AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

IMMIGRATION: ENFORCING EMPLOYEE WORK ELIGIBILITY LAWS AND IMPLEMENTING A STRONGER EMPLOYMENT VERIFICATION SYSTEM

FIELD HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYER–EMPLOYEE RELATIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

July 31, 2006, in Plano, Texas

Serial No. 109–51

Printed for the use of the Committee on Education and the Workforce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house
or
Committee address: http://edworkforce.house.gov

U.S. GOVERNMENT PRINTING OFFICE

28–875 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON EDUCATION AND THE WORKFORCE

HOWARD P. "BUCK" McKEON, California, *Chairman*

Thomas E. Petri, Wisconsin, *Vice Chairman*
Michael N. Castle, Delaware
Sam Johnson, Texas
Mark E. Souder, Indiana
Charlie Norwood, Georgia
Vernon J. Ehlers, Michigan
Judy Biggert, Illinois
Todd Russell Platts, Pennsylvania
Patrick J. Tiberi, Ohio
Ric Keller, Florida
Tom Osborne, Nebraska
Joe Wilson, South Carolina
Jon C. Porter, Nevada
John Kline, Minnesota
Marilyn N. Musgrave, Colorado
Bob Inglis, South Carolina
Cathy McMorris, Washington
Kenny Marchant, Texas
Tom Price, Georgia
Luis G. Fortuño, Puerto Rico
Bobby Jindal, Louisiana
Charles W. Boustany, Jr., Louisiana
Virginia Foxx, North Carolina
Thelma D. Drake, Virginia
John R. "Randy" Kuhl, Jr., New York
[Vacancy]

George Miller, California,
Ranking Minority Member
Dale E. Kildee, Michigan
Major R. Owens, New York
Donald M. Payne, New Jersey
Robert E. Andrews, New Jersey
Robert C. Scott, Virginia
Lynn C. Woolsey, California
Rubén Hinojosa, Texas
Carolyn McCarthy, New York
John F. Tierney, Massachusetts
Ron Kind, Wisconsin
Dennis J. Kucinich, Ohio
David Wu, Oregon
Rush D. Holt, New Jersey
Susan A. Davis, California
Betty McCollum, Minnesota
Danny K. Davis, Illinois
Raúl M. Grijalva, Arizona
Chris Van Hollen, Maryland
Tim Ryan, Ohio
Timothy H. Bishop, New York
[Vacancy]

Vic Klatt, *Staff Director*
Mark Zuckerman, *Minority Staff Director, General Counsel*

SUBCOMMITTEE ON EMPLOYER–EMPLOYEE RELATIONS

SAM JOHNSON, Texas, *Chairman*

John Kline, Minnesota, *Vice Chairman*
Howard P. "Buck" McKeon, California
Todd Russell Platts, Pennsylvania
Patrick J. Tiberi, Ohio
Joe Wilson, South Carolina
Marilyn N. Musgrave, Colorado
Kenny Marchant, Texas
Bobby Jindal, Louisiana
Charles W. Boustany, Jr., Loiusiana
Virginia Foxx, North Carolina
[Vacancy]

Robert E. Andrews, New Jersey
Ranking Minority Member
Dale E. Kildee, Michigan
Donald M. Payne, New Jersey
Carolyn McCarthy, New York
John F. Tierney, Massachusetts
David Wu, Oregon
Rush D. Holt, New Jersey
Betty McCollum, Minnesota
Raúl M. Grijalva, Arizona
George Miller, California, *ex officio*

