Does Comprehensive Immigration Reform Have a Prayer?

By Ted J. Chiappari and Angelo A. Paparelli*

Last month the prayers of many religious workers from abroad and their sponsoring faith-based employers were seemingly answered. A federal judge in Seattle agreed that immigrant religious workers should be treated the same way as other immigrants, in *Gabriel Ruiz-Diaz, et al. v. United States of America, et al.,* and invalidated the U.S. Citizenship and Immigration Services ("USCIS") regulation, 8 C.F.R. § 245.2(a)(2)(i)(B), that gives preferential treatment to foreign citizens immigrating on the basis of petitions by family members or employers of so-called "priority workers" and others with special skills or experience.[1] Advocates of comprehensive immigration reform ("CIR") have not yet resorted to the help of a higher power. At this stage, they are placing their hope in the Democratic majority in Congress and the new administration under President Obama to repair or replace an immigration system widely perceived as broken. As this article will suggest, CIR supporters may do well to look to the heavenly light cast by the court in *Gabriel Ruiz-Diaz* and recent commentators who offer a lawful path to achieving CIR without the enactment of legislation.

CIR is a three-pronged approach that supporters say would reduce the number of unauthorized immigrants in the United States, by (1) regularizing the status of those already here without proper documentation, (2) controlling future flows of immigrants through increases in the legal paths to immigration, and (3) increasing border and workplace enforcement. What distinguishes CIR from other approaches is the notion that the system cannot be fixed in piecemeal fashion. Rather, as CIR's proponents maintain, any reform, in order to be effective, must address all three basic areas of concern:

1. What should we as a nation do with the 12 million or so immigrants already in the United States who have entered without permission or overstayed their visas?

"Legalization," "amnesty" and "earned immigration" – as opposed to "mass deportation" – are terms often floated to describe the solution to the problem. Other than doing nothing and keeping a pool of marginalized workers at risk of exploitation and tempted to use fraudulent documents, which some advocate as the best strategy, whatever approach is taken – even mass deportation – would involve a process of determining who has developed sufficient ties or made sufficient contributions to the United States to merit overlooking their violation of U.S. immigration laws.

2. What criteria should apply to determine the categories and numbers of people who should be allowed into the United States, both on a nonimmigrant basis (e.g., as a tourist, a foreign student or temporary worker) and as permanent residents (e.g., the spouse of a U.S. citizen)?

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[1] Gabriel Ruiz-Diaz, et al. v. United States of America, et al., Case No. C07-1881RSL (W. Dist. Wash.), Mar. 23, 2009, available at http://www.scribd.com/doc/13628825/RuizDiazvUS309.

Although a guest worker program has dominated the discussion, the issue is broader than the need to address perceived labor shortages in occupations variously described as "unskilled," "essential" or "those jobs American workers are unwilling to do." The issue raises fundamental questions of national identity (who are we as a people? who should be invited to join us?) in addition to posing thorny practical and logistical considerations (e.g., should there be visa quotas? if so, how should they be set? should a completely new program or visa category be introduced or should existing visa categories merely be expanded or reconfigured?).

3. How should the federal government establish and maintain the integrity of our borders and insure that those lawfully admitted abide by the terms of their visas (so that yet another new pool of undocumented immigrants does not form within our borders)?

Our land borders, particularly our border with Mexico, have attracted the most attention, with workplace enforcement, national identification cards and concerns about our civil liberties close runners-up.[2] To be effective, however, any measures taken must be supported by systems that monitor and promptly locate foreign nationals who overstay or violate their immigration status and that insure their speedy and humane removal from the United States.

What do disgruntled religious workers have to do with CIR? Understanding the answer to the questions requires a bit of background on immigration law provisions affecting religious workers. "R-1" religious worker status, as this nonimmigrant visa category is designated, allows foreign citizens who are members of established religious organizations to come here for up to five years. After two years of employment in the United States in R-1 status, many become eligible to be petitioned by their employers for lawful permanent resident (green card) status. The underlying reason for the class action by the religious workers was the inordinate delay in USCIS adjudication of the petitions filed by the workers' employers. Pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B), the regulation invalidated in federal court last month, a religious worker could file an application to adjust status to lawful permanent resident (the final step in the green card process and one that allows the applicant to remain in the United States as long as the application is pending) only after USCIS approves the immigrant petition filed on the worker's behalf. Because of USCIS processing delays, religious workers have been unable to maintain proper R-1 religious worker visa status.

