

**“FEMALE TROUBLES”: THE PLIGHT OF  
FOREIGN HOUSEHOLD WORKERS  
PURSUING LAWFUL PERMANENT  
RESIDENCY THROUGH EMPLOYMENT-  
BASED IMMIGRATION**

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## I. INTRODUCTION

Throughout the history of the United States, the political debate over immigration policy has been exceedingly fraught with drama and controversy. And never has this been as true as it is today, in the aftermath of the tragedies of September 11th. The terrorist attacks of September 11th, 2001 “radically changed the political debate over immigration issues.”<sup>1</sup> On the eve of the terrorist attacks, Congress and the President were poised to enact liberalizing immigration reform measures.<sup>2</sup> But this day changed the world, and such liberalizing legislation was immediately derailed as the United States turned its attention to the more pressing issue of national security.<sup>3</sup>

A conflux of swirling emotions now directs the post-September 11th debate. The direction U.S. immigration policy should take has become increasingly contested among those with irreconcilable views, such as those in favor of liberalizing current immigration laws, including legalizing certain undocumented immigrants;<sup>4</sup> those in favor of restricting current immigration laws, including closely tracking the immigrant community pursuant to domestic antiterrorism measures;<sup>5</sup> and everyone in between. With each side claiming some ground in this debate, it is little wonder that current U.S. immigration law looks a little schizophrenic.

It is against this colorful backdrop that the following

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1. *What a Difference a Day Makes: Revisiting the Aftermath of September 11th*, 79 No. 3 Interpreter Releases 61 (West 2002).

2. *Id.*

3. *Id.*

4. See, e.g., Tamar Jacoby, *Lift Shadow from Illegal Immigrants*, L.A. TIMES, Oct. 15, 2003, at A1.

5. *What a Difference a Day Makes*, *supra* note 1, at 61.

analysis unfolds. By way of introduction, this Comment is concerned with the plight of foreign household workers pursuing lawful permanent residency through employment-based immigration. In the following analysis, I will flesh out some of the immigration obstacles faced by these workers—who are by and large female—and will detail why such immigration obstacles often prove to be insurmountable for them. I will also consider the consequences of this reality for those foreigners working in the United States as household workers, such as their increased exploitation and overall vulnerability. This analysis will, in turn, naturally lead to an exploration of the gendered dimension of current U.S. immigration policy.

To provide legal context, I will provide a detailed summary of the current procedures in place for pursuing lawful temporary and permanent residency through employment-based immigration. In the course of my analysis, I will highlight key problems that plague this area of immigration law. In connection with this, I will grapple with possible solutions to assuage some of the tensions endemic to this area of law, most notably, permanently restoring Section 245(i) of the Immigration and Naturalization Act (INA).<sup>6</sup> Restoration of Section 245(i) of the INA is an issue that has been recharged in the post-September 11th political debate. I will also propose other procedural solutions, including recasting the job classification for certain household workers, such as nannies, as skilled. Finally, I will suggest that the ominous “business necessity” standard demanded by the Department of Labor for live-in household workers be removed or procedurally eviscerated in order to make greater strides toward reconciling that which became disconnected somewhere in the evolution of U.S. immigration policy: the market demands for the services of foreign household workers and the legal hurdles associated with securing the same.

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6. Immigration and Nationality Act of 1952 § 245(i), 8 U.S.C. § 1255 (2003) [hereinafter INA].

## II. THE PROCEDURE

### A. *Temporary Residency: The Nonimmigrant Visa*

Any discussion about lawfully securing permanent residency must start at the beginning. In employment-based immigration law, the beginning is almost always the nonimmigrant visa. The nonimmigrant visa gives foreign nationals the opportunity to be admitted temporarily into the United States,<sup>7</sup> and, as such, it is a very important part of the overall procedure. In many cases, once in the United States, the foreign national begins to think of seeking permanent residency.<sup>8</sup> Essentially, this foreign national will use his nonimmigrant visa status as a springboard for pursuing permanent residency through his employer.<sup>9</sup>

Typically, this process plays out in employment-based immigration as follows: the foreign national enters the United States with the proper nonimmigrant visa status to work for a specified employer.<sup>10</sup> That employer may, in turn, extend an offer of permanent employment to the foreign worker in light of that individual's job skills.<sup>11</sup> In this situation, the employer will be the foreign national's immigration sponsor over a period of several years until such time as the foreign national becomes a

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7. *Temporary Visitors*, U.S. Citizenship and Immigration Services, at <http://uscis.gov/graphics/services/tempbenefits/index.htm> (last modified Nov. 5, 2004). Admission into the United States will be determined by an Immigration Officer at the airport or border. *See* INA § 221(h). The Immigration Inspector has the discretion to deem the foreign national ineligible for admission pursuant to INA § 212. *See id.*

8. The doctrine of dual intent allows nonimmigrants in H, L, E-1, or E-2 status to have both a short-term intent to depart the United States and a long-term intent to pursue permanent residency in the United States. IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 313, 313-14 (7th ed. 2000). Other nonimmigrant visa classifications require that the visa applicant not be an intending immigrant (i.e., that he not have any long-term intent to reside permanently in the United States). *See generally* EDWIN T. GANIA, U.S. IMMIGRATION STEP BY STEP 35 (2002).

9. *See* GANIA, *supra* note 8, at 31.

10. For a list of nonimmigrant visa classifications, see INA § 101(15)(A)-(V).

11. *See generally*, AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION PROCEDURES HANDBOOK § 16:2, 16-5 to 16-6 (2004) (describing general procedures employer must undertake to allow alien to apply for permanent residence status) [hereinafter IMMIGRATION PROCEDURES HANDBOOK].

permanent resident.<sup>12</sup> Although the process involved in securing lawful permanent residency through employment-based immigration is long and arduous<sup>13</sup> (not to mention costly), the conclusion is usually happy.

1. *“Too Hot, Too Cold, Too Big, Too Small” or “The Goldilocks Problem”: Why Most Household Workers Are Unable to Secure Nonimmigrant Visa Status Through Their Employers*

The household workers’ version of this story, however, has no such “happy ending.” Like Goldilocks frantically searching for the porridge and bed that were “just right,” so too search the foreign household workers for a nonimmigrant visa classification that will fit their immigration needs. However, unlike Goldilocks, none of the three nonimmigrant visa categories that are normally pursued by household workers prove satisfactory for either the foreign national or for the employer.

2. *B-1 Business Visitor*

The B-1 visa<sup>14</sup> classification is often very difficult to get, and once secured, does not provide U.S. work authorization.<sup>15</sup> Accordingly, after admission into the United States in B-1 status, the household must obtain an Employment Authorization Document (EAD) before beginning employment.<sup>16</sup> This application takes several months; must be renewed frequently; is not issued retroactively,<sup>17</sup> meaning that there will likely be gaps in the household worker’s employment

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12. *Id.* at 16-5.

13. GANIA, *supra* note 8, at 39.

14. *See B1 Visa and B2 Visa*, Green-Cards.com, at [http://www.green-cards.com/non\\_us/b1\\_b2\\_visa.htm](http://www.green-cards.com/non_us/b1_b2_visa.htm) (last visited Apr. 1, 2005).

15. *See IMMIGRATION PROCEDURES HANDBOOK*, *supra* note 11, § 1:10, at 1-12 to 1-13. Only U.S. citizens or nonimmigrants may sponsor a House Worker for B-1 status (i.e., lawful permanent residents may not) and there are several requirements involved; some examples include proof of one year prior employment, employment contract, pay that meets the prevailing wage for that position in the applicable metropolitan area as determined by the Department of Labor. *Id.* at 1-27. In general, the B visa classification is very hard to secure unless the foreign national is able to show strong financial and emotional ties to the country of origin. *See generally id.*

16. *Id.* at 1-28.

17. *See id.* at 1-28 to 1-29.

authorization because of lengthy and often erratic processing times; and is costly.<sup>18</sup> Adding to this cumbersome procedure is the fact that B-1 visa status is normally only given for a period of six months to a year, so this, too, must be extended frequently, which is also costly.<sup>19</sup>

### 3. *J-1 Exchange Visitor*

The second visa classification possibility is the J-1,<sup>20</sup> which is used for exchange visitors, such as Au Pairs.<sup>21</sup> Foreign nationals coming to the United States under the Au Pair Program in J-1 status must meet several requirements: being between the ages of eighteen and twenty-six; having a high school-level education, or its equivalent; being proficient in English; being in good health, as evidenced by a physical; passing a thorough background check; and passing a personality test.<sup>22</sup> In addition, the participating J-1 visa holders are required to return to their home country for a period of two years at the conclusion of the Au Pair Program.<sup>23</sup> Finally, the Au Pair Program is usually just for a one-year period.<sup>24</sup> So, although the Au Pair Program undoubtedly facilitates the needs of some employers in hiring foreign household workers, by and large, most foreign household workers will not be able to access the J-1 classification because they do not meet the Au Pair requirements as detailed.

