

**IMPROVING THE IMMIGRATION POLICY  
OF THE UNITED STATES TO FULFILL THE  
CAREGIVING NEEDS OF AMERICA'S  
AGING BABY BOOMERS: THE  
ALTERNATIVE TO OUTSOURCING  
GRANDMA**

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*The elderly in America are receiving substandard care due to the increasing costs of health care and the lack of willing unskilled caregivers. As a result, many elderly outsource their health care to foreign countries, where better, cost-efficient care is available. Not only do these elderly Americans end their lives far away from their loved ones and suffer transfer trauma from adjusting to a new country, but the U.S. economy also suffers from the loss of citizens and billions of dollars in health care revenues. Another problem that the United States faces is the dearth of immigrants who are able to take these unskilled, less desirable jobs. The U.S. immigration laws have generally favored allowing well-educated individuals to enter the United States. However, such a policy ignores the growing need for unskilled caregivers, who can improve the United States, to enter the country. Congress should amend U.S. immigration laws to allow immigrants to reside permanently in the United States if they become employed as unskilled caregivers to elderly Americans and meet other stringent requirements to protect the job security of U.S. citizens. These immigrants would thus reside legally in the United States and increase the number of unskilled caregivers available to the elderly. Amending immigration laws in this way will not only improve the standard of care that elderly Americans receive, but it will also lower the cost of health care and discourage outsourcing eldercare.*

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## I. Introduction

Ernest Herzfeld, a ninety-three-year-old American, sits in an overstuffed chair and watches television in a house in Pondicherry, a city located on India's southern coast.<sup>1</sup> The televised newscast keeps him connected with his former life in America.<sup>2</sup> Ernest's eldercare<sup>3</sup> has been outsourced to India.<sup>4</sup> In 2004, his wife, Frances, a sufferer of Parkinson's disease, broke her hip.<sup>5</sup> This incident, combined with Ernest's battle with Alzheimer's disease, resulted in their son, Steve, caring for them.<sup>6</sup> A few years later, due to exorbitant health care costs, Steve made the decision to move his parents to India, where housing and caregiving options are much more cost-efficient.<sup>7</sup>

The transition to Pondicherry, "a haven for aging hippies from around the world," was not easy for the Herzfelds.<sup>8</sup> A few hours after arriving in India, Ernest tried to chase his personal aide, who had been instructed to assist him in the bathroom.<sup>9</sup> Ernest fell and cracked his head on the bathtub, resulting in his family spending their first night abroad in a hospital while he received stitches.<sup>10</sup> The Herzfelds also had to adjust to a new diet and other cultural differences.<sup>11</sup> Eight months after his arrival, Ernest admitted that, while he enjoyed the assistance of the attractive Indian nurses, he was "ready for a change."<sup>12</sup> In January 2008, Steve, who has also moved to India, admitted that the current situation was "lonely but manageable."<sup>13</sup>

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1. Laurie Goering, *Made in India: Low-Cost Care for Ailing Parents; American Facing Unpleasant Alternatives Finds Novel Solution with Outsourcing*, CHI. TRIB., July 29, 2007, at News 11.

2. *See id.*

3. Eldercare includes rehabilitative therapies, skilled nursing care, palliative care, and social services. Senior Solutions of America, Elder Care Glossary E-F, <http://www.aging-parents-and-elder-care.com> (last visited Aug. 23, 2008). It also includes supervision of the elderly and a variety of supportive personal care to assist the elderly with their daily activities. *Id.*

4. Goering, *supra* note 1.

5. *Id.*

6. *See id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Cheryl Ellis, *Fearless Caregiving Abroad*, TODAY'S CAREGIVER, [http://www.caregiver.com/articles/caregiver/fearless\\_caregiving\\_abroad.htm](http://www.caregiver.com/articles/caregiver/fearless_caregiving_abroad.htm) (last visited Aug. 26, 2008).

While the decision for a U.S. firm to outsource its labor to foreign markets can provide overall savings for businesses,<sup>14</sup> the benefits received from outsourcing eldercare do not outweigh the costs of moving elderly U.S. citizens to a foreign land to spend their last days. The isolation that these individuals can experience due to the lack of visits from friends and relatives and the trauma of adjustment reveal the necessity for a cost-efficient alternative to outsourcing.<sup>15</sup> Even Steve Herzfeld understands the realities of outsourcing eldercare and does not encourage others to follow his lead “when they could be very unhappy.”<sup>16</sup> However, people have e-mailed Steve to learn about shipping their aging spouses abroad alone, which would cause married couples to spend their last days thousands of miles apart.<sup>17</sup>

The Herzfelds represent the emerging trend in America to outsource eldercare.<sup>18</sup> An improved immigration policy that includes recruiting unskilled workers to care for America’s elderly population is necessary. Approximately 35.7 million immigrants, comprising 12.4% of the U.S. population, currently reside in the United States, bolstering the economy and taking undesired positions of employment.<sup>19</sup> A growing need for both skilled and unskilled workers currently exists within the realm of eldercare, a need that could be fulfilled with individuals born abroad.

Due to the lack of caregivers in the United States, caregiving costs are at an all-time high. The number of people entering nursing school in the United States is at an all-time low, indicating that the shortage of nurses will only escalate.<sup>20</sup> Because of this shortage, many

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14. George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 NOTRE DAME L. REV. 955, 972 (2007).

15. See Goering, *supra* note 1.

16. Neasa MacErlean, *A New Front in Outsourcing*, THE HINDU, Aug. 31, 2007, <http://www.hindu.com/2007/08/31/stories/2007083158182200.htm>.

17. *Id.*

18. *See id.*

19. See IMMIGRATION POLICY CTR., THE ECONOMIC IMPACT OF IMMIGRATION 1–6 (2007), <http://immigration.server263.com/images/File/Factcheck/EconomicsofImmRe-link2-12-08.pdf>; ROB PARAL, THE GROWTH AND REACH OF IMMIGRATION: NEW CENSUS BUREAU DATA UNDERSCORES IMPORTANCE OF IMMIGRANTS (2006), <http://immigration.server263.com/index.php?content=pr0608>.

20. Linda H. Aiken, *U.S. Nurse Labor Market Dynamics Are Key to Global Nurse Sufficiency*, 42 HEALTH SERVICE RES. 3, 4 (2007) (indicating that the decline in nursing school enrollment led to focusing on international nurse recruitment efforts to combat the nursing shortage).

nursing homes seek to employ foreign citizens to ensure a full staff.<sup>21</sup> Current U.S. immigration laws allow foreign-born nurses to work in the United States under the Nursing Relief for Disadvantaged Areas Act of 1999 and the Immigration and Nationality Act.<sup>22</sup> The U.S. Department of Labor, recognizing the scarcity of registered nurses in the United States, streamlined the immigration process for nurses.<sup>23</sup> The Department of Labor regulations place registered nurses in the Schedule A category,<sup>24</sup> which covers occupations for which “there are not sufficient United States workers who are able, willing, qualified, and available.”<sup>25</sup> These regulations further provide that the immigration of nurses from other countries will not “adversely affect” the wages and working conditions of U.S. nurses.<sup>26</sup>

However, these same immigration laws unnecessarily restrict unskilled workers from immigrating, allowing only 10,000 visas for the unskilled per year.<sup>27</sup> Consequently, a shortage of unskilled workers currently exists in the United States.<sup>28</sup> The growing need for unskilled workers to care for the elderly will only exacerbate this short-

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21. Marsha King, *Care of Aging Americans Often in Immigrants' Hands*, SEATTLE TIMES, June 20, 2006, at A1.

22. See 8 U.S.C. § 1101(a)(15)(H)(i) (2001) (as amended by Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No. 106-95, 113 Stat. 1312).

23. 20 C.F.R. § 656.5 sched. A (2008) (allowing employers to forgo the general labor certification requirement to prove a need for the immigrant employee because the Department has already acknowledged this need).

24. *Id.* Schedule A contains a list of occupations for which an insufficient number of U.S. workers exists. *Id.* Currently, Schedule A specifically lists only “professional nurses” and physical therapists. *Id.* The regulation also recognizes the need for individuals “of exceptional ability in the sciences or arts” and those who have “exceptional ability in the performing arts.” *Id.* According to the regulation, a professional nurse is one who “applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological, and behavioral sciences.” *Id.* To qualify for Schedule A classification, nurses must be employed as professional nurses and have received a certificate from the Commission on Graduates of Foreign Nursing Schools, “hold a permanent, full, and unrestricted license to practice in the state of intended employment,” or have passed the National Council Licensure Examination for Registered Nurses that is administered by the National Council of State Boards of Nursing. *Id.*

25. *Id.*

26. *Id.*

27. Immigration and Nationality Act, 8 U.S.C. § 1153(3)(B) (2006); Walter N. Leutz, *Immigration and the Elderly: Foreign-Born Workers in Long-Term Care*, IMMIGR. POL'Y IN FOCUS, Aug. 2007, at 1, available at <http://www.immigrationpolicy.org/images/File/infocus/Immigration%20and%20the%20Elderly-%20Leutz%20FINAL.pdf>.

28. JOHN P. HORAN, IMMIGRATION REFORM: CAN CONGRESS CURE DECADES OF BAD IMMIGRATION POLICIES? 2 (2007), available at [http://www.foley.com/files/tbl\\_s31Publications/FileUpload137/4546/ImmigrationReform.pdf](http://www.foley.com/files/tbl_s31Publications/FileUpload137/4546/ImmigrationReform.pdf).

age. Such unskilled workers provide nonskilled supportive custodial care for the elderly, working as home health aides, certified nursing assistants, noncertified nurse aides, homemakers, or companions.<sup>29</sup> The Immigration and Nationality Act provides 10,000 visas per fiscal year for individuals who perform such “unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”<sup>30</sup> This provision covers visas for unskilled workers in every field of employment,<sup>31</sup> meaning that less than 10,000 immigrants each year take eldercare positions. The dearth of caregivers has resulted in many elderly U.S. citizens receiving subpar treatment.<sup>32</sup> The sharp increase in nursing home citations for placing residents in “immediate jeopardy[.] . . . the most serious reprimand inspectors can issue,”<sup>33</sup> reveals the effects of the staffing shortage.

This Note analyzes the growing crisis of the shortage of eldercare employees throughout the United States and the positive solution that reforming America’s immigration policy can provide to reduce this shortage. Part II depicts the societal conditions that led to the enactment of congressional legislation, such as the Nurse Reinvestment Act, to correct the country’s nursing shortage problem. Part III provides an overview of current immigration law, focusing on the shortcomings that exist concerning caregiving for the elderly. Part IV resolves the issue, providing an immigration policy that would fulfill the need for caregivers for the elderly while also maintaining safety and security for U.S. citizen employees.

## II. Background

### A. The Graying of America

The aging of the approximately seventy-six million individuals born during the baby boom, 1946 through 1964, is altering the demographics of American society.<sup>34</sup> The elderly population, aged sixty-

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29. See HomeCareFiles.org, Types of Home Care Agencies, <http://www.homecarefiles.org/types-of-agencies.cfm> (last visited Aug. 23, 2008).

30. §§ 1153(b)(3)(A)–(B).

31. See § 1153(b)(3)(A)(iii).

32. See Leutz, *supra* note 27, at 3.

33. *Id.* Nursing homes often receive these citations when residents were “physically or sexually abused or left without medications.” Brad Heath, *Nursing Home Citations Climb 22%*, USA TODAY, Dec. 21, 2007, at 1A.

