

Testimony of

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The Need for Comprehensive Immigration Reform: Strengthening Our National Security

Before the
Senate Judiciary Committee
Subcommittee on Immigration, Border Security, and Citizenship and the Subcommittee on Terrorism, Technology
and Homeland Security
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Senator Cornyn and Senator Kyl and distinguished Members of the Subcommittees, my name is Margaret Stock. I am honored to be here in two capacities: on behalf of the American Immigration Lawyers Association (AILA) and as an expert in the field of constitutional, military, national security, and comparative law. I am an Associate Professor in the Department of Law at the United States Military Academy at West Point, New York. The statements, opinions, and views expressed herein are my own, and do not represent the views of the United States Military Academy, the Department of the Army, or the Department of Defense.

AILA is the immigration bar association with more than 8,900 members who practice immigration law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is an affiliated organization of the American Bar Association (ABA). AILA members represent tens of thousands of American families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States; U.S. businesses, universities, colleges, and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers when required, on a permanent basis; and healthcare workers, asylum seekers, often on a pro bono basis, as well as athletes, entertainers, exchange visitors, artists, and foreign students. AILA members have assisted in contributing ideas for increased port of entry inspection efficiencies and continue to work through their national liaison activities with federal agencies engaged in the administration and enforcement of our immigration laws to identify ways to improve adjudicative processes and procedures.

As I mentioned previously, I am an Associate Professor at the United States Military Academy at West Point, New York, where I teach National Security Law, Constitutional Law, Military Law, Comparative Law, and International Law to future military officers. As an attorney and a graduate of the Harvard Law School, I have practiced in the area of immigration law for more than ten years, and have written and spoken extensively on the issue of immigration and national security. I am also a lieutenant colonel in the Military Police Corps, United States Army Reserve. Over the years, I have represented hundreds of businesses, immigrants, and citizens seeking to navigate the difficult maze of U.S. immigration law.

I am honored to be appearing before you this afternoon to discuss comprehensive immigration reform and its relationship to our national security. I congratulate Senators Cornyn and Kyl for holding this hearing, along with the earlier hearings that focused on the following important areas: the need for better training for border inspectors; ensuring document security and integrity; finding and closing gaps in the visa system; interior enforcement, including

detention and deportation; border security between authorized ports of entry; and the use of technology to protect the borders.

These hearings are long overdue and much needed. Today's hearing on "The Need for Comprehensive Immigration Reform: Strengthening Our National Security" could not be more important or timely. We must acknowledge the connection between comprehensive immigration reform and our national security and the fact that enhancing our national security depends on comprehensively reforming our immigration laws. Until now, many have focused on border and interior enforcement, but we simply cannot effectively reform our immigration laws or enhance our security with an "immigration enforcement-only" approach. Neither can we ensure our security by focusing solely on a guestworker program. A guest-worker approach by itself inadequately addresses the systemic problems with our immigration laws and an enforcement-only approach is doomed to failure because it is unworkable and far too expensive for too little in return. My testimony will emphasize the kind of immigration reform necessary to fix our system and enhance our security

Before I focus on the issues of comprehensive immigration reform and its relationship to national security, however, I want to reiterate two points I made during an earlier appearance before the Immigration, Border Security, and Citizenship Subcommittee:

? We best enhance our security by enhancing our intelligence capacity. National security is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher immigration laws or blindly treating all foreigners as potential terrorists. Policies and practices that fail to properly distinguish between terrorists and legitimate foreign travelers are ineffective security tools that waste limited resources, damage the U.S. economy, alienate those groups whose cooperation the U.S. government needs to prevent terrorism, and foster a false sense of security by promoting the illusion that we are reducing the threat of terrorism. Reforming our immigration laws will help us to identify those who seek to enter our country or are already residing here.

? We need to make our borders our last line of defense. The physical borders of the United States should be our last line of defense because terrorism does not spring up at our borders. In fact, we need to re-conceptualize how we think about our "borders," because in our modern world they really start at our consulates abroad.

The Necessary Components of Comprehensive Immigration Reform

Reforming our immigration system is a key component, along with enhancing our intelligence capacity and reframing our understanding of the border, to making our nation safer. While many emphasize that such reform must be "comprehensive," there may not be consensus on what constitutes comprehensive reform. I believe the following core components constitute needed "comprehensive" reform.

