

The Regularization of Undocumented Immigrants in the United States

The Spanish Solution

Oscar Celador Angón*

Abstract

The aim of this article is to offer solutions to the problem of undocumented immigrants in the United States, using the Spanish migration model as a possible solution. During the last decade Spain has been the European country that has received more migration flows due to his economic development. Spain has used the knowledge and experience of other European host societies to design a migration model, which avoids the social conflicts arising from the coexistence of large numbers of undocumented immigrants, and that could provide answers to the problems faced by the US system.

Keywords: undocumented immigrants, migration policy, regularization process, social assimilation, economic crisis.

A. Introduction

The immigration movement characterizes the 21st century and today's diverse society. The constant movement of people among different societies defines many aspects of our socioeconomic life. Migration movements ensue from many factors, but they have historically been associated with the search for better job opportunities and a better future for the migrant or his/her family.

One of the difficulties that currently need to be answered by the migrant-receiving societies is how to deal with undocumented immigrants who reside in their territories. After the legal barriers undocumented immigrants face, immigrants: either entered the country illegally and have remained with this status or entered the country legally but did not return to their home country before their visa expires converting their status into undocumented. In some cases, the immigrant may possess lawful residence in the host society, but cannot retain that status indefinitely. The United States of America has become one of the main participants in this debate because, according to statistics from the Department of Homeland Security, there are approximately 11 million undocumented people

* Oscar Celador Angón is Professor of Law and Director of the Department of International Law, Ecclesiastical Law and Philosophy of the Universidad Carlos III de Madrid.

residing in the United States, the vast majority of them originating from Latin America.¹

The aim of this paper is to offer solutions to the problem of undocumented immigrants in the United States. The fact that the US immigration system does not provide a positive solution that allows undocumented immigrants who are fully integrated into the American society to regularize their situation remains a major problem. As a possible comparative solution we will use the Spanish migration model. During the last decade Spain has been the European country that has received more migration flows due to his economic development. Spain has used the knowledge and experience of other European host societies (especially France, Germany and Britain) to design a migration model, which avoids the social conflicts arising from the coexistence of large numbers of undocumented immigrants, and that could provide answers to the problems faced by the US system.

B. Spanish Migration Policy

At the beginning of the 1990s, the Spanish population was made up almost entirely of Spaniards, with immigrants accounting for less than 1% of residents. Spain's admission into the European community and its relatively continuous economic growth has made Spain an attractive destination for immigrants. Spain currently has the second highest immigration rates within the EU, just after Cyprus, and the second highest absolute net migration in the World (after the USA). According to Eurostat, in 2010, there were 6.4 million foreign-born residents in Spain, corresponding to 14.0% of the total population. Of these, 4.1 million (8.9%) were born outside the EU and 2.3 million (5.1%) were born in another EU Member State.²

There are three types of documented residence permits for non-EU citizens in Spain: 1) traditional tourist permits of ninety days; 2) temporary residence permits, which are valid for more than ninety days but less than five years; and 3) permanent residence permits, which are given to those who have lived in Spain for at least five consecutive years with a temporary resident permit, and allows foreigners to live and work in Spain indefinitely, under the same conditions as Spaniards.

In accordance with the 2009 Spanish immigration reform, undocumented immigrants are those immigrants who have never acquired any type of documentation to be legal residents in Spain because of his/her clandestine entry to the country. Also undocumented immigrants are considered those who entered and have been legally in the country during a certain period of time, but due to different circumstances have been unable to get or renew their residence permits.³ The irregular status is also reached by those immigrants that start working legally in

1 <www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf>.

2 <http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-034/EN/KS-SF-11-034-EN.PDF>.

3 Art. 30 of the Spanish immigration act 2009 (Organic Law 2/2009, of 11 December. BOE No. 299 of December 12).

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Spain, thanks to the quota system or/and by the seasonal work process, and fail to fulfil their obligation to return to their countries.

I. 2009 Immigration Reform and Integration Public Policies

The main objective of the Spanish immigration reform of 2009 was to promote the full integration of immigrants into the Spanish territory and ensure peaceful coexistence and social cohesion between immigrants and the native population. The 2009 immigration reform established a framework of rights and freedoms for foreigners, which guarantee everyone the full exercise of fundamental rights, improve the integration of immigrants through family regrouping and ensure the immigrant population's access to public services (particularly education, employment, social services, health and housing) in equal conditions as Spaniards.

1. Integration through Recognition of Rights and Access to Social Benefits

One of the main differences between the Spanish and US migration model is that Spanish law traditionally recognized rights to foreigners, whether documented or undocumented, as part of its policy of social integration. This context is clearly favourable for immigrants, and has been reinforced through the Article 3 of the 2009 immigration law, which establishes that foreigners shall exercise the fundamental rights on an equal footing with Spaniards.

