



Crafting a Successful Legalization Program

Lessons from the Past

By Lisa S. Roney

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ABOUT PERSPECTIVES ON IMMIGRATION

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ABOUT THE AUTHOR

Lisa S. Roney retired in 2009 as Director of the Research and Evaluation Division of the Office of Policy and Strategy at U.S. Citizenship and Immigration Services (USCIS) following 39 years as a policy analyst and manager with USCIS and the legacy Immigration and Naturalization Service. She served on the staff of the Interagency Task Force on Immigration Law and Policy and was a Senior Research Associate with the Select Commission on Immigration and Refugee Policy. She was responsible for monitoring and reporting on implementation of the Immigration Reform and Control Act of 1986 and research on the legalized immigrant population. She is currently an independent immigration consultant working with Westat on evaluation of electronic employment verification programs. She received a B.A. from Hood College and an M.P.A. from American University.

ABOUT THE IMMIGRATION POLICY CENTER

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One of the themes that emerged from the Senate Judiciary Committee mark up of the 2013 Senate immigration bill was the necessity of avoiding the mistakes of the past. In the context of legalization for the 11 million unauthorized immigrants now in the United States, the argument is often made that the 1986 law wasn't tough enough, and any new legalization program should have more requirements and restrictions. However, in my 39-year career with the Department of Homeland Security (DHS) and former Immigration and Naturalization Service (INS), and after years of studying implementation of the 1986 law, I've reached a different conclusion. A successful legalization program depends on simplicity and common sense. There are many lessons to be learned from the 1986 law about how to design a better legalization program. Fortunately, many of those lessons have been absorbed by the drafters of S. 744, the Border Security, Economic Opportunity and Immigration Modernization Act. Nonetheless, as the debate continues on this bill, it is important to reiterate the importance of good design and thoughtful implementation. That is what will ensure success and provide the country with a working immigration system.

This essay reinforces the importance of the lessons learned from IRCA, the Immigration Reform Control Act of 1986—and the necessity for adhering to them as debate on immigration reform continues. Lessons from the past for designing a new legalization program can be categorized into six basic principles: keep it simple, be inclusive, make it affordable, make it safe, promote administrative efficiency, and make all parts of the system work together.

Principle 1: Keep the program simple

The simplest and most efficient legalization program would be a single-application process resulting in immediate permanent resident status. However, because unauthorized immigrants have been living outside the legal system for many years and may need time to collect needed documentation and meet prospective program criteria (such as payment of penalties and acquiring English-language skills), this may be too large a step to take initially. Further, to the extent that legal status for some unauthorized immigrants is tied to the legal immigration process (where long waits may currently exist), that would leave many potential applicants without a legal status for many years, which would undermine the program by definition.

Based on experience with the 1986 legalization program, getting the unauthorized immigrant population registered and in lawful status quickly is the most important goal. Therefore, a two-stage program, similar to the 1986 legalization program, is desirable. Such a program would start with an initial registration period that grants temporary status, including employment authorization and permission to travel. This would attract the maximum number of unauthorized immigrants and get them on the path to qualifying for lawful permanent residence. The second stage of the program leading to permanent residence would include additional requirements such as payment of a penalty, proof of payment of assessed taxes, and acquisition of English-language skills. This stage would end with lawful permanent resident status for those successfully completing the process and, after an additional period of residence and meeting the criteria, could lead to U.S. citizenship.

Principle 2: Facilitate Inclusion

Participation

The provisions in IRCA required at least 5 years' residence to qualify, which created a significant documentary barrier for those who met the period-of-residence requirement but did not have the documents to prove it, and resulted in a significant population of residents who were left in unlawful status at the end of the program. A legalization program should be designed to allow the maximum number of unauthorized immigrants to participate. It is in the national interest to register all persons who are currently here in unlawful status so they are henceforth legally included in our society. A policy of inclusion entails provisions specifying a recent cut-off date and short period of continuous residence to qualify, as well as realistic and verifiable documentary requirements. Inclusion of the maximum number of unauthorized immigrants supports the first principle of keeping the program simple and prevents a residual unauthorized population.