? Comprehensive Immigration Reform Must Address the Situation of People Living and Working Here by Allowing Them to Earn the Opportunity to Obtain Permanent Status: Estimates are that there are more than 10 million illegal or out-of-status immigrants here in the United States. The vast majority are relatives of U.S. citizens and lawful residents or workers holding jobs that Americans do not want. People already living here and who are no threat to our security but who work hard, pay taxes, and are learning English should be allowed the opportunity to earn their permanent residence. These people are not the problem; rather, they are a symptom of the problem: our broken immigration system. Reforming the system to include these people is necessary and realistic: necessary because it would allow our government to know who resides in our country; realistic because this nation will not deport the millions of illegal immigrants living and working here. Those who suggest that these people do not want to be part of America because they have not fixed their immigration status do not understand that no current law exists to allow them to do so. Also, the public understands that we will not deport all of these undocumented individuals, and is calling out for a constructive solution. Allowing people to earn the opportunity to adjust their status is that solution.

? Immigration Reform Must Include a "Break-the-Mold" Worker Program: Current immigration laws do not meet the needs of our economy or workers. A "break-the-mold" program would provide visas, family unity, full labor rights, the ability to change jobs, and a path to permanent residence over time for those who would not displace U.S. workers. It also would diminish illegal immigration significantly by creating a legal avenue for people to enter the U.S. and return, as many wish, to their countries, communities, and families.

? Immigration Reform Must Reunify Families: Legal permanent residents often wait up to 20 years to reunite with their spouses and children. Such long separations make no sense in our pro-family nation, reflect poorly on us, and ultimately encourage illegal immigration. It simply makes no sense for this country to have an immigration policy in which legal immigration from Mexico ends in June or July of every year because of per-country limits.

Guest-Worker and Work and Return Programs

The three initiatives outlined above together would go a long way toward addressing the current systemic dysfunctions in our immigration system. Furthermore, all three are necessary and would help create a system of laws that is, in fact, enforceable. Neither a guest-worker program alone (that includes the possibility of an adjustment to a permanent status), nor a variation in the form of a pure "work and return program," would constitute the kind of reform necessary to bring about an orderly, controlled and fair immigration system--a system that would, in turn, help us to enhance our security.

The U.S. already has two kinds of guest worker programs, one official and the other unofficial. The official program is the H-2B program, which is difficult to use and has an annual cap of 66,000. This cap was reached after only three months into the current fiscal year, necessitating an emergency short term fix that recently became law. The unofficial program is more commonly known as illegal immigration. In the past, many illegal migrants would work for short periods of time in the United States and return home again. Because of the enhanced efforts to secure our borders, illegal migrants are more likely than ever to remain in the United States. Thus, the illegal "guest-worker program" is now more of a "work and not-return" program because immigrants feel they must remain in the U.S. or risk losing any chance of ever returning to the United States.

It is important that we legalize this flow by creating a new temporary worker program that would give workers the opportunity to work where they are needed, and employers experiencing shortages the legal workforce they need. Such a program would provide legal visas, family unity, full labor rights, labor mobility and, if the worker so desires (and assuming he or she would not displace a U.S. worker), permanent residence and citizenship over time. Such a program also would diminish significantly future illegal immigration by providing people with a legal way to enter the U.S. and return, as many wish, to their home countries, communities, and families. This kind of program would allow our government to know who is in the United States, and better focus resources on those who mean to do us harm. This program would also reduce the power of the criminal gangs and networks that are currently profiting off our failure to legalize migrant flows. A properly designed guest-worker program would re-create the circularity that has characterized the foreign worker flow for decades. Workers would come to the U.S. and return to their home countries when they finished their work assignments (unless they seek permanent residency here and would not displace a U.S. worker). Our reinforced borders have dramatically changed that traditional migratory pattern as undocumented workers are now deciding to stay in the U.S. rather than risk death by crossing the borders through increasingly hostile terrain.

A viable temporary worker program would help us secure our borders by allowing our government to focus on the people who mean to do us harm, not on those who are filling our labor market needs and trying to reunite with their family members. Such a program must include the option to adjust to permanent status if no American worker would be displaced. Because a pure "work and return" program would not include that option, employers would be prohibited from retaining a valued worker on a more permanent basis.