34. *Long-Term Care: Aging Baby Boom Generation Will Increase Demand and Burden on Federal and State Budgets: Hearing Before S. Spec. Comm. on Aging*, 107th Cong.

five and older, numbered 36.8 million in 2005, which is an increase of 3.2 million, or 9.4%, since 1995.<sup>35</sup> By 2030, the number of elderly individuals in the United States is likely to reach seventy-two million, which will be almost one in every five people.<sup>36</sup> In addition, the fastest growing age group in the United States is the cohort of adults over the age of eighty-five, the “old-old,”<sup>37</sup> whose increased longevity is primarily attributable to proper nutrition, improved medical care, and fewer work- or war-related deaths.<sup>38</sup> This “graying of America,” largely the result of longer lifespans and lower birth rates, necessitates a change in the caregiving structure as the elderly will soon outnumber their younger counterparts.<sup>39</sup>

An increase in caregiving needs accompanies the rise of the elderly population.<sup>40</sup> According to the 1999 National Long-Term Care Survey, approximately seven million elderly had a disability requiring eldercare.<sup>41</sup> One million of America’s elderly depend on this assistance to perform the five basic activities of daily living (ADL).<sup>42</sup> As a result of the aging baby boomers, the total number of the disabled elderly population is projected to be as high as 12.1 million by 2040.<sup>43</sup>

Reported disability increases with age.<sup>44</sup> In 2002, 52% of the elderly reported that they had some type of disability—sensory, physical, or mental<sup>45</sup>—compared to only approximately 12% of adults un-

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(2002) [hereinafter *Hearing*] (statement of David M. Walker, Comptroller Gen. of the United States).

35. ADMIN. ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER U.S. CITIZENS: 2006, at 1 (2006), available at <http://www.aoa.gov/prof/Statistics/profile/2006/2006profile.pdf>.

36. Leutz, *supra* note 27, at 2.

37. *NewsHour with Jim Lehrer: Graying of America* (PBS television broadcast May 25, 2005), available at [http://www.pbs.org/newshour/bb/social\\_security/jan-june05/graying\\_5-25.html](http://www.pbs.org/newshour/bb/social_security/jan-june05/graying_5-25.html) [hereinafter *Graying of America*].

38. ROSEMARY CHAPIN ET AL., CAREGIVING ISSUES AND OLDER ADULTS 2 (2002), available at <http://www.oaltc.ku.edu/GeroRich/Reports/CAREGIVINGISSUESANDOLDERADULTS.pdf>.

39. *Id.*

40. See *Hearing*, *supra* note 34, at 1–2.

41. *Id.* at 3.

42. “Activities of daily living” are activities related to personal care, such as bathing or showering, dressing, getting in or out of bed or a chair, using the toilet, and eating. Nat’l Ctr. for Health Statistics, Activities of Daily Living, <http://www.cdc.gov/nchs/dataawh/nchsdefs/adl.htm> (last visited Aug. 23, 2008).

43. *Hearing*, *supra* note 34, at 11.

44. See ADMIN. ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 35, at 14.

45. *Id.*

der the age of sixty-five.<sup>46</sup> “Some of these disabilities may be relatively minor, but others cause people to require assistance to meet important personal needs. Almost 37% of the older persons reported a severe disability and 16% reported that they needed some type of assistance as a result.”<sup>47</sup> Fifty-seven percent of people over the age of eighty reported a severe disability.<sup>48</sup> At least 30% of these people reported a need for assistance as well.<sup>49</sup> Consequently, a high demand exists for nurses and other health care professionals. This need includes unskilled workers who can assist the elderly with ADL, a task for which formal education is not mandatory.

## B. Relevant Legislation

### 1. THE IMMIGRATION NURSING RELIEF ACT OF 1989

Congress first addressed the issue of the paucity of nurses in the United States two decades ago. The first major legislation was the Immigration Nursing Relief Act of 1989 (INRA),<sup>50</sup> which was “enacted to address the nationwide shortage of qualified nurses.”<sup>51</sup> At that time, some areas in the United States needed an additional 10% of nurses to uphold a minimum standard of care for their patients.<sup>52</sup> The scarcity of nurses caused dire consequences for the elderly and other patients because hospitals were overcrowded and at risk of providing substandard care to patients.<sup>53</sup> The INRA addressed the issue of the large number of nonimmigrant, temporary-worker nurses who were in the United States and allowed them to bypass the numerical limitations imposed upon H-1 visa holders and adjust their status to lawful

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46. Disability Funders Network, 2005 Census Data Regarding People with Disabilities, <http://www.disabilityfunders.org/content/2005-census-data-regarding-people-with-disabilities> (last visited Aug. 23, 2008).

47. ADMIN. ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 35, at 14.

48. *Id.*

49. *Id.*

50. Immigration Nursing Relief Act of 1989, Pub. L. No. 101-238, 103 Stat. 2099.

51. Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 BRANDEIS L.J. 967, 990 (2002).

52. *Id.*

53. *Id.* at 990–91.

permanent residents of the United States.<sup>54</sup> Covered nurses included those who had maintained employment in the United States for three years prior to applying for adjustment of status.<sup>55</sup> Additionally, the INRA allowed foreign nurses to enter the country for a five-year period, bypassing the standard admission procedures, through the newly created H-1A category visa.<sup>56</sup> The program allowed 6512 nurses into the United States between 1989 and 1995.<sup>57</sup> This visa expired in September 1997,<sup>58</sup> indicating that Congress had initially expected to solve the nursing crisis in eight years.

## 2. THE NURSING RELIEF FOR DISADVANTAGED AREAS ACT OF 1999

Unfortunately, despite the efforts of the INRA, the shortage of nurses became increasingly troubling as fewer people entered the nursing profession despite the increasing caregiving needs of the aging elderly population.<sup>59</sup> Responding to this concern, Congress enacted the Nursing Relief for Disadvantaged Areas Act of 1999 (NRDAA), which sought to address nursing shortages in underserved and impoverished communities.<sup>60</sup> These areas paid lower wages and had inferior working conditions compared to affluent neighborhoods.<sup>61</sup> The statute sought to promote nurse employment in impoverished areas based upon the premise that these areas could not sufficiently recruit and maintain qualified nurses through their own efforts.<sup>62</sup>

The NRDAA established the H-1C classification visa.<sup>63</sup> Per this visa's provisions, modeled after the expired H-1A visa that the INRA had established, health care facilities hiring nurses must confirm that a temporary immigrant worker will not adversely affect the salary and working conditions of similarly situated registered nurses.<sup>64</sup> To en-

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54. Immigration Nursing Relief Act § 2, 103 Stat. at 2099. The statute also allowed the qualified nurse's accompanying spouse and children to adjust their status from nonimmigrant to lawful permanent resident. § 2(a), 103 Stat. at 2099.

55. Immigration Nursing Relief Act § 2(a)(2), 103 Stat. at 2099.

56. Immigration Nursing Relief Act § 3(a), 103 Stat. at 2100; 8 U.S.C. § 1101(a)(15)(H)(i) (2006).

57. Leutz, *supra* note 27, at 6.

58. Trucios-Haynes, *supra* note 51, at 996.

59. *Id.*

60. Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No. 106-95, 113 Stat. 1312; Trucios-Haynes, *supra* note 51, at 996.

61. Trucios-Haynes, *supra* note 51, at 996.

62. *Id.*

63. *Id.*

64. *Id.* at 996-97.



force this requirement, health care facilities must pay noncitizen workers the prevailing wage rate and must actively seek to hire U.S. nurses prior to employing foreigners.<sup>65</sup>

The ultimate goal of the NRDA was to eliminate the dependence on foreign labor and recruit additional U.S. citizens into the workforce.<sup>66</sup> Consequently, the NRDA imposed strict criteria upon those potential immigrant employees who attempted to reap the benefits of the H-1C visa.<sup>67</sup> Only 500 visas per year *for the entire country* may be issued to foreign-born nurses seeking to improve America's health care system, and only understaffed health care facilities may request a worker under this program.<sup>68</sup> In addition, H-1C workers are subjected to immigration laws that mandate that noncitizen health care employees "meet professional certification requirements relating to their education, qualifications, and English language proficiency."<sup>69</sup> These stringent requirements result in increased delays in bringing workers to assist with the ever-increasing nursing shortage.<sup>70</sup>

The NRDA expired on June 13, 2005,<sup>71</sup> but the need for additional health care workers still existed. In response, Congress enacted the Nursing Relief for Disadvantaged Areas Act of 2005 on December 20, 2006.<sup>72</sup> This Act reauthorized the H-1C program for an additional three years.<sup>73</sup> Consequently, the provisions of the 1999 Act will remain in effect until December 20, 2009.<sup>74</sup>

### 3. THE NURSE REINVESTMENT ACT

The Nurse Reinvestment Act (NRA),<sup>75</sup> enacted on August 1, 2002, amended the nursing provisions of the Public Health Service Act.<sup>76</sup> The two parts of the NRA focused on efforts to improve nurse

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65. *Id.* at 997.

66. *Id.*

67. *Id.*

68. Leutz, *supra* note 27, at 6.

69. Trucios-Haynes, *supra* note 51, at 997.

70. *See id.* at 998.

71. Interoffice Memorandum from Michael Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship & Immigration Serv., to Reg'l Divs. et al., U.S. Citizenship & Immigration Serv., *available at* <http://www.uscis.gov/files/pressrelease/H1CReauth122606.pdf>.

72. Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005, Pub. L. No. 109-423, 120 Stat. 2900.

73. Interoffice Memorandum from Michael Aytes, *supra* note 71.

74. *Id.*

75. Nurse Reinvestment Act, Pub. L. No. 107-205, 116 Stat. 811 (2002).

76. *E.g.*, Nurse Reinvestment Act, § 101.

recruitment efforts and to increase nurse retention rates.<sup>77</sup> To popularize nursing school, the Secretary of State attempted to “develop and issue public service announcements” that promoted nursing as a profession.<sup>78</sup> In addition, grants and loan repayment programs, such as the Nursing Education Loan Repayment Program, assisted nurses practicing in “priority areas,” which included “providing care for underserved populations and other high-risk groups such as the elderly.”<sup>79</sup> Congress hoped that the additional financial assistance that now accompanied entry to the nursing profession would attract worthy candidates.<sup>80</sup> Recognizing the increasing needs of the elderly population, the NRA also authorized grants for eligible entities<sup>81</sup> to “develop and implement . . . programs and initiatives to train and educate individuals in providing geriatric care for the elderly.”<sup>82</sup> Although the Act provided a minimal solution, the current paucity of eldercare workers in both medical and nonmedical settings is staggering.<sup>83</sup> Just like its counterparts, this statute focused on the recruitment of skilled nurses and failed to recognize the potential use of unskilled workers to alleviate the nursing shortage.

### C. Effects of the Legislation

In 2006, Congress approved \$149.7 million to fund the NRA, a significant improvement from the \$20 million that was appropriated in 2003.<sup>84</sup> Despite the most fervent congressional efforts, the nursing profession still desperately seeks additional members. Currently, fewer than 20,000 full-time faculty members are teaching in nursing schools, with nearly 1800 full-time faculty members leaving their posi-

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77. Nurse Reinvestment Act, § 201.

78. Nurse Reinvestment Act, sec. 102, § 851(a).

79. Nurse Reinvestment Act, § 103(a); *id.*, sec. 201, § 831(b).

80. See H.R. REP. NO. 108-188, at 28 (2003) (Conf. Rep.).

81. The statute defines an “eligible entity” to include “a school of nursing, a health care facility, a program leading to certification as a certified nurse assistant, a partnership of such a school and facility, or a partnership of such a program and facility.” 42 U.S.C. § 298(d) (2000).