Notwithstanding this, even for Au Pairs, the J-1 visa classification is not usually a proper stepping stone toward securing permanent residency because it triggers a two-year foreign residency requirement.<sup>25</sup> In most cases, this means that the Au Pair will be ineligible to pursue permanent residency unless he or she returns abroad for two years after departing the

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18. *See id.*

19. *Id.* § 1:19, at 1-57.

20. INA § 101(15)(J) (2003) (defining those classified who may be classified under J-1).

21. KURZBAN, *supra* note 8, at 346-47.

22. 22 C.F.R. § 62.31 (2003).

23. *See* KURZBAN, *supra* note 8, at 346-47.

24. 22 C.F.R. § 62.31 (2003).

25. KURZBAN, *supra* note 8, at 347.

United States or secures a waiver.<sup>26</sup>

#### 4. *H-2B Unskilled Worker*

At first blush, the third visa classification appears to be “just right”; upon closer inspection, however, it also proves unworkable. The H-2B visa<sup>27</sup> classification was designed for unskilled workers and requires certification from the Department of Labor (DOL) before the employer can hire the foreign national.<sup>28</sup> Certification is granted on two conditions: That unemployed, qualified U.S. workers are not available for this position in the region of the foreign national’s proposed employment; and that the employment of the foreign national will not adversely affect the wages or working conditions of U.S. workers similarly employed.<sup>29</sup> In addition, the employer’s need for someone with the foreign national’s skills must be temporary.<sup>30</sup>

If the requirement of DOL certification were not onerous enough, the requirement that the position be temporary usually ends any hope household workers may have had regarding finding immigration refuge in the H-2B visa classification.<sup>31</sup> Because there are no assurances that their employment will be temporary and, in fact, there is a presumption to the contrary, both the DOL and the U.S. Citizenship & Immigration Service (CIS) have hesitated to certify household jobs as temporary or to approve H-2B petitions for foreign household workers.<sup>32</sup>

In conclusion, in most cases, the household worker is left without a suitable nonimmigrant visa classification to use as a springboard for her permanent residency application. This means the household worker is often unable to secure, let alone maintain, legal status in the United States.<sup>33</sup> This, in turn,

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26. *Id.*

27. INA § 101(15)(H)(ii)(b) (2003) (defining those persons eligible for H-2B visas).

28. IMMIGRATION PROCEDURES HANDBOOK, *supra* note 11, § 7:1, at 7-4 to 7-5.

29. *Id.* at 7-5.

30. *Id.* at 7-4 to 7-5.

31. Melvin R. Solomon, *Between a Rock and a Hard Place: An Explanation of the Immigrant Issues Facing Employers of Domestic Workers*, 167 N.J. LAW. 40, 43 (1995).

32. *Id.*

33. Kenneth J. Harder, *Foreign Domestic: Immigration Remedies for Alien*

means that her opportunities for lawfully pursuing permanent residency are greatly eclipsed, if not completely extinguished, by the totality of her circumstances. The reality is that these circumstances weigh heavily on household workers. Because of their precarious legal status in the United States, these workers—largely female—are made vulnerable and ripe for exploitation.<sup>34</sup>

Having hashed out the key problems faced by household workers in the nonimmigrant visa arena, we turn now to the permanent residency application. It will quickly be made apparent that this procedure is, by far, the more challenging of the immigration processes from the household worker's perspective under current immigration law.

### *B. Permanent Residency: The Immigrant Visa*

The process involved in securing temporary residency in the United States has been described above. If a foreign national wishes to pursue lawful permanent residency, however, a separate, more dynamic and politically-charged process must be engaged. The following subsections detail the process involved in pursuing lawful permanent residency based on U.S. employment. Keep in mind that lawful permanent residency may also be sought based on family relationships or through the diversity visa lottery, both of which are outside the scope of this Comment.<sup>35</sup>

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*Household Workers*, 38-DEC HOUS. LAW. 16, 22 (2000).

34. See Kathleen A. DeLaney, Note, *A Response to "Nannygate": Untangling U.S. Immigration Law to Enable American Parents to Hire Foreign Child Care Providers*, 70 IND. L.J. 305, 315 (1994). For a discussion on the need for a criminal statute to address the problem of employer exploitation of alien employees, see Roshani M. Gunewardene, *Criminalization of Employer Fraud Against Alien Employees? A National Priority*, 25 NEW ENG. L. REV. 795, 812 (1991).

35. IMMIGRATION PROCEDURES HANDBOOK, *supra* note 11, § 19:1, at 19-3 to 19-4. Foreign nationals whom Congress deems to be immediate relatives of U.S. citizens by the Congress are immediately eligible to pursue lawful permanent residency in the United States. *Id.* § 12:1, at 12-3 to 12-4. Other close family members of U.S. citizens, as well as spouses and unmarried sons and daughters of permanent residents, must wait for an immigrant visa in their family-based preference category to become available before they can be assigned an immigrant visa. *Id.* Criticism regarding how Congress defines the "traditional family" for immigration purposes is mounting, most vociferously from the gay rights movement sweeping the country. See, e.g., Mara Schulzetenberg,

### 1. Introduction

A brief overview of the history of immigration law may be helpful at this point. In 1952, Congress enacted the INA,<sup>36</sup> which established annual immigration quotas based on race and national origin.<sup>37</sup> The 1965 amendments to the INA replaced the race- and national origin-based quotas with a fixed, unified immigration quota.<sup>38</sup>

In 1990, Congress enacted a wide-sweeping immigration reform bill known as the Immigration Act of 1990 (IMMACT).<sup>39</sup> Among other things, IMMACT increased the immigration quota; divided the quota into three groups: employment-based, family-based, and diversity-visa categories; and also carved out “preference categories” for the family- and employment-based groups.<sup>40</sup> In creating these preference categories, IMMACT dramatically changed the allocation of immigrant visas to workers.<sup>41</sup> The five groups, several of which are subdivided, are based on the qualifications of the foreign nationals and represent a specified percentage of the overall numbers allotted for employment-based immigrants.<sup>42</sup>

Right off the bat, IMMACT proved crippling to foreign household workers. Because the CIS classifies this group as unskilled, household workers have been siphoned off into the ominous “other worker” classification in the third employment-based preference category.<sup>43</sup> The term “other workers” is

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Note, *U.S. Immigration Benefits For Same Sex Couples: Green Cards For Gay Partners?*, 9 WM. & MARY J. WOMEN & L. 99, 99–100 (2002) (noting that current U.S. immigration laws do not recognize gay partnerships, which results in a denial of immigration benefits to the foreign national partner). Another way to immigrate is through the diversity visa immigration program. IMMIGRATION PROCEDURES HANDBOOK, *supra* note 11, § 19:4, at 19-7 to 19-8. Diversity visa selection is made randomly based on applications made during a specified period. *Id.* at 19-8.

36. McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

37. STEVEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 128 (3d ed. 2002).

38. *Id.* at 129–30.

39. *Id.* at 131.

40. *Id.* at 132, 141–42.

41. Solomon, *supra* note 31, at 41.

42. INA § 203(b)(1)–(5) (2003).

43. See AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, LABOR CERTIFICATION

statutorily defined as those immigrants “performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”<sup>44</sup> Of critical importance, no more than 10,000 visas are made available annually for those unskilled laborers relegated to the other worker classification.<sup>45</sup>

## 2. *Step One: Alien Labor Certification*<sup>46</sup>

Having discussed the primary factors at play in securing lawful permanent residency, we now turn to the procedure involved. The first step involved in pursuing permanent residency for most workers is the alien labor certification process. As set forth in the INA, certain foreign nationals coming to the United States to work are inadmissible without having first received certification from the DOL.<sup>47</sup> Certification is premised on two bases: First, that there are not any qualified, available, willing, and able U.S. workers for the position in the area of intended employment.<sup>48</sup> Second, that the employment of the foreign national “not adversely affect the wages and working conditions” of similarly-employed U.S. workers.<sup>49</sup> DOL certification is required for all foreign nationals in the third employment-based preference category.<sup>50</sup>

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HANDBOOK §§ 1:1, 1:23, at 1-3 to 1-4, 1-32 (2004) [hereinafter LABOR CERTIFICATION HANDBOOK]; INA § 203(b)(3)(A)(iii).

