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FACED WITH THE MOST SERIOUS FINANCIAL downturn in the US since World War II, and in the midst of an epic struggle to enact sweeping reform of the country's healthcare system, President Barack Obama could be forgiven for deferring action on the controversial and divisive issue of immigration reform until a more advantageous time. However, he has instead chosen to reiterate his commitment to achieving reform of the country's dysfunctional immigration laws and regulations, and has instructed his administration to start working on a comprehensive reform package.

OBAMA'S VIEW ON IMMIGRATION

In immigration, as in other matters, Obama has chosen the path of pragmatism, recognising that a push for reform that focuses largely on addressing the inequities of the current system rather than on enhancing border security and enforcing existing laws will be tough for the US Congress to swallow. In a high-profile speech on 19 June 2009 at the National Hispanic Prayer Breakfast and Conference in Washington, the President stressed that he was committed to signing immigration reform legislation that would both strengthen border security and address the festering problem of the millions of undocumented aliens in the US. In his most direct statement on immigration since becoming President, Obama told the audience that:

'The American people believe in immigration, but they also believe that we can't tolerate a situation where people come to the US in violation of the law, nor can we tolerate employers who exploit undocumented workers in order to drive down wages. That's why we're taking steps to strengthen border security... we must also clarify the status of millions who are here illegally, many who have put down roots. For those who wish to become citizens, we should require them to pay a penalty and

pay taxes, learn English, and go to the back of the line behind those who played by the rules. That is a fair, practical and promising way forward, and that's what I'm committed to passing as President of the United States.'

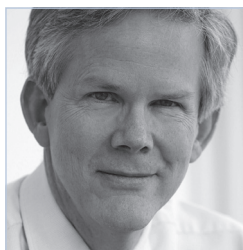
Obama's speech highlights the two seemingly disparate components of his nascent immigration reform proposal:

- 1) provide better border security; and
- 2) provide a path to legalisation for undocumented aliens.

This does not preview an approach significantly different from that of his predecessor President George W Bush, nor does it differ to a great extent from the stance of his opponent in the last election, John McCain. Both Bush and McCain were strong supporters of a genuine comprehensive reform that addressed the most controversial issue of some kind of legalisation or 'amnesty' for illegal aliens. But for Obama to re-enter the fray on immigration reform at a time of high unemployment, and increased economic anxiety, reflects his commitment to reform and his willingness to press for solutions to long-festering, politically risky problems.

REALITY OF THE DREAM

In spite of the President's strong support for reform, a full-scale effort in Congress to overhaul the nation's immigration regime will probably not be possible in 2009. In the meantime the Obama administration has quietly taken several steps to distinguish its enforcement policies from those of the Bush administration, while keeping most of his predecessor's policies in force. The Department of Homeland Security, under its new secretary Janet Napolitano, has ended highly controversial and disruptive workplace raids that had ripped families apart and filled the nation's deportation centres. Instead, the enforcement focus



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'If unemployment begins to drop towards the end of 2009, the political climate could by then be more favourable for immigration reform than anyone could have predicted in January.'

has shifted towards employer abuses, with increased audits and fines for employers who knowingly hire undocumented aliens. In its first six months in office the administration issued notices to 652 companies suspected of employing undocumented aliens, more than the Bush administration did during its entire last year in office. It has also reversed a program requiring employers to fire any worker who could not resolve discrepancies in their social security record, and vacated a Bush administration order that limited appeals by immigrants who had received inadequate assistance from corrupt or incompetent attorneys.

At the same time, the administration has chosen not to rescind the Bush administration's E-Verify system requiring all federal contractors and subcontractors to verify the legal status of their work force. The new administration has continued to press for the deportation of convicted felons who are illegal aliens. Obama's approach reinforces the administration's credibility with those who are genuinely concerned about the long-term adverse impact of lax enforcement of US immigration laws while keeping the divisive 'amnesty issue' from dominating the debate at a time of intense national insecurity about job loss and security. It is also not without political risk, as evidenced by criticism in recent days from pro-immigration groups concerned about the administration's emphasis on enforcement rather than reform.

But a true reform of US immigration law will not come merely by fine-tuning the previous administration's policies. Without a long-term, practical solution resolving the status of the estimated 12 million illegal aliens in the US and addressing the inequities of the current employment-based visa system, tightening enforcement measures will now achieve little other than to push the 'illegal alien problem'

down the road. Once the economy revives, as it is already showing signs of doing, the influx of undocumented workers will rise again in response to growing demand for skilled and unskilled labour.

HAS THIS HAPPENED BEFORE?

Something similar happened after the last major overhaul of US immigration laws, the Immigration Reform and Control Act (IRCA) 1986. This Act legalised the status of millions of undocumented aliens and set up new enforcement procedures, but failed to create new, more rational ways to bring in future legal workers. Inevitably, demand for labour resulted in increased illegal, uncontrolled migration to the US, which now has more undocumented aliens than at any time in its history. Opponents of immigration reform are quick to point to the failures of IRCA 1986 in reducing illegal migration as justification for opposing any meaningful immigration reform other than implementing stricter border controls.

WHAT CAN BE DONE?

