

A Response to "Nannygate": Untangling U.S. Immigration Law to Enable American Parents to Hire Foreign Child Care Providers

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INTRODUCTION

On January 22, 1993, Zoë Baird, responding to public and media pressure generated by her employment of illegal immigrants, withdrew from consideration as President Clinton's nominee for United States Attorney General.¹ Weeks later, President Clinton's replacement candidate for Attorney General, Kimba Wood, withdrew from consideration after revealing that she, too, had a "nanny problem."² The media paid a great deal of attention to these events, and dubbed the scandal "Nannygate."³ Subsequent Presidential appointees have experienced similar nanny problems, often with dire consequences.⁴

"Nannygate" brought child care issues to the forefront of the national consciousness.⁵ The use of nannies as child care providers⁶ became the subject of television programs and even motion pictures.⁷ More importantly, however, the scandals focused the nation's attention on an issue that many working families face in their daily lives—how to obtain satisfactory child care for their children without violating immigration and tax laws. "Nannygate" exposed the public to the current complexities of the nation's immigration and tax laws relating to child care. Consequently, many American families with nannies came to realize that they had been breaking the law.

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1. Deborah Sontag, *Increasingly, 2-Career Family Means Illegal Immigrant Help*, N.Y. TIMES, Jan. 24, 1993, § 1, at 1.

2. Cindy Loose, *The Price of Going Legal with Child Care: Obeying Law on Nannies is a Balance Between Conscience, Checkbook*, WASH. POST, Sept. 6, 1993, at A1, A8. The phenomenon has been dubbed "having a Zoë Baird problem." The phrase covers failing to comply with any of a myriad of immigration and tax laws covering the employment of a foreign worker. See Barbara Presley Noble, *At Work: Solving the Zoe Baird Problem*, N.Y. TIMES, July 3, 1994, § 3, at 21.

3. See, e.g., Andrea Sachs, *Desperately Seeking Daycare*, A.B.A. J., June 1993, at 58; Gene Steuerle, *'Nanny-gate' and Tax Simplification*, 58 TAX NOTES 1119 (1993).

4. For example, Associate White House Counsel William H. Kennedy III was reprimanded and stripped of some of his responsibilities when it was learned that he had only recently paid past-due social security taxes for a nanny he and his wife employed. Douglas Jehl, *White House Aide Who Failed to Pay a Tax is Punished*, N.Y. TIMES, Mar. 24, 1994, at A1.

5. Anna Quindlen, *Joining Forces to Anita Hill the Child-Care Issue*, CHI. TRIB., Mar. 2, 1993, at N13.

6. According to one source, "about 10 percent of working mothers in families that make more than \$54,000 a year use nannies; overall, about 5 percent of working mothers nationally have nannies." Loose, *supra* note 2, at A1. The International Nanny Association estimates the number of legal nannies working in the United States at between 75,000 and 100,000. Paul Clegg, *'90s Nannies*, SACRAMENTO BEE, May 8, 1993, at SC1.

7. See, e.g., *The Nanny* (CBS television premiere broadcast, Nov. 3, 1993); MRS. DOUBTFIRE (Twentieth Century Fox 1993) (starring Robin Williams as Mrs. Doubtfire, an "English" nanny providing child care to an American family).

Those families who had consciously ignored the law paused to reconsider their actions.

United States immigration law contains a patchwork of provisions governing the temporary employment of foreign nannies and *au pairs*⁸ in the United States. This system allows only a small number of people to come to the United States each year on a temporary basis to provide child care for American families. Accordingly, the law fails to adequately redress the shortage of child care providers in this country, serving only to perpetuate particular problems for American parents who participate in, or wish to participate in, the labor force. As a result, many families resort to child care arrangements like those undertaken by Zoë Baird and Kimba Wood.⁹

Building on the impetus for change provided by "Nannygate," this Note will address the inadequacies of the present immigration system and will outline a legislative proposal to facilitate the entry of nannies and *au pairs* into the United States for a definite period of time. Part I will outline the parameters of the current, flawed immigration system. Part II discusses legislative proposals, including this Author's proposal to enact the Child Care Access Program. Anticipating that this proposal will be controversial, Part III addresses some of the opposing arguments, concluding that the benefits of change outweigh the costs.

I. A PATCHWORK SYSTEM THAT FAILS WORKING FAMILIES

The shortage of American workers willing to provide live-in child care services leads many American families to hire foreign-born nannies or *au pairs*.¹⁰ Currently, parents may follow three different routes to hiring a foreign, live-in nanny or *au pair* to care for their children.¹¹ Parents who look carefully will find two legal but difficult mechanisms, and a third, illegal route. All paths encounter income and social security tax issues and obligations.¹² The intricacies of contemporary United States immigration law

8. *Au pair* refers to the relationship in which a young person, not a domestic-servant by vocation, joins another family for a relatively short period with the understanding that she will share family chores and take part in family activities. The family is often in another country and her prime purpose is usually to learn something of the foreign language and culture.

Stanley Mailman, *'Au Pair'—Valid Visitor or Unauthorized Worker*, N.Y. L.J., Aug. 4, 1982, at 1, 1-2.

9. Kimba Wood hired a nanny who had no legal right to be in the country, but she did so at a time when the law did not sanction Americans who employed illegal workers. Zoë Baird admittedly violated the law in her child care arrangements. Stephen L. Carter, *The Confirmation Mess*, 62 U. CIN. L. REV. 75, 90 (1993).

10. This Note uses the term "live-in child care provider" to encompass both nannies and *au pairs*.

11. Cathie Robertson, president of the International Nanny Association, estimates that there are 75,000 nannies in the United States. She also estimates that there are twenty to forty jobs available and waiting for every nanny. Martha Sherrill, *The Newfangled Nannies: At Their Annual Convention, the Rolls-Royces of Mother's Helpers Bring Each Other up to Date*, WASH. POST, June 30, 1990, at C1.

12. The difficulties associated with tax compliance for employers of domestic workers also hit the spotlight in 1993. Senator Daniel Patrick Moynihan (D-NY) has led the movement for reform by introducing a bill that would raise the threshold for paying Social Security taxes on domestic employees' wages to an annual floor of \$610. Rita L. Zeidner, *Moynihan Gets Qualified Support for Nanny Tax Reforms*, 60 TAX NOTES 429 (1993).

and the inherent difficulties parents face in their attempts to follow a legal path to importing child care providers often encourage Americans to resort to hiring undocumented workers. The legally established means of hiring foreign child care workers are the H-2B unskilled worker visa and the J-1 exchange visitor visa. The H-2B visa may permissibly be used by the broadest group of employers, but it also involves the most complicated hiring process.

A. The Unskilled Worker Visa

The unskilled worker visa, known by its visa category as the H-2B non-immigrant visa,¹³ allows American employers¹⁴ to sponsor foreign workers for employment in the United States on a temporary basis under certain limited circumstances. Several aspects of the visa application process render the H-2B option unattractive. First, the worker must find an American employer who is willing to hire a foreign worker. Then, he must convince the employer to complete the lengthy labor certification process on his behalf. Only after receipt of an approved labor certification may the worker commence the visa application process.

As noted by one commentator, red tape, the temporary need requirement,¹⁵ and short time limits make the H-2B option unattractive to most employers

Under current law, employers must comply with an elaborate scheme of withholding and reporting requirements if they pay a domestic worker \$50 or more in a calendar quarter. The rules apply to household workers such as baby-sitters, gardeners, nannies, and cooks. Following the Baird debacle, government officials conceded the rules are obsolete and that compliance with the requirements has been extraordinarily low—about 25 percent.

Id.

Applicable state tax provisions further complicate the process. On April 14, 1994, Senator Moynihan's bill was reported out to the full Senate. A similar bill was introduced in the House by Representative Andrew Jacobs, Jr., (D-IN) on March 22, 1994. The Jacobs Bill, H.R. 4278, passed the House of Representatives by a vote of 420-0 on May 12, 1994. The Senate passed a different version of the Jacobs Bill on May 25, 1994. On June 21, Congress created a conference committee to work out a compromise bill.

On October 6, 1994, the House approved the conference committee version of the bill by a vote of 423-0. This cleared the bill for final Senate action; however, the Senate recessed on October 8, 1994 until after the 1994 elections without taking any action.

13. The regulations accompanying the Immigration and Nationality Act define the H-2B worker as follows:

An H-2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if unemployed persons capable of performing such service or labor cannot be found in this country The temporary or permanent nature of the services or labor to be performed must be determined by [the U.S. Department of Labor]. This classification requires a temporary labor certification issued by the Secretary of Labor . . . prior to the filing of a petition with the [Immigration and Naturalization] Service.

8 C.F.R. § 214.2(h)(3)(D) (1994).

14. For purposes of United States tax and immigration law, families who hire even one household worker are deemed to be employers.

15. "The requirement that the petitioner's need be 'temporary' . . . severely limits the utility of this [H-2B] classification. So too does the necessity of applying for a temporary labor certification, a procedure which is time-consuming and often unsuccessful." CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 20.10[1] (rev. ed. 1990).

and foreign workers.¹⁶ The odds work against a given employer successfully running the gauntlet of government regulations concerning the H-2B visa. The process includes obtaining a labor certification from the Department of Labor, an employment petition from the Immigration and Naturalization Service ("INS"), and finally, a visa from the Department of State.¹⁷ Congress limits to 66,000 the total number of H-2B visas issued annually.¹⁸ Child care providers constitute only a portion of the 66,000 unskilled workers allowed to enter the United States each year.