44. INA § 203(b)(3)(A)(iii).

45. *Id.* § 203(b)(3)(B). To access the State Department’s visa bulletin, which lists the processing dates for family- and employment-based preference categories, visit the State Department at <http://travel.state.gov/> and search for “visa bulletin.” See, e.g., *Visa Bulletin for April 2005*, Visa Bulletin No. 80, Vol. VIII, at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_2150.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_2150.html) (last visited Apr. 1, 2005).

46. Effective March 28, 2005, labor certification applications are handled under a new system known as PERM. See *PERM: The New System of Alien Labor Certification*, Immigration Law Group, P.C., at <http://www.immigrationgroup.com/PracticeAreas/PERM.asp> (last visited Apr. 5, 2005). While PERM ushers in a new era in labor certifications the differ procedurally from the description in this Comment, which was written under the traditional system, the legal process known as labor certification remains unchanged substantively. See *id.*

47. INA § 212(5) (2003).

48. *Id.* § 212(5)(A)(i)(I).

49. *Id.* § 212(5)(A)(i)(II).

50. *Id.* § 203(b)(3)(C). In most cases, labor certification is also required for foreign

In very general terms, the alien labor certification process normally proceeds in the following manner. The employer extends a full-time, permanent job offer to the foreign national for a specified position.<sup>51</sup> Next, the employer must consider whether the offered job falls into Schedule A or Schedule B.<sup>52</sup> For occupations in Schedule A, the DOL has determined that a shortage exists in the United States.<sup>53</sup> For occupations in Schedule B, such as household workers, the DOL has determined that there is no shortage in the U.S. market.<sup>54</sup> The DOL may waive Schedule B restrictions to allow labor certification for Schedule B occupations, such as household workers, in certain circumstances as detailed in the statute.<sup>55</sup>

The employer then submits information about the position, including the job title, requirements, description, and location, to the appropriate State Workforce Agency (SWA).<sup>56</sup> A year or more later (depending on the processing time of the SWA),<sup>57</sup> the SWA will open a job order for the position and will supervise all recruitment efforts conducted for that position during a thirty-day period.<sup>58</sup> After the job order is closed, the employer will be responsible for contacting all candidates generated from the recruitment and will submit the results of such interviews to the SWA.<sup>59</sup> The SWA then forwards the results to the Certifying Officer (CO) at the DOL.<sup>60</sup> Depending on the regional office of the DOL, a couple of months or even a couple of years may pass

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nationals in the second employment-based preference category, which has not been discussed in this Comment. LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 1:1, at 1-3.

51. See LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 1:4, at 1-6. The job must be all three: in the United States, permanent, and full time. *Id.*

52. See *id.* § 2:11, at 2-36.

53. 20 C.F.R. § 656.10 (2004).

54. *Id.* § 656.11.

55. See *id.* § 656.23. See also LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 1:24, at 1-33.

56. 20 C.F.R. § 656.21 (2004). See also LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 3:1, at 3-3 to 3-4.

57. Information on current processing times for the regions is available at <http://www.workforcesecurity.doleta.gov/foreign/times.asp> (last visited Apr. 1, 2005).

58. LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 1:12, at 1-17.

59. *Id.* at 1-17 to 1-19.

60. *Id.* at 1-19.

before the CO reviews the results of the supervised recruitment.<sup>61</sup> The CO then either grants the certification or issues a Notice of Finding (NOF) to address problems with the application.<sup>62</sup> The NOF may lead to a denial if the flaws are not satisfactorily corrected.<sup>63</sup>

Throughout this process, the SWA and DOL heavily scrutinize several factors. To begin with, the wage must meet ninety-five percent of the average prevailing wage for the position offered in the relevant job market.<sup>64</sup> As a practical matter, the Employment and Training Administration (ETA) of the DOL can provide prevailing wage information online or by regular mail.<sup>65</sup>

Another factor to tackle is choosing the correct requirements for the position. The Dictionary of Occupational Titles (DOT)<sup>66</sup> is an important tool in determining how much education and experience an employer can request for the offered position.<sup>67</sup> The DOT codes each job title with a Specific Vocational Preparation (SVP) estimate.<sup>68</sup> The SVP determines how much experience and skill can be required, and the employer cannot exceed this cap.<sup>69</sup> The SVP level can be hotly contested, as discussed below, because it essentially determines whether the position is skilled or unskilled and how wide the net must be cast into the local job market.

A third factor is business necessity. Certain job requirements automatically trigger the business necessity

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61. The ETA runs Backlog Processing Center in Philadelphia and Boston. See *Foreign Labor Certification Processing Times and Dates*, U.S. Dep't of Labor Employment & Training Admin., at <http://www.workforcesecurity.doleta.gov/foreign/times.asp> (last visited Apr. 1, 2005).

62. LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 1:13, at 1-19.

63. *Id.*

64. 20 C.F.R. § 656.40(a)(2) (2004).

65. See, e.g., U.S. Dep't of Labor, Educational & Training Administration's website, at <http://www.doleta.gov> (giving wage information online) (last visited Apr. 1, 2005).

66. EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES (4th ed.1991).

67. Employee Benefits, 20 C.F.R. § 656.21(b)(2)(i)(B) (2004).

68. LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 2:38, at 2-77.

69. See *id.* at §1:23, at 1-32.

standard, such as live-in household workers.<sup>70</sup> To satisfy the stringent business necessity standard, the employer must articulate compelling reasons for the requirement and support such statements with evidence.<sup>71</sup>

By all accounts, the labor certification process can be grueling.<sup>72</sup> For many, it will be the insurmountable wall keeping them from pursuing lawful permanent residency through their employer. In some cases, the reason for this is clear: Some positions are simply less suited for labor certification.<sup>73</sup> Positions are less suited where there is arguably an ample supply of U.S. workers who are qualified, available, willing, and able to assume the position.<sup>74</sup> In other cases, where there is arguably not a sufficient supply of qualified, available, willing, and able U.S. workers, other factors are at play. In many cases, for example, the harrowing procedural hurdles of the application alone serve to disproportionately disadvantage those workers who fall into disfavored job occupations, such as household workers, as discussed in more detail below.<sup>75</sup>

### 3. *Step Two: Immigrant Visa Petition*

If the alien labor certification is granted by the DOL, then the next step is to file an immigrant visa petition with the CIS.<sup>76</sup> The employer files this petition on Form I-140 along with supporting documentation, including the approved labor certification document.<sup>77</sup>

Because household workers are classified as unskilled

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70. *Id.* § 6:6, at 6-35.

71. *Id.* at 6-35 to 6-36.

72. *See, e.g.,* Deborah J. Notkin, *Labor Certifications*, in *BASIC IMMIGRATION LAW* 229, 232-33 (Practising Law Inst. 2003); GANIA, *supra* note 8, at 39.

73. *See* The Immigration Project of the National Lawyers Guild, *IMMIGR. LAW & DEF.* § 4:71, at 4-131 (3d ed. 2004).

74. Notkin, *supra* note 72, at 235.

75. *See generally id.* (describing the procedures an employer must follow in order to sponsor foreign nationals for permanent residence in the United States).

76. *IMMIGRATION PROCEDURES HANDBOOK*, *supra* note 11, § 16:23, at 16-69, § 16:29, at 16-117.

77. *Id.* § 16:23, at 16-69.

workers, the SVP is capped at a mere three months.<sup>78</sup> This means the employer cannot request more than three months of experience for the position regardless of whether more experience is actually preferred by the employer for the offered position.<sup>79</sup> Evidence of at least three months of experience is therefore required as part of the FORM I-140 petition.

Even though only three months of experience is technically required under the terms set forth in the labor certification application, since the household worker is on Schedule B, more experience must in fact be documented.<sup>80</sup> Specifically, the household worker must submit proof of one year of prior paid experience as part of the immigrant visa petition in order to be waived from Schedule B.<sup>81</sup> This one year of prior paid experience must be documented through letters, must equal full-time experience, and cannot be secured through the employer filing the immigrant visa petition.<sup>82</sup>

#### 4. *Step Three: Adjustment of Status or Visa Processing*

Once the immigrant visa petition has been approved by the CIS, the next step is to patiently wait for a visa number to become available in the appropriate preference category.<sup>83</sup> Since the household workers face a tremendous backlog, this wait may span the course of many years.<sup>84</sup> Once a visa number is available, then the applicant will have to decide whether to file the permanent residency application with the CIS through a process known as adjustment of status or whether to file the application abroad at a U.S. Consulate or Embassy through a

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78. LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 1:25, at 1-34 to 1-35.

79. *Id.* at 1-34. The labor certification process is designed to protect U.S. workers, not to ensure that the employer secures the most qualified candidate for the offered job. *See id.* §1:26, at 1-37 to 1-39. This is the central premise of the labor certification process, and often the most misunderstood aspect of this procedure. *See id.*

80. *Id.* § 1:25, at 1-34 to 1-35.

