NATIONAL IMMIGRATION FORUM

BACKGROUNDER

To embrace and uphold our tradition as a nation of immigrants.

IS "WORK AND RETURN" A SOLUTION OR A SOUND BITE?

Workability is the touchstone by which any proposal to fix our failing immigration system should be measured. The American public is tired of failed policies and political posturing, and thirsts for a realistic solution. All sides agree that success ultimately hinges on dramatically reducing the number of people living in the United States without legal status. It is also crucial for national security reasons that we know who is here by getting them to come forward, submit to background checks, and participate in the legal system. Because neither mass deportations nor amnesty are viable options, legislators have offered some creative alternatives.

The two basic legislative proposals on the table are "earned legalization" and "deferred mandatory departure" (DMD). This paper evaluates the deferred mandatory departure proposal, as outlined in Senator Specter's draft "Chairman's mark" from November 9, 2005, against the standard of workability. It concludes that proposals which do not provide a clear path to permanent status, or that require large numbers of legalizing immigrants to return to a foreign country before obtaining status, will fail.

SUMMARY OF TOP REASONS (EXPLAINED IN DETAIL BELOW) WHY DMD IS NOT WORKABLE

1. The DMD proposal in the Chairman's mark excludes hundreds of thousands, even millions, of undocumented immigrants from the program. This means that even if people came forward for DMD, millions would remain in the shadows, undercutting real reform.

2. Because there is no realistic or workable path to permanent status in the Chairman's mark, many of those who did come forward and qualified for DMD would not depart at the expiration of the program, but rather remain in the U.S. in undocumented status, undercutting the goal of decreasing the undocumented population.

3. For those who do receive DMD (as mentioned above and outlined below, millions of the current undocumented population would not be eligible for DMD), and depart in hopes of reentering the U.S. in legal status, numerous barriers would prevent them from being able to do so. Notably, there will not be nearly enough available green cards for the millions of people in need of regularizing their status.

4. DMD does not provide a path to permanent status for most individuals. Most people will not register for a program that ultimately leads to their removal from the United States and bars them from permanent status (whether practically-speaking or outright). If millions of people do not participate, there will continue to be a large undocumented population in the country. Immigration reform cannot be built on a foundation of millions of people remaining in the shadows.

WHO ARE WE TALKING ABOUT?

Recent estimates put the number of undocumented immigrants living the U.S. at 11 million.[1] There are 13.9 million people living in families where at least one head of household is undocumented. 1.6 million children are undocumented immigrants, and another 3 million children are U.S. citizens with undocumented parents.[2]

Undocumented immigrants make up approximately 5% of the U.S. labor force,[3] and are concentrated in key industries such as construction, food and hospitality, cleaning, and agriculture. [4] They are also present in every state of the Union, including new immigrant destinations like North Carolina, Georgia, Iowa, and Utah.

Given this, it is difficult to imagine how a program that requires 11 million individuals to leave the country before accessing stable legal status would not disrupt the U.S. economy and American families. To quote the Essential Worker Immigration Coalition, a business coalition advocating for comprehensive immigration reform: "Removing all of these people, even for a two to six month period, would be disastrous to the U.S. economy—not to mention a logistical nightmare. For our own economic benefit, we need to have a way for these people to come forward, make amends for past status violations, and participate in a program that leads to a permanent lawful status."[5] Since the vast majority of these individuals are employed in service sectors of the economy, removing them from their jobs would also disrupt millions of other workers who are dependent on their labor.

Even if Congress decided that such widespread disruption is acceptable, there are practical reasons why legislative proposals that require mandatory departure will not accomplish the goal of permanently reducing the undocumented immigrant population.

SIGNIFICANT GROUPS INELIGIBLE

As noted from the outset, if we truly intend to solve this problem, we have to deal effectively with the current undocumented population. That means any realistic proposal should strive to cover as many undocumented individuals as possible. The DMD proposal in the Chairman's mark, however, renders hundreds of thousands if not millions of undocumented immigrants ineligible from the outset. The bill excludes hardworking, non-criminal, undocumented people who fail to meet the following requirements:

1. Admissibility: The Chairman's mark requires that individuals applying for DMD show they are admissible under current immigration law. Only the grounds enumerated in INA 212(a)(5), (6)(A), and (7) are deemed to "not apply" to these applicants. Other grounds of inadmissibility

[1] http://pewhispanic.org/files/reports/44.pdf
[2] http://pewhispanic.org/files/reports/46.pdf
[3] http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf
[4] http://pewhispanic.org/files/reports/46.pdf
[5] Essential Worker Immigration Coalition, letter to U.S. Senate, 11/8/2005

that will be common to people who have been unlawfully present[6] may be waived at the discretion of the DHS secretary, but are not automatically dismissed.