Neither a simple guest-worker program that includes an option to adjust, nor a work and return program, in and of themselves, can be considered comprehensive reform, as both programs ignore the significant problem in the current system--namely, those who are residing now in the U.S. but who do not have lawful status, and families who must endure lengthy separations. It is unrealistic to assume that significant numbers of undocumented people will step forward and register for a program which, at the end of the day, would force them to leave their jobs and families. A program that includes no real possibility for people to earn permanent resident status will not generate full participation. People will simply choose not to participate, or take the risk and go back into the shadows if the laws do not change before the time period of the program expires. It also is unrealistic to assume that families will endure decades of separation. To enhance our security, we need immigration laws that acknowledge the needs of American business, reunite families, and allow us to find out who is living in the United States. Both a guest-worker program alone (with the possibility of adjustment) and a work and return-type approach simply fail on these counts.

Immigration reform that legalizes hard-working people already here and that creates a new worker program will help the U.S. government focus resources on enhancing security, not on detaining hard-working people who are filling vacancies in the U.S. labor market or seeking to reunite with their close family members. In addition, an earned adjustment program will encourage people to come out of the shadows and be scrutinized by our government, and a new worker visa program will create a legal flow through which people can enter and leave the U.S. The legality that results from these initiatives will contribute to our national security by helping to focus resources on those who mean to do us harm. Such legality also will facilitate enforcement efforts. Enforcing a dysfunctional system only has led to more dysfunction, not better enforcement.

Likely Voters Support Comprehensive, Bipartisan Reform

A recent survey of "likely" voters reinforces support for the kind of comprehensive reform set forth in the recently introduced Secure America and Orderly Immigration Act (S. 1033/H.R. 2330)--one that is bipartisan and that would combine toughness with fairness, provide a path to citizenship with reasonable requirements, implement an effective guest worker program, and reunite families. This survey tells us that voters want a system that rewards immigrants who come here to work hard, pay taxes, and learn English. In fact, 75% of likely voters favor a proposal that has the following components:

- ? Registers undocumented workers as temporary guest workers,
- ? Provides temporary work visas for seasonal and temporary workers,
- ? Provides newly registered workers with a multi-year process for legal residency and eventual citizenship,
- ? Provides newly registered workers with no preferential treatment for citizenship,
- ? Provides tougher penalties for workers or employers who violate these laws, and
- ? Puts a priority on reuniting close family members.

In response to other questions in this survey, more than three-in-four likely voters agree on these statements framing the immigration reform debate:

- ? "The immigration system is broken and needs to be fixed."
- ? "If an immigrant has been in this country working, paying taxes, and learning English, there should be a way for them to become a citizen."
- ? "Fixing our immigration system to make it safe, legal, and orderly will make us more secure from terrorists."

Additionally, the survey also found that 73% agreed that "deporting all 10 million undocumented immigrants currently in the United States is unrealistic."

Congressional Efforts

The recently introduced Secure America and Orderly Immigration Act (S.1033 /H.R. 2330) is a bipartisan comprehensive reform bill that would take a giant step toward reforming our laws and enhancing our national security. I applaud Senators McCain and Kennedy and Representatives Kolbe, Flake, and Gutierrez for their work on this important effort. This bill reflects the following important facts: the federal government must step up to the plate and reform our current immigration laws; this nation cannot have border security unless we undertake such reform; fixing our immigration system to make it safe, legal and orderly will make us more secure; we need a controlled immigration system that would replace an illegal flow with a legal immigration flow; and, finally, we need an immigration system that is consistent with the basic American values of fairness and equal treatment under the law.

Members of Congress, along with the Bush Administration, must work together to fix our broken immigration system. Given the complexity of the law in this area, the broken status quo, and the fact that whatever reforms are enacted will impact on our security, proposals that are introduced in the future must reflect the kind of reform I have discussed above. Such reform is necessary, especially in a post-September 11 world in which enhanced security is central, and yet we must understand that our security depends on maintaining our economic power by allowing the continued flow of people and goods across our borders. Our current system is characterized by families being separated for long periods of time and U.S. employers unable to bring in needed workers. People are forced to live an underground existence, hiding from the government for fear of being separated from their families and jobs. The current

enforcement system fails to prevent illegal immigration, and precious resources that should be spent on enhancing our security are wasted on stopping hard-working people from filling job vacancies in the U.S. Our immigration system must be reformed so that legality is the norm, and immigration is legal, safe, orderly, and reflective of the needs of American families, businesses, and national security.