81. *Id.* at 1-35 to 1-36.

82. *Id.*

83. *See* IMMIGRATION PROCEDURES HANDBOOK, *supra* note 11, § 19:1, at 19-3 to 19-4. The State Department determines and publishes information regarding immigrant visa availability based on preference categories. *See id.* at 19-4.

84. Solomon, *supra* note 31, at 41-42.

process known as visa processing.<sup>85</sup>

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>86</sup> household workers could choose whether to adjust their status or process a visa abroad.<sup>87</sup> However, IIRIRA was a punitive immigration measure, and it imposed bars of reentry for foreign nationals with unlawful presence in the United States of three or ten years.<sup>88</sup> Since leaving the United States to process a visa will trigger the bar, effectively preventing the foreign national from applying for reentry for three or ten years, visa processing ceased to be a viable option for those with unlawful presence, including many of the household workers.<sup>89</sup>

Indeed, since the enactment of IIRIRA, the only option for household workers who have unlawfully accrued presence in the United States is to opt for adjustment of status processing.<sup>90</sup> While most household workers are unable to secure or maintain lawful nonimmigrant (temporary) status for reasons detailed above, workers fortunate enough to have employers who were willing and able to sponsor them could at one time file an adjustment of status application as allowed by Section 245(i) of the INA.<sup>91</sup> However, under the terms of IIRIRA, Section 245(i) of

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85. IMMIGRATION PROCEDURES HANDBOOK, *supra* note 11, § 19:1, at 19-4.

86. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

87. Note that immigration law was heavily slanted toward visa processing before 1994, when INA § 245(i) was temporarily enacted to allow many foreign nationals previously ineligible to adjust their status in the United States by paying a penalty fee. See AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION LEGISLATION HANDBOOK § 6:22, at 6-39 to 6-40 (2004) [hereinafter IMMIGRATION LEGISLATION HANDBOOK].

88. *Eliminating the Three Year, Ten Year and Permanent Bars to Admission*, American Immigrant Lawyers Association, Doc. No. 03031758 (March 17, 2003), available at <http://www.aila.org> [hereinafter *Three Year, Ten Year and Permanent Bars*]. Specifically, the three-year bar applies to individuals who have been unlawfully present in the United States for a continuous period of more than 180 days and the ten-year bar applies to those with unlawful presence of an aggregate period of one year or more [hereinafter referred to as the "3/10-year bar"]. *Id.* The 3/10-year bars applies to voluntary departures. *Id.* A permanent bar applies to foreign nationals removed and who seek readmission. *Id.*

89. See IMMIGRATION PROCEDURES HANDBOOK *supra* note 11, § 20:12, at 20-33.

90. *Id.* at 20-32 to 20-33.

91. *Id.*

the INA sunsets on January 14, 1997, thereby rendering those foreign nationals with unlawful presence ineligible for the adjustment of status process.<sup>92</sup> Since its sunset in 1997, Section 245(i) has been briefly resuscitated a few times,<sup>93</sup> always amidst a storm of controversy.<sup>94</sup>

In summary, as of the time of the writing of this Comment, if a household worker has accrued unlawful presence in the United States, which is almost certainly the case,<sup>95</sup> then she can neither process a visa without triggering the 3/10-year bar nor can she be eligible to file an adjustment of status application.<sup>96</sup> She is simply stuck, woefully unable to even contemplate lawful permanent residency.

Bearing this in mind, we turn now to the interminable debate over how to “fix” the current immigration conundrum. The following section grapples with possible solutions to reform current immigration law from a household worker’s perspective. It is hoped such reforms would dislodge household workers from the immigration machinery in which they have become stuck.

### III. PROPOSED SOLUTIONS

#### A. *Solution Number One: Permanently Restore Section 245(i) of the INA*

##### 1. *Background*

To recap, Section 245(i) was added to the INA in 1994 by Congress.<sup>97</sup> Section 245(i) represented a major change in immigration law<sup>98</sup> because it allowed many foreign nationals,

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92. See CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 51.01[1][b], at 51-9 (2004). Section 245(i) of the INA was enacted as part of the 1994 reforms and was not intended to be a permanent provision in the 1994 laws because it had a three-year life span. IIRIRA effectively extended Section 245(i) through September 30, 1997. IMMIGRATION PROCEDURES HANDBOOK, *supra* note 11, § 20:12, at 20-32 to 20-33.

93. See *id.* at 20-33.

94. See, e.g., GORDON ET AL., *supra* note 92, § 51:01[1][b], at 51-6 to 51-13.

95. See Solomon, *supra* note 31, at 42.

96. See IMMIGRATION PROCEDURES HANDBOOK, *supra* note 11, § 20:14.

97. GORDON ET AL., *supra* note 92, § 51:01[1][b], at 51-9.

98. *Id.*

who had been ineligible to adjust their status for reasons such as entering without inspection or failing to maintain their status, the opportunity to file an adjustment of status petition.<sup>99</sup> Section 245(i) was scheduled to sunset on September 31, 1997; however, it was extended through November 26, 1997 under IIRIRA.<sup>100</sup> Section 245(i) was then grandfathered indefinitely for those who filed an immigrant visa petition or an alien labor certification was filed by January 14, 1998.<sup>101</sup> Later, the LIFE Act Amendments of 2000<sup>102</sup> extended the filing date of Section 245(i) through April 30, 2001.<sup>103</sup>

2. *The Problem: The Catch-22 Legal Nightmare Faced by Undocumented Immigrants Who Are Unable to Secure Lawful Status in the United States*

Quite simply, the sunset of Section 245(i) of the INA coupled with the creation of the 3/10-year bar has created a subclass of foreign nationals, otherwise eligible for lawful permanent residency, who have become permanently stuck in an immigration rut. They face a Catch-22 nightmare, and there does not appear to be any legally-cognizable solution in sight. In the absence of any viable alternative, they simply do nothing, waiting perhaps for Godot,<sup>104</sup> or perhaps, arguably just as unlikely, an extension of Section 245(i) of the INA.<sup>105</sup>

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99. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, § 506(b), 108 Stat. 1724 (1994).

100. GORDON ET AL., *supra* note 92, § 51:01[1][b], at 51-9.

101. *Id.*

102. LIFE Act Amendments of 2000, Pub. L. 106-554, 114 Stat. 2763 (2000).

103. GORDON ET AL., *supra* note 92, § 51:01[1][b], at 51-10. The LIFE Act Amendments added the requirement that the principal applicants prove they were physically in the United States on December 21, 2000. *Id.* at 51-10 to 51-11.

104. This is a reference to Samuel Beckett's famous existential play, "Waiting for Godot". SAMUEL BECKETT, *WAITING FOR GODOT* (Samuel Beckett trans., Grove Press 1954). In the play, Estragon and Vladimir keep waiting for Godot to show up, but Godot never does. See generally *id.* One of the themes Beckett tackled in his play was the concept of "suffering of being." *About Waiting for Godot*, GradeSaver, at [http://www.gradesaver.com/ClassicNotes/Titles/WaitingForGodot/About\\_the\\_Play.html](http://www.gradesaver.com/ClassicNotes/Titles/WaitingForGodot/About_the_Play.html) (last visited Apr. 1, 2005). The figure of Godot represented the ultimately false hope that people have that something or someone will "show up" to alleviate this suffering. *Id.*

105. Note that American Immigration Lawyers Association strongly supports an extension of Section 245(i) because it is "pro-family, pro-business, fiscally prudent, and a

### 3. *Of Critics & Systemic Cracks: Why Immigration Reforms Are Bad (or Good!)*

The general argument against an extension of Section 245(i) of the INA or other type of amnesty action directed toward undocumented workers is that such immigration reforms serve to reward those that entered the country illegally.<sup>106</sup> Although this argument makes sense at first blush, when we turn to the example of the household worker, cracks in the critics' argument become visible. One such crack is the discomfiting knowledge that current U.S. immigration law does not provide most foreign nationals a way to work legally—temporarily or permanently—in the domestic services industry.<sup>107</sup>

Taking a step back from the paradigm presented in this Comment of the foreign household worker, we see that this argument reveals an even deeper crack. Specifically, there is a true disconnect between market demands for household workers and the supply of legal household workers.<sup>108</sup> Never has this been as true as it is today, as our increasingly hectic lives leave little time or energy for, or frankly any interest in, domestic work.<sup>109</sup> Working mothers, in particular, are becoming increasingly dependent on foreign household workers for childcare services as more women join the paid workforce.<sup>110</sup> Ironically, despite their greater needs for greater domestic help, their options for legally securing such services are becoming increasingly difficult because of recent changes in U.S.