Employers seeking to import a foreign worker or to legally hire an alien already residing in the United States under an H-2B visa begin the process by filing for Department of Labor certification. The Department of Labor grants certification when the position satisfies prevailing wage and conditions standards and when American workers are unavailable.¹⁹ Certification constitutes a necessary prerequisite to visa issuance; however, it does not guarantee that a visa will ever be issued to the worker.²⁰ The statute governing labor certification specifies the conditions:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is excludable, unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that—(I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.²¹

Most importantly, the worker must be coming to the United States *temporarily* to perform *temporary* service or labor.²² "The test for whether a job is temporary as opposed to permanent is 'the nature of the *need* for the duties to be performed.'"²³

Employers of H-2B temporary workers must demonstrate that "the [employer's] need for the [worker's] services or labor is of a short, identified length, limited by an identified event located in time."²⁴ In one unusual case, the District of Columbia Circuit Court overturned a Department of Labor decision to deny certification to a live-in child care provider from El Salvador.²⁵ In *Wilson v. Smith*, the court reversed the Department of Labor's

16. Stanley Mailman, *The Zoë Baird Questions: Answers to Immigration Law Concerns*, N.Y. L.J., Feb. 1, 1993, at 1, 4.

17. GORDON & MAILMAN, *supra* note 15, at § 1.03[2][e].

18. 8 C.F.R. § 214.2(h)(8)(i)(C) (1994).

19. Mailman, *supra* note 8, at 1.

20. 8 U.S.C. § 1184(c)(1) (Supp. V 1993). *See also*, Thomas K. Ware, *Visa Petition Appeals and Motions*, 38 FED. B. NEWS & J. 437 (1991).

21. 8 U.S.C. § 1182(a)(5)(A)(i) (Supp. V 1993).

22. *Id.* § 1101(a)(15)(H) (Supp. V 1993) (emphasis added).

23. *Volt Technical Servs. Corp. v. INS*, 648 F. Supp. 578, 579 (S.D.N.Y. 1986) (emphasis in original) (quoting *In re Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982)).

24. *Volt*, 648 F. Supp. at 580; *see also In re Ord*, 18 I. & N. Dec. 285, 287 (1982).

25. *Wilson v. Smith*, 587 F. Supp. 470 (D.D.C. 1989).

finding that the nature of the services was not temporary because the family "made a plausible case for their assertion that their need for live-in help is temporary, based on their daughter's youth."²⁶

Employers must show good faith attempts to recruit American workers who are willing to work at the prevailing wages and under the working conditions of the proposed job.²⁷ This process includes advertising the position²⁸ and considering all American applicants by inquiring into their background and experience.²⁹ Employers must also justify the rejection of any applicant who is a United States citizen.³⁰

The Department of Labor may issue a certification only after "a finding that there are not sufficient workers available 'at the place to which the alien is destined.'"³¹ In determining the availability of American workers to perform the service, the Department of Labor often considers the availability of live-out workers, even when employers specify that living in their house is a condition of employment.³² The employer must establish that in order to perform the described job duties, the employee must live in the employer's home.³³ Pertinent factors with respect to the performance of the employee's duties include the employer's occupation, the circumstances of the household itself, and any other relevant facts.³⁴

If the Department of Labor denies a certification request, the employer may appeal that decision.³⁵ On appeal, the would-be employer carries the burden of proving that the employee qualifies for certification. The reviewing court may set aside a final agency determination only when it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.³⁶

Only after receipt of an approved labor certification can an employer take the next necessary step and petition the Immigration and Naturalization Service for work authorization. After the employer receives an approved work petition, the employee takes the approval notice to the American Embassy in her country to apply for a visa, the necessary document for seeking lawful

26. *Id.* at 473.

27. *Kwan v. Department of Labor*, No. 91-INA-369, 1993 BALCA LEXIS 113 (I. & N. Dec., May 26, 1993).

28. Stanley Mailman, *The Difficulties in Compliance*, N.Y. L.J., Oct. 25, 1993, at 3, 4.

29. *Morse v. Department of Labor*, 92-INA-334, 1993 BALCA LEXIS 195 (I. & N. Dec., June 17, 1993).

30. *Blumenfeld v. United States*, 762 F. Supp. 24, 26 (D. Conn. 1991); *Martin v. Department of Labor*, No. 92-INA-00249, 1993 BALCA LEXIS 137 (I. & N. Dec., June 2, 1993).

31. *In re Tamayo*, 15 I. & N. Dec. 426, 427 (1975) (quoting § 216(a)(14) of the Immigration and Nationality Act).

32. *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 762 (D.C. Cir.) (stating that the employer's live-in requirement was a "personal preference irrelevant to determination of whether there was . . . a pool of potential workers willing to perform the Pesikoffs' domestic tasks"), *cert. denied*, 419 U.S. 1038 (1974).

33. *Basso v. Department of Labor*, No. 92-INA-173, 1993 BALCA LEXIS 101 (I. & N. Dec., May 28, 1993); *Blake v. Department of Labor*, No. 91-INA-394, 1993 BALCA LEXIS 115 (I. & N. Dec., May 26, 1993).

34. *Basso*, No. 92-INA-173, 1993 BALCA LEXIS 101.

35. *Ware*, *supra* note 20, at 438.

36. *Blumenfeld v. United States*, 762 F. Supp. 24, 26-27 (D. Conn. 1991).

entry into the United States.³⁷ Once an employee gains lawful admission, she becomes subject to deportation if she overstays the duration of the visa or quits the authorized job or activity.³⁸

In sum, the entire burdensome process works against the employer and the foreign employee. The law creates a presumption that foreign workers should not be permitted to work in the United States because of the likely harmful impact on American workers.³⁹ In the event that an employer successfully obtains employment authorization, the Department of Labor grants permission to work for a period of only one year.⁴⁰ If approved, extension applications could allow a maximum overall stay of three years.⁴¹ Unfortunately, another legal avenue open to parents, the Exchange Visitor Visa,⁴² works similarly against employers.

B. The Exchange Visitor Visa

The second legal means of importing child care providers, the Exchange Visitor Visa, circumvents the complicated labor certification process, but involves numerous other restrictions. Workers must apply for and gain acceptance into one of eight exchange programs approved by the United States Information Agency.⁴³ Then the worker must qualify for a visa by applying at the American Embassy in her home country. Meanwhile, families in the United States apply to exchange program sponsors for placement of *au pairs* in their homes.

Under the rubric of international cultural exchange, United States law allows American families to host foreign youth in their homes as *au pairs*. The Mutual Educational and Cultural Exchange Act, passed by Congress in 1961, allowed foreign visitors to enter the United States under a new visa category, the J-1 visa.⁴⁴ Congress created this program as an acknowledgment that the channels of international exchange are broader than the

37. If the employee has already entered the United States, the visa application becomes necessary only when the employee leaves the United States and seeks reentry. See GORDON & MAILMAN, *supra* note 15, § 8.04[2].

38. See, e.g., *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir.) ("After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country. He thus was in the same position legally as the alien who wades across the Rio Grande or otherwise enters the United States without permission."), *cert. denied*, 474 U.S. 862 (1985); see also, *Spyropoulos v. INS*, 590 F.2d 1 (1st Cir. 1978); *In re Teberen*, 15 I. & N. Dec. 689 (1976); *In re Tamayo*, 15 I. & N. Dec. 426 (1975); *In re Santana*, 13 I. & N. Dec. 362 (1969).

39. *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir. 1974).

40. 8 C.F.R. § 214.2(h)(9)(iii)(C) (1994).

41. *Id.* § 214.2(h)(13)(iv).

42. 8 U.S.C. § 1101(a)(15)(J).

43. Exchange program participants must have a high school diploma or equivalent degree, and must demonstrate a proficiency in English. See Jennifer Senior, *In Washington, Au Pairs Are Bipartisan Choice for Child Care*, N.Y. TIMES, Apr. 21, 1994, at C9.

44. Pub. L. No. 87-256, 75 Stat. 527 (1961) (codified as amended at 22 U.S.C. §§2451-2460 (1988 and Supp. V 1993)).

exchange of students and teachers.⁴⁵ The Congressional Statement of Purpose codified in the Act states:

The purpose of this chapter is to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations, and the contributions being made toward a peaceful and more fruitful life for people throughout the world.⁴⁶

As with the H-2B visa, the provisions of the J-1 visa category contain various restrictions and limitations.⁴⁷ In fact, *au pair* programs were excluded from the exchange visitor visa category from 1961 until 1986, when the first *au pair* program was designated.⁴⁸ This pilot program allowed families to bring foreign youth between the ages of eighteen and twenty-five to the United States for one year to provide a cross-cultural exchange, improve the *au pair's* English language skills, and to assist host families with child care.⁴⁹ According to the program's guidelines, host families must promote cross-cultural awareness through sports, cultural, and social activities for the purpose of enhancing the *au pair's* knowledge and understanding of American mores, customs, and traditions.⁵⁰ Host families must provide room, board, and \$100.00 per week in "pocket money."⁵¹ Additionally, *au pairs* must spend no more than forty-five hours per week on child care activities.⁵²

With only eight approved program sponsors, the scope of existing exchanges remains extremely limited. By 1988, the governing federal agency, the United States Information Agency ("USIA"), had designated a total of eight programs, each authorized to bring up to 2840 participants per year into the

45. H.R. REP. NO. 1094, 87th Cong., 1st Sess. 1094 (1961); S. REP. NO. 372, 87th Cong., 1st Sess. 372 (1961).

46. 22 U.S.C. § 2451 (1988).