Documentary Requirements

As shown in the 1986 program, the provisions for length of residence and documentary requirements are inherently intertwined; the longer the period of residence required and the earlier the cut-off date for residency, the more onerous the documentary requirements become to prove presence during this time. Conversely, the easier it is to demonstrate eligibility, the less difficult the administrative burden becomes to review documentation and the less likely it is that applicants will have difficulty documenting their past residence and resort to use of fraudulent documentation.

IRCA's provisions and its implementing regulations¹ prudently facilitated the application process by not specifying the documentary requirements for proof of continuous residence. However, experience administering the 1986 program found that, because unauthorized immigrants seek to avoid detection, potentially changing employers and housing frequently, their lifestyles made them less likely to retain rent receipts, pay stubs, school records, and other evidence that could demonstrate continuous presence. Thus some qualified applicants used fraudulent documentation because it was their only option. Therefore, a recent cut-off date resulting in the need for less documentation reduces the burden on both applicants and the government to provide and review paperwork.²

A policy of inclusion is strongly supported by the best studies of the unauthorized immigrant population, which estimate that most unauthorized immigrants have many years of residence in the United States. Nearly two-thirds have been here for at least 10 years; another 22 percent have been resident for 5 or more years, with only 15 percent having less than 5 years of residence.³ This population has the potential to be well on its way to being part of our society once allowed to come out of the shadows.

Inclusion of Spouses and Children

Unlike the 1986 legalization program, new legislation should provide derivative status for spouses and minor children of principal legalization applicants, whether inside or outside the United States. By excluding family members that did not qualify on their own merits, participation in the 1986 program was reduced, especially among those who were fearful that their family members might be deported. Moreover, following administrative attempts to provide status for immediate family members who did not qualify on their own, legislation was passed in 1990 to give provisional legal immigration status and work authorization to many of these family members. Doing so originally would have been far more efficient and humanitarian.

Data suggest that including the closest family members will not greatly increase numbers. Based in part on their relative youth, unauthorized immigrants are more likely to be living in nuclear families (with a spouse or cohabiting partner and children) than either legal-immigrant or U.S.-citizen adults. Overall, 45 percent of unauthorized immigrants live with a spouse or cohabiting partner and children, compared with 34 percent of legal-immigrant adults and 21 percent of U.S.-born adults.⁴ Currently, almost half of all unauthorized immigrants have minor U.S. children,⁵ a majority of whom are likely native-born U.S. citizens.

Length of Application Period

The initial process needs to be time limited but sufficiently long to register some 11 million unauthorized immigrants currently resident in the United States. Presumably, much—if not most—of the administrative legalization process, including intake, verification, adjudication, and notification, can be automated. The initial registration period for the 1986 legalization program was one year, which would presumably need to be extended to at least two years for the much larger number of applicants—the amount of time needed being offset by greater use of technology in a new program.

Designing the program to draw participants in voluntarily and encourage those who may be hesitant to apply is critical.⁶ Maintaining a steady flow of applications is also beneficial, since a more constant flow results in a better-administrated program. The IRCA legalization program saw a slow initial rise in applications at the beginning of the program as persons increasingly prepared their cases and saw that applying was safe. However, the initial period was followed by a drop in receipts midway through the program, with 30 percent of the applications filed in the last 2 months of the program, a time when funding levels and staffing were lower due to the reduced applications in the preceding months.⁷

In addition to sufficient intake capacity, a publicity program needs to be funded to reach all groups of unauthorized immigrants regardless of their nationality or place of residence. During the 1986 legalization program, participation was uneven based on nationality and geographic area of the country, resulting in part from the level of publicity and languages and approaches used to reach the unauthorized population. Additionally, concerns about putting mixed-status family members at risk also reduced participation.⁸