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matter of common sense." *House Passes Limited Section 245(i) Extension with Additional Restrictions: Four Months is Not Enough Time and Restriction is Unworkable*, Doc. No. 28me1012, available at <http://www.aila.org/infonet> (May 23, 2001) (on file with the Houston Journal of International Law).

106. See, e.g., Richard W. Stevenson & Steven Greenhouse, *Plan for Illegal Immigrant Workers Draws Fire From Two Sides*, N.Y. TIMES, Jan. 8, 2004, at A28.

107. See generally Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE L.J. & FEMINISM 23, 25–26 (1997); DeLaney, *supra* note 34, at 306, 313.

108. See generally Fitzpatrick, *supra* note 107, at 25–26; Mary Romero, *Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!"*, 53 U. MIAMI L. REV. 1045, 1056, 1063–64 (1999) [hereinafter Romero, *Immigration*].

109. See Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1, 59 (2001).

110. DeLaney, *supra* note 34, at 321, 323.

immigration laws.<sup>111</sup>

If we take an even farther step back and take on the “big picture,” we can see approximately nine million undocumented workers currently in the United States.<sup>112</sup> Since U.S. borders have become increasingly militarized in the last decade,<sup>113</sup> we ensure those undocumented workers who do make it within our borders cannot leave easily. The revolving door that has historically enabled undocumented immigrants to enter and to leave has become jammed shut by our own political machinations. This, in addition to the 3/10-year bar,<sup>114</sup> has created a situation whereby we are forced to deal with the reality of the continuous and increasing presence of undocumented workers in the United States. Despite this, solutions often elude us—primarily because political solutions are so politically charged.<sup>115</sup>

All of this being observed, it seems that some immigration reforms are necessary to respond to this growing problem. In the continued absence of any meaningful enforcement of immigration laws, the alternative to immigration reforms seems to be to simply turn a blind eye to all of this and do what we do best: Wait. And wait. For Godot, perhaps?

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111. *See id.* at 320–21.

112. Jacoby, *supra* note 4, at B13.

113. *See, e.g., Clinton Administration Announces Enhanced Border Initiatives*, 73 INTERPRETER RELEASES 101 (Fed. Pub’s 1996); *Legislative Activity Veers Toward Boarder Control, Scrutiny of Aliens*, 78 INTERPRETER RELEASES 1527 (Fed. Pub’s 2001).

114. *Three Year, Ten Year and Permanent Bars*, *supra* note 88.

115. *See, e.g., Hernan Rozemberg, Immigration is Drawing Line in Sand within GOP; Not All Republicans Are Embracing the President’s Proposal*, SAN ANTONIO EXPRESS-NEWS, Feb. 29, 2004, at 1A (mentioning how Republicans are divided on George W. Bush’s plan to provide temporary immigration benefits to certain undocumented workers). *See also* Marc Cooper, *Border Justice*, 278 THE NATION 22 (2004), available at 2004 WL 55135301. A week after Bush presented his plan, a coalition of Latino, civil rights and labor groups railed against Bush’s proposal as “insufficient and skewed toward corporate employers.” *Id.* The heaviest criticism of Bush’s plan comes from within his Party, however. *Id.* On the other side, Corporate America sees the plan as one that would “stabilize its coveted low-wage work force.” *Id.*

#### 4. *The Terrorist Spin: How 9/11 Recharged the Undocumented Immigration Debate*

As previously discussed, in the wake of September 11th, talks about legalizing the status of certain undocumented foreign nationals were put on hold by the George W. Bush Administration.<sup>116</sup> The nation instead turned its attention toward pressing national security concerns.<sup>117</sup> Legalization of undocumented foreign nationals is now understood by many as a significant way to bolster national security<sup>118</sup> because it encourages these individuals to come out of the shadows and normalize their status.

At the time of the writing of this Comment, President Bush has set in motion a plan to legalize certain undocumented foreign nationals.<sup>119</sup> Although this plan does appear to provide some legal remedy to certain members of the undocumented community, because Bush's plan does not contemplate any type of permanent residency status for these workers,<sup>120</sup> it appears to fall far short of providing the type of legal remedy the restoration of Section 245(i) could provide. Thus, the Bush Administration's discussions regarding possibly legalizing certain foreign nationals temporarily should not be understood as foreclosing any ongoing discussion regarding permanently restoring Section 245(i).

#### 5. *"Female Troubles": How Gender Plays Out in the Debate*

Looking again to the paradigm of the foreign household worker, we see that she likely has a very precarious legal status in the United States.<sup>121</sup> Most analyses of undocumented workers are articulated in terms of the benefits they provide to the United States. While this is a valid line of thinking, and certainly their contributions to the U.S. economy cannot be

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116. *What a Difference a Day Makes*, *supra* note 1, at 61.

117. *See id.*

118. *See Excerpts from George W. Bush's Address on Allowing Immigrants to Fill Some Jobs*, NY TIMES, Jan. 8, 2004, at A28.

119. *Id.*

120. Cooper, *supra* note 115.

121. *See DeLaney, supra* note 34, at 305.

denied,<sup>122</sup> let us move beyond this line of thinking and ponder for a second the plight of the foreign national who is a household worker. First and foremost, we can assume she has no legal status nor any ability to pursue permanent residency through her employer under current U.S. immigration laws, even if she finds an employer willing to sponsor her. She therefore has no protection under the law for the interminable services<sup>123</sup> she provides. Her lack of status and her inability to pursue lawful permanent residency ensure that she will remain on the periphery of the society of which she is, ironically, so centrally placed. What is more, she is ensured to constantly be a target of exploitation in the labor market.<sup>124</sup> This “bottoms-up” view of the plight of the foreign household worker reveals the painfully real and palpable experience of her overwhelming isolation and exploitation in the private sphere.<sup>125</sup> Without a doubt, such domestic work is “socially and physically isolating, invisible, and interminable.”<sup>126</sup> For all of these reasons, current immigration law needs to be reformed to bring foreign national household workers into the fold of the law.

6. *Conclusion: Immigration Laws Should Be Equitably Reformed to Give More Workers a Bite of the Apple*

Restoration of Section 245(i) will not protect all foreign household workers, but it will give those fortunate enough to have employers willing and able to sponsor them for lawful permanent residency the right to pursue such status. Since current immigration laws disproportionately affect females,<sup>127</sup> this would serve to bolster their security within the U.S. labor

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122. See, e.g., Karen Fleshman, Comment, *Abrazando Mexicanos: The United States Should Recognize Mexican Workers' Contributions to Its Economy by Allowing Them to Work Legally*, 18 N.Y.L. SCH. J. HUM. RTS. 237, 237, 239 (2002).

123. See Mary Romero, *Beyond Belonging: Challenging the Boundaries of Nationality: Nanny Diaries and Other Stories: Imagining Immigrant Women's Labor in the Social Reproduction of American Families*, 52 DEPAUL L. REV. 809, 818–19, 843–44 (2003) [hereinafter Romero, *Nanny Diaries*].

124. Fitzpatrick, *supra* note 107, at 25–26.

125. Romero, *Nanny Diaries*, *supra* note 123, at 819.

126. Young, *supra* note 109, at 62.

127. *Id.* at 41–42.

market. In addition, it would bolster the security of the United States insofar as restoration of Section 245(i) would bring many people out of the woodworks and into the public sphere. In short, restoring Section 245(i) is simply the right thing to do as it would be an equitable immigration reform designed to give more workers a bite of the apple. (An apple, I cannot help but add, that was probably harvested by an undocumented worker.)

With one solution under our belt, we turn now to the second solution and the tricky issue of immigrant visa numbers for unskilled workers.

*B. Solution Number Two: Increase the Number of Immigrant Visas Available for Unskilled Workers*

To recap, the passage of IMMACT was devastating to foreign household workers, among others.<sup>128</sup> Because the CIS classifies this group as unskilled, household workers have had to compete against each other, as well as against all other “unskilled” workers, for the sparse 10,000 immigrant visas allowed annually in the other worker classification of the third employment-based preference category.<sup>129</sup>

*1. WANTED: Gender-Sensitive Legislation! How the Effect of IMMACT Has Been Devastating to Women’s Interests— Domestic and Foreign Alike*

“As a result of IMMACT, the demand for unskilled worker visas far exceeds the supply.”<sup>130</sup> Accordingly, “with the passage of IMMACT in 1990, the waiting period [for unskilled workers] has mushroomed to more than ten years.”<sup>131</sup> From a logistical

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128. In fact, IMMACT was challenged unsuccessfully in court by housekeepers and childcare workers as a violation of their rights under the Due Process Clause of the Fifth Amendment of the U.S. Constitution. *Aliens for Better Immigration Laws v. United States*, 871 F.Supp. 182, 183, 186 (S.D.N.Y. 1994).