47. The INS may deport program participants who fail to maintain "status consonant with the purpose for which the alien received the privilege of admission." *Wei v. Robinson*, 246 F.2d 739, 746 (7th Cir.), cert. denied, 355 U.S. 879 (1957). *Au pairs* who change programs without prior authorization, or who stay in the United States beyond the completion of the program without authorization, are subject to deportation. *United States v. Igbatayo*, 764 F.2d 1039 (5th Cir.), cert. denied, 474 U.S. 862 (1985); *In re Teberen*, 15 I. & N. Dec. 689 (1976); *In re Tamayo*, 15 I. & N. Dec. 426 (1975).

48. Statement of Policy Regarding Exchange Visitor Au Pair Programs, 57 Fed. Reg. 46,676 (1992) (to be codified at 22 C.F.R. § 514).

49. *Id.*

50. Exchange Visitor Program, 58 Fed. Reg. 15,180, at 15,182 (1993) (to be codified at 22 C.F.R. § 514).

51. Services provided by *au pairs* in the United States under the J-1 visa are not subject to Federal Insurance Contribution Act ("FICA") or Federal Unemployment Insurance Act ("FUTA") withholding. Diane J. Fuchs, *Household Employers: An Overview of the Federal Tax Requirements and Current Employment Tax Issues*, 34 TAX MGMT. MEMORANDUM 179 (1993) (footnote omitted).

Because the employers of *au pairs* incur no FICA or FUTA obligations, these workers look even more attractive to parents. Employers of other household employees must file quarterly statements, end-of-the-year wage and tax statements, end-of-the-year transmittal of income and tax statements, and must comply with other statutory requirements. Steuerle, *supra* note 3, at 1120.

52. Statement of Policy Regarding Exchange Visitor Au Pair Programs, *supra* note 48, at 46,676.

United States.⁵³ However, cultural exchange programs have always been limited to bringing *au pairs* only from the countries of Western Europe that provide reciprocal opportunities for American youth.⁵⁴

The inclusion of *au pairs* in exchange programs created a new legal mechanism for parents to provide low-cost,⁵⁵ live-in child care for their families. The public responded favorably: "On the day the program was announced, families were lined up outside the door, telephones were ringing off the hook, and Federal Express packages with family information arrived in the hundreds."⁵⁶ Unlike the H-2B visa,⁵⁷ J-1 visa regulations do not require an initial showing that no American worker could be found to do the job.⁵⁸ Consequently, the application procedure has proven less unwieldy; however, employers must cede control over the selection of *au pairs* to the organizing agency,⁵⁹ and must compete for a limited number of *au pairs* authorized each year.⁶⁰

From the program's inception, Congress has closely monitored *au pair* exchanges, while critics have labeled them as "inappropriate" forms of cultural exchange.⁶¹ Beginning in 1987, the USIA sought to eliminate the program, arguing that it was "a full-time home child care work program and not a valid educational and cultural exchange."⁶² Rather than eliminating this popular program, Congress extended it indefinitely⁶³ and mandated that the USIA not eliminate or expand the program unless and until another government agency authorized and implemented the program.⁶⁴

Au pair programs offer obvious benefits to some American families and reciprocal benefits to *au pairs* who gain an opportunity to live with an American family. In addition to the Exchange Visitor Visa, current law gives certain American and foreign families residing in the United States expedited processing for their legally imported foreign child care providers.⁶⁵ While

53. *Id.*

54. *Id.*

55. See Elizabeth Ross, *Au Pairs: An Alternative Form of Child Care*, CHRISTIAN SCI. MONITOR, Mar. 18, 1993, at 12 (stating that many parents at different income levels find *au pairs*, at an average total cost of \$175.00 per week, to be affordable alternatives to other forms of day care).

56. ROBIN D. RICE, THE AMERICAN NANNY 40-41 (1987).

57. See *supra* part I.A.

58. 8 U.S.C. § 1101(a)(15)(J).

59. The regulations governing exchange visitor programs specify that program sponsors, meaning companies like the American Institute for Foreign Study and Experiment in International Living, evaluate the individual participants' eligibility criteria. These companies determine which American families are eligible to host *au pairs* and which foreign youth are eligible to come to the United States. Then the companies match families and *au pairs*. Exchange Visitor Program, *supra* note 50, at 15,181.

60. Currently the USIA allows eight program sponsors each to bring 2840 *au pairs* to the United States each year. Statement of Policy Regarding Exchange Visitor Au Pair Programs, *supra* note 48, at 46,676.

61. *Id.*

62. *Id.*

63. 8 U.S.C. § 1182.

64. Eisenhower Exchange Fellowship Act, 20 U.S.C. § 5206 (1990).

65. Certain members of the United States Armed Forces and Foreign Service, foreign diplomats and government officials posted to the United States, and foreign temporary workers employed in the United States are permitted to bring child care providers into this country to work. U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL, 22 C.F.R. §§ 41.20 notes 1-7, 41.25, notes 4.2(j), (s) (1984).

exchanges continue, the J-1 visa fails to adequately address the child care needs of American families.⁶⁶ Only families with the luxury of an extra bedroom available to house an *au pair* may participate. In addition, costs exceed what many Americans pay for child care, particularly those who rely on relatives to provide care.⁶⁷

C. Recruiting Illegal Providers

Continuing shortages of child care providers and inherent difficulties with the H-2B and J-1 visa options lead many parents to resort to illegal sources of child care. As described by one commentator, "The way by which many American families respond to a critical need for child-care workers, is complex, expensive, fraught with hardship, and in violation of the law."⁶⁸ Unlawful hirings circumvent all governmental involvement in the process. Many families find this the easiest way to obtain safe and affordable help; however, illegal employment remains problematic from the employee's perspective because the employee fears deportation. Moreover, employers of undocumented workers face stiff civil and criminal penalties if their actions are detected by the government. Finally, parents—particularly mothers—who hire undocumented child care providers do so at their own peril, as Zoë Baird and Kimba Wood discovered in the early months of 1993.

Employment agencies report that they regularly place undocumented workers as child care providers for American families.⁶⁹ Apparently, many families have found hiring undocumented workers to be simpler and less complicated.⁷⁰ Parents report that undocumented workers are easier to find, less expensive, and often are the only ones to respond to their advertisements.⁷¹ While the precise scope of hiring unauthorized workers as in-home

In addition, foreign diplomats assigned to the United States, United Nations officials living in New York, and persons performing duties at any international organization located in the United States may bring their servants and personal employees to the United States to provide in-home services. *Id.* at §§ 41.22, 41.24-26.

Anyone seeking to take advantage of these special visas must demonstrate that he or she intends to reside in the United States for a time period of specifically limited duration. Moreover, these sponsors of foreign child care providers often must satisfy requirements concerning prior employment of this child care worker overseas before moving to the United States. *Id.* § 41.25 notes 4.2(j), (s). It is difficult to determine how many of these special visas are issued each year; however, most American families lack the necessary qualifications.

66. Only the "financially blessed" can afford live-in caregivers. A 1990 study by the Urban Institute revealed that "only 3 percent of all families with children under 13 hire in-home babysitters. . . . The rest rely on parents, relatives, and day care centers." Senior, *supra* note 43, at C9.

67. One national survey estimates that average weekly expenditures on child care range from \$45 to \$60. Jonathan R. Veum & Philip M. Gleason, *Child Care: Arrangements and Costs*, MONTHLY LAB. REV., Oct. 1991, at 10, 13 (interpreting data from the National Longitudinal Surveys of Labor Market Experience).

68. Mailman, *supra* note 16, at A1.

69. See, e.g., Sontag, *supra* note 1, § 1, at 1.

70. One report referred to the hiring of illegal caregivers as "an endemic labor practice" in cities known as being points of entry and having a high immigrant population. Noble, *supra* note 2, § 3, at 21.

71. See, e.g., Sontag, *supra* note 1, § 1, at 1, 32.

child care providers remains unknown,⁷² many believe that these workers are part of a large and growing underground economy.⁷³

Lower salaries and fewer benefits also make undocumented workers more attractive for American employers. "Available information indicates that many American employers are willing to hire undocumented workers in spite of, and sometimes because of, their illegal status. Such workers, accustomed to the lower standards of living in their home economies, will frequently work for lower wages than U.S. natives."⁷⁴ Employers of undocumented workers often receive additional savings through noncompliance with social security and other tax regulations.⁷⁵ Indeed, illegal workers often seek to block social security contributions⁷⁶ out of fear of detection and subsequent deportation⁷⁷ by the INS.⁷⁸

72. The INS estimates there are 3.2 million illegal aliens in the United States. Dana Coleman, *System Fails to Keep Pace with Immigration Backlog*, N.J. LAW., Apr. 11, 1994, at 1.