82. *Id.* § 298(a).

83. See AM. ASS’N OF COLLS. OF NURSING, NURSING SHORTAGE FACT SHEET (2008), available at <http://www.aacn.nche.edu/Media/pdf/NrsgShortageFS.pdf> [hereinafter NURSING SHORTAGE FACT SHEET].

84. See NAT’L ASS’N OF PEDIATRIC NURSE PRACTITIONERS, TITLE VIII—NURSING WORKFORCE DEVELOPMENT PROGRAM FUNDING—FY 2007, at 1 (2007); AM. ASS’N OF COLLS. OF NURSING, NURSING FACULTY SHORTAGE FACT SHEET 4 (2008), available at <http://www.aacn.nche.edu/Media/pdf/FacultyShortageFS.pdf> [hereinafter NURSING FACULTY SHORTAGE FACT SHEET].

tions each year due to a lack of funding.<sup>85</sup> Masters and doctoral programs fail to produce a sufficient number of nurse educators to fulfill the need. Due to the shortage of faculty, 3048 qualified applicants were rejected from masters programs and 313 qualified applicants were rejected by doctoral programs in 2007.<sup>86</sup> The Nurse Education Loan Repayment Program that the NRA supported is severely underfunded.<sup>87</sup> Although the Program received 4711 eligible applications, only 586 grants were awarded, a meager 12.44% of all requests.<sup>88</sup> Without adequate financial resources supporting the potential benefits of the NRA, the quality of caregiving for America's elderly continues to decline.

#### D. The Elderly's Caregiving Needs and Related Consequences

##### 1. CAREGIVING FOR DISABILITIES AND ILLNESSES

The growing need to provide long-term care to the elderly is one of the leading political and social challenges facing industrialized countries, including the United States.<sup>89</sup> For many adults, old age is accompanied by various disabilities, including failing eyesight and hearing loss, as well as chronic or debilitating illnesses, such as cancer, diabetes, and Alzheimer's disease.<sup>90</sup> Sixty-nine percent of people who turned sixty-five in 2007 will need some form of long-term care, either in the community or in an eldercare facility.<sup>91</sup> By the year 2020, twelve million elderly will need long-term care.<sup>92</sup> The growing elderly population demands significantly more financial and human resources for health care support.<sup>93</sup>

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85. NAT'L ASS'N OF PEDIATRIC NURSE PRACTITIONERS, *supra* note 84, at 1.

86. NURSING FACULTY SHORTAGE FACT SHEET, *supra* note 84, at 2.

87. NAT'L ASS'N OF PEDIATRIC NURSE PRACTITIONERS, *supra* note 84.

88. U.S. DEP'T OF HEALTH & HUMAN SERVS., NURSING EDUCATION LOAN REPAYMENT PROGRAM, <http://bhpr.hrsa.gov/nursing/loanrepay.htm> (last visited Aug. 23, 2008) (of this number, 315 were for two-year programs and 271 were for three-year programs).

89. Leutz, *supra* note 27, at 2.

90. *Id.*

91. Am. Ass'n of Homes & Servs. for the Aging, Aging Services: The Facts, <http://www.aahsa.org/article.aspx?id=74> (last visited Nov. 9, 2008). Eldercare facilities include nursing homes, assisted living facilities, continuing care retirement communities, adult day care centers, and other facilities dedicated to providing care for the elderly. Univ. of Utah, Home Health, Hospice & Elder Care—Selecting an Elder Care Facility, <http://healthcare.utah.edu/healthinfo/adult/homehealth/facility.html> (last visited Aug. 23, 2008).

92. Am. Ass'n of Homes & Servs. for the Aging, *supra* note 91.

93. Leutz, *supra* note 27, at 2.

Despite the many elderly U.S. citizens requiring skilled health care, a larger number could use unskilled care for assistance with their ADL, which include bathing, eating, and ambulating.<sup>94</sup> Studies have indicated that limitations on ADL because of chronic conditions increase with age.<sup>95</sup> The challenge of living with chronic diseases such as arthritis, osteoporosis, and diabetes increases the caregiving needs of the elderly.<sup>96</sup> Consequently, many facilities dedicated to the care of the elderly do not provide medical services, but do assist them with their ADL.<sup>97</sup>

Due to their training, nurses can fulfill the elderly's health care needs as well as assist them with ADL.<sup>98</sup> Legally, however, only nurses and family members may provide skilled care, such as wound care and medication administration.<sup>99</sup> The nursing shortage generally necessitates that nurses focus their efforts on those needing skilled care and leave ADL assistance to their unskilled counterparts.<sup>100</sup> Even though the number of the elderly residing in nursing homes that employ skilled workers is declining, the nursing shortage remains.<sup>101</sup> The elderly are increasingly turning toward receiving unskilled workers' assistance through in-home care and assisted living facilities.<sup>102</sup> Nonetheless, Congress has focused narrowly on the nursing shortage and

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94. See ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 35, at 14.

95. See *id.*

96. CHAPIN ET AL., *supra* note 38, at 20.

97. See LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* 182-86 (4th ed. 2006).

98. See *Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1035 (9th Cir. 2007) (discussing the burden that non-nursing-related tasks place on nurse aides).

99. See FROLIK & KAPLAN, *supra* note 97, at 69-70 (defining skilled care); Bill Moss & Linda Rolfe, *Family as Paid Caregivers Performing Skilled Tasks* (Apr. 17, 2005), <http://www.aasa.dshs.wa.gov/professional/MB/MB2006/H06-026%20FAMILY%20AS%20PAID%20CAREGIVERS%20PERFORMING%20SKILLED%20TASKS.doc> (showing that family members can provide skilled care).

100. See *Resident Councils of Wash.*, 500 F.3d at 1035 (discussing the advantages of delegating non-nursing-related tasks).

101. CHAPIN ET AL., *supra* note 38, at 20.

102. Haya El Nasser, *Fewer Seniors Live in Nursing Homes*, USA TODAY, Sept. 27, 2007, at A1. Currently, more than 1.4 million nursing home residents (of all ages) exist in the United States, whereas 900,000 individuals live in assisted living facilities, 150,000 people receive care from an adult day care center, more than 1.1 million elderly reside in senior housing communities, and 745,000 elderly live in continuing care retirement communities. Am. Ass'n of Homes & Servs. for the Aging, *supra* note 91.

thereby failed to recognize the dearth of unskilled caregivers for the elderly.<sup>103</sup>

## 2. CAREGIVING BURDENS

The demand for caregivers has increased substantially during the last forty years and has imposed significant strain and stress on both family and institutional caregiving systems.<sup>104</sup> “A caregiver can be defined as someone who gives assistance to another person who is no longer able to perform the critical tasks of personal or household care necessary for everyday survival.”<sup>105</sup> Caregivers face many responsibilities and anxieties, called the “caregiver burden,”<sup>106</sup> which will only increase as the demand for caregiving grows in response to the increasing elderly population.<sup>107</sup> Therefore, the availability of caregiving options for the elderly must be addressed.<sup>108</sup>

Women who entered the workforce and consequently lacked sufficient time to devote to caregiving led to the establishment of various untraditional family structures that compounded the necessity for unskilled caregivers.<sup>109</sup> Traditionally, family members assumed the informal caregiving role because many elderly lived in multigenerational households where their children cared for them.<sup>110</sup> Although many families continue to care for their elderly relatives, the numbers are declining.<sup>111</sup> Familial caregivers generally bear the financial burden to care for their elderly loved ones—eldercare facilities that pro-

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103. See Nurse Reinvestment Act, Pub. L. No. 107-205, 116 Stat. 811 (2002). The Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005 provides for the immigration of skilled nurses into the United States, while ignoring the need for unskilled workers in the health care industry who could serve as caregivers for the elderly. Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005, Pub. L. No. 109-423, 120 Stat. 2900.

104. CHAPIN ET AL., *supra* note 38, at 2.

105. CHRISTINE TAYLOR, OHIO STATE UNIV. EXTENSION, THE ROLE OF A CAREGIVER 1 (1997), <http://ohioline.osu.edu/ss-fact/pdf/0117.pdf>.

106. SUSAN MOCKUS PARKS & KAREN D. NOVIELLI, AMERICAN ACAD. OF FAMILY PHYSICIANS, A PRACTICAL GUIDE TO CARING FOR CAREGIVERS 1 (2000), available at <http://www.aafp.org/afp/20001215/2613.html>.

107. CHAPIN ET AL., *supra* note 38, at 2.

108. *Id.*

109. *Id.*

110. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 258–59 (2006).

111. *Id.* at 259.

vide similar services for the elderly cost approximately \$250 billion per year.<sup>112</sup>

Traditionally, nursing homes and other eldercare facilities existed to fulfill caregiving roles when family was unavailable or unwilling to assume the increased responsibility and burden.<sup>113</sup> Today, many elderly lack family members who can meet their caregiving needs.<sup>114</sup> Changes in the family structure caused an increased number of childless or unmarried elderly, potentially leaving them with only extended family members who can care for them.<sup>115</sup> However, the dispersion of families throughout the United States and even abroad could make even this possibility nonexistent.<sup>116</sup>

Complicating matters further, families now bear children later and the elderly live longer, placing middle-aged individuals in the demanding role of caring for both their parents and their children.<sup>117</sup> These dual-caregivers are part of the “sandwich generation,” which includes approximately ten million U.S. citizens.<sup>118</sup> Due to the challenge of playing both roles simultaneously, this generation may experience increased emotional and physical demands without support or recognition.<sup>119</sup> Sandwich generation caregivers may feel isolated from their peers due to the excessive time they spend caregiving, inhibiting them from meeting their own personal needs, such as enjoying free personal time and building relationships.<sup>120</sup> In many cases, caregivers struggle to balance the various roles in their lives, straining their marital and other social relationships.<sup>121</sup> Unskilled caregivers could free these modern families from at least the eldercare role. Furthermore, unskilled caregivers may provide better care because their attention would be focused only on their employment as a caregiver for the el-

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112. See Kathleen Bogolea, *Rural Caregivers Living in Shadowland*, TODAY'S CAREGIVER, Mar. 14, 2007, [http://www.caregiver.com/channels/rural/articles/sandwich\\_generation.htm](http://www.caregiver.com/channels/rural/articles/sandwich_generation.htm).

113. CHAPIN ET AL., *supra* note 38, at 2.

114. *Id.* at 3.

115. *Id.*

116. *Id.*

117. *Id.* at 2–3.

118. Walecia Konrad, *Sandwich Generation: Survive the Midlife Tug of War*, CNN MONEY, Feb. 20, 2007, [http://money.cnn.com/2007/02/20/magazines/moneymag/tug\\_of\\_war.moneymag](http://money.cnn.com/2007/02/20/magazines/moneymag/tug_of_war.moneymag).

119. Bogolea, *supra* note 112.

120. *See id.*

121. See Richard T. Kasuya et al., *Caregiver Burden and Burnout: A Guide for Primary Care Physicians*, 108 POSTGRADUATE MED. 7 (2000), available at [http://www.postgradmed.com/issues/2000/12\\_00/kasuya.shtml](http://www.postgradmed.com/issues/2000/12_00/kasuya.shtml).

derly, as opposed to family members who must apportion time between outside employment and caregiving.