Criteria for Qualifying

Based on the 1986 program experiences, qualifications for the first temporary-resident phase should be kept to a minimum and include only passing a background check, proving identity, and having the requisite period of residence. By the time participants have reached the stage at which they are applying for permanent resident status, they should demonstrate that they have paid all assessed income taxes and either have sufficient English-language skills or be on a path to learning English. In both cases, however, those requirements must be reasonably designed for success. For instance, a “back taxes” requirement that requires compiling additional documents or endless hours at the IRS may impede efficient processing of applications. Similarly, advancing English proficiency requirements that are currently part of the naturalization process to the adjustment phase for legalization (something that has been proposed in the current Senate debate) extends processing times and ignores the limited resources often available to English language learners.

Grounds of exclusion applying to legalization applicants, as in the 1986 legalization program, must be appropriate to the process and be confined to those protecting the health, safety, security, and welfare of the United States. Grounds of exclusion applying to the 1986 cohort were limited to not having been convicted of a felony or three misdemeanors and not having persecuted anyone. Any minor infractions, including those committed at an early age, should be forgiven.

Principle 3: Make it Affordable

Fees and penalties should not deter participation in the program.⁹ The application fee should be meaningful, but within reach of participants, many of whom are living at or below the poverty level. As under the 1986 legalization program, the fee for families, including minor children, should be capped. However, the program should not be a financial burden on the nation; it should be largely self-funding, with fees covering most of the cost of the program. However, unlike the 1986 program, which was solely self-funded and reliant on the flow of applications, legislation should ensure appropriated funds for the start-up period and during and following slow application periods. Presumably, a majority of appropriated funds could be repaid into a fund to foster integration of applicants at the close of the program.

It would be reasonable for any required monetary penalty to be paid at the time applicants adjust to permanent status, which would give participants in the temporary-registration phase time to acquire the amount of the penalty, including paying any assessed taxes and taking classes in English.

Principle 4: Make it Safe

A key element of a legalization program is a nonthreatening environment. Since the former Immigration and Naturalization Service (INS), which administered the 1986 program, has been reorganized into separate benefit and enforcement agencies, this can now be more easily achieved. Nevertheless, it is important that participants understand that the application process is free of enforcement action or threat of such action. Rapid adjudication of applications and transmittal of case decisions will also send a positive message and help assuage fears about participating in the program.¹⁰ Those provisions of law that would make applicants automatically deportable upon application must also be waived in legislation.

Use of community and other nongovernmental groups in the legalization program, as in 1986, would not only increase participation¹¹ and the incidence of approvable applications, but would also help assure applicants that the program is safe. To the extent that there are legislative provisions to pay community groups for their assistance, provision needs to be made for prompt transfer of funds and for payment to be based on assistance provided, as well as completed applications submitted. Immigrant assistance groups in the 1986 program performed considerable work beyond the cases they submitted, which was the sole basis for their pay.

Principle 5: Promote Administrative Efficiency

Administering a legalization program is a huge task, and a new program will pose a greater challenge than the 1986 program in terms of size. Therefore, it is all the more important that the legislative design promote administrative efficiency and manageability. Experience with the 1986 program demonstrated that sufficient time to prepare for implementation is essential. While expediting the legalization process is crucial, developing the program requires time and resources. An overly short implementation schedule combined with insufficient upfront funding in 1986 resulted in incomplete and unclear administrative and operational structures, delayed regulations, insufficient outreach and public information, inadequate training, and inconsistencies in decision-making that resulted in litigation.¹²

Fortunately, technological advances and new administrative structures and practices in place at USCIS should greatly expedite staff training and case processing, and allow the agency to handle the much larger number of legalization cases with more standardized decision-making than was possible in 1986. Nevertheless, time is required for development of standardized materials and strategies, and legislation needs to provide up-front time, funding, and expedited procurement and hiring authorities required to build additional capacity so implementation of the legalization program does not detract from the ongoing immigration and citizenship adjudicative workload. Legislation needs to provide the necessary authorities, a framework, and goals, but should leave the details of the program to the regulatory process.