Comprehensive reform is essential to both enhance our security and make our enforcement efforts more effective. Addressing the situation of people here would encourage these people to come out of the shadows and be scrutinized by our government. This initiative is even more important now that the REAL ID Act has become law, because REAL ID mandates that illegal migrants can no longer be part of our state and local driver's license law enforcement databases, and they will thus be even harder to find than ever before.

Security and Enforcement Focus

Our current immigration system is an obstacle to enhancing our security because it is dysfunctional and unenforceable. We currently allocate massive resources in a futile attempt to enforce a system that simply does not work. Continuing to enforce our currently dysfunctional system will only lead to more dysfunction and a waste of resources. On the other hand, comprehensively reforming our laws will shrink the haystack of people so that we separate those who are here to be with their families or work from those who aim to do us harm. Our enforcement efforts would be far more effective if our laws made sense. In considering reforms to those laws, what are the questions we need to ask and answer?

1. What security measures are most effective in preventing attacks? In the hours following the deadly terrorist attacks of September 11, 2001, the United States government took the extraordinary step of sealing U.S. borders to traffic and trade by grounding all aircraft flying into or out of the country and imposing a lock-down on the networks of transportation and commerce that are the lifeblood of our economy and society. Given the uncertainty over what might happen next, these emergency procedures were a necessary and appropriate short-term response to the attacks. In the long run, however, a siege mentality and the construction of a fortress America are ineffective and unrealistic responses to the dangers we face.

If we are to succeed in reducing our vulnerability to further terrorist attacks, we must focus our attention and resources on the gaps in intelligence gathering and information sharing that allowed nineteen terrorists to enter the United States. National security is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher immigration laws or blindly treating all foreigners as potential terrorists. Policies and practices that fail to properly distinguish between terrorists and legitimate foreign travelers take us down the wrong path as ineffective security tools that do more harm than good. Comprehensively reforming our immigration laws is an essential tool to help us distinguish between those who mean to do us harm and those who are here to fill our labor market needs and reunite with close family members.

As Asa Hutchinson rightly stated when he appeared before this committee last year, "Illegal entry across our borders makes more difficult the urgent task of securing the homeland. Our homeland will be more secure when we can better account for those who enter our country, instead of the current situation in which millions of people are unknown."

If we are going to take seriously our responsibility to defend the homeland, we must make hard choices and do what is needed to know who is here, who is entering, and why. In pursuit of answers to these questions, DHS has developed several programs, some in conjunction with other departments. Some of these initiatives include:

? The National Targeting Center, which provides around the clock tactical targeting and analytical research support for anti-terrorism efforts. The NTC staff consists of CBP officers and field analysis specialists who are experts in identifying high-risks targets from raw intelligence, trade, travel, and law enforcement data;

? The Human Smuggling and Trafficking Center, a joint DHS, DOS, and DOJ venture that analyzes and disseminates information to enforcement, intelligent and other entities that take action against threats of human smuggling, trafficking and against criminal support for terrorist travel; and

? Threat Analysis Section (TAS), an ICE-run program that identifies and addresses potential vulnerabilities to the United States. The TAS establishes associations between the individuals or groups linked to potential national security threats, develops profiles based upon relevant investigative and intelligence reporting, and produces actionable leads for field office.

I hope that one of the main questions the Senate asks as a result of this hearing is how comprehensive immigration reform would help these anti-terrorism programs be more effective? The answer is clear. By bringing the people that are here out of the shadows, and creating an orderly mechanism for identifying and documenting the low-risk individuals who travel to this country to work, and by curbing policies such as separating families that entice otherwise low-risk individuals to cross the border illegally, a comprehensive immigration reform plan would help these initiatives better focus on those who have come here to do us harm. Quite simply, only an immigration reform program that deals with the current problem in its entirety would have such a positive effect. A program that fails to identify the reasons for illegal-crossings or one that inadequately deals with the undocumented population would not help these initiatives protect our citizens.