C O N T E N T S

	Page
Hearing held on July 31, 2006	1
Statement of Members:	
Johnson, Hon. Sam, Chairman, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce	1
Prepared statement of	3
Tierney, Hon. John F., a Representative in Congress from the State of Massachusetts	4
Prepared statement of	6
Wilson, Hon. Joe, a Representative in Congress from the State of South Carolina, prepared statement of	9
Statement of Witnesses:	
Beardall, Bill, Ph.D., on behalf of the Equal Justice Center and the National Immigration Law Center	31
Prepared statement of	34
Chawkin, John, special agent in charge, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security	11
Prepared statement of	13
Luther, Jon L., chairman and CEO, Dunkin' Brands, Inc.	42
Prepared statement of	44
Martinez, Abel, vice president, H–E–B	17
Prepared statement of	19
Simmons, Geri, human resources manager, on behalf of the Society for Human Resource Management	24
Prepared statement of	26
Additional Submissions:	
American Staffing Association, prepared statement of	57
The U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security:	
Prepared statement of	52
News release	56
Fact sheet	56

IMMIGRATION: ENFORCING EMPLOYEE WORK ELIGIBILITY LAWS AND IMPLEMENTING A STRONGER EMPLOYMENT

Monday, July 31, 2006
U.S. House of Representatives
Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
Plano, TX

The subcommittee met, pursuant to call, at 11 a.m., in Plano Council Chambers, 1520 Avenue K, Plano, TX, Hon. Sam Johnson [chairman of the subcommittee] presiding.

Present: Representatives Johnson, Wilson, Tierney.

Staff Present: Loren Sweatt, Professional Staff Member; Steve Forde, Communications Director; and Guerino J. Calemine, III, Labor Counsel.

Chairman JOHNSON. Thank you. I want to thank all of you for being here. It's rare that we have hearings outside of Washington, D.C. Oftentimes we bring all these witnesses to Washington, to our committee, and it's a pleasure to be able to be here in Plano, Texas, and I want to thank Mr. John Tierney, who is from Massachusetts, for coming in. He is in the Congress on our committee, the full committee, not necessarily the subcommittee. And Mr. Joe Wilson from South Carolina, who came in as well. But he is on the subcommittee as well as the full committee.

But a quorum being present, the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce will come to order.

We are holding this hearing today to hear testimony on immigration, enforcing employee work eligibility laws, and implementing a stronger employment verification system.

With that, I ask unanimous consent that the hearing record remain open for 14 days until our member statements and other material referenced during the hearing to be submitted in the official record.

Without objection, so ordered.

I want to again welcome you all. It is an honor to host and chair one of the hearings in the heartland. Texans come face to face with illegal immigration daily, and that is why I was interested in having this discussion here, rather than in Washington D.C.

So you know it, I have heard a lot about this issue from my constituents, especially. In fact, about four out of five calls and e-mails are from constituents who are fired up about our porous borders

and want something done about it. I hear you, and I am not happy about it either. That is why we are having these hearings, to get outside of Washington, to take these issues to where they matter, in hometowns across America.

Today's hearing is the third in a series of hearings that the Committee on Education and the Workforce, and its subcommittees have held, to examine immigration reform proposals pending in both the U.S. House and the U.S. Senate.

As you all know, the subject of immigration, legal and illegal, has garnered significant attention recently.

The hearing today will focus on practical solutions to preventing illegal immigration. Specifically, we will examine the enforcement of the employee work eligibility laws that are currently on the books and look at legislative proposals that would implement a stronger employment and verification system.

This hearing is an interesting intersection between my responsibilities on the Ways and Means Committee and the Education and Workforce Committee.

As a member of the Social Security Subcommittee, in Ways and Means, I am well aware of the difficulties facing the Social Security Administration as they attempt to implement a workable employment verification system that does not compromise an individual's privacy.

We are working diligently with the Social Security Administration to resolve these issues, and have been, believe it or not, for over 10 years.

Clearly, employment is the key factor that experts point to as to why people come to this country. Our economic opportunities are legendary. A legal workforce is welcome but an illegal workforce undermines our nation's security. It is safe to assume that many illegal aliens in our country are doing what we are all doing, working hard to make a good life for themselves and their children.

What is different about them is they have broken the law to do so. Employers have been required to determine the work eligibility of their employees since 1986. Employers have two methods for verifying employment eligibility of people who have been offered employment. They can fill out the employment eligibility verification, or I-9 form, which requires review of the documents presented by the individual to determine work eligibility.