Experienced immigration practitioners know that securing such discretionary waivers can be extremely difficult. To better serve the compelling interest of inclusiveness, the proposal should waive these non-criminal status violations for the undocumented. The Chairman's mark as written could bar hundreds of thousands, even millions, of individuals from accessing DMD.

2. Removal Orders and Voluntary Departure: The Chairman's mark also bars DMD to any alien subject to a final removal order or a voluntary departure agreement that has become invalid. This could exclude hundreds of thousands of additional noncitizens from participating in the program. While no one wants to condone disregard of a formal order, there are frequently mitigating circumstances. For example, many individuals have *in absentia* removal orders because they were never provided notice of their hearing. Again, in the interest of bringing as many people into the fold as possible, this bar on participation should be dropped. [7]

3. Presence: To be eligible for DMD, an individual must have been present in the U.S. as of 7/20/2004, unlawfully present on 7/20/2005, and continuously present since 7/20/2005. The Pew Hispanic Center estimates that 562,000 undocumented immigrants settled in the U.S. in 2004.[8] While similar numbers are not yet available for 2005, Pew estimates that in recent years an average of 488,000 undocumented immigrants settled in the U.S. annually. As such, right out of the gate the Chairman's mark would exclude more than 700,000 of the current 11 million undocumented immigrants.

4. Employment: The bill makes no exceptions to the employment requirement for children/students, disabled persons, or the elderly. Undocumented immigrant children could apply as derivatives on a parent's application (assuming the parent was undocumented), but if the parent does not qualify for DMD (for whatever reason) the children will be unable to obtain status. Immigrants with physical or mental disabilities, who were pregnant during the required employment period, or who are elderly but have previous work histories or families that support them fully, would not be eligible for DMD unless they were employed prior to and after 7/20/05.

5. Failure to Respond to Request for Information: The Chairman's mark also makes ineligible for DMD individuals who willfully fail to comply with any request for information from the DHS secretary. It is unclear whether this provision would apply to unlawfully present individuals from countries that were required to participate in the National Security Entry-Exit Registration System (NSEERS). If so, this could bar additional thousands of individuals from applying for

[6] Among these are INA 212 (a)(6)(B) relating to failure to attend a removal hearing – often this is because the individual never received notice of the hearing, 6(C) relating to using false documents to enter the US and 6(D) relating to being a stowaway – for a variety of reasons linked to lack of legal channels, many undocumented people in the U.S. made misrepresentations to obtain documents to enter the U.S. or entered as stowaways.

[7] The Chairman's mark does give the DHS secretary the discretion to waive this ground of ineligibility, but immigration practitioners know from experience that discretionary waivers are generally very hard to obtain.

[8] http://pewhispanic.org/files/reports/53.pdf

DMD.[9] It makes no sense to further limit participation by excluding people for technicalities like this.

WILL THEY SIGN UP?

The first goal in structuring a program for the current undocumented population should be to maximize the universe of eligible participants. For security purposes, we need to know who is here; in order to accomplish this goal, we must provide real incentives for people to come forward and participate in the program. However, even a program that is open to every undocumented immigrant (which this one is not, as explained above) will fail if it creates too many disincentives to participation.

1. "Report to Deport" not an Attractive Option for Most: As outlined below, because there is no realistic or workable path to permanency in the Chairman's mark, most undocumented immigrants will not sign up for a "report to deport" program.

2. Timeframes: The timeframes identified in the Chairman's mark are unrealistic, and no provisions are made to ensure that immigrants processing through the system do not miss out on a benefit because the agency is unable to meet goals set by Congress.

   Application Time Frame: The Chairman's mark requires DHS to begin accepting DMD applications no later than three months from date of enactment. All applications must be submitted within six months of the bill's enactment, and adjudicated within twelve months of enactment. Based on experience with the implementation of benefits programs, this timeframe is unrealistic. Regulations will need to be written and issued, which can take months to years for complicated programs such as this one.

   Absent such guidance, USCIS adjudicators will have no instructions as to how to implement this program. And applicants will have no guidance as to how to prepare their applications, or what supporting documentation and evidence is required.

   Even if regulations were quickly issued, the agency would need to ramp up staff and training in order to securely process millions of new applications. And applicants would need sufficient time to gather the information and documentation needed to make their cases. Three months is simply an insufficient time period for either new staffing at USCIS or application preparation for would-be beneficiaries.