The best examples of the equivalence between Spaniards and foreigners in the context of legal rights and access to social benefits are the following:⁴

1. Rights to documents: Foreigners who are in Spanish territory have the right and duty to retain documents as proof issued by the competent authorities of the country of origin or provenance, as well as certifying their status in Spain.
2. Freedoms of association, assembly and demonstration: Foreigners have the right to association, assemble and demonstrate under the same conditions as Spaniards.
3. Right to education: Foreigners under sixteen years of age have the right to get free public education. Foreigners under eighteen are also entitled to post-compulsory education, including the taking of appropriate academic qualifications and access to public system of scholarships and grants under the same conditions as Spaniards. The main advance in this context is the possibility of foreigners to join university studies paying the same price as Spaniards, because this level of education, as happening in most of EU countries, is almost free.⁵
4. Right to health care and social services: Foreigners who are in Spain, entered in the register of the municipality where they have habitual residence, are entitled to healthcare under the same conditions as Spaniards. In any case, foreigners in Spain have the right to emergency health care for serious illness

4 Arts. 3-11 of the Spanish immigration act 2009 (Organic Law 2/2009, of 11 December. BOE No. 299 of December 12).

5 Art. 9.2 of the Spanish immigration act 2009 establishes: "foreigners over the age of eighteen have the right to access post compulsory educational stages, to obtain relevant qualifications, and to the public system of grants under the same conditions as Spaniards".

or accident, whatever its cause, and continuity of such care until the state of discharge, and foreign pregnant women who are in Spain are entitled to health care during pregnancy, childbirth and postpartum. Foreigners with disabilities, children under eighteen, who have habitual residence in Spain, are entitled to receive treatment and care services required by their physical or mental state.

5. Housing benefits: Foreign residents are entitled to access to public schemes for housing in the terms established by regional law, and are entitled to such aid under the same conditions as Spanish.
6. Public participation: Foreigners resident in Spain may be in possession of the right to vote in municipal elections in the manner provided by international treaties. Foreign residents that are registered in a municipality can be heard on matters affecting them in accordance with applying regulatory requirements.
7. Right to work and social security: the main difference between documented and undocumented immigrants appears in the area of the right to work, because, according with Article 10 of the 2009 immigration reform, only foreign residents who meet the requirements of the immigrant regulation have the right to engage in gainful employment or self-employed, and to access the Social Security system in accordance with current legislation.

Thus, the main difference between documented and undocumented immigrants is that only documented immigrants have the right to work in Spain, and the main difference between documented immigrants and Spaniards is that the documented immigrants cannot vote in Spanish elections, except if they get Spanish citizenship or if an international agreement is reached between the foreigner country and Spain providing this possibility.

2. *Integration through Family Regrouping*

One of the main ingredients of the Spanish migration model is the recognition of the immigrant's right to move their families to Spain in order to facilitate their social integration. A novel aspect in this context, especially comparing the Spanish and US regulation, is the possibility of immigrants to ask for family regrouping with their partners, even if they are nor married couples, and regardless of sexual orientation of the partners.

Foreigners who wish to exercise the right to family reunification do not need to have a permanent residence permit, but if they have a temporary residence permit they must request a renewal of their initial residence permit (after their first year of residence in Spain), and must certify that they have adequate shelter and sufficient financial means to meet their needs and those of his family, once reunited.

Documented immigrants in Spain are entitled to regrouping with the following members of their family.⁶

6 According with Art. 17 of the Spanish 2009 immigration law.

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1. Resident's spouse or the person with whom the immigrants has an emotional relationship similar to marriage: the regrouped spouse may obtain an independent residence permit when she/he proves to have sufficient financial means to meet his/her own needs.
2. Descendants: the children of the documented immigrant and spouse, including adopted children, must be under eighteen years old; descendants may obtain an independent residence permit when they reach adulthood and have sufficient financial means to meet their own needs.
3. Ascendants: when they are over 65 years and there are reasons that justify the need to authorize their residence in Spain. In this case, unlike the spouse and descendant cases, foreigners do not have an automatic right to bring his/her parents to Spain, unless they proved that exist medical or social reasons that justifies their request.

3. *Integration through Citizenship*

Citizenship brings many benefits to immigrants and the communities where they reside. The best way to integrate foreigners is to provide them access to citizenship, because as a result of that opportunity, foreigners can participate fully in the civic life of the country where they reside, also is a powerful symbolic gesture of commitment to their new home and therefore identifies them positively with the host society.