129. INA § 203(b)(3)(B) (2003).

130. Solomon, *supra* note 31, at 41.

131. *Id.* As an aside, the “other worker” category progressed rapidly in 2001 because there were so few visa applications processed by the CIS in this category. LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 7:2. As a result, those in this category do not face any waiting period. However, this window of opportunity is not expected to last very long. *Id.*

perspective, it seems unlikely positions for household workers would be viable ten or so years down the road when so many household workers are primarily engaged to care for the young and elderly.<sup>132</sup>

IMMACT represents the type of legislation enacted “without gender sensitivity and with an attitude of tolerance toward disproportionate damage to women’s interests.”<sup>133</sup> To begin with, despite their growing numbers in the workforce, women continue to provide primary care within the house and do more housework, in general, than their male partners.<sup>134</sup> As more women continue to enter the labor force, women will have even greater needs for delegating household responsibilities, and more critically, childcare services.<sup>135</sup> A shortage in the U.S. labor market for domestic childcare providers<sup>136</sup> means our reliance on foreign childcare providers will continue to become more acute, in spite of the increasingly restricted supply of these workers.<sup>137</sup>

Given the preceding, from the perspective of the employed mother, IMMACT has unquestionably made it much harder to make adequate childcare arrangements by severely restricting the supply of legal workers.<sup>138</sup> By extension, such immigration policy “subtly reinforces the idea that women who are mothers should stay home to take care of their children.”<sup>139</sup> In fact, the result of IMMACT may lead to just that since “[t]he lack of suitable child care creates a significant barrier to successful labor market participation for women.”<sup>140</sup>

From the perspective of the household worker, it sharply narrowed the opportunities available to her in the United States. In fact, it sealed her destiny. The obstacles presented by gender-unfriendly legislation such as IMMACT represent

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132. Solomon, *supra* note 31, at 42.

133. Fitzpatrick, *supra* note 107, at 34.

134. Young, *supra* note 109, at 3.

135. *See id.* at 59.

136. M. Isabel Medina, *In Search of Quality Childcare: Closing the Immigration Gate to Childcare Workers*, 8 GEO. IMMIGR. L.J. 161, 197 (1994).

137. DeLaney, *supra* note 34, at 306-07.

138. Medina, *supra* note 136, at 188.

139. *Id.*

140. DeLaney, *supra* note 34, at 328.

“nearly insurmountable barriers to lawful hirings.”<sup>141</sup> As a result, foreign household workers will disproportionately face disadvantages from their precarious legal status, including “uncertainty with respect to their right to remain in the United States, diminished economic leverage in the labor market, and threats to their physical security due to their inability to turn to governmental authorities for protection.”<sup>142</sup>

2. *Conclusion: Increasing the Number of Immigrant Visas Available for Unskilled Workers Would Dramatically Improve Women’s Roles in the Home and in the Workplace*

Immigration to the United States as a household worker is extraordinarily difficult. The level of difficulty involved is a reflection of the very low priority to which current U.S. immigration law assigns such workers.<sup>143</sup> Despite their low priority, there is clearly an urgent need to increase immigrant visa numbers available for unskilled workers. Such an increase would dramatically improve women’s roles in the home and in the workplace, for both domestic and foreign women.

We turn, last but not least, to arguably the most emotionally-charged issue of all: the skill level classification for household workers. It is emotionally charged quite simply because it bears directly on how U.S. society understands and values “women’s work.”

C. *Solution Number Three: Reclassify Certain Household Workers as Skilled*

1. *Background*

As discussed above, an alien labor certification application is required for foreign household workers pursuing lawful permanent residency.<sup>144</sup> Drafting the alien labor certification is a delicate art, requiring careful and close collaboration between the employer, the foreign national, and the immigration

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141. *Id.* at 329.

142. Fitzpatrick, *supra* note 107, at 25–26.

143. Young, *supra* note 109, at 37.

144. *See supra* Part II.B.2.

attorney. The job description and requirements represent the heart of the application and they engender society's understanding of the nature of the work to be performed. To this extent, immigration law as captured by the alien labor certification process is arguably a reflection of society. Herein lay the inherent complexities of this procedure.

To begin with, the job duties and requirements for the offered position of household worker must be consistent with those defined for that position in the DOL's Dictionary of Occupational Titles (DOT).<sup>145</sup> If the employer exceeds the DOT requirements for the position, then the DOL will deem such requirements as "unduly restrictive," and the employer will have to prove a business necessity.<sup>146</sup> Both are used as terms of art in immigration law and will be discussed below.

The DOT's description of the household worker (classified as domestic "servant," notably) is one who:

Performs any combination of [the] following duties to maintain private home clean and orderly, to cook and serve meals, and to render personal services to family members: Plans meals and purchases foodstuffs and household supplies. Prepares and cooks . . . . Serves meals and refreshments. Washes dishes and cleans silverware. Oversees activities of children . . . . Cleans furnishings, floors, and windows . . . . Changes linens and makes beds. Washes linens and other garments . . . and mends and irons clothing, linens, and other household articles . . . . Answers . . . doorbell.<sup>147</sup>

In addition to providing the specific job duties, the DOT also sets forth SVP levels for each occupation.<sup>148</sup> SVP levels range from one to nine and reflect the DOL's understanding of the amount of time required by a typical worker to learn the specific job.<sup>149</sup> The SVP for a household worker is three, which means that the employer cannot require more than three months of

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145. See Deborah J. Notkin, *Labor Certifications*, in BASIC IMMIGRATION LAW 229, 232-33 (Practising Law Inst. 2004).

146. *Id.* at 236-37.

147. EMPLOYMENT & TRAINING ADMIN., *supra* note 66, § 301.474-010, at 239.

148. Notkin, *supra* note 145, at 234.

149. *Id.*

experience for the job.<sup>150</sup> More generally, an SVP of three also means that the job is unskilled.

2. *“Women’s Work”: The Department of Labor, Through Their Blanket Classification of All Household Workers as Unskilled, Perpetuates the Legacy of Gender-Based Discrimination in the Labor Market.*

The overarching problem with a low-skill classification for household workers is that it undermines the nature of the work that is performed, and by extension, it prolongs the “systemic subordination of women.”<sup>151</sup> “Women’s work,” or the work that is traditionally ascribed to women in the home, is chronically undervalued by the “persistent sexual division of labor within the home and in the market.”<sup>152</sup> Even housework that is done by paid employees is undervalued, reflecting society’s deep-seated belief that such work is “economically inconsequential.”<sup>153</sup> This inherently speaks to the belief that such work does not require much skill. If we pierce the thin veil that shrouds this argument, a darker truth is revealed. “[S]kills deployed in ‘women’s work’ are disregarded, discounted, or denied because they are treated as inherent to women and therefore not acquired abilities deserving of recognition . . . .”<sup>154</sup> Thus, the end result of a legal system’s reinforcement of women’s work as unskilled is the systemic perpetuation of women’s subordination<sup>155</sup> in the labor market.

By way of illustration, home childcare workers (or nannies)<sup>156</sup> are the lowest paid of any occupation tracked by the DOL’s Bureau of Labor Statistics.<sup>157</sup> In connection with this, many states even exempt household workers from minimum

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150. See EMPLOYMENT & TRAINING ADMIN., *supra* note 66 at 239.

151. See Young, *supra* note 109, at 2–3.

152. *Id.* at 2.

153. *Id.*

154. *Id.* at 62 (citing Audrey Macklin, *Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?*, 37 MCGILL L.J. 681, 742 n.291 1992).

155. *Id.* at 71.

156. Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1, 6 (1999).

157. Young, *supra* note 109, at 62.

wage laws.<sup>158</sup> Indeed, the existence of these workers is precarious with very few employment rights even in the best case scenario. For instance, household workers are consistently excluded from labor legislation.<sup>159</sup> The result of all of this, particularly for the foreign household worker who has very little chance to legalize her status, is a type of “occupational ghettoization.”<sup>160</sup>

This occupational ghettoization sharply contrasts with the image of household workers portrayed by popular culture. “Popular culture functions to normalize the hiring of immigrant women by depicting domestic service as a bridging occupation that offers social mobility, opportunities to learn English, and other cultural skills that assist in the assimilation process.”<sup>161</sup> The result of such characterization serves to “erase issues of employee rights from the American imagination.”<sup>162</sup>

3. *Conclusion: Household Workers, and Most Notably Nannies, Need to be Reclassified as Skilled Workers by the Department of Labor – For the Good of Women Everywhere*

With so much riding on how society characterizes women’s work, we cannot afford to erase household workers’ rights from our consciousness. Household workers, most especially nannies, need to be reclassified as skilled by the DOL.<sup>163</sup> Reclassifying household workers as skilled would empower them with the proper tools needed to secure permanent residency faster by upgrading them out of the “other worker” category, which only allows 10,000 visas annually. For employers, it would mean the chance to impose more requirements for the job offered in an

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158. *Id.* at 30.