### 3. ADL AND UNSKILLED CAREGIVERS

Today, fewer elderly individuals die from diseases such as heart disease, cancer, and stroke.<sup>122</sup> However, they do suffer physical and mental limitations from living longer that require nonmedical caregiving assistance, such as the consequences of a stroke.<sup>123</sup> The debilitating effects of a stroke depend upon where the stroke occurred in the brain.<sup>124</sup> Strokes that occur in the brain's left hemisphere can affect movement of the right side of the body, communication, and memory.<sup>125</sup> Strokes that occur in the right hemisphere of the brain can affect movement of the left side of the body, as well as spatial and perceptual abilities.<sup>126</sup>

After a stroke, many people cannot bathe or dress themselves due to paralysis or weakness on one side of the body.<sup>127</sup> Unskilled caregivers can assist stroke survivors with these tasks and other ADL. Stroke survivors may also have difficulties with reading, writing, or speaking; unskilled caregivers can read to stroke survivors and write for them.<sup>128</sup> These caregivers can also attempt to communicate with the stroke survivors and ease their frustration.<sup>129</sup> With time, caregivers and stroke survivors can learn to communicate with each other.<sup>130</sup> Stroke survivors can also have vision problems, which can prevent

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122. CHAPIN ET AL., *supra* note 38, at 2.

123. *See id.*

124. Nat'l Stroke Ass'n, What Is Stroke?, <http://www.stroke.org/site/PageServer?pagename=STROKE> (last visited Aug. 23, 2008).

125. Family Caregiver Alliance, Stroke, [http://www.caregiver.org/caregiver/jsp/content\\_node.jsp?nodeid=578](http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=578) (last visited Aug. 23, 2008).

126. *Id.*

127. Nat'l Stroke Ass'n, Hemiparesis, <http://www.stroke.org/site/PageServer?pagename=HEMIPARESIS> (last visited Aug. 23, 2008).

128. Nat'l Stroke Ass'n, Life After Stroke: Survivor and Caregiver, <http://www.stroke.org/site/PageServer?pagename=LAS> (last visited Aug. 23, 2008).

129. Home Instead Senior Care, Senior Home Care Services, <http://www.homeinstead.com/services/default.aspx> (last visited Aug. 23, 2008).

130. Am. Stroke Ass'n, Being a Communication Partner, <http://www.strokeassociation.com/presenter.jhtml?identifier=3030113> (last visited Oct. 17, 2008) (discussing the "language" that caregivers and stroke survivors can develop to communicate with one another).

safe ambulation and driving.<sup>131</sup> Unskilled caregivers can help stroke survivors to walk and can act as chauffeurs.<sup>132</sup>

Another issue that stroke survivors face is depression.<sup>133</sup> An unskilled caregiver can serve as a companion and alleviate some of the symptoms of depression, as well as the frustration that often accompanies stroke-related disabilities.<sup>134</sup> Unskilled caregivers can also use their abilities to assist with ADL for sufferers of a variety of other ailments that afflict the elderly, such as Alzheimer's disease and other illnesses that prevent complete functioning.<sup>135</sup>

Most states do not require unskilled caregivers to receive formal training to assist the elderly with ADL.<sup>136</sup> The only training required is on-the-job training that employers provide.<sup>137</sup> An employer, such as a home health care agency, can provide training for the unskilled worker even in the states that require training.<sup>138</sup> For example, Home Instead Senior Care, an organization committed to allowing the elderly in all fifty states to age in place,<sup>139</sup> requires no experience or medical training in order to work as an unskilled caregiver.<sup>140</sup>

The increasing need for and shortage of unskilled caregivers must be addressed in conjunction with the nursing shortage. Unskilled workers could supplement nurses in their caregiving role by

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131. Nat'l Stroke Ass'n, Effects of Stroke, <http://www.stroke.org/site/PageServer?pagename=EFFECT> (last visited Aug. 23, 2008).

132. See NAT'L STROKE ASS'N, RECOVERY AFTER STROKE: SOCIAL SUPPORT 1-2 (2006), [http://www.stroke.org/site/DocServer/NSAFactSheet\\_socialsupport.pdf?docID=1003](http://www.stroke.org/site/DocServer/NSAFactSheet_socialsupport.pdf?docID=1003).

133. Family Caregiver Alliance, *supra* note 125.

134. See NAT'L STROKE ASS'N, *supra* note 132, at 1-2.

135. See Family Caregiver Alliance, Caring for Adults with Cognitive and Memory Impairments, [http://caregiver.org/caregiver/jsp/content\\_node.jsp?nodeid=392](http://caregiver.org/caregiver/jsp/content_node.jsp?nodeid=392) (last visited Aug. 23, 2008).

136. See WENDY FOX-GRACE ET AL., FEDERAL AND STATE POLICY IN FAMILY CAREGIVING: RECENT VICTORIES BUT UNCERTAIN FUTURE 1 (2001), [http://www.caregiver.org/caregiver/jsp/content/pdfs/op\\_2001\\_10\\_policybrief\\_2.pdf](http://www.caregiver.org/caregiver/jsp/content/pdfs/op_2001_10_policybrief_2.pdf).

137. See *id.*

138. See Home Instead Senior Care, Answers to Your CAREgiver and Home Instead Senior Care Questions, <http://www.homeinstead.com/Lists/faqlib/ShowFAQ08.aspx> (last visited Oct. 18, 2008) (discussing training of caregivers).

139. "Aging in place" refers to the elderly's desire to remain in their current residences as long as possible and preferably for the rest of their lives. FROLIK & KAPLAN, *supra* note 97, at 189.

140. Home Instead Senior Care, Become a CAREgiver, <http://www.homeinstead.com/caregiver/default.aspx> (last visited Aug. 23, 2008) [hereinafter Become a CAREgiver].



assisting the elderly with ADL, a tiring task that many nurses dread.<sup>141</sup> After all, nurses are medically trained and would rather focus their efforts on treating the ailments of the elderly rather than assisting them with menial tasks.<sup>142</sup> ADL do not require the assistance of medically trained professionals.<sup>143</sup> The only requirement is a willingness to assist the elderly and meet their needs so that they can live as comfortably as possible.<sup>144</sup> Of course, unskilled workers do perform important duties because elderly care recipients rely on them for daily survival needs such as eating and bathing.<sup>145</sup> In addition, unskilled workers alleviate the emotional burden placed on family members who must endure the frustration of watching their elderly relatives who are no longer able to perform ADL.<sup>146</sup>

All that is needed to improve caregiving for America's elderly are additional unskilled workers. However, therein lies the dilemma: most U.S. citizens have no desire to work in an eldercare facility and would rather work in other unskilled employment positions.<sup>147</sup> The segmented labor market in the United States creates good jobs that predominantly attract U.S. citizens, and poorly paid, unattractive jobs that immigrants accept.<sup>148</sup> Employment in eldercare facilities falls into the latter category.<sup>149</sup> Currently, approximately three million people work as home health care aides, nursing assistants, or personal care aides.<sup>150</sup> By 2017, the United States will need one million additional employees in such positions, and by 2030, when all surviving baby

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141. See Eleanor D. Kinney et al., *Quality Improvements in Community-Based Long-Term Care: Theory and Reality*, 20 AM. J.L. & MED. 59, 69 (exploring quality assurance in long-term care).

142. See *id.*

143. Become a CAREgiver, *supra* note 140.

144. *Id.*

145. *Id.*

146. Home Instead Senior Care, Caregiver Stress, <http://www.homeinstead.com/resources/familyresources/Caregiver%20Stress%20Flyer.aspx> (last visited Aug. 23, 2008).

147. Georgea Kovanis, *Mary Graham's Mission*, DETROIT FREE PRESS, Jan. 6, 2008, at Lifestyle 1 (explaining that most people do not desire to work as home health aides for the elderly because the pay is low and the job includes "bathing people who are too ill to take care of themselves and are too much for their families to handle, washing away the sour stink of sickness, leaving them feeling refreshed and renewed even though their flesh may be rotting from bedsores").

148. Jorge Durnad & Douglas S. Massey, *Borderline Sanity*, AM. PROSPECT, Sept. 24, 2001, at 28, reprinted in THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 384-85 (6th ed. 2008).

149. See King, *supra* note 21.

150. Kovanis, *supra* note 147.

boomers will be at least sixty-five, an additional three million will be needed.<sup>151</sup>

#### 4. ELDER ABUSE

In addition to the lack of desire among U.S. citizens to work as elderly caregivers, many people do not have the compassion and patience necessary to serve effectively in this role.<sup>152</sup> Caregivers abuse an estimated 1.5 million elderly U.S. citizens, which is equal to approximately 5% of those sixty-five and older.<sup>153</sup> Some caregivers merely express an evil intent with their abuse.<sup>154</sup> They may enjoy tormenting defenseless elderly individuals.<sup>155</sup> Other caregivers cannot bear the caregiving burden and channel their anger and frustration by abusing and neglecting the elderly.<sup>156</sup> Some caregivers abuse drugs or alcohol and commit most elder abuse while under the influence of these substances.<sup>157</sup> Therefore, despite the lack of a formal education requirement for unskilled caregivers, not everyone can fulfill this role.

#### E. Costs of Caregiving

Providing care for the elderly can be expensive for the elderly and their families. Private funds pay for nearly 40% of long-term care.<sup>158</sup> A 2006 survey found that the average annual cost of nursing home care is more than \$67,000 and can be higher than \$100,000 in some urban areas.<sup>159</sup> “In 2004, older consumers averaged \$4193 in out-of-pocket health care expenditures, an increase of 58% since 1994.”<sup>160</sup> Average health costs incurred by elderly consumers in 2004 consisted of \$2307 for insurance, \$977 for drugs, \$769 for medical services, and

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151. *Id.*

152. *See id.*

153. FROLIK & KAPLAN, *supra* note 97, at 406–07.

154. *Id.* at 414.

155. *Id.*

156. *Id.*

157. *Id.* at 415.

158. Am. Ass’n of Homes & Servs. for the Aging, *supra* note 91.

159. Nasser, *supra* note 102. The American Association of Homes and Services for the Aging reported in August 2008 that the average daily cost for a private room in a nursing home is \$213, which amounts to \$77,745 annually. Am. Ass’n of Homes & Servs. for the Aging, *supra* note 91. The average daily cost for a semi-private room in a nursing home is \$189, or \$68,985 annually. *Id.*

160. ADMIN. ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 35, at 15.

\$140 for medical supplies.<sup>161</sup> The median income of elderly U.S. citizens in 2005 was \$21,784 for males and \$12,495 for females.<sup>162</sup> In addition, approximately 3.6 million elderly persons, 10.1% of the elderly population, were below the poverty level in 2005.<sup>163</sup> These staggering statistics indicate that the elderly cannot afford to pay for the increasing cost of caregiving in the United States.

To supplement their income, many elderly U.S. citizens depend upon governmental assistance, such as Social Security.<sup>164</sup> This program constitutes 90% or more of the income received by 34% of all Social Security beneficiaries (21% of married couples and 43% of non-married beneficiaries).<sup>165</sup> Because Social Security operates on a “pay-as-you-go” system, “today’s tax revenues are not saved to pay for workers’ own retirements but are used immediately to finance the benefits of their parents and grandparents.”<sup>166</sup> With the growing numerical disparity between younger workers in American society and the elderly, less money is entering the Social Security system to fund a greater amount of individuals.<sup>167</sup> In 2002, the average monthly check for the elderly over the age of sixty-five<sup>168</sup> was \$895, a meager sum to cover rising health care costs.<sup>169</sup>

### III. Analysis

The shortage of unskilled U.S. citizens who are willing to work as caregivers for the elderly results in expensive and inadequate elder care.<sup>170</sup> Consequently, many U.S. citizens are outsourcing their end-of-life care.<sup>171</sup> In determining the proper course of action to take re-

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161. *Id.*

162. *Id.* at 12.

163. *Id.* at 13.

164. *See id.*

165. *Id.*

166. *Graying of America*, *supra* note 37.