   Processing Time Frame: The program requires in-person interviews with each applicant and significant background checks, both of which will take time and U.S. government resources. It is simply unreasonable to think that all applications could be decided within twelve months of the bill's enactment. The timeframe for adjudicating these applications is likely to stretch into years instead of months, and potential grantees will be unable to pursue the next step (whether re-entering on a temporary worker visa or as a legal permanent resident) while waiting for the initial DMD grant.

[9] The Chairman's mark does give the DHS secretary the discretion to waive this ground of ineligibility, but again it is impossible to know how or whether the secretary will utilize such discretion.

3. Workplace Disruption: The return requirement is an acute disincentive to long-term employees seeking to advance in their workplace. If participation in the program carries a significant risk of being stranded outside the country, the prospect of losing their job will lead the most valued workers to decline. The return requirement is also troubling to employers who seek to stabilize their work force through legalization, not create an even more revolving workforce. The Chairman's mark makes no guarantees regarding an employee's ability to quickly return to work if they do follow the departure requirement. [10]

4. The Fear Factor: One of the most important deterrents to participation in a DMD program will be risk analysis. Particularly for migrants who have deep roots in the United States, who may own businesses or homes and have U.S. citizen children or spouses, the idea of signing up for an untested "work and return" program will appear precarious at best. They will want to see the program operate successfully before they expose themselves to this risk. But by the time they see a friend or family member obtain DMD, apply for a new legal status, report to his country of nationality, and return to the U.S., the DMD application period will be long over.

   Some migrants will apply for DMD, provided they can clear the other eligibility hurdles and prepare an application in time. However, those more likely to gamble on DMD are the more recent arrivals— many of whom would be ineligible because the Chairman's mark excludes immigrants who arrived in the US since July, 2004.

5. Punitive Requirements: Those who receive DMD status, but fail to obtain a new temporary worker visa within five years, will either be forced to wait outside the U.S. for their next status or remain in the U.S. unlawfully. If they choose the latter, they will be barred from immigration status for a period of 10 years. There are no extensions of status for situations in which the inability to obtain a new visa is not based on the migrant's lack of a sponsor, but rather on processing delays or the unavailability of a visa due to per-country or other statutory limits. This means that many people will find themselves between a rock and a hard place when the five years are up. With visa lines currently stretching to between four and twenty-two years, these individuals will have to decide whether to remain in the U.S. unlawfully and face a bar to future status, or return to their home countries for an indefinite time period, leaving behind jobs and families in the U.S. Finally, the Chairman's mark contains a requirement that every DMD grantee who is not employed for 45 days is ineligible for employment until she departs the United States. A DMD grantee who loses employment or leaves employment may not realistically be able to secure new employment within 45 days. This provision will discourage immigrants from coming forward and applying for DMD status.

   Moreover, the punitive terms of the DMD program will make applicants wary and serve as another disincentive to participate. Requiring applicants to waive all rights to review or appeal

[10] It also appears that the Chairman's mark would limit the employers for which DMD grantees could work. As drafted the bill includes a qualification that DMD grantees may work only for employers "authorized by the Secretary of Homeland Security to hire aliens under section 218C." This may be a drafting error, as it refers to a provision in S. 1438 that was not included in the worker program in the Chairman's mark. However, if the intent of the Chairman is to limit which employers a DMD grantee can work for, the program would engender greater dependence on the immigrant's current employer, deflating the worker's bargaining power with a detrimental effect on other workers in similar jobs.

of a decision on their applications, or to contest any future removal actions, will discourage participation.

6. Expense: The departure fines in the DMD program are impractical.[11] The longer an individual remains in the U.S. with DMD, the more he has to pay when he finally departs. The fine escalates to $5,000 per immigrant. Again, the bill makes no exception for individuals who have applied for a legal visa but are simply waiting for their applications to be processed or a visa to become available.

7. Undercuts Labor Protections: The return requirement is also problematic from a labor protection standpoint, because it permits employers to wield a certain power over immigrants who believe that their employer may petition for them to receive a temporary worker visa or an immigrant visa. It sets up a dynamic where an employer can encourage a worker to "remain loyal," resist union-organizing, and accept sub-par wages and working conditions, with the carrot of eventually being sponsored for a more stable immigration status. The DMD program and transitioning to a stable status are highly complicated, and the employer would clearly have the upper hand in manipulating this system.

RETURNING WITH STABLE LEGAL STATUS?