159. Romero, *Immigration*, *supra* note 108, at 1056.

160. Young, *supra* note 109, at 62.

161. Romero, *Nanny Diaries*, *supra* note 123, at 845.

162. *Id.* at 845–46.

163. On April 8, 1994, the DOL upgraded the SVP for Nanny Domestic Worker to 6. *Nannies Get SVP of 6*, Doc. No. 14mm4e03, available at <http://www.aila.org/infonet> (Apr. 8, 1994) (on file with the Houston Journal of International Law). However, it was immediately rescinded on April 11th. See Letter from Stanley M. Rose, Supervisor, North Carolina Occupational Analysis Field Center, to Priscilla Labovitz, Attorney (Apr. 11, 1994), available at <http://www.aila.org/infonet/libraryViewer.aspx?docID=3381&st=27MM4e31&pf=true> (on file with the Houston Journal of International Law).

alien labor certification application. For society in general, and women specifically, it would mean something much more—it would mean the chance to realign the public-private axis<sup>164</sup> and end the legacy of chronic undervaluation of women’s work.

We turn now, finally, to the last solution proposed in the Comment. This solution tackles the unique problems faced by those household workers who will live in the employer’s house pursuant to her employment arrangement. It will quickly become apparent that the DOL strongly disfavors such arrangements, as practical as they may be for both employer and employee.

*D. Solution Number Four: Toss out the Business Necessity Requirement for Live-In Household Workers*

*1. Background*

In the context of the alien labor certification application, employers seeking the services of a live-in worker must adequately document the live-in requirement as a true business necessity.<sup>165</sup> Parsing out the meaning of business necessity is no easy matter; in fact, it has been one of the most contentious of all labor certification issues.<sup>166</sup> If the DOL is not convinced that such documentation establishes a business necessity (which is often the case, as discussed below), then the live-in requirement will be deemed unduly restrictive and the alien labor certification will fail.<sup>167</sup> For the live-in household worker, who is almost always a nanny or a “nanny hybrid,”<sup>168</sup> the business necessity requirement effectively transforms the already difficult alien labor certification process into a Herculean endeavor. In this section, I will argue the business necessity standard is misplaced in the context of the live-in household

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164. See Romero, *Nanny Diaries*, *supra* note 123, at 846.

165. 20 C.F.R. § 656.21(b)(2)(iii) (2004).

166. LEGOMSKY, *supra* note 37, at 201.

167. § 656.21(b)(2)(iii).

168. A “nanny” can often go by different job titles, such as child monitor. See LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 1:23. The title does not control the labor certification analysis; rather, actual job duties determine how the DOL codes the position. *Id.*

worker and it should be eliminated, or at the very least, procedurally eviscerated.

## 2. *Problems*

Three particular problems generated by the current alien labor certification process for household workers are highlighted below.

### a. *Problem Number One: Who Needs the Law Anyway?: Current Immigration Law Precludes Many Employers from Seeking Legal Employees*

A shortage of U.S. workers willing to provide live-in domestic services has led many U.S. families to turn to immigrants for such services.<sup>169</sup> Because current immigration and labor regulations governing the employment of live-in workers erect “nearly insurmountable barriers to lawful hirings,” many families simply resign themselves to engaging in illegal employment arrangements.<sup>170</sup> Among the most difficult barriers placed in this procedure is the business necessity requirement, as discussed in the cases below. Most employers simply lack the Herculean strength required to clear this hurdle, and their employee’s alien labor certification application becomes permanently derailed. These employers, many of whom have made good faith efforts for lawful employment only to be thwarted by the law, may, like so many other U.S. employers, simply resign themselves to entering into illegal arrangements for household services.

Employers engaged in illegal employment arrangements, however, do so at risk of civil or even criminal penalties if such activities are brought to light by the government.<sup>171</sup> The plight of the foreign household worker is arguably much worse in such a situation because she risks deportation if her unlawful status is

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169. DeLaney, *supra* note 34, at 306. In fact, because labor market statistics indicate that there is a dearth of U.S. childcare workers, it has been argued that childcare workers should be removed from Schedule B and put in Schedule A, instead, which would exempt such workers from the alien labor certification process. *See* Medina, *supra* note 136, at 197.

170. DeLaney, *supra* note 34, at 329.

171. *Id.* at 313.

discovered. If, however, the unlawful hiring goes unnoticed by the government, as is usually the case,<sup>172</sup> then she can look forward to continuous exploitation in the labor market by virtue of her precarious legal status. For her, this would appear to be a lose-lose situation.

In summary, the business necessity requirement is bad in the context of live-in household workers because it indirectly encourages, and arguably necessitates, the unlawful hiring of live-in household workers. Therefore, U.S. employers, and especially foreign household workers, should be spared being subjected to this very stringent standard as part of the labor certification process.

*b. Problem Number Two: Shoring Up Motherhood! Immigration Laws Frustrate Working Mother's Search for "Good Help"*

The stringent business necessity requirement is also bad for working mothers because it means it will be harder for them to make childcare arrangements. "The lack of suitable child care creates a significant barrier to successful labor market participation for women."<sup>173</sup> Allowing working mothers to more easily retain the services of foreign household workers, most notably nannies, would greatly ameliorate the hardships working women face from inflexible work schedules to inflexible day care center hours.<sup>174</sup> Therefore, eliminating the business necessity standard for live-in household workers would make lawful hirings more feasible. This procedural solution would, in turn, ultimately result in the shoring up of support for working mothers everywhere.

*c. Problem Number Three: Discretion, Please! The Department of Labor Does Not Give Employers of Live-In Household Workers Any Discretion Regarding Job Requirements and Duties*

Lastly, we turn to the issue of discretion in the alien labor

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172. See Gunewardene, *supra* note 34, at 799 (noting how the U.S. Department of Justice will only prosecute the most serious cases of illegal employment).

173. DeLaney, *supra* note 34, at 328.

174. See *id.* at 329.

certification application. To review, the DOT dictates the nature of the job and the skill level required.<sup>175</sup> In addition, when a live-in arrangement is requested, the employer is responsible for documenting a business necessity to the satisfaction of the DOL.<sup>176</sup>

The job description and requirements in the context of a live-in household worker/nanny are very delicate, deserving of distinction. To begin with, it appears at once both absurd and abusive to allow the U.S. government to enter into the private sphere of the home and dictate what the household worker/nanny can and cannot do, or arguably more problematic, what experience the employer may request (or more accurately, what he may not request) as a job requirement.<sup>177</sup> We know at this point the employer cannot request more than three months of experience based on the SVP designation of three, and more recently, we have learned it is exceptionally difficult for her to request live-in household services.

Given all of this, and because of the special nature of this type of employment, U.S. immigration and labor laws should allow the employer more discretion in establishing the job duties and the qualifications of the household worker/nanny sought. Given the uniqueness of the live-in household worker arrangement, government guidelines “should acknowledge that the kind of relationship that results between the employer and the childcare worker is so close and so attuned to personal interactions that it warrants considerable discretion to the employer to determine which worker may best fulfill that function.”<sup>178</sup> That the business necessity requirement does not contemplate the special circumstances engendered in the household worker’s/nanny’s work is troubling. It is likewise troubling that critical factors, most notably the child’s best interest, are not allowed to bear on the decision of whom the

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175. See Notkin, *supra* note 145, at 233.

176. 20 C.F.R. § 656.21(b)(2)(iii) (2004).

177. Please note that this opinion does not include the right of the employer to not pay the household worker at least the prevailing wage for the applicable labor market as determined by the U.S. Department of Labor. See discussion *infra* Solution Number Three.

178. Medina, *supra* note 136, at 198.

employer is allowed to hire.<sup>179</sup> For all of the reasons above, the business necessity requirement as currently applied in practice and in case law is misplaced in the context of live-in household workers.

We turn now to concrete examples of where the business necessity standard has played the leading role in deciding the fate of alien labor certification applications for live-in household workers.

3. *The Cases: BALCA Cases That Showcase the Business Necessity Requirement for the Live-In Household Worker*

The DOL authorizes the Board of Alien Labor Certification Appeals (BALCA) to review the CO's decision to deny a labor certification.<sup>180</sup> The following are a sampling of BALCA cases that have focused on the business necessity requirement for live-in household workers. These holdings function informally as precedents for other labor certification cases,<sup>181</sup> effectively defining the business necessity requirement's outer bounds for live-in household workers.