The voided regulatory section, 8 C.F.R. § 245.2(a)(2)(i)(B), allows beneficiaries of immigrant petitions by family members and by businesses sponsoring workers (under the employment-based immigrant visa categories) who have special skills or experience to file their adjustment applications concurrently with their (as-yet unadjudicated) immigrant petitions, thereby allowing one group of immigrants permission to stay in the United States while their petitions are pending but forcing another group to wait until the petitions have been approved. The district court found that this disparate treatment violates the governing statute, Immigration and Nationality Act [INA] § 245(a), 8 U.S.C. § 1255(a), which makes no such distinction.

[2] Worksite enforcement includes programs like Form I-9 employment eligibility verification and the web-based E-Verify program that require employers to screen out those not authorized to work, as well as government raids and inspections to detain and deport those without documentation and prosecute employers who flout the law.

The delay that has disadvantaged religious workers is by no means unusual. Rather, the USCIS and its predecessor, the Immigration and Naturalization Service (INS), have been plagued for years with backlogs and processing delays. Neither are the arbitrary distinctions drawn by USCIS between one class of foreign nationals and another uncommon.[3] Nonetheless, the *Gabriel Ruiz-Diaz* lawsuit – and many of the negative consequences of other, similar processing delays – could have been entirely avoided if the USCIS had simply managed its workload differently.

The suit is but one illustration of the singular lack of vision, leadership and common sense at virtually all levels of the USCIS bureaucracy: from promulgation of defective regulations at headquarters, to tolerance for ridiculously long processing times at the Service Centers, to poor judgment in its litigation strategy in fighting the religious workers on this issue. The plaintiff class are, by and large, people already working in the United States after having been interviewed and inspected at least twice, first by State Department consular officers (who issued the R-1 visas) and then by CBP examiners (who inspected them again at the port of entry). The USCIS has at least two further opportunities to examine their cases as part of the green card process – in the adjudication of the immigrant petition and also in the adjudication of the adjustment application. The delay has been justified by USCIS as necessary to ferret out the fraud the USCIS claims is prevalent among religious organizations seeking to import foreign workers. Whatever fraud there might be should be addressed, however, before the religious workers are allowed to enter the United States, not afterward (which USCIS to its credit has subsequently started to do, but only after legislative prompting[4]). If USCIS is going to investigate suspected fraud after the religious worker is already here, there is no harm in allowing the religious workers to remain in the United States while that investigation is proceeding.

Now, back to CIR. USCIS is the agency that is primarily responsible for administering benefits under the immigration laws. Any program to regularize the status of those 12 million undocumented immigrants or any program to address the flow of future immigrants (two of the three prongs of CIR) would be directly administered by USCIS. The agency has also been responsible for educating employers about the rules on employment verification at the workplace, so it also would have a role in the third CIR prong. Yes, the tough political and economic questions should be debated and the appropriate balance struck among competing interests in our society, but an underperforming government agency is just as disruptive to the rule of law as an inadequate legislative agenda. Without a well-functioning agency able to command the respect of the regulated community by delivering reasonable, consistent and predictable adjudications relatively quickly, CIR will fail.

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[3] The other agencies involved in the immigration process, the Departments of State, Labor and Justice, as well as USCIS's sister agencies within the Department of Homeland Security, Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), have also had difficulty processing cases fairly, effectively and efficiently, and those difficulties should also be addressed before any new and ambitious reform program is introduced.

[4] New rules governing the religious worker program were published on November 26, 2008, in order to implement Section (2)(b) of Public Law 110-391, which requires the Department of Homeland Security to issue regulations to reduce or eliminate fraud in this program. See Notice at 73 Fed. Reg. 72298 (Nov. 26, 2008); regulations at 73 Fed. Reg. 72276-97 (Nov. 26, 2008), incorporated in 8 CFR Parts 204, 214 and 299.