The Obama administration recognises that immigration reform must offer both a fair and balanced avenue for legalisation and a better system for bringing in temporary and permanent workers for border security enhancements to work effectively to reduce illegal immigration. Unexpectedly, legalisation of undocumented aliens may turn out to be less politically risky for the president than revamping the system for bringing in workers. The Democrats in Congress have solid majorities in both the House and Senate, and there is key bipartisan support for a controlled legalisation program that offers a clear path to legalisation for undocumented workers who are prepared to pay fines and apply for legal immigration.

Devising a better way to bring skilled workers and professionals to the US, on the other hand, is likely to be difficult, and to

truly be effective would require a complete revamping of the current system of non-immigrant visa categories and immigrant visa quotas. While no-one is prepared to defend the status quo, with its confusing visa categories, politically determined quotas, and complicated procedures, the key players in the debate, including organised labour, the business community, and universities, bring widely different perspectives to the discussion.

The private sector, and in particular large multinational corporations, who are large employers of work-authorized non-immigrants and immigrants, want a more market-based system for bringing in workers, with fewer restrictions on the number of visas available for skilled non-immigrant workers in the H1B category, for example, and increased quotas for work-related immigrant visa categories, along with a less cumbersome system for processing these cases.¹

Universities want to encourage the most qualified foreign students to choose the US for undergraduate and graduate studies, and support easier paths to permanent residence for foreign graduates with offers of post-graduate employment.

Organised labour, on the other hand, is sceptical of reforms that would reduce the government's ability to regulate the intake of foreign workers in response to economic downturns. Labour's support for overall reform will be crucial to its success in Congress, and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) (the largest and most influential American labour group), has demonstrated flexibility by signalling its willingness to support controlled legalisation of foreign workers. But it has also indicated that it favours the creation of an independent commission to set annual quotas for both non-immigrant and immigrant visa admissions, an idea that is viewed with concern by many in the private sector.

Independent commission

The 'independent commission' idea, which has considerable support in Congress, would scrap existing strict quotas on work-based immigrant visas, eliminate the current system of work-authorising non-immigrant visas, and delegate to an independent

commission the authority to set annual numbers of admissions for both immigrant and non-immigrant workers in response to labour market and economic needs. If enacted this would be a radical departure from current procedures and, it is argued, would reduce the ability of Congress to mandate short-term, politically expedient, increases or decreases to the numbers of these visas. Opponents of the commission argue that it is unrealistic to assume that it would be able to make decisions in a political vacuum, and that it would be slow to identify economic trends and adjust accordingly in allocating visa numbers. For these groups, the best immigration reform package would be one that gave maximum latitude to private-sector employers to determine their current and future labour needs and, where appropriate, identify and bring in qualified foreign workers to meet those needs.

OBAMA'S HEALTHCARE REFORM BATTLE AND THE EFFECTS ON IMMIGRATION

The battle for healthcare reform continues to dominate the airways as Congress goes into its summer recess. Paradoxically, this may be working to the advantage of proponents of comprehensive immigration

NOTE

- 1) H1B visas are a primary means for prospective employers to bring skilled (university graduates) non-immigrants to work in the US, but the number of visas that may be issued each year in this category is limited by Congress at levels that do not usually satisfy demand.

reform, allowing the debate – and the horse trading among the interested parties – to be carried on somewhat below the radar screen. This increases the likelihood that a reasonable compromise proposal will emerge that the administration can support. The general outlines of this proposal are already apparent:

- controlled legalisation;
- enhanced border controls; and
- changes to the work visa regime.

Until draft proposed legislation exists, however, the opponents of reform have nothing against which to mount a concerted attack. This clearly suits the administration's purposes, as does pushing the timeline for introducing reform legislation into next year. If unemployment begins to drop towards the end of 2009, the political climate could by then be more favourable for immigration reform than anyone could have predicted in January when the Obama administration took office.

Obstacles

There are, however, some potential clouds on the horizon. If the administration's full-court press for Congress to pass healthcare reform legislation this year does not succeed, it will considerably diminish President Obama's clout on Capitol Hill and reduce his ability to persuade Congress to tackle another highly controversial and divisive issue like immigration reform. Emboldened opponents of legalisation and work visa reform would work furiously to

derail any package that included these provisions, and a weakened President and skittish Democratic Party might be loath to risk suffering another major defeat in an election year by putting reform on the legislative agenda. If, at the same time, unemployment rates have not begun to drop, the likelihood that the administration will push for immigration reform will be even further reduced. President Obama, who has been both bold and forthright in supporting immigration reform, is not going to tilt at legislative windmills.

COMMENT

President Obama has chosen to stake the success of his administration on the outcome of the healthcare debate, calculating that success in this endeavour would greatly strengthen his hand in advancing the rest of his legislative agenda, including immigration reform. This is not an unreasonable conclusion, nor is it reckless, but it is risky and the consequences of failure would be stark. In a very real sense the best thing proponents of comprehensive reform could do during the next few weeks and months to advance their cause would be to lobby hard for passage of the President's healthcare reform program. If this occurs, real immigration reform will take a giant step towards realisation. If it does not, a wounded President and shaken Democratic Party would have little stomach for taking on the highly divisive and emotional immigration issue, and the nation's immigration system will continue to malfunction for the foreseeable future.

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