligibility no later than one working day after the initial inquiry made by the employer. SSA, in consultation with DHS, must establish a secondary verification process for cases of tentative nonconfirmations; however, the employer must make a secondary verification inquiry within 10 days after receiving a tentative nonconfirmation. If an employee chooses to contest a secondary nonconfirmation, the employer shall provide the employee with a referral letter and instruct the employee to resolve the discrepancy within 10 working days with DHS and/or SSA. An individual's failure to contest a secondary nonconfirmation cannot be used as proof to the employer that the worker is undocumented.

The EECS must be designed to prevent discrimination based on citizenship status and national origin, and individuals must be allowed to view their own records and contact the appropriate agency to correct any errors through an expedited process established by SSA and DHS. Under the bill, it is an unlawful immigration-related employment practice (1) for employers or other third parties to use the EECS selectively or without authorization; (2) to use the EECS prior to an offer of employment; (3) to use the EECS to ex-

clude certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required; (4) to use the EECS to deny certain employment benefits, otherwise interfere with the labor rights of employees, or any other unlawful employment practice; and (5) to take adverse action against any person, including terminating or suspending an employee who has received a tentative nonconfirmation. The data collected by the EECS includes the following: country of origin, immigration status, employment eligibility, occupation, metropolitan area of employment, annual compensation paid, period of employment eligibility, employment commencement date, and employment termination date. The bill requires SSA and DHS to issue regulations protecting information in the database from unauthorized disclosure.

The bill also requires employers to (1) notify prospective employees that the EECS may be used for immigration enforcement purposes; (2) verify the identification and employment authorization status for newly hired individuals not later than three days after hire; (3) provide the occupation, statistical area of employment, and annual compensation for each employee hired; (4) retain the code received indicating confirmation or tentative nonconfirmation; and (5) provide a copy of the employment verification receipt to the employee. A person or entity may demonstrate good faith compliance with the requirements regarding the employment of individuals as an affirmative defense that the person or entity has not violated the requirements. A good faith defense does not apply if a person or entity engages in any of the unlawful immigration-related employment practices described above.

The bill requires the U.S. comptroller general to submit a report to the House and Senate Judiciary Committees not later than three months after the second and third year that the EECS is in effect. The report must include: (1) an assessment of the impact of the EECS on the employment of unauthorized workers; (2) an assessment of the accuracy of the database maintained by SSA and DHS, and timeliness and accuracy of responses from DHS and SSA to employers; (3) an assessment of the privacy, confidentiality and security of the EECS; (4) an assessment of whether the EECS is being implemented in a nondiscriminatory manner; and (5) recommendations on whether or not the EECS should be modified.

3.b. EECS: Analysis

The proposed EECS represents the first time all employers would be required to use an electronic system to verify the work authorization of their workers. While the EECS would initially be used only for H-5A workers, the goal is for it to eventually be used for all workers. In addition to replacing the I-9 system, the EECS would also replace the Basic Pilot program, which currently allows employers to electronically verify a worker's employment eligibility by directly checking the records maintained by DHS and SSA. It is unclear if the EECS will replace SSA verification programs such as the Social Security Number Verification System, Employee Verification Service, and SSA "no-match" letters. However, the bill does transfer the authority for verifying workers' employment eligibility status from DHS to SSA under the EECS. In reality, it is highly doubtful that either DHS or SSA would have the capacity in the foreseeable future to develop and operate the mandatory national system the bill would establish.

While the bill incorporates important protections, the use of the EECS, even just within the H-5A program, presents major potential problems. Based on advocates' experience with existing employment eligibility verification systems, the period of 10 working days allowed for workers to correct any discrepancies is clearly insufficient. A result will be that workers will lose days of work, and thus possibly their jobs, because they will be unable to rectify the agencies' errors within the prescribed deadline. Such a policy also will have an adverse affect on workers in rural areas who must travel far in order to personally visit a DHS or SSA office to clear up a discrepancy. Low-wage workers will likely need legal assistance to address such problems as well. Since employers will initially only have to verify the status of those with H-5A visas, there is a danger that employers will verify the employment authorization through this new EECS of anyone who is "foreign-sounding" or "foreign-looking." This is likely to result in widespread discrimination such as that which occurred after implementation of the I-9 system under the Immigration Reform and Control Act of 1986, according to reports by the General Accounting Office and other sources.