Another advantage of access to Spanish citizenship is being able to fully exercise the rights and freedoms that Spain recognized to their nationals, and get EU citizenship. EU citizenship is not a separate 'national' citizenship, but according to the Schengen Treaties (into force since 26 March 1995) citizenship plays a decisive role. EU States are not held to any standard regulation in the area of residency, and the EU States can set their own residency regulations. EU citizens have the right to circulate, reside and work freely without limitations within EU internal borders. However, non-EU citizens must fulfil requirements in order to cross the EU external frontiers, and obtain permits to be able to reside and/or work in each of the European Union countries. For example, a citizen of an EU State has the right to move freely to another EU State to work or retire legally, but a resident that it is not citizen of an EU State does not necessarily afford similar rights.

Spanish citizenship law has been amended several times in recent years (1982, 1990, 1995 and 2002).⁷ Spanish nationality can be obtained by means of one's origin or residence. Spanish nationality can be obtained by means of one's origin in these cases: people born (or adopted by Spaniards) of a Spanish mother or father; people born in Spain of foreign parents, if at least one parent was also born in Spain; people born in Spain of foreign parents if neither of them has

7 According to the MIPEX index, Spain benefits from slightly favorable policies for integration – now the best of Europe's major immigration countries and 2nd among its newest ones –, in fact long-term residents are better able to secure their future in Spain than in most European countries because of the 2009 Immigration Law's use of EU standards, and once non-EU residents have five years' residence and a basic income like any Spanish resident, the procedure is short and simple (<www.mipex.eu/spain>).

Spanish nationality or if either of the parents' legislations confer a nationality to their children; people born in Spain and whose filiations is not determined. The majority of children born in Spain between 2000 and 2010 are children of immigrants despite not counting as such, because Spain, unlike other countries of the EU, automatically grants Spanish nationality to the children of immigrants born in Spain whose parents' nationality of origin is not transferred *jus sanguinis* upon their child's birth abroad.

Spanish nationality can be obtained by residence, but the required periods of time are different according to the foreigners nationality, or other personal circumstances. Due to the peculiar Spanish pattern of access to citizenship is necessary to distinguish between immigrants from the former Spanish colonies and the other immigrants.

In 1995, the European Union regulated Visas for short stays and determined the countries whose nationals would need a Visa to enter the European Union for less than three months. This unique list of countries posed many problems for Spain, because Spain had to denounce many Visa elimination agreements with Latin American countries. To reverse this situation, Spanish citizenship policy has favoured naturalization for Latin Americans. More recent amendments favour above all persons who were once Spanish or were descendants of Spaniards, making it easier for such people to apply for citizenship.⁸ The most recent reform extended this privilege to grandchildren of former citizens. Mostly, this affects people from countries that were major destinations for Spanish emigrants in the 20th century, such as Latin American countries.

In contrast to the usual ten years of residence one must first fulfil in order to apply for citizenship, Latin Americans must reside in the country for just two years before applying. Accordingly, naturalization figures between 1975 and 2006 show that almost two thirds (62%) of Spain's approx. 379,300 naturalized citizens come from Latin America. This situation explain why 48% of the foreign-born population who are naturalized Spanish are of Latin American origin.⁹

C. Undocumented Migrants in Spain

I. Control of Undocumented Immigration

Spanish southern border has been traditionally one of the major entry points for undocumented migration from the African continent to the European Union. Due to the rise of undocumented immigration, EU has focused on the Euro-Mediterranean area, in which Spain is considered the border between Europe and the emigration countries of Africa. The EU decided to construct a 'security belt' against undocumented migration, promote the readmission-agreements, and prepare a list of secure countries of origin as some of the instruments used by the administrations of the EU and its member states to combat the problem of undoc-

8 D. Ruiz & J. Francisco, *The Relationship between Legal Status, Rights and the Social Integration of the Immigrants*, Working Paper 84, October 2002, Center for Comparative Immigration Studies, UC San Diego, <<http://escholarship.org/uc/item/6b10r5qk>>.

9 <<http://focus-migration.hwwi.de/Spain-Update-08-200.5420.0.html?&L=1>>.

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cumented immigration away. Spain began to close its southern border since the early 90s, creating a monitoring system (Integral System of Exterior Surveillance, SIVE), in order to 'close off' the sea routes from Africa. This system facilitates more effective control of irregular maritime immigration, enabling more rapid action in critical situations.¹⁰

In the last decade, Spain also concluded agreements with various countries to control undocumented immigration to Spain, including the return of foreign workers to their countries of origin. Such agreements have been made with Colombia, Ecuador, Morocco and the Dominican Republic (all in 2001), with Romania and Poland (both in 2002), Bulgaria (2003), Peru (2004) plus others with Gambia (2006), and Mauritania and Guinea-Conakry (2007).¹¹

For this reason, at the moment the common way for irregular immigrants to enter Spain is as tourists through stays of less than 3 months. Once the legal stay has expired, the foreigners do not return to their countries. This undocumented immigration is very difficult to control, mainly for those who do not need a Visa for short stays, and because millions of tourist visit Spain every year.