Alternatively, employers can use what is referred to as a basic pilot program. You will hear that referred to some today, and I hope you understand it. It is a computer-based system designed to weed out false claims of U.S. citizenship and counterfeit or altered documents.

The system is designed to work almost instantaneously, and I just asked Social Security if it was instant, and they said it is. I do not believe it. But it has its shortcomings, and as a result, there has been some criticism of the system.

A lot of you here today own businesses and abide by the law when it comes to employee verification. As a result, in 2005, the Social Security Administration sent about 128,000 no-match letters to employees, no match meaning they did not match up as legal, and about 8 million to employees. For those of you here who are abiding by the law, we commend you. The fact remains, however,

that it is against the law to hire an illegal alien or someone who is not authorized to work in the United States.

The U.S. House of Representatives passed an immigration bill which would provide for increased penalties and the potential for jail time for employers who knowingly violate the law. The House bill would also increase the number of employers who would be required to use the basic pilot program. Our witnesses today will discuss their experiences in using the basic pilot program, its impact on the functioning of their businesses, and suggest improvements that could be made to the system.

In addition, we will have a witness from Immigration and Customs Enforcement, or ICE, everybody calls it ICE, I-C-E-, now, who will discuss the consequences faced by those who fail to comply with the law. ICE's mandate is broad. Eliminate and identify criminal activities that pose a threat to our nation's borders. I commend them for their work and welcome them to our hearing.

[The prepared statement of Chairman Johnson follows:]

Prepared Statement of Hon. Sam Johnson, Chairman, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce

Welcome, it's an honor to host and chair one of the "hearings in the heartland." Texans come face to face with illegal immigration daily and that is why I was interested in having this discussion here, rather than in Washington, D.C.

So you know, I've heard a lot about this issue from my constituents.

In fact, about 4 out of 5 calls and emails are from constituents who are fired up about our porous borders and want something done about it.

I hear you—and I'm mad about it too. That's why we're having these hearings, to get outside of Washington and to take these issues to where they matter—in hometowns across America.

Today's hearing is the third in a series of hearings that the Committee on Education and the Workforce and its subcommittees have held to examine immigration reform proposals pending in both the House and Senate.

As you all know, the subject of immigration—legal and illegal—has garnered significant attention recently.

The hearing today will focus on practical solutions to preventing illegal immigration.

Specifically, we will examine the enforcement of the employee work eligibility laws that are currently on the books, and look at legislative proposals that would implement a stronger employment verification system.

This hearing is an interesting intersection between my responsibilities on the Ways and Means Committee and Education and the Workforce Committee.

As a member of the Social Security Subcommittee, I am well aware of the difficulties facing the Social Security Administration as they attempt to implement a workable employment verification system that does not compromise an individual's privacy. We are working diligently with the Social Security Administration to resolve these issues.

Clearly employment is the key factor that experts point to as to why people come to this country.

Our economic opportunities are legendary. A legal workforce is welcome, but an illegal workforce undermines our nation's security.

It's safe to assume that many illegal aliens in our country are doing what we're all doing, working hard to make a good life for themselves and their children.

What is different about them is that they have broken the law to do so!

Employers have been required to determine the work eligibility of their employees since 1986.

Employers have two methods for verifying employment eligibility of people who have been offered employment.

They can fill out the employment eligibility verification, or I-9 form. This requires a review of the documents presented by the individual to determine work eligibility.

Alternatively, employers can use what is referred to as the "basic pilot program." The basic pilot program is a computer-based system designed to weed out false claims of U.S. citizenship and counterfeit or altered documents. The system is de-

signed to work almost instantaneously, but it has its shortcomings and as a result, there has been some criticism of the system.

A lot of you here today own businesses and abide by the law when it comes to employee verification.

As a result, in 2005, the Social Security Administration sent about 128,000 no-match letters to employers and about 8 million no match letters to employees.

For those of you here who are abiding by the law, we commend you.

The fact remains, however, that it is against the law to hire an illegal alien or someone who is not authorized to work in the United States.