The requirement that the new EECS eventually annually reverify the employment eligibility of every worker is likely to have a substantial disparate impact on immigrant workers. The Basic

Pilot program has had major problems with the accuracy of DHS and SSA databases, protecting third-party use of the program, and employer misuse of the program.[3] Specifically, employers have used reverification of employment eligibility as a means to retaliate against workers who complain about labor conditions. This situation would likely be exacerbated by a system that requires annual reverification, and especially one in which workers have no means to seek remedies for retaliation, since the bill lacks such protections. It is unclear from the bill if employers will also have to reverify employment eligibility when an immigrant's work authorization expires—in addition to the annual reverification requirement. Because the employer will also have to verify the employment eligibility of all other non–H-5A workers, it is essential that the reverification requirements for all workers be set forth in the bill—including situations when employers may *not* reverify an immigrant's status (e.g., such as when they receive an SSA no-match letter regarding a particular employee). The danger is that overly cautious employers will reverify all "foreign" workers to make sure that they are complying with the law.

As SAOIA is currently written, all employers will eventually be required to use machine-readable equipment to electronically verify the identity and employment eligibility of all new workers through machine-readable documents that contain biometrics data. In addition to compiling information about a worker's identity, country of origin, and immigration status, the new EECS will maintain a large quantity of new information that will eventually be kept about all workers in the U.S., including occupation, annual wages paid, their period of employment eligibility, the date when workers begin a job, and the date when employment terminates. This information will be warehoused in a massive database that establishes the framework for a national ID system, raising grave civil liberties and civil rights concerns.

[3] An independent evaluation of the Basic Pilot program in 2002 concluded that it was not ready for larger-scale implementation due to the inaccuracies and outdated information in the government databases. See *INS Basic Pilot Evaluation Summary Report*, U.S. Dept. of Justice, Immigration and Naturalization Service, Jan. 29, 2002.

The SSA also has had problems with the accuracy of its database, as demonstrated by the large number of wages posted to the Earnings Suspense File.

The Basic Pilot evaluation recommended against a national expansion of the program, not only because of the inaccuracies in the databases on which the program is based, but also because of practical difficulties in its operation and the enormous costs that would be required to fix these problems and expand the system nationally. Yet the EECS proposed by the bill requires the development of a national system requiring the collection and tracking of substantially more information than the Basic Pilot. Moreover, while the evaluation addressed only the cost of a voluntary expansion of the Basic Pilot, the EECS would not only be a national program, but it also would be mandatory for all employers in the country—and not just those that opt to adopt it. Considering the massive costs and other difficulties involved in making such a system mandatory at the national level, it is likely that the EECS would not or could not be expanded to all workers in the foreseeable future. The result would be an electronic employment eligibility verification system applicable only to immigrants, resulting in massive discrimination.

4. Antidiscrimination Protections

4.a. Antidiscrimination: Review of Major Features

SAOIA increases the fines employers are subjected to for engaging in unfair immigration-related employment practices such as national origin and citizenship status discrimination, document abuse, and retaliation, as follows: (1) civil penalties may range from $500 to $4,000 for each individual discriminated against; (2) employers who have previously violated the law once are subject to a civil penalty ranging from $4,000 to $10,000 for each individual discriminated against; and (3) employers who have previously violated the law more than once are subject to a civil penalty ranging from $6,000 to $20,000 for each individual discriminated against.

The bill also expands the types of immigrants who are protected from citizenship status discrimination to include all LPRs, no longer excluding those who fail to apply for naturalization within six months of becoming eligible to apply or who fail to pursue pending naturalization applications. The bill retains the current law's protection for temporary residents under the Special Agricultural Worker and legalization programs of the

Immigration Reform and Control Act of 1986 (IRCA), refugees, and asylees, and it also extends protected status to workers granted the new H-5A or H-5B status.

4.b. Antidiscrimination: Analysis

Because even documented immigrant workers continue to suffer employment discrimination, the Immigration and Nationality Act's (INA's) antidiscrimination provisions must be strengthened. SAOIA takes an important step in that direction by increasing fines and widening the range of individuals who are covered by the anti–citizenship discrimination provision of INA section 274B. As noted above, the bill expands the definition of "protected individuals" who can file a claim of citizenship status to include long-term LPRs and workers granted the new H-5A or H-5B status.