II. *Immigration Offenses and Penalties*

One of the main differences between the US and Spanish migration models are the penalties for undocumented immigrants. The penalties for undocumented immigrants are much reduced in Spain, even when undocumented immigrants are working without a permit, and in no case the penalties for undocumented immigrants are of criminal nature.

The main administrative penalties immigrants (documented or undocumented) can incur are:

1. Finding a job in Spain without first seeking administrative authorization for it, when they have a temporary residence permit this activity is consider a minor offense, and it is punished with fines of up to 500 euros.
2. Finding a job in Spain without first seeking administrative authorization for it, not having a valid residence permit, or if they have a valid residence permit but they do not enlist in the Social Security. These activities are consider serious infringement, and are punished with a fine from 501 up to 10,000 euros.

There is a third kind of sanction, considered very serious infringements and punished with a fine from 10,001 to 100,000 euros, but do not apply to immigrants seeking work, working in the informal job market, or working without the required or appropriate permit.¹²

10 J. Carling, *The Merits and Limitations of Spain's High-Tech Border Control*, International Peace Research Institute, Oslo (PRIO), June 2007. MPI, Migration Information Source, in <www.migrationinformation.org/Feature/display.cfm?ID=605>.

11 <<http://focus-migration.hwwi.de/Spain-Update-08-200.5420.0.html?&L=1>>.

12 Art. 55 of the Spanish immigration act 2009 (Organic Law 2/2009, of 11 December. BOE No. 299 of December 12).

III. *Integration through Regularization Processes*

Migration is a recent and new phenomenon in Spain, so that the regulation initially approved by Spain to regulate migration was useless for three reasons: first, because contracting foreign workers was subject to very strict evaluation of the national labour market; second, when prior evaluation of the demands for foreign workers were carried out after 2000, the proposed annual quotas tended to be particularly low; and third, due to the complexities of entry procedures and the difficulty of contracting immigrants in their countries of origin.

Due to the difficulty of adjusting the urgent needs of the labour market, the number of undocumented immigrants moving to Spain increased rapidly. The massive influx of immigrants at the beginning of the 21st century received response by the governments with the creation of an erratic pattern of migration. In the words of Finotelli and Arango

“in a very short period, the Spanish foreign population came to represent 10% of the total population. Nevertheless, the growth of foreign population and, in particular, the increase in foreign workers, was not the result of an efficient immigration policy combining labour market demands and state policies”.¹³

Spain was not prepared for the arrival of thousands of undocumented immigrants in such a short period of time, so that the government's response in those moments of economic boom was the regularization of undocumented immigrants. Spain is not the only European country that has carried out regularization processes, but due to different factors, Spain and Italy are the European countries that have regularized the largest number of migrants in Europe; in concrete, since 1986, 1.2 million immigrants have been regularized in Spain.¹⁴

Regularization processes developed in Spain can be classified into two types:

1. In the regularization processes of 1989, 1991, 1996, 2000 and 2001, the main requisite to get regularization it was the duration of undocumented residence rather than having a job.
2. In 2005, it was calculated that there were more than a million illegal immigrants in Spain. The goal of 2005 regularization process was to regularize those undocumented workers with a job, and to ensure that more people would be paying Social Security contributions. In total, 1,100,000 immigrants have benefited from these regularizations, of these 578,375 of 691,655 applications in the last regularization in 2005 were approved, making it by far the most extensive legalization to date in Spain and Europe-wide.¹⁵

13 C. Finotelli & J. Arango Villa-Belda, 'Regularisation of unauthorised immigrants in Italy and Spain: determinants and effects', *Documents d'anàlisi geogràfica*, Vol. 57, No. 3, 2011, p. 498.

14 Finotelli & Arango Villa-Belda, 2011, p. 503.

15 J. Arango & M. Jachimowicz, Regularizing Immigrants in Spain: A New Approach, September 2005. MPI, Migration Information Source in <www.williamperezphd.com/articles/arango-jachimowicz-2005.pdf>.

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In 2005, undocumented immigrants were required as ‘a precondition’ to prove compliance with three requirements. First, residence (and registry) in Spain since 8 August 2004; to prove their residence in Spain, undocumented immigrants can apply for a certificate which proves his/her residence and habitual residence in the municipality. This does not mean that the municipality certifies the legal residence of the irregular immigrants registered, but it can prove the stay period in Spain in order to access ‘permanent regularization’. Second, they must have had an (informal) employment contract as well as a guarantee from the employer that the employment would be continued for at least six months (three months in agricultural jobs). And third, having no criminal records.¹⁶

IV. *Integration through Exceptional Regularization Process: ‘arraigo’*

1. *The Role of the Municipal Register*

The Spanish municipal register (Padrón Municipal) collects information about the people that live in the municipality, and has only a statistical function. Registration in the municipal register is free and there are no controls about the immigration status of the foreigners registered in it.