167. *Id.*

168. In 2002, the elderly could receive the full Social Security payment only upon turning sixty-five-years-old. SOCIAL SECURITY ADMIN., PUBL’N NO. 05-10035, RETIREMENT BENEFITS 5–6 (2008). Today, the graduated payment scale rewards deferring the receipt of initial payments and will pay the full amount to individuals who were born on January 2, 1960, or later only when they are sixty-seven years of age. *Id.*

169. Press Release, U.S. Census Bureau, Social Security COLA (Dec. 11, 2003), available at [http://www.census.gov/Press-Release/www/releases/archives/facts\\_for\\_features\\_special\\_editions/001583.html](http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/001583.html).

170. *See* Leutz, *supra* note 27, at 1.

171. Goering, *supra* note 1.

garding the shortage of unskilled caregivers for the elderly, Congress has faced a daunting dilemma: how to resolve this issue while also maintaining a strong immigration policy and preserving the nation's economy. Congress must address the issue of substandard eldercare in the United States by enabling additional unskilled immigrant workers to enter the country and to gain lawful employment in the geriatric health care industry on a permanent, rather than a temporary, basis.

This Part will provide an overview of current immigration policy, including its shortcomings with regard to caregiving for the elderly. Section A discusses existing issues in caregiving due to labor shortages. Section B.1 provides a brief overview of the Immigration and Nationality Act, the current major immigration legislation in the United States. In light of the 2008 presidential election, Section B.2 assesses the presidential candidates' immigration proposals and reveals that every proposal has failed to consider the benefit that unskilled workers who care for the elderly could provide. Section B.3 examines and addresses the concerns with immigration, and Section B.4 follows with a discussion of the benefits of immigration. Section B.5 considers the consequences of outsourcing the care of the elderly to foreign countries and explains the advantages that an immigrant workforce that fulfills available, unskilled caregiving roles can provide for the elderly. This Part concludes that the current immigration policy falls short as it neglects to address the critical need for unskilled workers in the health care profession, particularly those who care for the elderly.

## A. Caregiving Issues

### 1. QUALITY OF CARE

The U.S. health care industry has recurring labor shortages, especially in unskilled occupations, such as nursing aides and home health aides,<sup>172</sup> because of an insufficient supply of capable workers.<sup>173</sup> These staffing shortages affect the quality of care that patients re-

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172. Other unskilled health care occupations that currently have a shortage include nursing attendants and orderlies who provide assistance with ADL to the residents of eldercare facilities and personal and home care aides who help the elderly with ADL in their homes or at daytime nonresidential facilities. Leutz, *supra* note 27, at 2.

173. *Id.*

ceive.<sup>174</sup> Consequently, the elderly pay staggering costs for subpar care.<sup>175</sup> In a February 2008 study, the Centers for Medicare and Medicaid Services found that over 4000 nursing homes, comprising more than 25% of facilities nationwide, house elderly who endure unnecessary physical restraint, suffer from pressure sores, or both, in excessive numbers.<sup>176</sup> Due to staffing shortages, nurses and unskilled caregivers use physical restraints to control elderly residents but cannot ensure that those restrained are turned at regular intervals to avoid pressure sores.<sup>177</sup> The Centers for Medicare and Medicaid Services found in 2000 that understaffing “severely affected quality” in 54% of nursing facilities in the United States,<sup>178</sup> and more than forty states reported that aide shortages were “critical” in a 1999 survey of state long-term care ombudsmen.<sup>179</sup> Moreover, a high turnover rate—more than 100% annually in nursing home facilities in some states—exacerbates staff shortages and quality problems.<sup>180</sup>

More than 50% of all U.S. nursing homes are short-staffed and consequently provide insufficient care for the elderly residents.<sup>181</sup> Due to the staffing shortages, current staff members are often overburdened.<sup>182</sup> Failure to cope with the multiple stressors of caring for the elderly can lead nurses and nursing aides to abuse and neglect the elderly residents.<sup>183</sup> More than 30% of all nursing homes in America employ individuals who indulge in some form of resident abuse, with the numbers continually rising.<sup>184</sup> Furthermore, statistics reveal that only approximately 20% of nursing home abuse is reported, leaving the majority of instances undetected.<sup>185</sup> Increasing the number of unskilled workers, such as nursing aides, in eldercare facilities and in the

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174. *Id.*

175. Goering, *supra* note 1.

176. CTRS. FOR MEDICARE & MEDICAID SERVS., NATIONAL LIST: NURSING HOMES TARGETED FOR HIGH-RISK PRESSURE ULCER AND/OR PHYSICAL RESTRAINT IMPROVEMENT 1 (2008), available at <http://www.cms.hhs.gov/QualityImprovementOrgs/Downloads/NursingHomeChart.pdf>.

177. INST. OF MED., IMPROVING THE QUALITY OF LONG-TERM CARE 80–81 (Gooloo S. Wunderlich & Peter Kohler eds., 2001).

178. Leutz, *supra* note 27, at 3.

179. *Id.*

180. *Id.*

181. LawCore.com, Nursing Home Abuse Statistics, <http://www.lawcore.com/nursing-home-abuse/statistics.html> (last visited Aug. 23, 2008).

182. *Id.*

183. *See id.*

184. *Id.*

185. *Id.*

homes of the elderly would alleviate much of the caregiving burden that current employees experience and would also improve the standard of care that residents receive.

## 2. OVERMEDICATION

There is a current trend among nursing homes to medicate elderly residents who have Alzheimer's disease and other forms of dementia with antipsychotic drugs.<sup>186</sup> The Centers for Medicare and Medicaid Services found that nursing homes gave antipsychotic drugs to 21% of its residents who were not diagnosed with psychosis.<sup>187</sup> These pharmaceuticals, which the U.S. Food and Drug Administration has not approved for the treatment of any form of dementia, allow nursing home staff to sedate individuals and ignore them while they are in a medicated stupor.<sup>188</sup> Nursing homes frequently use these medications to "try to calm dementia patients and to maintain safety and order in their facilities."<sup>189</sup>

Federal insurance programs generally reimburse more readily for pills "than for the extra staff that would be needed to care for dementia patients without the use of drugs," which further contributes to overmedicating nursing home residents.<sup>190</sup> Toby S. Edelman, a Senior Policy Attorney with the Center for Medicare Advocacy, acknowledges the need for additional unskilled workers in America's eldercare facilities: "What's needed to avoid pressure ulcers and physical restraints is a sufficient number of well-trained certified nurse assistants, accompanied and supervised by a sufficient number of registered nurses."<sup>191</sup> If nurses could simply lead a team of aides to care for the elderly, their unskilled workload would be greatly alleviated. Unskilled caregivers could easily provide ADL assistance instead of having certified nurse assistants do so. Therefore, an additional benefit of increasing the number of unskilled caregivers would be that fewer

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186. Henry J. Kaiser Family Found., *Nursing Homes Often Medicate Residents Without Psychosis*, KAISER DAILY HEALTH REP., Dec. 4, 2007, [http://www.kaisernet.org/daily\\_reports/rep\\_index.cfm?DR\\_ID=49205](http://www.kaisernet.org/daily_reports/rep_index.cfm?DR_ID=49205).

187. *Id.*

188. *See id.*

189. *Id.*

190. *Id.*

191. Ctr. for Medicare Advocacy, *Poor Outcomes for Nursing Home Residents Underscore Need for Nurse Staffing Ratios and Stronger Enforcement*, MED. NEWS TODAY, Feb. 15, 2008, <http://www.medicalnewstoday.com/articles/96946.php>.

nursing homes, if any, would have to resort to overmedicating their residents in order to house them.

## B. U.S. Immigration Law

### 1. THE IMMIGRATION AND NATIONALITY ACT

Virtually no opportunities exist for unskilled immigrant workers to work in the United States on a temporary or permanent basis because the Immigration and Nationality Act (INA) limits the number of immigrant work visas.<sup>192</sup> These visas favor skilled workers, consistent with the general U.S. policy to promote the immigration of educated or otherwise qualified individuals.<sup>193</sup> U.S. immigration policy neglects to consider that unskilled workers can be just as beneficial to the economy, if not more so, especially with regard to providing caregiving services to the elderly. No temporary visas are designed specifically for unskilled caregivers, and it makes little sense for employers to sponsor foreign-born unskilled workers for permanent immigration because the waiting period is so long due to extensive labor certification requirements.<sup>194</sup> The INA does provide an opportunity for immigrants to enter the United States to provide unskilled labor “for which qualified workers are not available in the United States,” a category that easily includes the underserved eldercare industry.<sup>195</sup> However, not more than 10,000 of such visas per year can be granted, with up to 5000 reserved for “special immigrants.”<sup>196</sup> This low number does not even begin to fulfill the great need that exists for caregivers for the el-

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192. Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(B) (2007) (limiting unskilled worker visas to 10,000 per fiscal year).

193. A skilled worker is a worker who is capable of performing a job that requires at least two years of training or experience, that is “not of a temporary or seasonal nature,” and for which qualified U.S. workers are unavailable. 8 C.F.R. § 204.5(l)(2) (2008).

194. Leutz, *supra* note 27, at 6.

195. Immigration and Nationality Act, 8 U.S.C. § 1153b(3)(A)(iii).

196. A special immigrant is “an immigrant and the immigrant’s spouse and children if accompanying or following to join the immigrant . . . who seeks to enter the United States . . . before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation.” 8 U.S.C. § 1101(a)(27)(C)(ii)(II). Immigrants may also work for a bona fide religiously affiliated organization so long as they have worked continuously with the organization for at least two years immediately preceding the time of application for admission into the United States. § 1101(a)(27)(C)(ii)(III); *see* Leutz, *supra* note 27, at 2.

derly.<sup>197</sup> Considering the great number of positions for unskilled workers,<sup>198</sup> it is probable that few, if any, of these limited unskilled caregiver visas bring individuals into eldercare employment.

## 2. CURRENT IMMIGRATION PROPOSALS

Although Congress has enacted numerous immigration policies during the past few decades, immigration continues to be a popular issue in American society.<sup>199</sup> Because Congress failed to pass comprehensive immigration legislation in 2007,<sup>200</sup> the resolution of this issue served as a primary campaign issue in the 2008 presidential election. Republican and Democratic candidates issued proposals that they believed would resolve America's immigration woes. These plans presented a stark contrast between the goals of each party.<sup>201</sup> Members of both parties advocated a variety of enforcement measures.<sup>202</sup> All of the Democratic candidates supported granting legal immigration status to an estimated twelve million individuals who entered the United States without inspection, colloquially known as "illegal immigrants."<sup>203</sup> Most of the Republican candidates rejected this proposal, deeming it an unnecessary grant of amnesty and a reward to millions of people who violated U.S. law.<sup>204</sup> Many Republicans feared that

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197. The Bureau of Labor Statistics projects that the need for personal and home health care aides will grow by 51% between 2006 and 2016, adding approximately 389,000 jobs. U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS, PERSONAL AND HOME CARE AIDES 2 (2007), available at <http://www.bls.gov/oco/pdf/ocos173.pdf>. This growth rate is much faster than the national average for all occupations and is largely attributed to the increase in the number of elderly in the United States. *Id.*

198. See Leutz, *supra* note 27, at 6.

199. See, e.g., IMMIGRATION POLICY CTR., IMMIGRANTS AND CRIME: SETTING THE RECORD STRAIGHT 1 (2008), <http://www.immigrationpolicy.org/images/File/factcheck/ImmigrantsandCrime03-08.pdf> [hereinafter SETTING THE RECORD STRAIGHT]; Leutz, *supra* note 27, at 6.