73. The use of illegal household workers is prevalent in New York City; according to the *New York Times*:

The hiring of illegal household workers appears to be so commonplace that licensed employment agencies in an immigrant haven like New York routinely violate the law by recommending undocumented immigrants for hire, usually at lower wages than legal workers would be paid.

Even the controversy over Zoë Baird's employment of illegal immigrants . . . did not push employment agents to hide their practices . . .

. . . .

. . . Rather, the public spotlight on Ms. Baird's household situation has brought to light a pervasive phenomenon: the pragmatic, above-ground relationship that links illegal immigrants and middle-class families in vast, tangled networks outside the law.

Sontag, *supra* note 1, § 1, at 1.

74. Ellen Sehgal & Joyce Vialet, *Documenting the Undocumented: Data, Like Aliens, Are Elusive*, MONTHLY LAB. REV., Oct. 1990, at 18, 20.

Perhaps these workers accept lower wages because they fear deportation. Nonimmigrants may be deported by the Immigration and Naturalization Service if they overstay the authorized period of admission. *Ho Chong Tsau v. INS*, 538 F.2d 667, 668 (5th Cir.) ("To prove overstay, the [INS] need only show a nonimmigrant's admission for a temporary period, that the period has elapsed, and that the nonimmigrant has not departed."), *cert. denied*, 430 U.S. 906 (1977).

75. According to one report, the Internal Revenue Service estimates that only one quarter of the two million households that employ domestic workers comply with tax laws. See Loose, *supra* note 2, at A1; see also Fuchs, *supra* note 51, at 179 ("The IRS has estimated, based on recent census data, that compliance with Federal Insurance Contribution Act (FICA) and Federal Unemployment Insurance Act (FUTA) withholding rules is no higher than 25%.") (footnote omitted).

76. Nonresident aliens are subject to federal income tax obligations, and their employers are subject to federal income tax and federal unemployment tax for services performed in the United States. Stuart R. Josephs, *Payroll Taxes, Expatriates and Nonresident Aliens*, TAX ADVISOR, May 1993, at 306. Where undocumented workers are involved, "both the employer and the employee may want to prevent the government from discovering the worker." Rita L. Zoidner, *W & M Panel Hears Pleas for Simplification of Domestic Employee Tax Laws*, 58 TAX NOTES 1282, 1283 (1993).

77. S.J. Diamond, *Where Work is Illegal, the Rules Confusing, the Fix Unsure*, L.A. TIMES, Feb. 18, 1993, at E3. Persons who enter the United States without undergoing inspection by immigration officers commit a crime. 8 U.S.C. § 1325(a) (Supp. V 1993). Those entering the United States without the requisite inspection are subject to deportation. *Id.* at § 1251(a)(1)(B) (Supp. V. 1993). Persons who overstay the time allowed in the United States under any type of visa are also subject to deportation. *Id.* at § 1251 (a)(1)(C)(i) (Supp. V 1993).

78. Illegal workers also seek to avoid social security contributions due to the effect it would have on their wages:

Many household employers also may receive discouragement from their household workers who would prefer to avoid the withholding from and reporting of their wages. Reporting

Unfortunately, the bonus to employers in the form of lower wages and benefits leads to severe burdens for undocumented child care providers who are susceptible to exploitation by virtue of their precarious legal and material status.⁷⁹ Arguing for change in immigration and employment law, one commentator explained the special problems facing undocumented workers: "Undocumented workers are vulnerable. Employers can, and do, exploit undocumented workers by paying them substandard or illegally low wages and blocking their attempts . . . to improve conditions in the workplace."⁸⁰ Several commentators have argued for changes in immigration law in order to minimize the vulnerability and exploitation of undocumented household workers.⁸¹

Illegal employment of child care providers has proven costly for all parties involved. In addition to the costs incurred by undocumented workers in the form of low wages, substandard work conditions, and the risk of deportation, employers run the risk of criminal and civil penalties. The Immigration Reform and Control Act of 1986⁸² ("IRCA") provided, for the first time, that employers of undocumented workers were subject to sanctions.⁸³ Under IRCA, American parents who employ undocumented workers as child care providers face fines⁸⁴ of \$3000 per undocumented worker, and up to six months in jail.⁸⁵ Employer sanction provisions reflect the concern that undocumented workers take jobs away from American citizens.⁸⁶ IRCA aims to combat this phenomenon by providing employers with an increased incentive to hire lawful residents of the United States.⁸⁷

requires identification of the worker and disclosure of his or her social security number. Many household workers are at the lowest end of the income and wage scales and may suffer further hardship by having their income reduced by the withholding of taxes. Many such workers are undocumented aliens with illegal immigration status.

Fuchs, *supra* note 51, at 179 (footnote omitted).

79. JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 56 (1985); Sehgal & Viala, *supra* note 74, at 20.

80. Peter Margulies, *Stranger and Afraid: Undocumented Workers and Federal Employment Law*, 38 *DEPAUL L. REV.* 553, 554 (1989) (footnotes omitted).

81. See, e.g., Suzanne Goldberg, *In Pursuit of Workplace Rights: Household Workers and a Conflict of Laws*, 3 *YALE J.L. & FEMINISM* 63, 95-96 (1991) (advocating the exemption of household workers, defined as persons working "principally inside the employer's residence" and including child care workers, from the Immigration Reform and Control Act's requirements of United States citizenship or specified work authorization from the INS); Noble, *supra* note 2 (referring to live-in workers as especially vulnerable because of their isolation and harsh schedules).

82. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

83. "In general, it is unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(1) (Supp. V 1993).

The regulations further provide: "Any person or entity which engages in a pattern or practice of violations of . . . the Act shall be fined not more than \$3,000 for each unauthorized alien, imprisoned for not more than six months for the entire pattern or practice, or both." 8 C.F.R. § 274a.10 (1994).

84. For example, Zoë Baird paid \$10,900 in social security taxes, interest and fines after "Nannygate." Robert L. Turner, *Cough Up Counselor*, *BOSTON GLOBE*, Feb. 11, 1993, at 23.

85. 8 C.F.R. § 274a.10 (1994).

86. Margulies, *supra* note 80, at 560.

87. *Id.*

Generally, American families have escaped liability under IRCA's sanction provisions. Recognizing the widespread practice of employing undocumented household and child care workers, Congress stated its intention that sanctions should not be leveled against small-scale violators.⁸⁸ Consequently, the INS has released statements indicating that it will not pursue families hiring household workers. Therefore, the widespread practice of hiring unauthorized aliens as household help will likely continue unabated.⁸⁹ However, the plight of Zoë Baird and Kimba Wood underscores the potential problems for those American families that knowingly or unwittingly hire illegal aliens as in-home child care providers.

The illegal route to obtaining child care providers remains marred by difficulties for all parties involved. Although the illegal route may be the simplest and easiest way to find a child care provider, the solution demands sacrifices. Because the two legal routes to importing child care providers (the H-2B and J-1 visas) remain unsatisfactory, legislative reform proposals have proliferated.

II. LEGISLATIVE PROPOSALS

The current legal regime governing the employment of foreign workers as child care providers creates numerous obstacles to legal hiring. With the exception of the *au pair* program, the regulations leave no lawful way for families with legitimate child care needs to satisfy those needs.⁹⁰ To enable American parents to obtain help in caring for their children, Congress should reform the system.

The USIA has tried for years to eliminate its existing *au pair* program. Meanwhile, organizations comprised of American immigration lawyers have proposed the creation of a new temporary visa for domestic workers.⁹¹ Other advocates look to the Canadian Live-In Caregiver Program⁹² as the appropriate model for the United States. This Note outlines an alternative proposal, the Child Care Access Program,⁹³ designed to redress inadequacies in the present system.

88. The House of Representatives Conference Report demonstrates the legislative intent:

It is the intention of the Conferees that criminal sanctions are to be used for serious or repeat offenders who have clearly demonstrated an intention to evade the law by engaging in a pattern or practice of employment, recruitment, or referral of persons who do not meet the requirements [of citizenship or employment authorization]. The Conferees expect the Immigration and Naturalization Service to target its enforcement resources on repeat offenders and that the size of the employer shall be a factor in the allocation of such resources.

H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 86 (1986).

89. Maurice A. Roberts & Stephen Yale-Loehr, *Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act*, 21 INT'L LAW. 1013, 1016-17 (1987).

90. Linda Himelstein, *Immigration Groups Mobilize After Baird Flap*, LEGAL TIMES, Feb. 1, 1993, at 2, 19.

91. Nicole Wise, *Connecticut Q. & A.: Helene Pepe; Immigrants, Home Care and the Law*, N.Y. TIMES, June 20, 1993, § 13 (Magazine—Conn.), at 3.

92. Monica Anderson, *Proposed Cutback Unfairly Targets Domestic Workers*, TORONTO STAR, Aug. 24, 1993, at A17.

93. See *infra* part II.D.

A. Attempts to Eliminate the Au Pair Program

The USIA believes "reform" includes eliminating the *au pair* program, while continuing other exchange programs with work components. A USIA-commissioned study by the Government Accounting Office ("GAO") determined that the *au pair* program runs counter to the legislative intent of Congress.⁹⁴ From its inception, the *au pair* program has been evaluated by an interagency review panel every six months.⁹⁵ "The panel found that *au pairs* were working up to forty-five hours per week and concluded that the program . . . was a full-time child care work program and not a valid form of educational and cultural exchange."⁹⁶ Apparently, too many families hosting *au pairs* "treat[] the visitor as a substitute for a domestic servant rather than as a member of the family."⁹⁷ Opponents argue that the child care component has subsumed the cultural and educational components of the exchange.