The municipal register is a unique instrument to record documented and undocumented immigrants for two reasons. First, municipal register figures are continuously updated by the Spanish municipalities and the results of such updating operations are periodically published by the National Institute of Statistics (INE) for the entire country. In addition, it is necessary to take into account that since 2000 most municipalities have periodically carried out campaigns to promote the registration of foreign people residing in their territory, because an important share of municipal budgets depends on its population as registered in the municipal register. And second, the municipal register contains data on the entire population living in Spain regardless of their documented or undocumented status.¹⁷

Until 1999, the counting of undocumented immigrants in the municipal register was inefficient because fear of expulsion prevented most foreigners from registering in their municipalities. The 2000 Spanish immigration regulation changed this situation offering strong incentives for registration, particularly to undocumented foreigners, for three reasons.¹⁸ First, irregular immigrants are

16 <<http://focus-migration.hwwi.de/Spain-Update-08-200.5420.0.html?&L=1>>, C. González-Enríquez, “Country Report Spain,” *Undocumented Migration. Counting the Uncountable. Data and Trends across Europe, 2009*, <<http://clandestino.eliamep.gr/wp-content/uploads/2009/02/spain.pdf>>, p. 20.

17 J.M. Pemán Gavín & A. Ezquerro Huerva, ‘El empadronamiento de extranjeros en situación irregular: sobre la capacidad de actuación de los Ayuntamientos al respecto’, *El Cronista del Estado Social y Democrático de Derecho*, No. 11, 2010, pp. 72-83. J. María & R. Álvarez, *Cambios normativos en la realidad de la extranjería en nuestro país: la nueva Ley Orgánica 4/2000, de 11 de enero, Cuadernos de trabajo social*, No. 13, 2000, pp. 109-130. Vid. C. Tolosa Tribiño, ‘Algunas cuestiones de actualidad en la jurisprudencia en materia de extranjería’, *Revista de derecho migratorio y extranjería*, No. 14, 2007, pp. 25-45.

18 Law 4/2000, on the Rights of Foreigners and their Social Integration into the Spanish Society (BOE no. 10, 12 January).

allowed to register without any negative consequence. Second, registration in the municipality is the only legal requirement to access education, public health care and other public services such as enrolment in primary schools for children. And third, regularization programs have accepted the certificate of registration in the municipal register as a proof of the length of residence in Spain.

Thanks to the voluntary registration of immigrants in the municipal register, it is relatively easy to know with certain level of accuracy the percentage of foreign (documented or undocumented) population in Spain. Usually this information has been estimated by taking the difference between the number of foreigners registered in the municipally and the number of foreigners with legal residence permits.¹⁹

2. *Exceptional Regularization Process*

The 2000 immigration Law opened up the way for extraordinary individual regularization (known as *arraigo*).²⁰ The exceptional regularization process through *arraigo* is a novelty in the European panorama, and one of the big differences between the US and the Spanish migrations models. The exceptional regularization process allows for the legalization of undocumented immigrants, on a case-by-case basis, of individuals who can prove that they are 'rooted' in the country.²¹ Since 2000, this mechanism has enabled thousands of undocumented immigrants, who have been unable to regularize their situation in Spain by other ways and meet some requirements, to be integrated into Spanish society

This exceptional measure has been subject to various regulations, and the current regulation is dated in April 2011.²² Article 124 of the 2011 regulation establishes, as an exceptional regularization process, that undocumented immigrants can obtain a permit for temporary residency (that after five years can be converted in indefinite) by the following reasons:

1. To obtain temporary residency through '*arraigo laboral*' undocumented immigrants must: 1) give proof of his/her irregular residence in Spain for at least two consecutive years, 2) give proof that she/he has no criminal records in Spain and in their country of origin during the last five years; and 3) provide proof of the existence of a labour relations in Spain for at least six months (in the regular or in the informal market).
2. To obtain temporary residency through '*arraigo social*', undocumented immigrants must 1) give proof of his/her irregular residence in Spain for at least three consecutive years, 2) give proof that she/he has no criminal records in

19 D. Ruiz, <www.ccis-ucsd.org/PUBLICATIONS/wrkg84.pdf>, pp. 22-24.

20 4/2000 Spanish immigration Law, named Organic Law on the Rights and Liberties of Foreigners in Spain and Their Social Integration.