There are three basic ways a DMD beneficiary could seek to re-enter the U.S. after his DMD status had expired and he had returned home. One would be as a legal permanent resident. A second would be through the new temporary worker program established by the Chairman's mark. A third would be through another nonimmigrant visa category. Below are pitfalls that could trip up a would-be returnee.

1. Barriers to Adjustment of Status/Reentering as a Legal Permanent Resident: DMD grantees with employer or family sponsors (or who win the diversity visa lottery) could potentially seek re-entry as a legal permanent resident. They could also apply for adjustment of status through an employer sponsor if they re-enter under the H-5A visa program.

   Availability of Green Cards: Even if a DMD grantee was not subject to one of the inadmissibility grounds (outlined below), and thus was able to leave and reenter the U.S., the Chairman's mark does not provide nearly enough employment-based immigrant visas for eligible DMD workers. These individuals would be counted against the immigrant visa limits for workers and family members—as well as the per-country limits—outlined in Title V of the Chairman's mark.

   While the Chairman's mark would increase employment-based visas from 140,000 to 290,000, and make modifications to the family immigration system to preserve more visas for immigrants in preference categories beyond "immediate relatives," there would still be a woefully inadequate number of visas to absorb undocumented immigrants in the U.S. who comply with the envisioned DMD program, leave the United States and then attempt to enter the U.S. through the employment-based immigration system. Skilled workers, professionals, and entrepreneurs will continue to enter the U.S. through the employment–based immigration system[12] and will be

[11] The departure fee is separate from the DMD application fee, which is $1,000 plus processing costs.
[12] The Chairman's mark exempts the following individuals from the 290,000 level: immigrants who have earned an advanced degree in science, technology, engineering or math and have been working in a related

competing with "unskilled workers" for the 290,000 employment-based visas in the Chairman's mark, substantially reducing the number of visas available to DMD participants hoping to reenter the U.S.[13] The population of DMD grantees transitioning to permanent legal status would ideally be in the millions; these individuals would be competing for immigrant visas against future workers and family members who are outside the U.S. waiting to immigrate. This would push the wait times for legal immigrant visas into the decades-plus time frame for all concerned.

It is difficult to imagine or quantify when DMD grantees would have immigrant visas available to them, but the five year timeframe they are given to seek out a visa or lose status is likely to be insufficient for many stuck in both processing and priority date backlogs. And, for those who go home after their DMD period has expired in hopes of being able to reenter in legal status, they will most likely find there is no way for them to reenter the U.S. (due to inadmissibility bars discussed below). Even if they could get around those barriers, the lack of green cards would result in interminable waits for permission to return to the U.S. Knowing that there is no path to permanency will prevent most undocumented people from ever applying for DMD in the first place.

No Guarantees: The Chairman's mark is silent when it comes to communicating where an application would be made for legal permanent residency. The options are to apply from within the U.S. but complete some portion of the process at the U.S. consul in their home countries, or apply outside of the U.S. and go through consular processing. Absent clear language in the Chairman's mark, including extensions of DMD status if processing deadlines are not kept, a "return and wait" scenario is much more likely than "work and return."

Inadmissibility Bars: Because current law includes many grounds of inadmissibility related to time spent unlawfully present in the U.S., hundreds of thousands, if not millions, of DMD grantees would be ineligible for legal permanent residency. While the three- and ten-year unlawful presence bars are deemed to not apply to any DMD grantee, the permanent bar and other grounds of inadmissibility related to unlawful status are not forgiven.[14] Waivers of certain inadmissibility grounds are provided for in current law, but they are limited and exceedingly difficult to obtain.

Barriers to Re-Entering Through the Temporary Worker Program: DMD grantees seeking to re-enter on an H-5A visa would also face multiple hurdles.

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field in the US under a temporary visa during the three-year period preceding their application for a green card, certain immigrants who have received a "national interest waiver" and immediate relatives (spouses, children and parents) of immigrants who are admitted through the employment based immigration system [Chairman's mark, Sections 311 and 312]. Yet, skilled workers, professionals and entrepreneurs will continue to compete for these visas as will the millions of envisioned DMD participants.

[13] The Chairman's mark does amend the allocation of the 290,000 visas such that 25% are preserved for the "other worker" category (the category through which most if not every DMD grantee would be applying) -- this makes but a tiny dent in the millions of visas which would be necessary to meet the demand.

[14] See e.g. INA s. 212 (a) (9) (C) (permanent bar), 212 (a) (4) (relating to public charge), 212 (a) (6) (relating to illegal status), and 212 (a) (7) (relating to document fraud).