Principle 6: Make All Parts of the System Work Together

Reform legislation must include complementary processes that are mutually supportive and that serve the same goals. The failure of IRCA in large part resulted from the lack of a comprehensive approach to reforming the U.S. immigration system. While attempts were made to provide legal status to many of the then-unauthorized immigrant population and prevent the unlawful entry or employment of future unauthorized immigrants, changes were not made to the legal immigration system to meet future needs in terms of either family reunification or labor demand. Furthermore, the will was lacking to end the employment of unauthorized workers, many of whom were filling jobs for which there were no other available workers.

Comprehensive immigration reform, therefore, needs to include changes to the legal immigration system that will make it more humane and more in tune with modern U.S. family-reunification, humanitarian, and labor-market needs. In doing so, legislation needs to be clear on what social-service and health benefits are available to applicants at each stage of the legalization process, recognizing that revenues from legalization and an improved legal immigration system are likely to more than offset the costs of additional access to social and health benefit programs.¹³ Reform also needs to include the means for employers to determine quickly, accurately, and definitively whether a new employee is authorized to work, and a system of enforcement that is implemented even-handedly and targeted at egregious violations that are harmful to the nation's safety and security.

Endnotes

¹ Also true for LIFE Act late-legalization cases.

² Given advances in technology, provisions in new legislation giving legal authority for government agencies to share electronic information in a totally confidential context solely for the purposes of the legalization program in lieu of, or to support, documentation of residence, employment, or tax payment would greatly increase the efficiency and integrity of the legalization program. Further, based on experience with the 1986 program, it is helpful to consistent implementation if legislation is worded with an ameliorative intent that can be translated during implementation to foster inclusion.

³ Paul Taylor, Mark Hugo Lopez, Jeffrey Passel, and Seth Motel, [*Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*](#) (Washington, DC: Pew Hispanic Center, December 1, 2011).

⁴ Jeffrey Passel and Paul Taylor, [*Unauthorized Immigrants and Their U.S.-Born Children*](#) (Washington, DC: Pew Hispanic Center, August 11, 2010).

⁵ Pew Hispanic Center, [*A Nation of Immigrants: A Portrait of the 40 Million, Including 11 Million Unauthorized*](#) (Washington, DC: January 29, 2013).

⁶ Doris M. Meissner and Demetrious G. Papademetriou, *The Legalization Countdown: A Third Quarter Assessment* (Washington, DC: The Carnegie Endowment for International Peace, February 1988).

⁷ Susan Gonzalez Baker, *The Cautious Welcome* (Washington, DC: The RAND Corporation and The Urban Institute, 1990).

⁸ Susan Gonzalez Baker, *The Cautious Welcome* (Washington, DC: The RAND Corporation and The Urban Institute, 1990); Doris M. Meissner and Demetrious G. Papademetriou, *The Legalization Countdown: A Third Quarter Assessment* (Washington, DC: The Carnegie Endowment for International Peace, February 1988).

⁹ Immigration Policy Center, [*Focusing on the Solutions: Key Principles of Comprehensive Immigration Reform*](#) (Washington, DC: American Immigration Council, March 2010), p. 7.

¹⁰ Doris M. Meissner and Demetrious G. Papademetriou, *The Legalization Countdown: A Third Quarter Assessment* (Washington, DC: The Carnegie Endowment for International Peace, February 1988).

¹¹ Susan Gonzalez Baker, *The Cautious Welcome* (Washington, DC: The RAND Corporation and The Urban Institute, 1990).

¹² Jason Juffras, *Impact of the Immigration Reform and Control Act on the Immigration and Naturalization Service* (Washington, DC: The RAND Corporation and The Urban Institute, January 1991).

¹³ Congressional Budget Office, [*Congressional Budget Office Cost Estimate: S. 2611, Comprehensive Immigration Reform Act of 2006*](#) (Washington, DC: Congressional Budget Office, August 18, 2006).