21 Régimen de empadronamiento de extranjeros que residen clandestinamente en España, *Actualidad administrativa*, No. 16, 2004, pp. 2031-2032. Isaac Martín Delgado, 'El empadronamiento por omisión de extranjeros no comunitarios', in *Actualidad administrativa*, No. 20, 2005, pp. 2446-2457. Javier Zuloaga González, 'Contratación de extranjeros: el empadronamiento por omisión en el proceso de normalización', in *Iuris: Actualidad y práctica del derecho*, No. 123, 2008, pp. 34-37.

22 Royal Decree 557-2011.

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Spain and in their country of origin during the last five years; 3) provide proof of a labour relation of a future employment contract for at least one year (six months in agricultural jobs), and 4) give proof of family links with other foreigners who reside legally in Spain (spouses or similar affective relations, ascendants or descendants of first grade and direct line), or give proof of his social integration through a certificate issued by the regional administrative authorities.

3. To obtain temporary residency through '*arraigo familiar*', undocumented immigrants must be the parents of a child of Spanish nationality, and to have the legal responsibility of the minor.

The criteria used for the regularization process through *arraigo* are virtually identical to that applied in the extraordinary regularization campaign, with the difference that regularization through *arraigo* is a permanent and continuous regularization procedure, and are resolved on an individual basis. Despite the importance of this type of regularization, in the words of Arango and Finotelli: "even if the number of residence permits issued through *arraigo* has been increasing year on year, their effect, at least until 2009, has been limited."²³ In concrete, according to the data from the Ministry of Labor and Social Security, the number of permits issued through *arraigo* increased from about 7,200 in 2006 and 56,000 in 2008 to 77,866 in 2009.²⁴

The regularization through *arraigo* presents numbers significantly lower than those of 1989, 1991, 1996, 2000 and 2001 legalization campaigns. However, this mechanism has the virtue of avoiding the problems of mass regularization, and offers a unique opportunity for undocumented immigrants that for social, work or family reasons are fully integrated into Spanish society. In other words, regularization through *arraigo* is a central ingredient of the Spanish migration model, that is not able to solve the problem of undocumented migration by itself, but it is an open door to those undocumented migrants fully integrated into Spanish society and, therefore, contributes to maintain the social peace.

D. The Economic Crisis Consequences in the Immigration Debate

Spain focused on immigration as a positive phenomenon, due to the impact that immigration had for the Spanish economy, and because during the last quarter of the century Spain saw a dramatic fall in birth rates. Spain's fertility rate of 1.47 (the number of children the average woman will have during her lifetime) is lower than the EU average, but has climbed every year since the late 1990s, thanks to immigration. The phenomenon of immigration demands public services like health care or education, but in the case of Spain immigration does not only not

²³ Finotelli & Arango Villa-Belda, 2011, p. 512.

²⁴ <<http://www.meyss.es/estadisticas/pte/pte09/ANE/PTEp.htm>>.

reduce employment rates but raised them; specifically, immigration in the period 2000 to 2004 raised Spanish per capita income by 2.2%.²⁵

However, at the moment the economic situation in Spain is quite different than a decade ago, in concrete the number of unemployed people in Spain reached 5,273,600 in January 2012, the highest level of unemployed people ever recorded in Spain (23% in 2012, twice the average for the euro zone). This figure represents 22.85% of the workforce. During 2011, the number of people who lost their jobs increased by 12.29%, while 600,600 jobs were destroyed, representing a fall in employment of 3.26%.²⁶

The economic crisis reduced dramatically the Spanish demand for migrant workers, and, according with the 2009 Spanish immigration regulation, documented immigration depend of a specific employment offer during the first five years. For this reason, many immigrants without a job are losing their legal status. The outlook for Spain's immigrants has deteriorated dramatically, because their unemployment rate, at 32%, is well above the national average (23%), bringing the total number of unemployed foreigners to 1,225,800 which is 34.82% of all foreigners living in Spain.²⁷

The situation from the economic and social focus is contradictory because, on the one hand, Spain needs immigrant population since the future of its economy depends on it; but on the other hand, the persistent rise in Spain's unemployment rate is pushing Spanish people to become immigrants seeking employment abroad.²⁸

Due to the high unemployment of the Spanish population, in September 2008, Spain enacted new regulation²⁹ providing the voluntary return of unemployed migrant workers. The law applies only to migrants from non-EU-origin countries and with which Spain has signed bilateral social security agreements (these are twenty countries). The law provides that unemployed workers who agree to return to their home countries will be paid in advance the totality of unemployment benefits to which they are entitled. Forty per cent of the amount would be paid in Spain, and 60% in the country of origin. Further, their contributions to the social security system in Spain would be accumulated with those made in the country of origin, for purposes of calculating their future pensions.