Nevertheless, other forms of cultural exchange continue to operate with even less cultural and educational activity. For example, foreign youth may come to the United States to work as summer camp counselors.⁹⁸ The requirement that a counselor "impart[] skills to American campers and information about his or her country or culture"⁹⁹ ostensibly fulfills the cultural component. This requirement, however, fails to guarantee any cultural exchange since camp counselor regulations lack any requirement that the counselors demonstrate proficiency in the English language.¹⁰⁰

B. Other Proposals

While USIA works to eradicate the only existing *au pair* program, other organizations work to create new legal mechanisms for legally employing foreign workers for child care duties. The American Immigration Lawyers Association ("AILA") intends to introduce federal legislation creating a new visa for home-care workers.¹⁰¹ Their proposal would allow home-care workers to obtain temporary work permits while they await permanent

94. Exchange Visitor Program, *supra* note 50, at 15,180.

95. Statement of Policy Regarding Exchange Visitor Au Pair Programs, *supra* note 48, at 46,676.

96. *Id.*

97. Mailman, *supra* note 8, at A2.

98. 22 C.F.R. § 514.4(h)(3) (1994).

99. *Id.*

100. *See id.* § 514.30 (1994).

101. On February 1, 1993, Warren R. Leiden, executive director of the American Immigration Lawyers Association, wrote a letter to Senator Edward Kennedy, chairman of the Senate Judiciary Subcommittee on Immigration and Refugee Affairs, detailing the AILA proposal. Leiden's plan included a modified labor certification procedure, modeled after the H-2B non-agricultural worker certification process. Employers would be required to provide wages and working conditions specified by the Department of Labor and would have to comply with relevant tax and social security requirements. After the end of the temporary, conditional employment authorization (perhaps three years), the worker would be sponsored for permanent residence under the employment-based category for skilled workers. *Families Should Be Able to Sponsor Immigrant Home Workers, Lawyers Say*, Daily Labor Rep. (BNA) No. 27, at A-6 (Feb. 11, 1993).

residence visas.¹⁰² Advocates believe that creating such a "nanny visa" would permit "qualified foreign workers to enter this country legally to address the needs of two-income families or single parents who cannot find competent and willing caregivers among American workers."¹⁰³ The AILA proposal functions as a temporary work permit leading to permanent resident status for the employee:

The home-care worker visa would be a temporary five-year work permit allowing immediate employment while the permanent green card papers are being processed.

During the life of the temporary visa, the foreign worker would be able legally to remain in the United States working for the sponsoring family while the immigrant visa is being processed.¹⁰⁴

Other elements of the AILA proposal include requiring employers to pay the prevailing wage and provide evidence of compliance with tax and social security laws.¹⁰⁵ Tax and social security provisions may render the proposal more palatable¹⁰⁶ to Congress in light of growing anti-immigration sentiment.¹⁰⁷

Demetrios Papademetriou, a senior associate with the Carnegie Endowment for International Peace, proposes creation of a new provisional visa category for immigrants who wish to work as home-care providers in the United States while seeking to obtain permanent legal status. His proposal includes setting salary levels at 150% of the minimum wage and establishing adequate standards for working conditions and civil rights. In addition, foreign workers would retain the freedom to change employers.¹⁰⁸

The Task Force on Quality Legal Child Care of the New York Women's Bar has outlined another reform proposal. Specifically, the Task Force advocates: (1) creating a new temporary work visa category for foreign workers whose employers have obtained Department of Labor certification; (2) reclassifying the home-care worker category from "unskilled" to "skilled"; and (3) requiring employers to comply with federal, state, and local laws while paying prevailing regional wages for in-home care.¹⁰⁹ This series of provisions aims to balance the protection of employment opportunities for

102. Mark A. Ivener, *Creating a 'Nanny Visa' Would Address an Unmet Need for Home-Care Workers*, 106 L.A. DAILY J., Feb. 18, 1993, at 6; Wise, *supra* note 91, § 13 (Magazine—Conn.), at 3.

103. Ivener, *supra* note 102, at 6.

104. *Id.*

105. *Id.*

106. Currently, many parents employ illegal aliens and fail to make tax and social security payments because they do not wish to jeopardize the continued employment of the illegal alien. *See supra* notes 75-78 and accompanying text. By legalizing the status of these workers through the home-care visa, employers and employees alike may be more willing to make tax and social security payments.

107. According to a recent Gallup Poll, support for a cut in immigration levels has grown over the past eight years from just under 50% to roughly 66%. Joel Kotkin, *Citizenship; Full Assimilation Should Be the Goal of U.S. Immigration Policy*, SAN DIEGO UNION-TRIB., July 10, 1994, at G1.

108. *Revision of Temporary Worker Laws Urged at Immigration Commission Hearing*, Daily Labor Rep. (BNA) No. 38, at A-9 (Mar. 1, 1993).

109. Noble, *supra* note 2, § 3, at 21.

American workers against the interests of immigrants' rights, while expanding the pool of available live-in workers.¹¹⁰

*C. Canada's Live-In Caregiver Program*¹¹¹

The Canadian government has a long history of involvement in bringing household workers to Canada from other countries. "Since the time of Confederation, Canadian governments have imported women to do domestic work. . . . [S]uccessive governments have seen fit to continue active involvement in such schemes."¹¹² The demand for workers continues to increase as more and more Canadian mothers enter the labor force.¹¹³ The Canadian program may serve as an appropriate model for American reform.

To qualify for a visa under the Live-In Caregiver Program,¹¹⁴ workers must have completed the equivalent of a grade twelve education and a six-month training course before they are permitted to work in Canada.¹¹⁵ All workers must live in their employers' homes for the first two years of their employment,¹¹⁶ and must be able to speak, read, and understand either English or French.¹¹⁷ Employers must pay at least the minimum wage, including time and a half for overtime beyond forty-four hours per week, withhold income taxes, make payments toward the employee's pension and unemployment compensation, and pay the premiums for the employee's national health insurance.¹¹⁸ If a worker completes two years as a live-in domestic, she may then apply for permanent resident status,¹¹⁹ the equivalent of an American "green card." In Canada, the vast majority of foreigners who arrive under the Live-In Caregiver Program obtain permanent residence after just two years of work.¹²⁰

The Canadian program is well-tailored to fit the needs of professional women and men who wish to legally hire live-in caregivers for their

110. *Id.*

111. This program, established in 1992, replaced the Foreign Domestic Movement program that operated from 1981 to 1992.

112. Jennifer Aitken, *A Stranger in the Family: The Legal Status of Domestic Workers in Ontario*, 45 U. TORONTO FAC. L. REV. 394, 396 (1987); see also Audrey Macklin, *Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?*, 37 MCGILL L.J. 681, 684 (1992).

113. Macklin, *supra* note 112, at 684.

114. One source estimates that over 85,000 workers have come to Canada since 1981 as live-in caregivers. Anderson, *supra* note 92, at A17. According to the Canada Employment and Immigration Commission, a total of 10,946 workers entered Canada in 1990 under the precursor program to the Live-In Caregiver Program. Macklin, *supra* note 112, at 693 (referring to an unpublished survey by the Canada Employment and Immigration Commission, Apr. 9, 1991).

115. Cheryl Cornacchia, *A Domestic Nightmare: Thousands of Women Work Illegally as Nannies*, MONTREAL GAZETTE, Feb. 22, 1993, at C1.

116. *Id.*

117. *Ottawa Ends Ban on Entry of Foreign Nannies*, VANCOUVER SUN, Apr. 29, 1992, at A6.

118. Mary Williams Walsh, *In Canada, Zoë Baird Would Have Found Help*, L.A. TIMES, Jan. 27, 1993, at E1, E3.

119. Macklin, *supra* note 112, at 685.

120. Walsh, *supra* note 118, at E1.

children.¹²¹ In particular, middle-class, double-income families seem pleased with the program.¹²²

Canadian parents typically choose this [Live-In Caregiver] option to facilitate the pursuit of professional careers without sacrificing the ideal of the nuclear family The workplace is still structured around the anachronistic model of the male breadwinner with the stay-at-home wife. In particular, live-out daycare is not considered feasible by dual career couples or single parents who must work long or erratic hours.¹²³

Several elements of the Live-In Caregiver Program have been incorporated into this Author's proposed reform, the Child Care Access Program, designed to facilitate the entry of foreign child care workers into the American labor force.

D. The Child Care Access Program

American families face a shortage of qualified, affordable child care providers. The demand for child care providers of all kinds, and live-in providers in particular, will continue to grow. Many families discover that finding quality child care that is affordable can be a problem.¹²⁴ As an increasing number of American mothers join the labor force, the shortage becomes more acute. Federal policy should encourage continued and expanded labor force participation by women in order to reap the benefits of their unique contributions to society. The Child Care Access Program aims to increase the supply of live-in child care providers by enabling greater numbers of foreign workers to legally provide child care services to American families.