This section could be further strengthened by allowing all employment-authorized individuals to file claims under section 274B, which would be consistent with other types of claims under the antidiscrimination provisions. In addition, documented immigrants who suffer citizenship status discrimination or document abuse (when employers require employees to present specific documents or more than are required under the I-9 process)[4] during the course of their employment should be able to file a claim. However, current law only protects individuals in the recruiting, hiring and firing stages of employment. The law must be amended to clarify that individuals are protected from discrimination during the "terms and conditions" of their work, as is currently the case with other civil rights laws.

The ability of the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), created by IRCA, to enforce these antidiscrimination provisions also must be strengthened. In addition to increasing the agency's budget and broadening its jurisdiction, Congress should, at a minimum, improve OSC's ability to conduct independent investigations. OSC should be able to file a complaint based on its findings within two years of commencing such an investigation rather than being restricted to filing such complaints only within the short and impractical 180-day period that the agency currently has. Current law has resulted in relatively few complaints being filed.

5. Family Unification

5.a. Family Unification: Review of Major Features

SAOIA includes provisions designed to reduce backlogs in the family and employment immigration process. It removes some categories of immigrants from numerical limitations that currently require them to wait for long periods before they can apply for adjustment to LPR status. It also redistributes the way permanent resident visas are allocated so that more visas are available to categories that are backlogged, thus reducing the number of years that these immigrants must wait before they can immigrate.

The bill would broaden the definition of "immediate relatives" of U.S. citizens—individuals who can immigrate without being subject to the backlogs of the preference system—to include children seeking to immigrate along with ("accompanying or following to join") these relatives. This eliminates the need for these children to have separate visa petitions filed on their behalf.

In addition, under the bill "immediate relatives" would no longer be deducted from the overall limit of 480,000 family-based immigrants, so that many more visas would be available for other family-based immigrants. The bill also allows family-based visas that were authorized but not used in prior years to be added to this limit and eliminates technical deductions from the cap contained in the current statute.

The bill would allocate ten percent of family preference visas to the first preference, for unmarried sons and daughters of U.S. citizens, making at least 48,000 visas available per year, in place of the first preference's current limit of 23,400. In precisely the same way it would raise the number of visas available for the third preference, for married sons and daughters of U.S. citizens. The number of visas available to the second preference (spouses, children, and unmarried sons and daughters of LPRs) and to the fourth preference (brothers and sisters of U.S. citizens) would also

[4] IRCA established procedures that employers must follow to verify that employees are authorized to work in the United States. Under IRCA, employers are required to verify the identity and employment eligibility of all employees hired after Nov. 6, 1986, and to complete an employment eligibility verification form (Form I-9) for each new employee hired.

be raised. The bill also would raise the limit of visas available to any one particular country from 7 percent to 10 percent.

The bill also would raise the annual worldwide limit on employment-based immigrant visas from the current 140,000 to 290,000 and redistribute how these are allocated among preferences in order to eliminate backlogs. For example, the category of "other workers," which currently is allocated 10,000 visas per year as a subcategory of the third employment preference "skilled workers, professionals, and other workers," is made a new fifth preference category and allocated 87,000 visas per year. "Special immigrants," the current fourth preference, which includes an assortment of categories of immigrants, including religious workers, employees of the U.S. government abroad, and juveniles dependent on the state, is removed from the preference system so that visas issued to these immigrants would no longer be deducted from the worldwide limit.

The bill also allows surviving beneficiaries of adjustment applications to have their applications adjudicated despite the death of the petitioner, making this relief available for family and employment preference categories.

The bill relaxes the financial requirements for sponsors of immigrants, in those cases where a binding affidavit of support (Form I-864) is required. The bill would require that the sponsor be able to support the immigrant at 100 percent of federal poverty guidelines, rather than the current 125 percent. The bill also would expand the waiver for fraud or misrepresentation and make this waiver available to noncitizens who pay a $2,000 fine. It also amends the unlawful presence bars by raising the age for which a noncitizen's unlawful presence is not counted from age 18 to age 21 and by adding a waiver for beneficiaries of visa petitions filed on or before the law's date of enactment.