The recent enactment of the REAL ID Act makes these efforts more important than ever. REAL ID forces states to stop putting data provided by illegal immigrants into the largest law enforcement database in the country--the driver's license database. When only American citizens and legal aliens are in this database, border security and interior enforcement will be harder than ever to accomplish. Comprehensive immigration reform is thus also necessary to counteract the security vulnerability the REAL ID Act has created.

2. What is the role of our "borders" in enhancing security? What and where are our borders? When people refer to our "borders," they usually mean the geographic boundaries that separate the United States from Canada and Mexico. Yet to enhance our security we must make our physical borders the last line of defense against terrorism, not the first. We must pursue initiatives including multilateral strategies with Canada and Mexico and increase the use of pre-clearance and pre-inspection programs that provide U.S. officials the opportunity to check passengers for admission before those passengers board a flight to the United States (while including safeguards to allow asylum protection for those who truly deserve it).

Our government has been touting the United States Visitor and Immigrant Status Indicator Technology program (US-VISIT) as a tool that will help to make us safer by identifying terrorists. While US-VISIT can help to identify people, its utility as a security tool is unclear. This new automated entry/exit system is being implemented at our nation's ports of entry and is designed to collect and share information on foreign nationals traveling to the United States (including travel details and biometric identifiers), confirm identity, measure security risks, and assess the legitimacy of travel in an effort to determine who is welcome and who is not. The program is also intended to help speed traffic flow. The overall plan for the implementation of US-VISIT calls for the collection of personal data, photos, and fingerprints at U.S. consular offices abroad and at our ports of entry, as well as broad database and information sharing. The system also is intended to track changes in foreign nationals' immigration status and make updates and adjustments accordingly. Ultimately, the Department of Homeland Security (DHS) plans to make available information captured through US-VISIT at all ports of entry and throughout the entire immigration enforcement system.

Will US-VISIT help to enhance our security? While the jury is still out, serious questions need to be addressed as to US-VISIT's achievable mission. A June 1998 Senate Judiciary Committee Report (Senate Judiciary Report 105-197 on S. 1360, the Border Improvement and Immigration Act of 1998, June 1, 1998) makes the following apt comment:

The Committee is keenly aware that implementing an automated entry/exit control system has absolutely nothing to do with countering drug trafficking, and halting the entry of terrorists into the United States, or with any other illegal activity near the borders. An automated entry/exit control system will at best provide information only on those who have overstayed their visas. Even if a vast database of millions of visa overstayers could be developed, this database will in no way provide information as to which individuals might be engaging in other unlawful activity. It will accordingly provide no assistance in identifying terrorists, drug traffickers, or other criminals. (emphasis added)

With regard to tracking visa overstayers, the report further states:

Even if a list of names and passport numbers of visa overstayers would be available, there would be no information as to where the individuals could be located. Even if there was information at the time of entry as to where an alien was expecting to go in the United States, it cannot be expected that 6 or more months later the alien would be at the same location. Particularly, if an alien were intending to overstay, it is likely that the alien would have provided only a temporary or false location as to where the alien was intending to go.

Notwithstanding these concerns, to enhance our security and allow the flow of people and goods to support our economy, US-VISIT must be adequately funded. The U.S. government needs to appropriate billions of dollars to purchase real estate, upgrade facilities, develop an infrastructure and technological capabilities, and hire inspectors to manage the program. This cost includes neither the millions of dollars needed to fully address current staffing shortages of inspectors at ports of entry nor the money now needed to supply all ports with basic technology such as document readers. With a preliminary estimated price tag of billions of dollars, recent appropriations have been grossly insufficient to fund the program's expansion. Without sufficient funding to support a fully operational program, delays could result in the entry and exits at our nation's ports, particularly land ports. Such delays would undermine the entire effort to maintain an efficient border, and efficiency is a vital component of increased security.

In addition, as the number of enrollees into US-VISIT increases, it is incumbent upon the Department of Homeland Security to ensure that information input into the database is accurate and reliable. This includes integrating into US-VISIT the databases from the three immigration bureaus. Unless these databases are integrated with US-VISIT, visitors who have applied for visa extensions might be detained for overstaying their visas, when in reality, they had maintained proper visa status. Having complete and correct information will make the difference between having a workable secure system or a discredited inefficient one.