200. See Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007) (a comprehensive statute which, among other things, would have provided legal status to all illegal immigrants and would have given them a path to legal citizenship). Congress never voted on the Act as even the votes on cloture failed. See The Library of Congress, S. 1348, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN01348:@@L&summ2=m&#major%20actions> (last visited Aug. 23, 2008).

201. Katerina Valdivieso & Jennifer Ludden, 2008 Election Issues: Immigration, NAT'L PUB. RADIO, Jan. 30, 2008, <http://www.npr.org/news/specials/election2008/issues/immigration.html>.

202. *Id.*

203. *Id.*

204. See *id.*



such a policy would only encourage other foreigners to enter the United States without following proper immigration protocol.<sup>205</sup>

Democratic Senator Hillary Clinton was a proponent of comprehensive immigration reform.<sup>206</sup> Her plan was to fight illegal immigration with additional border security and measures to ensure that employers complied with the law against hiring illegal immigrants.<sup>207</sup> Regarding unskilled labor, Clinton supported an “Ag Jobs” program, which would have provided legal and illegal immigrants with a “blue visa” so long as they worked in an agricultural job.<sup>208</sup> The visa would have enabled these agricultural workers to receive fair wages and labor protections.<sup>209</sup> The “Ag Jobs” program would have also granted amnesty to illegal immigrants, who would have been required to become citizens after working three to five years in the agricultural industry.<sup>210</sup>

Republican Senator John McCain supported the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007.<sup>211</sup> As a presidential candidate, McCain took the position that securing the U.S. borders was a higher priority than legalizing immigrants.<sup>212</sup> McCain also favored imposing harsher penalties upon employers who hired illegal immigrants.<sup>213</sup> Recognizing the benefits that immigrants provide for the economy, however, McCain also promoted a policy that would have given employment opportunities to skilled immigrants.<sup>214</sup>

Democratic Senator Barack Obama also sought to combat illegal immigration with the creation of secure borders and the penalization

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205. See Timothy Egan, Editorial, *Disorder on the Border*, N.Y. TIMES, Mar. 29, 2008, at A17; Valdivieso & Ludden, *supra* note 201.

206. Senator Hillary Clinton, Remarks at the Democratic Presidential Debate (Jan. 31, 2008).

207. HILLARY CLINTON, CAMPAIGN THEMES: THE STRENGTH AND EXPERIENCE TO MAKE CHANGE HAPPEN, READY FOR CHANGE 3 (2008), <http://bluewavenj.org/08election/HillaryClintonPositionPaper.pdf>.

208. See Agricultural Job Opportunities, Benefits, and Security Act of 2007, S. 340, 110 Cong. (2007).

209. S. 340.

210. S. 340, §§ 101(a), 103(a)(1)(A).

211. Press Release, Senator John McCain, Statement on the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 (May 25, 2007).

212. See JohnMcCain.com, John McCain on Border Security and Immigration, <http://www.johnmccain.com/informing/issues/68db8157-d301-4e22-baf7-a70dd8416efa.htm> (last visited Aug. 23, 2008).

213. See *id.*

214. *Id.*

of employers who hired illegal immigrants.<sup>215</sup> He supported the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 and also cosponsored a bill to allow states to offer illegal immigrants in-state tuition.<sup>216</sup> Regarding immigrant workers, Obama focused on recruiting skilled immigrants to benefit the economy.<sup>217</sup>

While the candidates each provided a comprehensive approach to immigration reform, they primarily focused on illegal immigration, and all failed to consider the great need for unskilled caregivers for the elderly.<sup>218</sup> The bulk of their proposals focused on “illegal immigrants,” with some provisions regarding skilled workers.<sup>219</sup> Because the need for unskilled caregivers for the elderly is only growing, immigration legislation must address this issue. The lack of unskilled caregivers for the elderly will only result in worse care for the elderly at even higher costs.

### 3. CONCERNS WITH IMMIGRATION

Opponents of immigration adopt the belief that immigrants will displace U.S. citizens from their jobs or that a more flexible immigration policy will invite terrorists.<sup>220</sup> Another growing fear regarding immigration is that of illegal immigration.<sup>221</sup> Currently, more than ten million undocumented aliens reside in the United States, and that population grows by 700,000 annually.<sup>222</sup> The country’s unsecure borders, which allowed 3% of the U.S. population to enter the country illegally, concern U.S. citizens about national security.<sup>223</sup> For the most part, illegal immigrants enter the United States to reap the benefits of the unskilled labor market.<sup>224</sup> However, “even though they pose no

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215. BarackObama.com, Immigration, <http://www.barackobama.com/issues/immigration/> (last visited Aug. 23, 2008).

216. See The Library of Congress, Cosponsors of Bill S. 2075, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SNO2075:@@P> (last visited Aug. 23, 2008); The Library of Congress, Congressional Record, <http://www.thomas.gov/cgi-bin/query/R?r110:FLD001:S07154> (last visited Aug. 23, 2008).

217. BarackObama.com, *supra* note 215.

218. See *id.*; JohnMcCain.com, *supra* note 212.

219. See BarackObama.com, *supra* note 215; JohnMcCain.com, *supra* note 212.

220. Stephanie E. Steele, Note, *Deterrence to Hiring Illegal Immigrant Workers: Will the New Employer Sanction Provisions Work?*, 36 GA. J. INT’L & COMP. L. 475, 478 (2008).

221. See Tim Kane & Kirk A. Johnson, *The Real Problem with Immigration . . . and the Real Solution*, BACKGROUND, Mar. 1, 2006 at 1, 1, available at [http://www.heritage.org/Research/Labor/upload/94504\\_1.pdf](http://www.heritage.org/Research/Labor/upload/94504_1.pdf).

222. *Id.* at 2.

223. See *id.* at 1–2.

224. *Id.* at 2.

direct security threat, the presence of millions of undocumented migrants distorts the law, distracts resources, and effectively creates a cover for terrorists and criminals.”<sup>225</sup> Providing immigrants an additional opportunity to enter the country legally could decrease illegal immigration by encouraging immigrants to pursue legal methods of entry.<sup>226</sup> Studies have indicated that immigrants agree that becoming a U.S. citizen provides far more opportunities than merely remaining in the country as a temporary immigrant, either legally or illegally.<sup>227</sup> Unless the current law changes, however, illegal immigrants cannot become U.S. citizens.<sup>228</sup> A provision in the INA that allowed immigrants to fulfill the demand for unskilled caregivers for the elderly could benefit the United States by improving care for America’s elderly and also by potentially decreasing the rate of illegal immigration.

Another concern is the impact that immigration has on the U.S. economy.<sup>229</sup> However, much evidence indicates that immigrants do not adversely affect the economy.<sup>230</sup> Many working-age immigrants enter the United States in search of economic opportunity.<sup>231</sup> They usually find jobs, earn and spend their wages, pay taxes, and use public services, thereby expanding employment.<sup>232</sup> Most economic analysts believe that immigrants pay more in taxes than they consume in public benefits because most are young and employed.<sup>233</sup> If anything, these immigrants are net tax contributors as they pay sales and income taxes but are ineligible for some tax-supported services.<sup>234</sup> Consequently, profits rise, and the entire economy expands due to immigration.<sup>235</sup> An additional economic benefit is that unskilled

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225. *Id.*

226. *Id.* at 2–4.

227. *Id.* at 4.

228. *See id.* at 4–5.

229. *Id.* at 2.

230. *Id.*

231. *Id.*

232. IMMIGRATION POLICY CTR., *ASSESSING THE ECONOMIC IMPACT OF IMMIGRATION AT THE STATE AND LOCAL LEVEL 1* (2008), available at <http://immigration.server263.com/images/File/factcheck/State%20and%20Local%20Study%20Survey%20FINAL%201-15-08.pdf> [hereinafter *ECONOMIC IMPACT OF IMMIGRATION*].

233. *Id.* Immigrants add \$88,000 more in tax revenues than they consume in services. Kane & Johnson, *supra* note 221, at 3.

234. PHILIP MARTIN & ELIZABETH MIDGLEY, *IMMIGRATION: SHAPING AND RESHAPING AMERICA* 16–26 (2d ed. 2006), reprinted in ALEINIKOFF ET AL., *supra* note 148, at 440, 442–51.

235. *Id.* at 368–69.

immigrants could allow eldercare facilities that would otherwise have to close due to labor shortages to remain in business.

Another worry is that immigrants will increase America's crime rate. One basis for this concern is the Government Accountability Office's estimate that 25% of all federal prisoners in the United States are "criminal aliens."<sup>236</sup> This statistic is misleading for two reasons. First, in December 2005, only 8% of the 2.2 million U.S. inmates were in federal prisons.<sup>237</sup> At any time, most inmates are in state prisons or local jails.<sup>238</sup> Even if the 25% statistic is correct, immigrants then comprise 25% of the federal prison population, which is only 2% of the overall inmate population.<sup>239</sup> In addition, undocumented immigrants are also included in the 25% figure.<sup>240</sup> Undocumented immigrants are more likely to be sent to the smaller federal prison system because of their immigration status, even if they committed no crime or a relatively minor crime.<sup>241</sup> Dissecting the Government Accountability Office's statistic reveals that a small percentage of immigrants are incarcerated for committing crimes,<sup>242</sup> which should not cause alarm when considering the great benefits that immigrants provide.

Many studies conducted by independent researchers have revealed that crime rates among immigrants are lower than among native-born U.S. citizens.<sup>243</sup> For example, a 2007 study reported that incarceration rates are lower for male immigrants in every ethnic and nationality group than for native-born American males.<sup>244</sup> Indeed, the incarceration rates for native-born U.S. citizens was five times higher than for immigrants.<sup>245</sup> A 2008 study found that crime rates are lowest in the states that have the highest immigration growth rates.<sup>246</sup> Most immigrants arrive in the United States seeking a better life and the

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236. IMMIGRATION POLICY CTR., IMMIGRANTS AND CRIME: ARE THEY CONNECTED? 2 (2007), available at <http://www.immigrationpolicy.org/images/File/factcheck/Crime%20Fact%20Check%2012-12-07.pdf> [hereinafter ARE THEY CONNECTED?].

237. *Id.*

238. *Id.* State prisons house 57% of U.S. inmates and local jails contain 34%. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. See SETTING THE RECORD STRAIGHT, *supra* note 199, at 1; Ramiro Martinez, Jr. & Matthew T. Lee, *On Immigration and Crime*, 1 CRIM. JUST. 485, 499 (2000).

244. ALEINIKOFF ET AL., *supra* note 148, at 733.

245. SETTING THE RECORD STRAIGHT, *supra* note 199, at 1.

246. *Id.*

opportunity to pursue educational or economic prospects.<sup>247</sup> Because they have so much to gain and too much to lose, crime is not a viable option for them.<sup>248</sup> Therefore, the benefits that immigrants can provide by caring for the elderly greatly outweigh any concerns about crime, especially considering that immigrants have a lower crime rate than U.S. citizens.

Misconceptions about immigrants cause some U.S. citizens to develop prejudicial attitudes toward immigrants.<sup>249</sup> Polls have indicated that much of the anti-immigration sentiment stems from the concern about illegal immigration.<sup>250</sup> Other stereotypes portray immigrants as “thugs” who “carry disease, and kill cops, and rape children.”<sup>251</sup> The immigrants’ low crime rates strongly counter these beliefs. Another consideration is that immigrants who commit crimes involving moral turpitude or aggravated felonies are removed from the country.<sup>252</sup> Because they provide for the removal of immigrant criminals, these statutory provisions exist to protect U.S. citizens from the potential criminal acts of immigrants.