The U.S. House-passed immigration bill would provide for increased penalties and the potential for jail time for employers who knowingly violate the law. The house bill would also increase the number of employers who would be required to use the basic pilot program.

Our witnesses today will discuss their experiences in using the basic pilot program, its impact on the functioning of their business, and suggest improvements that could be made to the system.

In addition, we will have a witness from Immigration and Customs Enforcement, or ICE, who will discuss the consequences faced by those who fail to comply with the law.

ICE's mandate is broad: eliminate and identify criminal activities that pose a threat to our nation's borders. I commend them for their work and welcome them.

Chairman JOHNSON. I will introduce our witnesses in a moment. I now yield to my distinguished colleague, John Tierney, from Massachusetts, for whatever opening statement you wish to make.

Mr. TIERNEY. Well, thank you, Mr. Chairman, and I want to thank the folks here in Plano. We are pleased to be here and really appreciate the hospitality we have been shown, even in the short period of time that we have been here.

I was just telling the Chairman, I thought that with the condition of this nice city facility, I thought maybe he had gotten Federal money down here to build it.

You know, typically, we don't have hearings during the month of August but for some reason, this year, my understanding is the committees of Congress are having some 21 hearings around the country, a whole slew of them on this particular issue.

Now the issue of immigration is of course important and it has been for some time, but oddly enough, only now, with this campaign season is the Republican Congress seeing fit to hold hearings.

The bills on which we are holding hearings of course have already been voted on. The House bill has already passed and the Senate bill has already passed.

So in a sense, these hearings are about 6 years too late and millions of dollars too short. If we could just review the record for a moment since 2001. President Bush has been in office since 2001. Congress has been controlled by the Republican Party since 1995. So, in essence, in the last 6 years, it has been a Republican show, and Congress is charged with making and enforcing the laws, so I think people would be excused, if they wonder how it is, that with total control of Congress and the White House for 6 years, the party that now tells us, they are so vigorously running around the country concerned about border security and enforcement, are just now getting to deal with the issue of immigration.

But like a lot of issues, it gets a lot of rhetoric and not a lot of action.

Mr. Chairman, under the Republican Party's leadership since 1995, 5.3 million new undocumented workers have come into the United States.

In 2004, Congress passed the 9/11 Act. That act required an additional 2000 border patrol agents over the next 5 years. But in the 2006 budget request of the president, he only sought 210, about 10 percent, and Congress only funded about a thousand, about half of what the act called for. And even this year, the president doesn't look for the remainder of those positions to be filled.

That same 2004 9/11 Act also called for 800 immigration enforcement agents over the next 5 years. Congress, in the 2006 budget, only gave 350. So it is clear that our borders remain porous and that we need to act, but it's not the fault of the hard-working border patrol agents or the custom and immigration agents. They have been doing the best they can with the staff and the resources that they have.

Seven times, seven times over the last four and a half years, Democrats have offered amendments to enhance border security resources.

If those Democratic amendments had passed, and been adopted, we would now have 6,600 more border patrol agents, 14,000 more detention beds, 2,700 more immigration agents. But each of those efforts were rejected by the Republican majority.

Under President Bush, and with Republican majorities in both the House and the Senate, immigration enforcement against employers has fallen drastically.

In 1999, the Immigration and Naturalization Service, the INS, had 240 agents. In 2003, the Immigration and Customs Enforcement, ICE, as the Chairman said, only have ninety.

Audits of suspected use of undocumented labor has dropped. It reached its peak under president Clinton of 8000, and its valley under President Bush of 2,200. Fines initiated against employers have plummeted. They are now a low priority.

In fiscal year 1999, President Clinton initiated fines against 417 employers. In 2004, under President Bush, the United States initiated only three actions against employers. That is a 99 percent drop-off.

So it does seem a bit of odd timing, that the order of events as situated brings us to Plano today, and to 21 other places around the country, this August.

But today's hearing is going to focus on employment and the enforcement of employment eligibility laws, and how the electronic employment verification system should work.