While US-VISIT is still in its infancy, database studies and reports should be completed on the feasibility of every aspect of the program. The Administration and Congress should use that information to develop a comprehensive plan that takes into account adequate funding levels, resources and obtainable deadlines.

3. How do we balance the flow of people and goods with securing our borders? The United States has over 300 ports of entry through which authorized travelers and commercial goods enter the country. In 2001, over 510 million people (63% of whom were foreign nationals) and over \$1.35 trillion in imports entered the U.S. through these ports. If the inspection of each of these entrants took even a little longer than it currently does, the flow of goods and people (particularly at land ports) would come to a grinding halt. The Department of Homeland Security thus has the challenge of streamlining current border procedures and evaluating future initiatives so that the border crossing processes are both more secure and efficient. Otherwise, security measures that do not take into account travel and trade could cripple our nation's economic viability. As we think about our security needs, we must remember that we need a strong economy to pay for our national security.

Our economic prosperity depends on the free movement of people and goods. We must be careful not to create an environment conducive to terrorists and criminals at our ports-of-entry as we seek to secure our borders in a way that does not trump cross-border facilitation. We need to adopt a "virtual border" approach that recognizes the importance of the continued flow of people and goods, and underscores that effective border management needs to take place away from our physical borders. I would only add that comprehensively reforming our immigration laws is the other component that is necessary for our borders to work and work well because such reform helps identify the people who present themselves at our ports-of-entry, thereby making legality the norm.

4. What is the role of immigration in the post-September 11 world? Because all nineteen of the September 11th terrorists were foreigners, some observers have been quick to blame our vulnerability to terrorist attacks on lax immigration laws. While such a response was predictable, it was misguided and has inevitably resulted in overreaction. Calls to impose a "moratorium" on immigration, halt the issuance of student visas, close the borders with Canada and Mexico, eliminate the Diversity Lottery visa program, draft harsher immigration laws, and similar types of proposals reflect a serious misunderstanding of the relationship between immigration policy and national security.

Although the attacks of September 11th revealed serious management and resource deficiencies in the bureaucracies that administer our borders, U.S. immigration laws in and of themselves did not increase our vulnerability to attack. In fact, U.S. immigration laws already are among the toughest in the world and have long provided the federal government with broad powers to prevent anti-American terrorists from entering or residing in the

United States. A careful analysis of the September 11th attacks reveals that deficiencies in U.S. intelligence collection and information sharing, not immigration laws, prevented the terrorists' plans from being discovered.

5. The Use of Technology: Technology is not a magic bullet. The best way to identify terrorists is an approach that capitalizes on human intelligence, using technology only to enhance our ability to use human intelligence. Our greatest successes in preventing terrorist attacks have come not from technology identifying terrorists, but from human intelligence we have gathered about terrorists. Over-reliance on technological solutions to the detriment of creating a strong human intelligence program is a recipe for disaster.

6. Proper Use of Databases: In creating and relying on ever-larger computer databases, we must be aware of the limitations of such databases and the potential security vulnerabilities that we are creating. In some cases, we are planning to rely heavily on the use of databases for purposes for which they were not intended. For example, the use of the NCIC database to track civil immigration violations presents difficulties in that immigration status is a moving target. A person can be legal one day, illegal the next; or legal one day, illegal the next, and legal again the following day. Using the NCIC database to track such violations is likely to make that database much less useful to law enforcement officials because there will be more inaccurate data in the system than there is already. The REAL ID Act has ruled out the possibility of using state DMV databases as a source of information about the illegal or undocumented migrant population in the United States. Thus, REAL ID will make it harder to enforce immigration laws, not easier. Comprehensive immigration reform that allows illegal immigrants to come out of the shadows and be identified will enhance our security and improve government data on who is present in the United States.

7. Is it important to move ahead on comprehensive immigration reform to secure our borders? Yes, absolutely. Our nation has no choice but to move ahead on comprehensive immigration reform if we are to secure our borders, enhance our security, and create a safe, legal, orderly and controlled immigration system.