25 R. Zapata-Barrero, 'Política del discurso sobre inmigración en España: discurso re-activo y discurso pro-activo en los debates parlamentarios', *Discurso & Sociedad*, Vol. 1, No. 2, 2007, pp. 317-369.

26 M. Fix et al., *Migration and the Global Recession. A Report Commissioned by the BBC World Service*, Migration Policy Institute, September 2009, <www.migrationpolicy.org/pubs/MPI-BBC2000062report-2010>.

27 Encuesta de Población Activa (EPA). Cuarto trimestre de 2011, in <www.ine.es/daco/daco42/daco4211/epa0411.pdf>.

28 T. Pogge, *Migraciones y pobreza*, Ciencia, pensamiento y cultura, Arbor, No. 744, 2010 (Ejemplar dedicado a: Políticas migratorias y sociedad integrada (Migration Politics and Integrate Society), pp. 571-583.

29 Real Decreto-ley 4/2008, de 19 de septiembre, sobre abono acumulado y de forma anticipada de la prestación contributiva por desempleo a trabajadores extranjeros no comunitarios que retornen voluntariamente a sus países de origen. BOE núm. 228 Sábado 20 septiembre 2008.

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As of May 2009, only about 4,000 people had taken up the Spanish government on its offer.³⁰

As long as the immigration policy does not reflect the reality, it is difficult to see any real progress towards a balance between undocumented immigration and the necessities of the Spanish labour market. However, even in a context like this Spain maintains the extraordinary individual regularization process through *arraigo*, due to the strong dependence of the Spanish economy on foreigner workers (Spain's fertility rate is 1.47) and because looks like a reasonable solution for those undocumented migrants fully integrated into Spanish society.

E. Undocumented Migrants in United States

The US immigration system currently poses monumental challenges for anyone trying to obtain proper documentation. The process to obtain a work permit or residency is a long and tedious one. The system does not differentiate between family and employment-based immigration; everyone has to go through the same process. For example, if an American citizen took a non-resident child under his protection, he would have to wait an average of fourteen years in order for the child to acquire his residency; if a permanent resident wished to bring his spouse to the United States, he would have to wait at least six years before anything could actually be done. As a result of the challenges posed by this broken system, many people simply cross the border illegally instead of following sanctioned procedures.³¹

Once undocumented immigrants are inside the United States, in many cases for years or decades, they cannot go back to their native country to fix their migratory status, unless they do it under the radar. Of course, undocumented immigrants could opt to go back legally but they would be penalized with not being able to apply for their residency for a certain amount of time. They are left with three options: they could go back to their country of origin through illegal means and wait years to obtain their residency; they could return legally, be penalized (especially in waiting time to apply for an immigrant visa) and then apply to emigrate with proper documentation to the United States waiting much longer to obtain their documents; or they could remain in a state of anonymity, without a true identity and not belonging to either place, waiting for an amnesty and a future regularization. In other words, the current immigration system in the United States encourages the third option: remaining illegally in the United States because of the penalties involved.³²

30 <www.ilo.org/dyn/migpractice/migmain.showPractice?p_lang=en&p_practice_id=29>.

31 A. Spence & L. Hamilton, *Immigration and America's Future: A New Chapter. Report of the Independent Task Force on Immigration and America's Future*, Migration Policy Institute, 2006, en <www.migrationpolicy.org/task_force/new_chapter_summary.pdf>, p. 24.

32 D. Meissner, *Comprehensive Immigration Reform in 2009, Can we do it and how?*, <www.migration-policy.org/pubs/Testimony-04-30-2009.pdf>, p. 7. L. Mañaga, *Immigration Policy and the INS, Straddling the Border*, University of Texas Press, Austin, 2003, p. 2.

As immigration continues to be a contested issue, some states have tried to regulate it by cracking down on the undocumented, as has happened recently in Arizona, Indiana and Alabama. These states treated the problem of illegal immigration as one of the causes of the current economic crisis. The aforementioned states are putting more challenges on the undocumented immigrants' lives, making it mandatory for them to carry at all times proper documentation of their legal residency. It seems ironic that this proposal comes to pass when it is not even mandatory to carry personal identification cards. Those states aim to give police officers the power to ask people for their residency documents and to make those legal documents a requirement to obtain a driver's license or to rent a house; they also seek to approve other legislative measures that would make it illegal for undocumented immigrants to apply for a job.³³

It is necessary to mention another key fact here, which is that illegal immigration is taken as seriously as a crime as homicide. As a general rule, most US states establish that a person who committed some minor crimes cannot be penalized or accused of committing the same crimes again after a certain period of time. In the case of illegal immigration, undocumented immigrants will always be penalized for being here illegally.³⁴ From this point of view, immigration is considered to be as serious a crime as homicide or other crimes of the same type in the US legal system.