We are going to hear from our witnesses, and I appreciate the fact that they're taking time out of their busy days to be with us today.

But Mr. Chairman, once again, this issue may, in a sense, be missing the beat a little bit. The title of this hearing, Enforcing Employee Work Eligibility Laws begs the question. In order to enforce employee's eligibility, the subject has to be an employee, and I think therein lies the rub in some of this.

Over the last few years, with increasing lax enforcement of labor laws, there has been an increasing trend among employers to re-

classify or misclassify workers as something other than employees, to treat employees as independent contractors.

This practice lets employers avoid immigration laws, and it also has them avoid all of our labor employment laws. In an employment verification system, if you're not an employee, then there's no reason to check on immigration status and verify it.

In employee rights regimes, if you are not an employee, you simply don't get any employee rights. You can set up a verification system and you can try to enforce it, but if you're not classifying workers as employees, you're not likely to do anything more than be chasing your tail.

If you are not first attempting to enforce the labor laws and the employment laws, and making sure employers are properly classifying workers and employees, then any discussion of verifying immigration status seems to be pointless.

If we talk about enforcement, as I said, we have seen a failure over these last 6 years of the administration to enforce those laws, and a failure by Congress to actually have the oversight.

I mentioned the figures of 417 notices to employers in 1999, and only three in 2004. The number of unauthorized workers arrested at a work site has declined by 84 percent. And I could go on.

The hospitality seems to be declining somewhat, Mr. Chairman. If I could just wrap up, I would appreciate that. I know your hospitality exceeds that of some of the others.

On labor law enforcement, we have had a steep downward slide under the Bush administration. The laws are supposed to protect all the workers, whether they're documented or undocumented. If we are serious about protecting the rights and living standards of our American workforce, and if we are serious about reducing or eliminating the incentives for employing undocumented workers, then we have to be serious about tough and effective labor law enforcement.

An undocumented worker is an exploitable worker. Employees can pay them less, or not at all, and keep them under constant threat of arrest and deportation if they attempt to complain about labor law violations.

If you remove that exploitability, then you remove a major incentive to use undocumented workers, and you ensure that the American workers receive the full protection of the law.

Mr. Chairman, I think that is what we might concentrate on in this hearing, is making sure that we have the full enforcement of all the laws, both labor rights as well as the immigration laws and verification, and I look forward to the testimony of our witnesses, and I thank you for your courtesy in allowing me to finish my statement.

[The prepared statement of Mr. Tierney follows:]

Prepared Statment of Hon. John F. Tierney, a Representative in Congress From the State of Massachusetts

Mr. Chairman, I am pleased to be here. We typically don't have hearings during recesses but, for some reason, the committees of the Congress are scurrying around the country holding a slew of hearings this August recess. I have to wonder why that is. The issue of immigration reform is an important one. We're in the midst of an immigration crisis in this country—and only now, in this campaign season, is the Republican Congress seeing fit to hold hearings on an issue for which it cannot show a single accomplishment.

Let's take a look at the record leading up to this turn of events:

• Under your party's leadership in the Congress, since 1995, we have seen 5.3 undocumented workers enter the country.

• In 2004, Congress enacted the 9/11 Act, which required an additional 2,000 Border Patrol agents being hired over each of the next five years. It sounds good, but the President and Congress have not provided the resources to make it happen. The FY2006 budget from the President only called for 210 additional Border Patrol agents, and the Congress turned around and only funded for 1,000 agents. And the President's FY2007 budget still does not adequately fund for Border Patrol.

• The 2004 9/11 Act also called for 800 more immigration enforcement agents over the next five years. But Congress's FY2006 budget only allowed for 350.

• Republicans in Congress have repeatedly voted down attempts by Democrats to adequately fund Homeland Security and implement the 9/11 Committee's recommendations on border security.

Only now, in the summer before an election, do we see this concerted campaign to hold hearings on the immigration issue nationwide. Only now, after the House passed an ill-conceived immigration reform bill, do we bother to have hearings.