The seminal case on the business necessity requirement for live-in household workers is *In re Graham*.<sup>182</sup> In *Graham*, the employer presented compelling reasons for why she required the live-in services of a household worker.<sup>183</sup> Such reasons included, but were not limited to, the fact that the household was very busy; that the employer's husband was a hospital president, on call twenty-four hours a day requiring a live-in employee to screen calls at night; that the employer accompanied her husband on his business trips, necessitating someone to stay at home with their child and the household; that the employer often had to run personal errands every day, including helping to care for her elderly mother; and that the foreign national had cared for the employer's child since birth.<sup>184</sup>

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179. See LEGOMSKY, *supra* note 37, at 203.

180. *Id.* at 194.

181. *Id.* at 203.

182. *In re Graham*, No. 88-INA-102, 1990 WL 299959 (Bd. Alien Lab. Cert. App. 1990).

183. *Id.* at \*3.

184. *Id.*

*Graham* is an important case in this area of law because it established the business necessity test still used for live-in household workers.<sup>185</sup> This test requires the employer to “demonstrate that the requirement is essential to perform, in a reasonable manner, the job duties as described by the employer.”<sup>186</sup> Pertinent factors “include the Employer’s occupation or commercial activities outside the home, the circumstances of the household itself, and any other extenuating circumstances.”<sup>187</sup>

When this test was applied to the facts of *Graham*, BALCA affirmed the CO’s denial of the labor certification.<sup>188</sup> Specifically, the court held there was not adequate documentation of business necessity.<sup>189</sup> Among the reasons cited for inadequate documentation was a lack of specificity and bases for the employer’s assertions.<sup>190</sup> The BALCA court wanted to know how many calls a night the household worker would have to answer; how many nights the employer was away from home; how much it would cost to hire the services of a housekeeper for the nights the employer anticipated being absent, etc.<sup>191</sup>

In summary, *Graham* set the bar high for proving business necessity for live-in household workers. More notably, since *Graham*, it has been increasingly difficult to establish business necessity for a live-in household worker.<sup>192</sup>

In *In re Earls*,<sup>193</sup> BALCA affirmed the CO’s decision to deny

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185. LABOR CERTIFICATION HANDBOOK, *supra* note 43, § 6:6.

186. *Graham*, 1990 WL 299959, at \*8.

187. *Id.*

188. *Id.* at \*9.

189. *Id.*

190. *Id.*

191. *Id.*

192. For example, before *Graham* was decided, in *Silva v. Sec’y of Labor* the court held that the DOL’s decision to deny the labor certification for a live-in household worker was arbitrary and capricious. *Silva v. Sec’y of Labor*, 518 F.2d 301, 310 (1st Cir. 1975). In *Silva*, the employers had similarly compelling reasons for live-in help and such services were difficult to secure in the labor market. *Id.* at 305. The court further stated in an addendum that more suitable regulations should be enacted with respect to domestic workers and that the current policy clearly punishes live-ins and employers of live-ins because current policy does not protect against arbitrary actions by the DOL. *Id.* at 311.

193. *In re Earls*, No. 2000-INA-65, 2001 WL 85945 (Bd. Alien Lab. Cert. App.

the labor certification application for a live-in household administrator because the employer did not establish to their satisfaction that the requirement arose from a true business necessity.<sup>194</sup> *Earls* shows how difficult it is to get an alien labor certification granted for live-in workers since, in this case, one of the parents was away from home as part of military duty and the child had a severe food allergy, which required emergency room treatment.<sup>195</sup> In addition, the child's allergy required diligent monitoring as well as experience in making medical assessments and basic medical care, such as Cardiopulmonary Resuscitation.<sup>196</sup>

This issue was also debated in *In re Shapiro*.<sup>197</sup> The employers in this case insisted that three months of experience was clearly not sufficient to take care of their three small children.<sup>198</sup> In addition, because both parents were frequently away from the home, the reliability placed on the household worker was clearly greater.<sup>199</sup> Rather than tackle the merits of their argument directly, BALCA, like the DOL before, simply resorted to the SVP provided by the DOT as authority on this issue and affirmed the DOL's denial of the labor certification.<sup>200</sup> BALCA held the employer had failed to "show factual support or a compelling explanation" for their stated requirement of two years of experience (instead of three months).<sup>201</sup>

BALCA's insistence that any person with three months of experience is sufficient is illustrative of the disconnect between the employer's needs and the bureaucratic morass which engenders the labor certification process. As the *Shapiro* case, BALCA's failure to find the employer's need for someone experienced to stay with their three young children alone in the

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194. *Id.* at \*5.

195. *Id.* at \*2.

196. *Id.* at \*2.

197. *In re Shapiro*, No. 1999-INA-286, 2000 WL 300770 (Bd. Alien Lab. Cert. App. 2000).

198. *Id.* at \*2.

199. *Id.*

200. *See id.* at \*3-4.

201. *Id.* at \*4.

house compelling simply speaks for itself as to the vast and troubling disconnect between U.S. employers and the DOL.

4. *Conclusion: The Business Necessity Standard is Misplaced in the Context of Live-In Household Workers*

The outcome in alien labor certification applications for live-in household workers is often disconcerting. The business necessity test is difficult to adequately document to the DOL's satisfaction, resulting in too much unnecessary interference by the DOL in the employer's hiring practice. Since the allowable requirements are so restrictive (three months), and the presumption against live-in services is so great (triggering the business necessity requirement), most live-in cases simply will not receive DOL certification. This is harmful in so many ways because the employer has his hands tied with respect to whom he is allowed to hire to live in his home, working mothers do not get the support they need to work outside the home, employers often risk sanctions by resorting to illegal employment arrangements, and notably, children's interests in the matter are completely brushed aside.<sup>202</sup>

For the employee in an illegal employment arrangement, it means something more. She will not be able to even consider lawful permanent residency to normalize her status. In fact, she may only realistically contemplate deportation, or arguably worse, a future full of insecurity and exploitation in the U.S. labor market. For all of these reasons, the business necessity standard imposed on live-in household workers is misguided as it is applied on a case-by-case basis. It either needs to be removed as a requirement or procedurally eviscerated to render it harmless when wielded against foreign live-in household workers.

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202. LEGOMSKY, *supra* note 37, at 203. In a letter, Professor Nora Demleitner wrote:

[T]he decision [in Marion Graham] is . . . interesting insofar as it is focused on the issue of [the] U.S. worker replacement without considering, for example, the child's [best] interest. Might it not make more sense (emotionally, if not economically) to leave the child with the caretaker who has been in charge of her since birth? *Id.*

#### IV. CONCLUSION

This Comment has been concerned about negotiating the complexities inherent in the alien labor certification process for foreign household workers. On the one hand, the process needs to protect the interests of U.S. workers by making sure only those positions where there is a documented shortage of able, available, willing, or qualified U.S. workers are filled by foreign nationals. The process also needs to protect the interests of the individual employer, and by extension the U.S. labor market, by ensuring the employer is able to secure the services of a qualified worker. The process must also protect the interest of the foreign national, the player almost always left out of the interminable debate swirling around her. And this is, quite frankly, where the system most visibly breaks down.

When you look around, you see “invisible” people all around. They clean your house, they wash your car, they cook your food, and they may even take care of your children. They are invisible because our eyes simply skip over them, not because they do not exist. We recast them in popular culture so that we can see them as we want to see them—in the safe care of kind and concerned U.S. employers. Despite wishes to the contrary, this is, sadly, not always the case.

This Comment argues for creating a better harmony between the interests of the diverse parties involved: U.S. workers, U.S. employers, working mothers, children, and foreign household workers. The alien labor certification process couched in the context of current immigration laws makes practically any lawful hiring of foreign household workers impossible. Moreover, both the labor certification process and current immigration law almost seem to conspire together to extinguish any chance these workers had at one time to pursue permanent residency in the United States through their employers. Without even the chance of any lawful status in the United States, these workers remain woefully on the fringe of the society in which, ironically, they are so centrally placed. They remain invisible to us because we tacitly accept their presence only when it serves our interest.

But this tacit acceptance of a broken system should no longer continue—this has never been as true as it is today. In

our post-September 11th world, we have an urgent need for greater security so it is in the best interests of the United States we bring more people into the public sphere by normalizing their status. Such legislation is already being proposed, to considerable opposition. The harried working mother should also demand the law be changed to allow her greater access to legal household workers. Last, but not least, the plight of the overworked, underpaid, and often exploited foreign household worker herself, should compel legal reform on this issue.

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