The available pool of American-born, live-in child care workers is not expected to grow quickly enough to match the growing demand for their services. Foreign-born workers face tough immigration controls and fewer means of gaining lawful entry into the United States.¹²⁵ Meanwhile, American workers seem unwilling to provide live-in child care services. Moreover, the well-documented shortage of openings in day care centers causes a spill-over effect in the live-in market:

[W]ith the demand for day-care facilities far outpacing supply, three-fourths of those children [younger than fourteen years of age with both parents or a single parent in the labor force] are in unregulated facilities, whether it's their own home with a nanny, or a neighbor's basement that illegally houses dozens of children.¹²⁶

121. *Id.*

122. *Finding Legal Domesticities: Change the Rules to Fill the Need*, SAN DIEGO UNION-TRIB., Feb. 15, 1993, at B8.

123. Macklin, *supra* note 112, at 684 (footnote omitted).

124. Peter Cattan, *Child Care Problems: An Obstacle to Work*, MONTHLY LAB. REV., Oct. 1991, at 3.

125. *See supra* part 1.

126. Liz Spayd, *Day-Care Needs Unmet, Report Says*, WASH. POST, Oct. 14, 1993, at B1 (referring to a comprehensive report by the Metropolitan Washington Council of Governments).

Many American workers would be reluctant to sacrifice their privacy and independence and live in someone else's home.¹²⁷ Many Americans consider the work demeaning or akin to being a servant. In addition, the pay and benefits offered have not been commensurate with the level of responsibility and personal sacrifice exacted from live-in workers. "The supply situation is not likely to improve. The unattractiveness of the work, low status, low pay, lack of fringe benefits, and limited advancement potential deter many prospective household workers."¹²⁸ Although child care workers are covered by minimum wage laws, significant noncompliance is evident.¹²⁹ For example, in 1988 the median annual earnings of full-time child care workers amounted to a paltry \$9724.¹³⁰

While American workers demonstrate an understandable unwillingness to engage in this undercompensated work, families continue to experience difficulty in obtaining live-in child care services. As many as 100,000 nannies and *au pairs* were working in the United States in January, 1992, but one nanny agency reported that for every ten families that wanted to hire a nanny, there was only one available.¹³¹ New nanny training programs have cropped up at community colleges across the nation. As new programs are announced, administrators receive many more requests for nannies than the program could possibly produce in a given year.¹³²

Dual career couples and professional women have traditionally been the most common employers of live-in child care providers. As American women continue to enter the professions in increasing numbers,¹³³ the demand for live-in child care providers will increase correspondingly. "Over an 8-year period—from 1980-81 to 1988-89—women's share of degrees rose from 14% to 26% in dentistry, 25% to 33% in medicine, and 32% to 41% in law."¹³⁴

127. The low pay and status afforded home child care workers provide additional disincentives for American workers to seek such work. Sandra L. Hofferth, a senior research associate at the Urban Institute, notes that home child care workers are the lowest paid of any occupation tracked by the Labor Department's Bureau of Labor Statistics, with annual pay averaging \$8008. *Revision of Temporary Worker Laws Urged at Immigration Commission Hearing, supra* note 108, at A-9.

128. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. 2350, OCCUPATIONAL OUTLOOK HANDBOOK 317 (1990).

129. Allyson Sherman Grossman, *Women in Domestic Work: Yesterday and Today*, MONTHLY LAB. REV., Aug. 1980, at 17.

130. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 128, at 308.

131. Chuck Haga, *Au Pair Care*, STAR TRIB. (Minneapolis-St. Paul), Jan. 12, 1992, at B1 (referring to the International Nanny Association).

132. One community college in San Diego reported that for each trained nauny, it received 25 to 250 requests. A.J. Dickerson, *Training to Meet Nanny Shortage Still in Its Infancy*, CHI. TRIB., Dec. 30, 1990, § 8, at 1. Another community college in New Jersey was flooded with calls after announcing the creation of a nanny training program, with forty families asking to be placed on a waiting list. Jacqueline Shaheen, *Another College Will Offer a Course on How to Be a Nanny*, N.Y. TIMES, Aug. 24, 1986, at NJ2.

133. In 1992, 23.1% of women who maintained families and 30.7% of women in married-couple families worked in management and professional specialty occupations. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, NO. 93-3, FACTS ON WORKING WOMEN 8 (1993).

134. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, NO. 93-2, FACTS ON WORKING WOMEN 3 (1993).

Professional couples earn more money than most other families, and as families earn more money, they spend more money on child care services.¹³⁵ Child care provided in the child's home carries numerous advantages for the child and the parents. Children benefit from care in a familiar environment with personal attention.¹³⁶ Parents benefit from the convenience of having someone live in the home with them. This guarantees greater flexibility in hours, enabling parents to have more flexible work schedules than day care centers typically allow.

The limited number of legal options available to parents seeking child care workers contributes to this shortage.¹³⁷ "Demand for household help has outstripped the supply of workers willing to take domestic jobs for many years. The imbalance is expected to persist—and possibly worsen—through the year 2000."¹³⁸ Several factors contribute to the continuing increase in demand for child care providers.¹³⁹ The most significant factor is the increased labor-force participation by American mothers:

One of the most significant trends in the United States labor force has been the growth of working mothers. In March 1988 there were nearly 33 million women who had children under the age of 18. Most of these mothers are now participants in the labor force—65 percent. Whether in married-couple families or families maintained by single parents, approximately 34 million children had mothers who were working or seeking employment.¹⁴⁰

By 1992, the thirty-four million women with children under the age of eighteen had a labor force participation rate of 67%.¹⁴¹ Even within the category of women with children under the age of three, the labor force participation rate reached 55% by 1992,¹⁴² a substantial increase over the 39.1% labor force participation rate of the same group in 1978.¹⁴³ Furthermore, the United States Department of Labor predicts that women will continue to account for an even larger proportion of the overall American workforce.¹⁴⁴

135. For example, a 1986 study showed that families with monthly incomes of less than \$1250 spent \$35.20 per week on average for child care, while families with monthly incomes of \$3750 or more spent \$57.60 per week. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 371 tbl. 616 (110th ed. 1990).

136. Johanna Freedman, *The Changing Composition of the Family and the Workplace*, in THE PARENTAL LEAVE CRISIS 23, 32 (Edward F. Zigler & Meryl Frank eds., 1988).

137. See *supra* part I.

138. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 128, at 317.

139. Barbara Kline, president of a child care placement firm, has testified that the demand for nannies consistently outpaces the supply. Moreover, she has speculated that the strict limitations on hiring immigrants might contribute to the problem. *Revision of Temporary Worker Laws Urged at Immigration Commission Hearing*, *supra* note 108, at A-9.

140. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, NO. 89-3, FACTS ON WORKING WOMEN 1 (1989).

141. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *supra* note 134, at 3.

142. *Id.*

143. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *supra* note 140, at 4.

144. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, NO. 92-1, FACTS ON WORKING WOMEN 1 (1992) (stating that of the 26-million-worker net increase in the civilian labor force between 1990 and 2005, women will account for 62% of the net growth).

Since women traditionally bear a disproportionate share of child care responsibilities within American families,¹⁴⁵ the continuing entrance of women into the labor force will further increase the demand for child care providers.¹⁴⁶

An upsurge in the number of mothers employed outside of the home in the last twenty-five years has created a pressing need for new forms of child care arrangements. The traditional mode of care, that of the mother staying at home, is no longer typical as more mothers of young children participate in the labor force.¹⁴⁷

In order to match the increased demand for child care services, the Child Care Access Program would facilitate the entry of additional providers into this country. Part of the problem of inadequate supply can be traced to current immigration policy in general,¹⁴⁸ and the employer sanction provisions of the IRCA¹⁴⁹ in particular. Thus, part of the solution lies in creating new, expanded, enforceable, lawful means of importing child care workers into the United States labor force.¹⁵⁰ The program is designed to allow more Americans access to a variety of forms of affordable, reliable, and flexible child care arrangements.¹⁵¹

The Child Care Access Program would allow foreign child care providers from any country,¹⁵² of any age¹⁵³ or gender, to work for up to five

145. "Traditionally, our society has merged childrearing and childbearing into a single notion of maternity, which has been viewed as a special and uniquely female function. Motherhood has been perceived as a woman's primary role to which other activities and functions should be, and often are, subordinated." Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. OF L. & SOC. CHANGE 381 (1984-85).

146. "Most studies have shown that in spite of strong acceptance of an egalitarian ideology that husbands and wives should share family responsibilities, wives, even though the time they devote to family activities has declined, continue to carry most of the household and child care load." BRUCE A. CHADWICK & TIM B. HEATON, *STATISTICAL HANDBOOK ON THE AMERICAN FAMILY* 198 (1992).

147. ABBIE GORDON KLEIN, *THE DEBATE OVER CHILD CARE 1969-1990*, at 4 (1992).

148. Recent changes in immigration law may reduce the number of immigrants available for private household work. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 128, at 317.

149. 8 U.S.C. § 1324a.

150. See Demetrios G. Papademetriou, *Learning Policy Lessons from Nannygate*, LEGAL TIMES, Feb. 1, 1993, at 36, 36-37 (arguing that by enacting enforceable immigration laws, the market mechanism would reach a rough equilibrium between supply and demand that meets the needs of those able to afford the service while allowing the economic survival of the available work force).