Although the disease rate among immigrants is higher, the INA subjects all legal immigrants to health screening to ensure that they do not bring diseases into the United States.<sup>253</sup> Much of the high disease rate can be attributed to illegal immigrants who are not subject to health screening.<sup>254</sup> Because the amendment to allow unskilled work-

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247. ARE THEY CONNECTED?, *supra* note 236, at 2.

248. *Id.*

249. NAT’L PUB. RADIO, IMMIGRATION: SUMMARY OF FINDINGS 3 (2004), <http://www.npr.org/news/specials/polls/2004/immigration/summary.pdf>.

250. *Id.*

251. Joel Achenbach, *Immigration Battle Divides Ariz. GOP*, WASH. POST, Feb. 2, 2008, at A01.

252. Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A) (2006) (listing the consequences of committing a crime of moral turpitude, but not detailing which crimes fall into this category); *id.* § 1101(a)(43) (listing offenses that constitute aggravated felonies, including murder, rape, sexual abuse of a minor, and illicit trafficking of a controlled substance).

253. *See id.* § 1182(a)(1)(A). This section provides that all immigrants seeking admission must provide documentation indicating that they have received vaccinations against “vaccine-preventable diseases,” which include measles, mumps, rubella, polio, and tetanus. § 1182(a)(1)(A)(ii). Immigrants (who are not adopted children under ten years of age) who have communicable diseases such as Acquired Immune Deficiency Syndrome are inadmissible. § 1182(a)(1)(A)(i). In addition, drug abusers or addicts and immigrants who have a physical or mental disorder that poses a threat to the public are inadmissible. §§ 1182(a)(1)(A)(iii)–(iv).

254. *See* Kimberly A. Johns & Christos Varkoutas, *The Tuberculosis Crisis: The Deadly Consequence of Immigration Policies and Welfare Reform*, 15 J. CONTEMP. HEALTH L. & POL’Y 101, 114–17 (1998).

ers to enter the United States would promote legal immigration, potential immigrants who have diseases would be prevented from entering the United States.

U.S. citizens can alleviate prejudicial attitudes toward immigrants through contact with immigrants.<sup>255</sup> Studies have indicated that a positive correlation exists between the amount of contact that a U.S. citizen has with an immigrant and positive feelings toward immigrants overall.<sup>256</sup> U.S. citizens who live in states with large immigrant populations are more likely to agree that immigrants benefit the economy and strengthen the country.<sup>257</sup> Conversely, U.S. citizens who live in areas with smaller immigrant populations are more likely to have negative attitudes toward immigration.<sup>258</sup> The rate of unemployment is another critical factor that affects U.S. attitudes toward immigrants.<sup>259</sup> More U.S. citizens have negative attitudes toward immigration in areas that have high unemployment rates than in areas that have low unemployment rates.<sup>260</sup> Allowing immigrants to enter the United States to serve as unskilled caregivers for the elderly would ensure that they have gainful employment and regular contact with the U.S. citizens in the community, potentially decreasing the anti-immigrant sentiment in the area.

#### 4. BENEFITS OF IMMIGRATION

Compelling evidence shows that immigrant workers improve the economy by accepting unpopular employment positions and improving accessibility to cheaper goods and services.<sup>261</sup> In 1960, 50% of American men dropped out of high school to seek an unskilled labor position, such as farming, for which a college degree is not required.<sup>262</sup> Today, fewer than 10% do so.<sup>263</sup> However, these employment posi-

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255. NAT'L PUB. RADIO, *supra* note 249, at 2–3.

256. *Id.*

257. *Id.* at 3. These U.S. citizens are also less likely to say that immigrants take desired jobs away from U.S. citizens. *Id.*

258. *See id.*

259. *See id.*

260. *Id.*

261. Editorial, *Looking Over the Wall*, N.Y. TIMES, Oct. 9, 2006, at A16 [hereinafter *Looking Over the Wall*].

262. Tamar Jacoby, Op-Ed., *Wanna Work Hunched over in a Field? Knock Yourself Out!*, L.A. TIMES, Feb. 20, 2007, <http://www.latimes.com/news/opinion/la-op-dustup20feb20,0,6475485>.

263. *Id.*

tions still exist and remain important.<sup>264</sup> Immigrant workers fill many of these positions—busing tables, mowing lawns, and gathering and harvesting crops.<sup>265</sup> In 2007, immigrants filled half of suburban Chicago’s blue collar, service, and unskilled positions.<sup>266</sup> Evidence indicates that no nationwide pattern of job displacement by immigrants, including those residing illegally in the country, exists and that immigration overall has benefited the United States.<sup>267</sup> While critics of immigration contend that immigrants displace U.S. workers,<sup>268</sup> a provision allowing unskilled caregivers for the elderly to fulfill positions that U.S. citizens reject would not do so. Rather, such a provision would benefit the U.S. citizens by alleviating the caregiving burden that many experience and would also improve the care given to America’s elderly.

Recent studies have found that immigrants are net contributors to the economy.<sup>269</sup> A 2008 Diversity Best Practices press release revealed that immigrant workers stimulate the economy with their additional labor capital because they complement the native-born workforce and increase capital investment by adding workers to the labor pool.<sup>270</sup> The immigrant workforce increases the U.S. gross domestic product by \$37 billion each year.<sup>271</sup> In addition, “the increase in the immigration flow has corresponded with steady and substantial reductions in unemployment from 7.3% to 5.1% over the past two decades.”<sup>272</sup> With the decreasing size of U.S. families and the onslaught of baby boomers’ retirement, the workforce will soon be shrinking dramatically.<sup>273</sup> Consequently, the economy would begin to decline without a new supply of workers arriving from abroad.<sup>274</sup> Had immi-

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264. *See id.*

265. *See id.*

266. ILL. COAL. FOR IMMIGRANT & REFUGEE RIGHTS, FACT SHEET: ECONOMIC CONTRIBUTIONS OF IMMIGRANTS 1 (2007), available at <http://icirr.org/node1221>.

267. *Looking over the Wall*, *supra* note 261.

268. *See* Ryan D. Frei, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1363 (2005).

269. ECONOMIC IMPACT OF IMMIGRATION, *supra* note 232, at 1.

270. Press Release, Diversity Best Practices, Diversity Best Practices Releases Annual Diversity Data Almanac (July 24, 2008), available at [http://diversitybestpractices.com/pdf/2008wow\\_global\\_release.pdf](http://diversitybestpractices.com/pdf/2008wow_global_release.pdf).

271. *Id.* (citing THE WHITE HOUSE, ECONOMIC REPORT OF THE PRESIDENT 107 (2007)).

272. Kane & Johnson, *supra* note 221, at 2.

273. Jacoby, *supra* note 262.

274. *Id.*

gration ceased for the past ten years, the economy of the United States would have grown only half as much as it did.<sup>275</sup> However, despite the fact that immigrants stimulate the economy and fulfill otherwise unwanted employment positions, current immigration laws only set aside 10,000 visas to fill the 500,000 new unskilled jobs every year.<sup>276</sup>

##### 5. OUTSOURCING ELDERCARE

Due to the rising costs of care in the United States, many elderly U.S. citizens are outsourcing their care to other countries.<sup>277</sup> Just as businesses outsource to save money and to gain an improvement in the delivery and quality of services,<sup>278</sup> our nation's elderly find higher standards of care at lower costs in other countries.<sup>279</sup> Even though Medicare does not cover these care costs, U.S. citizens can still save money abroad.<sup>280</sup> However, this outsourcing can have detrimental effects on the outsourced individuals as they experience "relocation stress syndrome" or "transfer trauma," which results from moving out of the homes in which the elderly wish to age in place.<sup>281</sup> Transfer trauma causes a variety of symptoms for the elderly, such as depression, anxiety, anger, fearfulness, decreased vigor, weight loss, and increased falls.<sup>282</sup> The elderly who experience transfer trauma have mortality rates that are two to four times higher than otherwise comparable individuals who are not transferred.<sup>283</sup> This increased mortality rate can be attributed to the elderly's inability to recover fully from the trauma and adjust to new surroundings.<sup>284</sup>

Many elderly endure this trauma when they move to an elder-care facility that is often located in the same community in which they

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275. *Id.*

276. *Id.*; see *supra* Part III.B.1.

277. Konrad M. Kressley, *Aging and the Public Institutions: From Campuses to Prison, Our Institutions Will Need Extreme Makeovers to Serve the Public's Needs in an Aging Society*, *FUTURIST*, Sept.–Oct. 2005, at 28, 31–32.

278. Carroll Hern & Ronald J. Burke, *Enhancing the Success of Outsourcing Initiatives*, *EUR. J. PSYCHOL.* 1–2 (2006), available at [http://www.ejop.org/archives/2006/11/enhancing\\_the\\_s.html](http://www.ejop.org/archives/2006/11/enhancing_the_s.html).

279. Kressley, *supra* note 277, at 31–32.

280. Joel Millman, *Developing Nations Lure Retirees, Raising Idea of "Outsourcing" Boomers' Golden Years*, *WALL ST. J.*, Nov. 14, 2005, at A2.

281. Michael Stones, *Transfer Trauma*, <http://flash.lakeheadu.ca/~mstones/transfertrauma.htm> (last visited Aug. 23, 2008).

282. *Id.*

283. *Id.*

284. *Id.*



have lived for many years.<sup>285</sup> The move abroad can only exacerbate the problem because the severity and scope of the trauma increases with the type of transfer.<sup>286</sup> When the care of the elderly is outsourced abroad, the elderly must face language and cultural barriers in addition to the isolation from the lack of family and friends who can and will visit.<sup>287</sup> Steve Herzfeld made the decision to outsource his parents' care to India in November 2006 because he admired India's respect for the elderly and consequently believed that his parents would receive superior care at a lower cost.<sup>288</sup> However, despite the financial benefits, his father, Ernest, still yearns to return to his home in the United States rather than spend his last days in a foreign land.<sup>289</sup> His mother, Frances, died in May 2007, a mere six months after being outsourced, and is now buried in Mumbai, India.<sup>290</sup> Ernest has already bought a burial plot adjacent to Frances, suggesting that he will also remain abroad permanently.<sup>291</sup> This decision enhances his isolation from the rest of his family.<sup>292</sup> In addition, although many families visit the gravesites of their deceased relatives, few people, if any, will make a trip abroad solely for this purpose.<sup>293</sup>

Foreign countries are capitalizing upon this outsourcing trend and have encouraged U.S. citizens to relocate to their eldercare facilities. Costa Rica has recruited U.S. citizens to retirement communities, promoting the lower cost of living.<sup>294</sup> Recognizing Costa Rica's success, Panama, Honduras, Mexico, Belize, and Nicaragua are also actively recruiting America's elderly and offering tax-free status to anyone who purchases or builds a house there.<sup>295</sup> However, these tactics can mislead U.S. citizens and cause negative outcomes.<sup>296</sup> For example, U.S. citizens who purchased homes in Mexico's Baja Peninsula

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285. Frank Oswald & Graham D. Rowles, *Beyond the Relocation Trauma in Old Age: New Trends in Today's Elders' Residential Decisions*, in *NEW DYNAMICS IN OLD AGE: ENVIRONMENTAL AND SOCIETAL PERSPECTIVES* 127, 127-32 (H.W. Wahl et al. eds., 2006).