5.b. Family Unification: Analysis

The changes SAOIA would make to the family and employment immigration system reduce or eliminate many of the causes of the large backlogs that currently exist. It is likely that the net result of these changes would be to substantially reduce current backlogs, which are a major problem with the current immigration system. Just a few examples serve to illustrate the complete inability of the current system to unite families: In July 2005, immigrant visas were not available to Mexican adult sons and daughters of U.S. citizens who submitted visa petitions after Jan. 1983, nor were visas available to Filipino brothers and sisters of U.S. citizens who submitted visa petitions after Jan. 1983. By failing to provide a lawful means to unite families within a reasonable period of time, the current family immigration system contributes to undocumented immigration.

6. Border Enforcement

6.a. Border Enforcement: Review of Major Features

SAOIA requires DHS to develop and implement a comprehensive National Strategy for Border Security. The strategy must include a plan for security enforcement and border lands management that includes coordination among federal, state, regional, local, and tribal authorities, strategic interior enforcement coordination plans, and strategic enforcement coordination plans with overseas personnel of DHS and the Dept. of State to end human smuggling and trafficking activities.

The bill also authorizes the DHS secretary to establish a Border Security Advisory Committee to advise and make recommendations to the secretary. The advisory committee is to be comprised of representatives of border states, local law enforcement agencies, community officials, tribal authorities, and other interested parties, representing "a broad cross section of perspectives."

The bill would require DHS to develop and implement a program to fully integrate aerial surveillance technologies into border security. The program must include the use of a variety of aerial surveillance technologies, including unmanned aerial vehicles, in a variety of topographies and areas, including populated and unpopulated areas on or near the international border. The program is to evaluate the cost and effectiveness of various technologies in different circumstances, as well as liability, safety, and privacy concerns relating to their use.

The bill requires DHS to develop and implement a plan to improve coordination between the Bureau of Immigration and Customs Enforcement (ICE) and the Bureau of Customs and Border Protection (BCBP) in efforts to combat human smuggling. The plan is to include effective utilization of visas for victims of trafficking and other crimes, consideration of different investigatory

techniques, equipment and procedures to prevent, detect, and prosecute international money laundering, and joint measures with the Dept. of State to enhance intelligence sharing and cooperation with foreign governments.

SAOIA also provides for the Dept. of State, in coordination with the DHS secretary and the government of Mexico, to negotiate an agreement with Mexico for cooperation in the screening of third-country nationals using Mexico as a transit corridor for entry into the U.S., and for providing technical assistance to support stronger immigration control at the border with Mexico. The secretary of the Dept. of State is also, in coordination with the DHS secretary, the Canadian Dept. of Foreign Affairs, and the government of Mexico, directed to establish a program to assess the needs of the governments of Central American countries in maintaining their border security, and to use this assessment to determine the financial and technical support needed by Central American countries from Canada, Mexico, and the U.S. for this purpose. The bill directs the DHS secretary to "provide robust law enforcement assistance" to the Central American governments to increase their ability to dismantle human smuggling organizations and improve border control. The secretary of State is specifically directed to establish a program to provide needed equipment, vehicles, and technical assistance to patrol the international borders between Mexico and Guatemala and between Mexico and Belize.

SAOIA also requires the secretary of the Dept. of State to coordinate with the DHS secretary, the FBI director, the government of Mexico, and Central American government officials to establish a program and database "to track Central American gang activities, focusing on the identification of returning criminal deportees." The program would include developing a mechanism to notify governments before gang members are deported, providing support for the reintegration of these deportees, and developing an agreement for sharing all relevant information with appropriate agencies in Mexico and Central America.

6.b. Border Enforcement: Analysis

Gaining tighter control of the border is a central goal of the new legislation. In general, by requiring a comprehensive study of technologies, tactics, and approaches and the development of an integrated plan, SAOIA avoids pitfalls of past legislation that repeatedly imposed unrealistic and unachievable goals and deadlines, such as for "entry-exit" registration, resulting in heavy investment in inadequately tested technologies without the guidance of any overall, comprehensive plan.