151. Under the current system, "[m]any parents turn to formal [institutional] childcare arrangements because they find it too difficult to set up a satisfactory arrangement with a relative, babysitter, or live-in worker." BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 128, at 308.

152. The lack of any geographic restriction increases the pool of potential workers far beyond that which exists under the current *au pair* program supervised by the USIA. That program limits participation to foreigners from a handful of Western European nations. Statement of Policy Regarding Exchange Visitor Au Pair Programs, *supra* note 48, at 4676.

Allowing child care providers from developing countries, Pacific Rim nations, and our Central and South American neighbors should enable more American families from the southern and western regions to employ legally documented workers, while erasing the Euro-centric bias inherent in the current system.

153. The current *au pair* program limits participation to foreign youth 18 to 25 years of age. *Id.*

years¹⁵⁴ in the United States.¹⁵⁵ The law would require employers to comply with minimum wage and maximum hours laws, to withhold income taxes, and to make social security contributions.¹⁵⁶ Employers would have to provide a private room, board, an employment contract, and round trip airfare to the employee.¹⁵⁷ Employers would sponsor child care workers through the Department of Labor's certification process,¹⁵⁸ but that process would be changed¹⁵⁹ to set aside 20,000 additional nonimmigrant visas annually¹⁶⁰ for live-in child care workers.¹⁶¹ The Child Care Access Program addresses temporary work authorization only, leaving the immigrant visa application process unaffected.

154. The program includes a visa of five years' duration to match the typical period of time from the mother's return to the workforce following childbirth until the child commences kindergarten. The long duration of work authorization facilitates continuity, attachment, and emotional bonds between the sponsoring family and the child care provider. See generally JUDITH M. BARDWICK, IN TRANSITION 71 (1979) (discussing the need for attachment between child and care-giver if the child is to attain normal emotional development).

155. In contrast to Canada's Live-In Caregiver Program, this proposal calls for a temporary work permit without any provision for subsequent permanent residence. During a time of anti-immigration sentiment, this Author believes that any proposal granting child care providers expedited processing of permanent residence applications would be politically untenable.

156. Simplifying tax reporting requirements would further help efforts to increase child care availability. Tax law simplification and a substantial increase in the income floor for in-home workers would accompany this program. Under current law, household workers are subject to income tax withholding if they receive wages of \$50 or more per calendar quarter; moreover, complicated filing requirements constitute a substantial burden for employers. These factors contribute an estimated \$11 billion annually in unreported payments for child care. Larry Tunnell et al., *Nannygate: An Overview of Payroll Tax Rules and Immigration Laws*, J. OF TAX ACCT., July 1993, at 36, 38.

157. These provisions parallel those found in a little-known section of United States immigration law that allows American citizens who normally reside outside the United States, but who are assigned as a condition of employment to work in the United States for no longer than four years, to bring their personal or domestic servants to live and work for them in this country. This regulation, frequently used by American diplomats and military personnel, requires that the employee reside in the employer's home, that the employer provide a private room and board, round trip airfare, an employment contract, prevailing or minimum wage (whichever is greater), and all other benefits normally required for U.S. domestic workers in the area of employment. U.S. DEP'T OF STATE, *supra* note 66, § 41.25 note 4.2(s).

158. See *supra* part I.A.

159. Administrative regulations would specify that the temporary-need requirement could be satisfied by a simple employer declaration. Moreover, an employer's live-in specification would be considered a reasonable job requirement, meaning that the Department of Labor inquiry into the availability of American workers could only incorporate American workers willing to live in the employer's home. In general, these provisions would simplify the labor certification process and would result in a greater percentage of favorable decisions on applications filed by American families sponsoring foreign child care workers.

160. This marks a substantial increase over the current legal limit of 66,000 "unskilled worker" visas, of which child care providers constitute only a small subset. See 8 C.F.R. § 214.2(h)(8)(i)(C) (1994).

This Author estimates that 20,000 additional visas for child care providers would meet the demand for live-in help. However, five years after the enactment of the Child Care Access Program, Congress should commission a study to determine whether increasing or decreasing the annual allotment of visas would be appropriate.

161. For an alternate proposal which simply removes a defined group of "household and domestic" workers from the requirements of the Immigration Reform and Control Act of 1986, see Goldberg, *supra* note 81, at 95-96 (outlining a legislative proposal which would eliminate citizenship or work authorization requirements for household or domestic workers providing services principally inside an employer's residence, including child care).

Driving up benefits and wages for foreign live-in child care providers through legalization may also have the salutary effect of encouraging more American workers to enter this field. As discussed earlier in this Part, many Americans are discouraged from accepting this work because of the incredibly low wages. The Child Care Access Program would help to boost wages for all live-in workers. Moreover, as immigrant workers benefit from legalization and enhanced wages, they will no longer undercut the wages paid to American workers. When employers pay immigrant workers the wages required by the Child Care Access Program, one of the most significant incentives for American families to hire foreign workers will disappear.

III. COUNTERING THE OPPOSITION

The Child Care Access Program attempts to address the shortage of live-in child care providers in the United States by enabling American families to legally hire foreign workers. Because this proposal involves issues such as immigration and women and work, it will likely encounter opposition. Anticipating counter-arguments, this Part will discuss anti-immigration attitudes and anti-feminist sentiment.

A. The Benefits of Liberalizing Immigration Law

In recent years, public opinion has shifted against allowing additional foreigners into this country.¹⁶² Border states like California¹⁶³ and Florida have mounted challenges to federal immigration policy calling for additional federal funding for border control efforts.¹⁶⁴ Immigration reforms have been premised on an "exclusionist theory"¹⁶⁵ based on the rationale that foreign workers take jobs in America away from Americans.¹⁶⁶ "[M]any suspect . . . that immigrants compete with the least-skilled native-born workers, taking

162. A Gallup Poll in July, 1993 found that 69% of respondents favored reducing immigration, which Gallup called its highest such finding since World War II. Ann Devroy & Michael S. Arnold, *Clinton Escalates Fight on Illegal Immigration*, WASH. POST, July 28, 1993, at A1, A12.

163. Anti-immigration sentiment in California seems to rise in tandem with the state's unemployment rate, fueled by any evidence that the newcomers detract from the living standards of Americans. Alan C. Miller, *Data Shows Heat, Not Light, on Immigration*, L.A. TIMES, Nov. 21, 1993, at A1.

The 1994 California senate race between Democratic Senator Dianne Feinstein and Republican Representative Michael Huffington focused on illegal immigration. Huffington announced his support for Proposition 187, a ballot initiative that would deny most government services, including schooling, to undocumented aliens. Feinstein opposed the measure.

One week after endorsing Proposition 187, Huffington admitted that his family employed an illegal immigrant in his home as a nanny from 1987 to 1993. Mr. Huffington's nanny problem became a major issue in the final days of the campaign, and the INS commenced an investigation. B. Drummond Ayers Jr., *California G.O.P. Candidate Admits Hiring Illegal Alien*, N.Y. TIMES, Oct. 28, 1994, at A1; B. Drummond Ayers Jr., *Inquiry Starts on Candidate Who Hired Illegal Alien*, N.Y. TIMES, Oct. 29, 1994, at A9.

164. Helen Dewar, *Senate Averts Filibuster, Compromises on Benefits for Illegal Immigrants*, WASH. POST, Nov. 6, 1993, at A5.

165. Margulies, *supra* note 80, at 559.

166. *Id.* at 560.

away their jobs or lowering their wages. That is why organized labor has long fought for tougher controls on immigration."¹⁶⁷

Others argue, however, that "recent arrivals—legal and illegal—have had minimal impact on the earnings or employment prospects of American residents. Immigrants, it seems, are either doing jobs that the American-born do not want, or they are filling slots in an economy with a nearly insatiable hunger for willing workers."¹⁶⁸ American workers seem uninterested in filling the void in live-in child care providers in this country. These "[p]rivate household workers . . . continue to dwindle in number. Domestic work is viewed more and more as a low-skill, low-status occupation, and young women, especially black women, are increasingly shying away from it."¹⁶⁹ Despite the prevalence of illegal employment of live-in child care providers, "[t]he demand for child care services is substantial and growing."¹⁷⁰

Moreover, any impact on the American labor force will be offset by the fact that many of the foreign nationals employed under the Child Care Access Program would likely be found among the ranks of those currently employed illegally in this country. Legalizing their status would bring substantial benefits in the form of increased tax and social security revenue,¹⁷¹ as well as enhanced pay, benefits, and working conditions for employees. Legalizing these workers would also help to reduce exploitation and vulnerability.¹⁷²

To ease the transition to legalization, the Child Care Access Program would include an amnesty provision of twelve months' duration to encourage illegal workers to acquire visas. Under the amnesty provision, American parents who sponsor their illegal workers for legal status would be immune from sanction. Workers who legalize would be immune from deportation.

American parents could use the Child Care Access Program to legally select the best person to care for their children from a much greater pool of potential providers. Currently, many parents must settle for their second or third choice of child care arrangements because they find it too difficult to arrange for a live-in worker.¹⁷³ While immigration opponents will fault the Child Care Access Program for facilitating the entry of additional foreign workers into the United States, others will fault the program for facilitating the entry of additional American mothers into the workforce.