Bilateral Agreement Requirements: Perhaps the biggest barrier to participation in the worker program will be the requirement that foreign governments enter into bilateral agreements with the United States before their nationals can be issued temporary worker visas. [15]

While many of the goals of these agreements certainly make sense, it is impractical to demand that all of these conditions be met before new workers from a particular country can enter the U.S. The obvious target here is Mexico, which can and should do more to control unauthorized migration of its nationals. However, smaller countries, those with unstable governments, or countries with significant parliamentary authority would most likely be left behind. Nationals from those countries will find again that the legal system is not open to them.

Labor Market Test: Another barrier would be the application of a labor market test to existing workers. If a DMD beneficiary wishes to continue working for the same employer, the employer will have to submit to a labor market test as if he were seeking to hire any H-5A worker. The worker would risk losing his job and his ability to re-enter if the employer subsequently identifies a U.S. worker available and willing to fill the position. While this may seem desirable on one level, it will serve as a disincentive to participation and is unnecessarily disruptive to workers.

Expense: Re-entry under the temporary worker program would be extraordinarily expensive for a DMD grantee. Already he has been subjected to DMD application costs, a $1,000 fine, and any additional fine for remaining in the U.S. to work (on a sliding scale, up to $5,000 per person). Then, the DMD grantee would be charged another application fee for the H-5A visa, another $500 fine, and if necessary a fine of $1,500 to obtain a waiver of certain grounds of inadmissibility. The total bill would be upwards of $8,000 plus application fees, travel costs, and legal fees to help the individual navigate such complex waters. For high expense to be acceptable, the process would have to involve more certainty. As drafted, however, it is just another reason not to participate.

Inadmissibility Bars: While the Chairman's mark deems the three- and ten-year re-entry bars to "not apply" to DMD grantees seeking re-entry, other relevant inadmissibility grounds are only waivable at the discretion of the DHS secretary, for conduct that occurred prior to the bill's enactment.[16] Certain of these grounds will apply to circumstances formerly undocumented immigrants are likely to face in the time between the bill's enactment and receipt of DMD. In particular, the failure to address the permanent re-entry bar will likely cause hundreds of thousands or even millions of former DMD grantees to be inadmissible, as it is impossible to imagine all of these applicants being processed within one year of enactment. These individuals will have been unlawfully present for too long in the U.S., as a result of processing delays and through no fault of their own, and therefore unable to re-enter on an H-5A visa.

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[15] The agreements would require countries to accept prompt return of deportees, cooperate in criminal and immigration law enforcement, provide information on private citizens to U.S. officials, educate their populations about participation in immigration programs, and provide minimum health care coverage to temporary workers.

[16] As noted previously, discretionary waivers are extraordinarily hard to obtain. Experience dictates that granting these are the exception not the rule.

No Guarantees: The Chairman's mark is not explicit about where DMD grantees will complete their processing for H-5A visas. One option is that they apply from within the U.S. but complete some portion of the process at the U.S. consul in their home countries. This option assumes that both DMD and the H-5A visa can be secured within a five year time frame, but it would still likely involve more than just a quick trip home. Another option is that they apply outside of the U.S. and go through consular processing. Absent clear language in the Chairman's mark, including extensions of DMD status if processing deadlines are not kept, a "return and wait" scenario is much more likely than "work and return" for many DMD grantees. This will be a strong deterrent for people to not apply for their second visa, and to remain in the U.S. undocumented.

2. Barriers to Re-Entering Through Another Non-Immigrant Visa Category: A DMD grantee could seek re-entry under a different non-immigrant classification, for example as a student, an H-2A worker, H-2B worker, or other temporary visa holder. However, due to his previous unlawful presence the DMD grantee would most likely face the inadmissibility bars in current law. While the three- and ten-year unlawful presence bars are deemed to not apply to any DMD grantee, the permanent bar and other grounds of inadmissibility related to unlawful status are not dismissed. A very limited waiver does exist for some of these grounds in current law, but it is exceedingly difficult to obtain.

   Even if re-entering on a non-immigrant visa were an option, again the Chairman's mark is not explicit about where processing would take place. Absent clear language in the Chairman's mark, including extensions of DMD status if processing deadlines are not kept or visas are not available, a "return and wait" scenario is much more likely than "work and return" for many DMD grantees.

   Conclusion: Because the Deferred Mandatory Departure proposal outlined in the November 9, 2005 draft Chairman's mark is unworkable and does not provide a clear path to permanency, it will not dramatically reduce the number of undocumented people living in the U.S. Any proposal that fails on this front will not fix our broken immigration system.

February 16, 2006