USCIS and the other immigration agencies can and must do better. There are numerous bright spots in the USCIS, examples of programs well administered, offices well run and initiatives well managed. At various times in its history, USCIS and its predecessor, the INS, have managed same-day adjudications, courteous and responsive customer service, meritorious expedite requests (even without an additional fee for premium processing), and consistent adjudications in a reasonable time-frame. Unfortunately, the success stories are generally short-lived or isolated to a particular office or a particular type of application. But these examples prove that it can be done.

Given the legislative fisticuffs that CIR debated in Congress would provoke, here are a few proposals,[5] all of which can be accomplished at the agency level without any legislation:

1. The Departments of Homeland Security, Justice, Labor and State all can and should reduce processing times on most if not all adjudications to three months or less, with same-day adjudications on many types of applications also easily within reach. They also can and must issue regulations promptly – no later than three months after passage of a statute. (Amazingly, there are immigration statutes dating back to the 1990s that have not been implemented by USCIS through regulation.) With the right leadership, vision and support, the rulemaking goal can be accomplished within six months. Congress and the Obama Administration should set ambitious, measurable targets for all agencies involved with immigration.

2. Accelerate USCIS's efforts to move its processes to an electronic environment. In November 2008, USCIS awarded a contract to IBM to help revamp its business processes to increase the speed and accuracy of its adjudications. USCIS and IBM have a contract with options over five years, but USCIS should pursue this in the most aggressive fashion possible to complete the transition much sooner than that, ideally within one to two years.

3. Find savings through government self-audits and process improvements. The USCIS, unlike its sister agencies CBP and ICE, is primarily funded by user fees rather than by general government appropriations. In 2007, USCIS imposed substantial fee increases, with the explicit justification that the increased funds would be used to improve case management. Only now, almost two years later, are we seeing the fruits of that initiative, and there is still much ground for USCIS to cover. When and if Congress does pass some form of CIR, it should provide advance funding on any new initiatives so that USCIS and any other agencies involved can ramp up and administer new programs without a negative impact on existing operations. Meantime, government auditors should review how USCIS has used the increased funding and identify process improvements that will make more funding available for improved performance by USCIS on speedier adjudications. The same approach should be applied to other DHS units as well as at the State Department and the Labor Department.

[5] For further suggestions on administrative actions that can be taken without Congressional involvement, see Angelo A. Paparelli, "Immigration Reform with the Stroke of a Pen," on his blog, www.nationofimmigrators.com (Mar. 6, 2009), and Gary Endelman and Cyrus Mehta, "The Path Less Taken: Is There an Alternative to Waiting for Comprehensive Immigration Reform?" in Immigration Daily, www.ilw.com.

4. Expand Premium Processing (15-business-day adjudication for an additional $1,000 filing fee) to all USCIS benefits programs. The additional revenue should be earmarked for improvements in case adjudications and processing times.

5. USCIS could publish and adopt regulations authorizing the enrollment of undocumented foreign citizens in a voluntary special registration program. Participation in the program would be encouraged by the enticement of employment authorization and the benefit of deferred action status. From the government's perspective, it would be the first step in locating and identifying the undocumented population. These benefits are well within the bounds of current law and would serve as a temporary administrative regularization of immigration status until Congress decides how to address the matter.[6]

Only the Almighty knows whether the religious workers' immigration prayers will ultimately be answered. While the regulation giving preferential treatment to other immigrants has been invalidated, USCIS could – and might very well – rectify the inequality by eliminating concurrent filing of immigration petitions and adjustment applications altogether. In fact, since 2006 the USCIS semi-annual Unified Agenda has proposed to rescind the concurrent filing of employers' immigrant petitions and adjustment applications,[7] and, perversely, this case may provide USCIS with the impetus to do so now. That ill-advised strategy would illustrate a continued lack of vision and judgment on the part of USCIS.

With or without divine intervention, CIR supporters should urge the Obama Administration to move quickly to change the facts on the ground. The proposed steps might allow for just enough celestial seasoning to prompt Congress to enact CIR sooner rather than later, and enable USCIS to implement CIR more effectively if and when it becomes law.

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[6] See, e.g., 8 CFR § 264.1(f)(4), § 274a.1(a) and § 274a.12(c)(14).

[7] See Gary Endelman and Cyrus Mehta, "The Path Less Taken: Is There an Alternative to Waiting for Comprehensive Immigration Reform?" in Immigration Daily, www.ilw.com.