167. Peter Passell, *So Much for Assumptions About Immigrants and Jobs*, N.Y. TIMES, Apr. 15, 1990, § 4, at 4.

168. *Id.*

169. "Private household workers" consist of cleaning workers, servants, child care workers, housekeepers, cooks, and launderers. Grossman, *supra* note 129, at 17.

170. Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897 (1993) (footnote omitted).

171. Estimates indicate unreported payments for child care alone total \$11 billion annually. Tunnell et al., *supra* note 156, at 36.

172. Margulies, *supra* note 80, at 554.

173. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 128, at 308.

B. Supporting Working Mothers

Over the past several decades, the United States has witnessed an immense change in demographics as more and more American women have entered the paid workforce. These forces of change have brought the issues of work and family to the forefront of political life. Some opponents of change in American families point to the entry of mothers into the workforce as the cause of a variety of societal problems. Those who oppose having mothers in the workplace would likely oppose the Child Care Access Program because it would facilitate the continued increase of labor force participation by mothers by easing the difficulties such women currently face in obtaining adequate child care.

Drastic change has already occurred in the nature of American families. "The typical family during the first half of the twentieth century included a father who was breadwinner and a mother who stayed home to care for the children and do the housework. Today both parents usually work outside the home."¹⁷⁴ The typical arrangement in the first half of this century effectively forestalled any need for child care providers in most American families. When the composition of the workforce began to change,¹⁷⁵ American families began to change,¹⁷⁶ and the demand for child care services began to steadily climb.¹⁷⁷

The entry of women into the paid workforce relates directly to issues of work and family. "Talk about work and family is tied to women's entry into the workforce and the concomitant redefinition of ourselves and our roles. It is also talk about responsibility and conflict, the conflict between work and family."¹⁷⁸ In many ways, family and work structures have failed to evolve and adapt to the changed composition of the American labor force.¹⁷⁹ Enhanced availability of child care services through the Child Care Access Program would help to alleviate work-family conflicts.¹⁸⁰

Splits in ideology about work and family parallel divergences of opinion on child care services. "[S]tereotypes regarding parenting, mothering and fathering, and the appropriate separation of work and family, lie at the heart

174. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, EMPLOYERS AND CHILD CARE: BENEFITING WORK AND FAMILY 1 (1989).

175. "The United States has experienced what can only be characterized as a demographic revolution in the composition of its workforce, with profound consequences for the lives of working men and women and their families." H.R. REP. NO. 511, 100th Cong., 2d Sess., pt. 2, at 17 (1988).

176. "Families have changed a great deal since the 1930's. The biggest changes have been increased divorce rates and greater maternal participation in the labor force." Patricia Schroeder, *Is There a Role for the Federal Government in Work and the Family?*, 26 HARV. J. ON LEGIS. 299, 300 (1989).

177. In recent decades, fewer grandparents have resided in the same house as their grandchildren, perhaps contributing to increased demand for child care providers and decreased use of relatives as providers.

178. Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989).

179. *Id.* at 87 (arguing that occupational patterns are geared toward the family life of a single individual or a worker who is supported by a nonworking wife).

180. *Id.* at 114 (stating that at least a partial solution to some work-family conflicts is the ability to purchase services such as child care).

of childbirth and early childcare issues."¹⁸¹ When comprehensive legislation on child care services first passed through Congress in the early 1970's, controversy ensued over the issue of whether child care access would precipitate the demise of the American family.¹⁸² Ultimately, President Nixon vetoed the Child Development Program, citing the need to

cement the family in its rightful position as the keystone of our civilization.

. . . .
 . . . bring the family together . . .
 . . . [and] enhance rather than diminish both parental authority and parental involvement with children—particularly in those decisive early years when social attitudes and a conscience are formed, and religious and moral principles are first inculcated.¹⁸³

Although social attitudes have changed since the early 1970's, opposition to child care services, particularly infant care, remains:

No longer is it culturally unacceptable for mothers to have jobs. In fact, the practice has become so widespread that many mothers at home feel that they "should" be working. . . . At the same time, there is still a strong bias against mothers leaving their babies in substitute care unless it is absolutely necessary.¹⁸⁴

Mothers have historically borne the primary responsibility for child care, either as providers or as consumers of child care services.¹⁸⁵ Even today, working mothers¹⁸⁶ bear a disproportionate share of child care obligations.¹⁸⁷ Thus, difficulties in obtaining child care services negatively affect mothers and their ability to effectively participate in the American workforce.¹⁸⁸ One U.S. Senator claims that "[t]wo hundred thousand mothers of young children turn down job offers each month because they cannot find satisfactory child care."¹⁸⁹

The lack of suitable child care creates a significant barrier to successful labor market participation for women.¹⁹⁰ Even when mothers successfully obtain child care, "[a] combination of rigid work schedules and the shortage

181. *Id.* at 125.

182. For an excellent discussion of this phenomenon, see MARGARET O'BRIEN STEINFELS, WHO'S MINDING THE CHILDREN 216-21 (1973).

183. Veto of the Economic Opportunity Amendments of 1971, PUB. PAPERS OF PRES. NIXON 1174, 1176, 1178 (Dec. 10, 1971).

184. T. Berry Brazelton, *Issues for Working Parents*, in THE PARENTAL LEAVE CRISIS, *supra* note 136, at 36.

185. LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 2 (1985).

186. Dowd, *supra* note 178, at 85 (stating that women's entry into the paid workforce has not led to an equitable redistribution of family and child care work).

187. *See, e.g.*, LISE VOGEL, MOTHERS ON THE JOB 67-68 (1993).

188. "Since mothers usually become child care providers when other arrangements are too expensive, the current system restricts employment opportunities for both married and unmarried mothers, thus perpetuating labor market inequality between men and women." Lance Liebman, *Evaluating Child Care Legislation: Program Structures and Political Consequences*, 26 HARV. J. ON LEGIS. 357, 364 (1989).

189. Edward M. Kennedy, *A Legislative Approach to Work and Family: Time for a Smart Start*, 26 HARV. J. ON LEGIS. 391, 392 (1989).

190. Mary J. Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 100 (1979).

of reliable and affordable child care can result in stress, lower productivity, and increased absenteeism as parents attempt to juggle work and child rearing responsibilities."¹⁹¹ The structure of the labor market and continuing inequities in child care responsibilities within families¹⁹² make full and equal achievement in the workforce beyond the reach of many women.¹⁹³ Allowing American families access to live-in child care providers would help to minimize the difficulties of juggling inflexible work schedules and inflexible hours at day care centers. The Child Care Access Program would thereby facilitate full and equal labor force participation by American mothers.

Unfortunately, the Child Care Access Program would not solve child care dilemmas for all American families. Only relatively affluent¹⁹⁴ families could afford to pay minimum wage *and* provide private room and board to a live-in child care worker. Dual-career couples could take advantage of the program to obtain quality child care, while others might not be able to do so. However, "elite professions also tend to impose longer and more unpredictable working hours, and are particularly resistant to extended leaves, part-time or flexible-time shifts and home work."¹⁹⁵ Therefore, professional women¹⁹⁶ and dual-career couples have a special need for live-in child care which they are currently unable to fulfill through legal means.

CONCLUSION

"Nannygate" brought issues of child care availability to both the front pages of American newspapers and to the forefront of the American consciousness. The ensuing debate over the vagaries of employing foreign citizens as child care workers provided the impetus for legislative change.

For the first time, many Americans realized that current regulations governing the employment of foreign workers as live-in child care providers erect nearly insurmountable barriers to lawful hirings. Facing difficulties in obtaining affordable and reliable child care, many families resort to illegal arrangements. "Under the table" employment deprives workers of full protection under employment law, deprives the U.S. Government of much-needed tax revenue, and most importantly, deprives many families of the flexible child care arrangements they desperately need.

191. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *supra* note 174, at x.

192. Sachs, *supra* note 3, at 58-59.

193. Frug, *supra* note 190, at 55.

194. In recent years, more and more middle-class families have employed live-in child care providers. See, e.g., Robert Reinhold, *Au Pairs' Employers Run Afoul of Aliens Law*, N.Y. TIMES, May 19, 1987, at A1; Ross, *supra* note 54, at 12.

195. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1185 (1988).

196. As one author explains: "If women can't have good home care for their children, they won't be able to pursue professions such as law, medicine and journalism, which don't close shop at 5 so you can get to the local day-care center before it closes at 6." Judy Mann, *The Hand That Rocks the Cradle*, WASH. POST, Feb. 10, 1993, at E13.

To alleviate current inadequacies of the child care system, Congress should enact the Child Care Access Program. This program, which would provide a five-year non-immigrant visa for qualified foreign child care providers, would enable more families to legally hire foreign workers as live-in child care providers, thereby accommodating the continued entry of American mothers into the workforce. Additionally, while enhancing access to these workers, the program would also promote government efforts to collect tax revenue. Moreover, legalizing foreign child care workers would help to improve their working conditions.

“Nannygate” demonstrated that the American child care system is in need of drastic reform. Because most Americans shun live-in child care work, filling the unmet demand for this service requires liberalizing and simplifying the hiring of child care providers from foreign countries. The Child Care Access Program offers such a remedy.