An exception to this approach in the bill is the seemingly arbitrary requirement that aerial surveillance technology be an element of border enforcement. The requirement that privacy concerns be considered in the implementation of this technology, and the inclusion of a broad range of perspectives in the Border Security Advisory Committee, provide only limited means by which the particular interests of border communities may be considered. The bill needs to include an explicit requirement that the factors to be considered in developing and implementing a border enforcement strategy include consideration of implications for human and civil rights, particularly since tighter enforcement in recent years has led to human rights violations, including deaths, in border areas.

The bill's provisions concerning border enforcement along the southern border of Mexico and the borders of Central American countries lack any explicit guarantee that this enforcement ensure respect for human rights and international law. The legislation's failure to ensure migrants' rights to seek asylum as well as refuge from torture or conflict is particularly troubling. Similarly, the provisions for tracking Central American gang members and sharing information about them with other governments raise serious due process and human rights concerns.

7. Restriction on Legal Representation

7.a. Legal Representation: Review of Major Features

The bill would limit the categories of individuals who "are authorized to represent an individual in an immigration matter before any Federal agency or entity." The categories of individuals who would be authorized to provide immigration representation are essentially those recognized in the current regulations. The bill also codifies much of the current regulations in setting out requirements for recognition of an organization, which (1) must be a nonprofit religious, charitable, social service, or similar organization; (2) may only make nominal charges to individuals provided assistance; and

(3) must have "at its disposal adequate knowledge, information, and experience." The bill also authorizes the Board of Immigration Appeals (BIA) to impose a bond requirement on organizations seeking recognition. The BIA is to approve qualified individuals designated to serve as accredited representatives by recognized organizations if the individuals meet the requirements established by the BIA by regulation.

The bill would also establish certain "prohibited acts" that are subject to civil enforcement if committed by an individual who is not authorized to practice under the statute.

7.b. Legal Representation: Analysis

The bill seeks to address the widespread abuse of immigrants by consultants, notaries, and other nonattorneys who offer immigration assistance but in practice take advantage of immigrants by charging significant fees to file meritless applications, leaving the immigrants subject to removal. State laws regulating unlawful practice of law vary and are often weakly enforced, and federal regulation could lead to more effective and uniform enforcement.

However, as currently drafted the bill does not take into account the dearth of affordable legal representation for low-income immigrants, a situation exacerbated by the restrictions that apply to legal aid organizations receiving funding from the Legal Services Corporation. Under the current recognition regulations, which the bill would incorporate into the statute, many nonprofits cannot meet the "nominal fee" requirement, since they must charge moderate fees due to the lack of other funding for this work. Not only does the bill codify the current regulations that make it difficult for many nonprofits to obtain recognition by the BIA, but it also adds the additional requirement of the posting of a bond. Most importantly, if the "nominal fee" requirement is retained, the bill should make funding available for nonprofit organizations representing immigrants.

While currently nonprofit organizations that are not recognized by the BIA and have no staff attorney cannot represent individuals in removal proceedings, they often do provide honest assistance in helping immigrants fill out forms and apply for benefits. For the most part the bill's description of "representation" appears consistent with typical state bar rules that prohibit nonattorneys from giving legal advice. However, because of the reference to "the incidental preparation of papers," the bill could be broadly interpreted to limit any assistance to immigrants seeking help in applying for benefits, including those seeking to take advantage of H-5B status. The bill would be improved by a more focused attention on unscrupulous conduct, whether committed by consultants or by attorneys.

8. Civics Integration

8.a. Civics Integration: Review of Major Features

The bill establishes the United States Citizenship Foundation, a public-private foundation associated with the Office of Citizenship of U.S. Citizenship and Immigration Services (CIS). The purpose of this foundation is to support the functions of the Office of Citizenship, whose mission is defined as promoting training of immigrants seeking to become naturalized U.S. citizens. The bill empowers the foundation to give and receive gifts to support the functions of the Office of Citizenship, including gifts from the foundation to the Office of Citizenship. It directs DHS to establish a competitive grant program to fund courses and other approved activities that promote knowledge of civics and instruction in English as a second language. The bill authorizes the appropriation of an unspecified amount of money to carry out the mission of the Office of Citizenship and the competitive grant program.