286. Stones, *supra* note 281.

287. See Goering, *supra* note 1.

288. *Id.* Even the medications the Herzfelds required cost less than 20% of their cost in the United States. *Id.*

289. *Id.*

290. Ellis, *supra* note 13.

291. *Id.*

292. See Goering, *supra* note 1.

293. See, e.g., Ellis, *supra* note 13.

294. Millman, *supra* note 280.

295. *Id.*

296. See *id.*

realized that their house deeds did not conform to Mexico's statute that allows only citizens to purchase property on the coast.<sup>297</sup>

Citizens of other countries, such as Great Britain, are also choosing to outsource their elderly.<sup>298</sup> The idea, born out of Deborah Moggach's fictional account of outsourcing care,<sup>299</sup> has resulted in British citizens considering their caregiving options abroad.<sup>300</sup> India has constructed "Dignity Lifestyle," a facility providing care for the elderly that recruits British and U.S. citizens.<sup>301</sup> One commentator aptly described the outsourcing trend as reflecting "a lack of confidence in the [g]overnment's policy on elderly care."<sup>302</sup> Increasing the number of unskilled immigrant workers who can provide care for the elderly will restore the public's faith in their eldercare options because the elderly will be able to receive a higher standard of care at a lower cost. Consequently, elderly U.S. citizens will realize that they can receive better care in the United States than abroad.

While outsourcing care allows the elderly to save money and also provides additional employment opportunities to people of the developing country,<sup>303</sup> this phenomenon could harm the U.S. economy by taking the nation's jobs elsewhere. The Costa Rican government states that American retirees contribute significantly to the Costa Rican economy with direct spending of \$1.4 billion each year.<sup>304</sup> After accounting for the multiplier effects of salaries in health care and other industries, the total benefit to the Costa Rican economy could reach \$4 billion, which is almost 25% of Costa Rica's gross domestic product.<sup>305</sup> This is \$4 billion that the U.S. economy has lost because of the subpar care that the elderly receive if they remain in the country. Recruiting unskilled immigrants to provide care for the elderly will ensure that fewer, if any, elderly U.S. citizens outsource their care, allowing the U.S. to capture the economic benefit.

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297. *Id.*

298. Vijay Dutt, *Outsourcing Britain's Elderly to India?*, HINDUSTAN TIMES, Mar. 9, 2007, available at <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=84ff5c0c-154a-40ce-989c-9b9c2fe300c5>.

299. DEBORAH MOGGACH, THESE FOOLISH THINGS 44-47 (2004).

300. Eastern Eye Live, *Outsourcing the Elderly*, [http://www.easterneyeuk.co.uk/iframe\\_story.asp?NID=3265](http://www.easterneyeuk.co.uk/iframe_story.asp?NID=3265) (last visited Aug. 23, 2008).

301. *Id.*

302. *Id.*

303. MARK KOBAYASHI-HILLARY, *OUTSOURCING TO INDIA: THE OFFSHORE ADVANTAGE* 50 (2004).

304. Millman, *supra* note 280.

305. *Id.*

## IV. Resolution and Recommendation

### A. Basic Provisions of the Proposed Visa

Congress should pass an amendment to the INA that establishes a visa that allows unskilled immigrant workers to enter the United States solely to provide care for the elderly. To prevent abuse of a provision that provides immigrants with an additional legal means of entering the United States, the amendment must be comprehensive. The amendment would allow unskilled immigrants to enter the United States so long as they provide unskilled care to the elderly. Just as J-visas allow students to remain in the United States on a temporary basis as long as they remain enrolled in an approved education program,<sup>306</sup> the unskilled caregiver visa would allow immigrants to remain in the United States while they provide care for the elderly. The amendment would allow unskilled immigrants to enter the United States even on a permanent basis so long as they remained employed in a position of providing unskilled care to the elderly. Permanent immigration would provide incentives for the immigrants to improve their knowledge of the English language and to establish roots in the community. Allowing the unskilled immigrant caregivers to feel connected to the United States is especially important because many U.S. citizens desire that immigrants assimilate and “become American.”<sup>307</sup> In addition, if the immigrants feel comfortable in the United States, they will not return to their home country and will continue to improve the standard of care for the elderly in the United States.

The Immigration and Nationality Act provides “physicians working in shortage areas” with a national interest waiver, so long as immigrants agree to work in at least one area that the Secretary of Health and Human Services deems as having a shortage of health care professionals and their work is in the public interest.<sup>308</sup> This provision allows the Secretary of Homeland Security to waive the numerical limit placed upon visas for “aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.”<sup>309</sup>

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306. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(J) (2006).

307. Michele Wucker, *The Top Ten Ways America Gets Immigration Wrong*, IMMIGRATION POL'Y CENTER, Aug. 2006, <http://immigration.server263.com/index.php?content=P0608>.

308. 8 U.S.C. § 1153(b)(2)(B).

309. § 1153(b)(2)(B). In November 2002, Congress passed the Homeland Security Act which abolished the Immigration and Naturalization Service and transferred most immigration functions to the Department of Homeland Security. *See* 6

Congress should enact a similar provision allowing for unskilled workers who will provide care to the elderly to enter the United States and work in underserved areas.

One primary concern is to protect the employment of native U.S. workers. When determining the shortage areas, the Secretary of Health and Human Services should consider some of the same factors that determine shortage areas for physicians, such as the population of the area, the number of people over the age of sixty-five, and the percentage of the population whose income falls below the poverty level.<sup>310</sup> Determining shortage areas for unskilled caregivers for the elderly will ensure that immigrants do not displace U.S. citizens' jobs.<sup>311</sup>

An additional provision of the amendment would allow for an expedited labor certification process. Despite the great need, U.S. eldercare providers are not very likely to spend time undergoing extensive procedures to recruit unskilled workers. An expedited process would place unskilled caregivers for the elderly on Schedule A and promote the recruitment of immigrants under this amendment. The expedited process would encourage employers to seek the full benefit of the amendment, thereby improving care for the elderly in the United States. The amendment would also establish an electronic database at U.S. embassies worldwide, allowing unskilled workers who seek immigration through the unskilled caregiver visa to register for employment. Employers who need unskilled eldercare workers could consult this database and request workers.

To protect the wages of unskilled U.S. citizens who provide care for the elderly, the amendment would include a provision allowing immigrants to receive the same wage as U.S. citizens employed in similar positions. Congress should also create specific provisions within the statute for unskilled workers in the health care profession

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U.S.C. §§ 271, 291 (2006). Therefore, the Attorney General's duties regarding immigration have been transferred to the Department of Homeland Security. §§ 271, 291.

310. Bureau of Health Professions, Guidelines for Medically Underserved Area and Population Designation, <http://bhpr.hrsa.gov/shortage/muaguide.htm> (last visited Aug. 25, 2008). The guidelines also consider the infant mortality rate and the full-time equivalent primary care physicians in the area. *Id.* The Secretary of Health and Human Services should not consider these provisions for the proposed amendment because they are irrelevant to the need for unskilled workers in an area.

311. It is unlikely that many areas will not be shortage areas considering the great need in the United States for unskilled caregivers for the elderly.

so that these individuals are not restricted by the 10,000 visa cap. Because these immigrants would be taking only positions of employment that U.S. citizens reject, they would not be taking jobs away from U.S. citizens.

### **B. Applying for U.S. Citizenship**

After seven years of caring for the elderly, the immigrants under this visa would be eligible to apply for U.S. citizenship. Seven years of serving the elderly as a caregiver would indicate to the Department of Homeland Security that the immigrants were committed to remaining in a legal status and did not enter the United States with deceitful intents. Citizenship would be contingent upon either remaining employed as caregivers for the elderly or receiving education or other training to improve themselves and fulfill other underserved employment areas based upon the occupations provided in Schedule A. Currently, the only available health care options are professional nurse and licensed physical therapist.<sup>312</sup> This requirement to meet the labor market needs of the United States also fits in with the policy of allowing the immigration of foreign citizens who will improve the United States. Should the amendment not meet the immigrants' needs, as would be the case for immigrants who desire employment in a field not listed in Schedule A, the immigrants could return to their home country. Under this amendment, immigrants who become U.S. citizens would not be provided the benefit of allowing siblings, parents, or married sons and daughters to enter the country under preference visa categories. The only people that would be allowed to accompany the immigrants and receive visa preferences are the immigrants' immediate family members, which include only spouses and children.<sup>313</sup>

If individuals can show that they would experience "extreme hardship" if compelled to remain in the unskilled health care profession or return to their home country, the Secretary of Homeland Security could grant an adjustment of status. The adjustment of status would allow the immigrant to become a lawful permanent resident prior to the seven-year deadline. Because such a stipulation provides

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312. Schedule A, 20 C.F.R. § 656.5 (2008). This also includes individuals who have exceptional ability in the sciences, arts, and performing arts. § 6565(b)(1).

313. 8 U.S.C. § 1101(a)(5)(b)(1) (2006) (defining *child* as an unmarried individual under the age of twenty-one).

immigrants with a substantial benefit, the Secretary of Homeland Security would grant these adjustments of status sparingly.

Factors of “extreme hardship” would include inhumane working conditions. Because one goal of this amendment would be to ensure that immigrants are treated fairly, an employer who exploits these immigrants or forces them to work under illegal conditions would cause “extreme hardship” by definition. In these situations, immigrants would be permitted to seek employment with another eldercare provider. If no other eldercare employers existed in the same location, and the immigrant had established a life in the United States and would experience “extreme hardship” to relocate, the Secretary of Homeland Security would have discretion to provide a waiver. This “extreme hardship” would have to be above and beyond the normal hardship that would result from having to leave the United States.<sup>314</sup> As is the case with other INA waivers, the Secretary of Homeland Security would not be required to provide any waivers for holders of the unskilled caregiver visa merely because the immigrant fulfills the minimum requirements.<sup>315</sup>

The proposed amendment would be attractive to members of both political parties because it would provide the solution to improving the care of the elderly in the United States. It would also create a legal means for unskilled workers to enter the country, thereby decreasing the amount of illegal immigration. In addition, the amendment would alleviate concerns that U.S. citizens may have about immigration. As part of the INA, the amendment would include health screening to ensure that immigrants do not bring diseases into the United States. The amendment would administer the same removability provisions for immigrants who commit crimes of moral turpitude or aggravated felonies, and immigrants who have a criminal record would not be allowed to enter the United States. Congress should pass the proposed amendment and allow the President to ratify it so that the standard of care for U.S. elderly will improve, while the cost decreases.

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314. See *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996) (defining *extreme hardship* as that which is “unusual or beyond that which would normally be expected upon deportation” and holding that “[t]he common results of deportation are insufficient to prove extreme hardship”).

315. See 8 U.S.C. § 1182(e) (allowing the Secretary of Homeland Security to use discretion when granting visa waivers).

## V. Conclusion

Immigration should serve as an integral element of the economic policy of the United States.<sup>316</sup> Aligning with the overall goals of immigration, permanent immigration policy should allow immigrants to take vacant job positions and must ensure that immigrants will contribute to the economic growth of the United States.<sup>317</sup> The current shortage of unskilled eldercare workers warrants an amendment to the current immigration laws. This amendment would allow unskilled workers to enter the United States on a permanent basis so long as they provide care for the elderly. Increasing the number of workers to provide care for the elderly would improve the standard of care for the elderly and would decrease the cost at which it is administered. Such a result would ensure that the U.S. economy did not lose billions of dollars each year when the elderly outsource their care. The proposed amendment to the INA would acknowledge that “immigration must be part of an overall human resources policy that recognizes the needs of members of our own society who have been left behind,” and would ensure that elderly U.S. citizens are not forgotten.<sup>318</sup>

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316. *Looking over the Wall*, *supra* note 261.

317. MARTIN & MIDGLEY, *supra* note 234, at 445–51.

318. Trucios-Haynes, *supra* note 51, at 990–91.