Undocumented immigrants are not entitled to many rights or legal help even if they have lived in the United States for a long time and have fully adapted to their society. An important factor is what happens to the children that immigrated to the United States with their parents. What happens to them in cases where their immigration status is questioned? The children did not have a choice but to follow their parents. Now many of those children are Americanized; however, they could be deported at any moment. Deportation puts their lives at risk in what once was their native country, but has now become a foreign country to them. A few legal measures have been proposed to help undocumented children. One legislation introduced is the Dream Act.³⁵ The Dream Act allows teenagers, sixteen years of age or younger who have lived in the United States for more than five years to remain in the country as citizens if they finish college or if they complete two years of service with the military forces.

33 Oscar Celador Angón, 'Los derechos y libertades de los inmigrantes en el modelo estadounidense: a propósito de la Arizona Immigration Law SB 1070', 24 *Derechos y Libertades* 2011, pp. 144-177.

34 Meneses, Guillermo Alonso, 'Human Rights and Undocumented Migration along the Mexican-U.S. Border', 51 *UCLA Law Review* 2003-2004, pp. 267-269; T.J. Espenshade & K. Hempstead, 'Contemporary American Attitudes Toward U.S. Immigration', *International Migration Review*, Vol. 30, No. 2, 1996, pp. 535-570.

35 United We Dream, DREAM Act of 2009 Fact Sheet, available at <<http://dreamactivist.org/wp-content/uploads/2008/02/dream-act-of-2009-factsheet.doc>> According to Moisa "The DREAM Act is the immigration reform undocumented students so desperately need, and despite its failed attempts, the DREAM Act remains promising. Despite their futures' looking grim, undocumented students may have reason to keep the faith and believe that they have a chance of attaining the American Dream if the DREAM Act becomes a reality." J. Moisa, 'Dare To Dream: The Dream Act, Turning Dreams into Reality', 24 *Chicano-Latino Law Review* 2003, pp. 79-94.

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The Dream Act provides a respectable way to help the children of undocumented immigrants; however, the Senate has refused to approve this legislation. The children of undocumented immigrants live in a kind of 'legal prison', because children have the same choices as their parents to get a documented status in the United States. In many cases children did not immigrate willingly to the United States, and often they do not know the language of their country of origin. One option for undocumented immigrants is to remain in the country, anonymous, without any legal rights or legal identity. The second option is to go back to their country of origin and apply to obtain legal residency, but these children would be separated from their communities and confront a country they are not familiar with. The family and children would then wait for their migratory status to be changed in order to return to the United States.

F. Is the Spanish Exceptional Regularization Process the Solution to the US Immigration Debate?

Immigration has been an on-going topic of debate for the last decade in the United States, but there are no legislative measures taken up on this topic since 1980. Political leaders must take a stand in this controversy since this could be the difference in whether or not they get elected. No obvious resolution exists to the immigration dilemma; however, two different approaches could be taken to get closer to a solution. The US government could try to find all the undocumented immigrants and deport them (of course, that would require a lot of time and energy as well as resources); or the US government could build a new immigration system, but there are a few important issues that would need to be fixed.

1. First of all, the United States is spending too much time and energy to secure the border. This is a waste of valuable resources since, as in Spain, statistics show that the problem lies in the impossibility of distinguishing between the tourist and the 'fake tourist', *i.e.*, the immigrant that crosses the border as a tourist but with no intention of ever going back to his country. Most of the problem comes through the legal means. The answer clearly lies in identifying between the two.
2. Another key issue would be fixing the immigration system according to the economic needs of the country. It is necessary to bring in immigrants through a more effective system that would regulate their incoming flow and their length of stay. This would eliminate for the immigrant the pressure to cross the border illegally.

One of the ingredients of the new migration model should be to provide a response to the situation of the 11 million of undocumented immigrants living in the United States. It is necessary to design a permanent and continuous regularization procedure, resolved on an individual basis, which avoids the problem of mass regularization, and offers a unique opportunity for undocumented immigrants that for social, work or family reasons, are fully integrated into US society. Of course, a continuous regularization procedure is not able to solve the problem

of undocumented migration by itself, but it is an open door to those undocumented migrants fully integrated into US society and, thus, contributes to maintain the social peace.

Finally, another necessary element to take into account is the Latino lobby in the United States that has been gaining in political weight, thanks in no small part to the immigration issue, among other factors. The traditional American conservative political class sees the growth rate of the immigrant population with fear and alarm, especially because this collective presents the language and the Latin-American culture as a strong social link. The regularization of undocumented immigrants would lead to the strengthening of the Latino lobby, threatening classic American assimilationist policies. This situation could be reversed if economic resources were invested to change the way Latinos are viewed (as cheap labour), and if public policies tried to fully integrate them in to the American way of life.