8.b. Civics Integration: Analysis

The provision of new money to fund civics and English language instruction for immigrants is welcomed and needed. In many communities across the U.S., there is a growing shortage of affordable, quality instruction in English as a second language and civics. Passage of SAOIA would spur further demand for such instruction, since applicants for adjustment to lawful permanent residence under the H-5A and H-5B programs are required to pursue a course of study in English language and civics. It is uncertain whether the money dedicated to English and civics instruction under the bill will be sufficient to meet the increased demand, in light of existing shortages. The bill specifies that of the total fees and fines collected from immigrants in association

with the H-5 programs, not more than three percent shall be allocated to promote civics integration and English language instruction. Finally, given the Office of Citizenship's current specified mandate to serve the needs of immigrants seeking to naturalize, technical clarification is needed to ensure that the activities of the United States Citizenship Foundation and the Office of Citizenship envisioned under this bill may also serve immigrants seeking adjustment to LPR status under both the H-5A and H-5B programs.

9. Promoting Access to Health Care

9.a. Access to Health Care: Review of Major Features

SAOIA includes a number of modest measures relating to health care.

The bill clarifies that health care providers may claim reimbursement for emergency treatment of uninsured H-5A and H-5B visa–holders under Section 1011 of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA). Section 1011 divides $250 million per year among hospitals and other health care providers to help defray the costs of otherwise uncompensated emergency care to certain uninsured immigrants who are ineligible for public health benefits. Under current law, Section 1011 funding is authorized until 2008. The bill extends authorization for an additional three years, until 2011. The bill also clarifies that section 1011 payments shall not be offset by a reduction in federal Medicaid funding to "disproportionate share hospitals" for the treatment of low-income patients.

SAOIA prohibits federal or state agencies from discriminating on the basis of employment in a hospital versus a nonhospital setting against J-1 visa–holders who seek a waiver of the two-year foreign residency requirement. Most foreign physicians who have graduated from medical institutions in their home county and who are in the U.S. pursuing medical training, clinical practice, teaching, or research have J-1 visas. Upon completion of their training, J-1 visa–holders generally are subject to a requirement obliging them to return to their home country for at least two years before being permitted to reenter the U.S. in another visa category. A waiver of the two-year foreign residence requirement is available in special circumstances under the recommendation of a federal agency or state department of health.

Finally, the bill directs the U.S. Dept. of Health and Human Services to contract with the Institute of Medicine of the National Academies to study and issue a report recommending ways to expand or improve binational public health infrastructure and health insurance efforts.

9.b. Access to Health Care: Analysis

The bill includes some provisions that, at best, may indirectly promote immigrant access to health. In order to promote access to health care more directly, the bill should clarify that H-5A and H-5B visa–holders shall be considered to be lawfully residing in the U.S. during the duration of their status. Such clarification would help ensure that these immigrants do not face barriers to establishing that they are state residents in the communities where they live and work, and that they are potentially eligible for the most basic health services available to undocumented residents, such as emergency Medicaid.

In addition, any amendments to Section 1011 of MMA should address the problem-laden mechanism by which providers seek reimbursement. On May 9, 2005, the Centers for Medicare and Medicaid Services (CMS) released a final guidance implementing Section 1011. Against the advice of health providers and immigrant advocates, CMS required providers of emergency health services to seek reimbursement based on an individualized patient assessment primarily aimed at determining whether a patient is undocumented. Although the questionnaire recommended by CMS advises providers not to directly ask a patient if he or she is undocumented, it recommends "indirect" questions that are similarly intrusive and that risk deterring immigrants and their family members from using health services. The bill should therefore amend section 1011 to base reimbursement on aggregate patient indicators using existing data (such as the portion of a hospital's patients who are receiving emergency Medicaid) rather than individual patient questioning.

CONCLUSION

SAOIA is a comprehensive proposal with a broad-based legalization program and family reunification provisions that are sure to address some of the major concerns immigrants in the U.S. currently

have. However, as discussed at the outset, the bill is silent on the provisions needed to decrease the incentive for unscrupulous employers to hire and exploit undocumented workers.

Improved labor protections for both documented and undocumented workers should complement the legalization provisions, as well as any temporary worker program. These labor provisions are necessary to ensure that all immigrants are integrated into our society and that the working conditions of U.S. workers are not adversely affected. They are vital if a reformed immigration system is to function well.

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