It's an odd timing, an odd order of events, but let's get down to business.

This hearing today deals with the enforcement of employment eligibility laws and how electronic employment verification systems should work.

But, Mr. Chairman, once again on this issue, we are missing the boat. The title of this hearing begs the question. "Enforcing Employee Work Eligibility Laws." If you want to enforce an employee's eligibility to work under immigration laws, they have to be an employee. And there's the rub.

Over the last several years, we have seen an increasing trend among employers to reclassify and misclassify workers as something other than employees, to treat employees as independent contractors. This practice not only allows employers to get out from under immigration laws—such as complying with I-9 requirements—but also out from under all of our labor and employment laws. In an employment verification system, if you're not an employee, there is no immigration status to verify. In an employee rights regime, if you're not an employee, you have no employee rights.

We can set up an employment verification system. We can go about trying to enforce it. But if we're not classifying workers as employees, we're like a dog chasing its tail.

So a key question for any attempt to enforce employees' work eligibility is whether we are enforcing our labor and employment laws or whether we are standing by and letting the entire regime of employer-employee relations to recede into a more informal economy. If we're not first attempting to enforce our labor and employment laws, and making sure employers are classifying workers correctly as employees, then any discussion of verifying a person's employment status is pointless. It's all for show.

So let's talk about enforcement. We have not held a single, focused oversight hearing on the Department of Labor during this Administration—how and whether the Department is enforcing our labor and employment laws. The last several years we have seen a failure by this Administration to enforce either immigration laws or labor laws, both of which are critical to a sound immigration policy. This Congress has failed to hold the Administration accountable and failed to address these issues for far too long. And now the country is reaping the fruit of those failures.

Let's first talk about immigration law enforcement.

• On immigration, enforcement has fallen precipitously under the Bush Administration. The GAO recently reported some stunning numbers. The number of notices of intent to fine employers for improperly completing I-9 forms dropped 99% between 1999 and 2004, from 417 notices in 1999 to just 3 in 2004.

• The number of unauthorized workers arrested during worksite enforcement operations declined by 84% between 1999 and 2003, from 2,849 in 1999 to only 445 in 2003.

On labor law enforcement, the trend has also been on a steep downward slide during the Bush Administration. These laws are supposed to protect all workers, US-born and immigrant, documented and undocumented. If we are serious about protecting the rights and living standards of our American workforce, and if we are serious about reducing or eliminating the incentives for employing undocumented workers, then we have to be serious about tough and effective labor law enforcement. An undocumented worker is an exploitable worker—employers can pay them less or not at all, or keep them under constant threat of arrest and deportation if they attempt to complain about labor law violations. If you remove that exploitability, then you remove a major incentive to use undocumented workers. And you ensure that American workers receive the full protection of the law.

But, across the board, we see a lack of focus on labor law enforcement.

• The Department of Labor's Wage and Hour Division, which enforces our minimum wage, overtime, and child labor laws, has seen repeated budget and staffing cuts during this Administration and under this Congress. The number of Wage and Hour investigators dropped from 946 to 788 between 2000 and 2004. What was the impact? A 15% decline in the number of compliance actions completed by the Labor Department.

• The Occupational Safety and Health Administration, or OSHA, has seen similar budget and staffing cuts. For example, the President's latest budget request for OSHA results in more than an 8% cut in OSHA staffing, or the loss of 197 total positions at OSHA, since 2001. At current levels, there is one OSHA staff person for every 1,700 employers—and that's counting administrative as well as enforcement staff.

• When it comes to enforcing the right of workers to organize, our labor laws are tragically weak. The penalties for violating a worker's right to join with his fellow workers and attempt to win better pay and benefits and working conditions are so meager that many employers simply ignore the law. Every year, 22,000 workers are unlawfully fired or otherwise discriminated against for exercising their rights to associate.

• And, again, none of these laws, not work eligibility laws, not immigration laws, not labor laws, can be enforced if we allow employers to treat workers as something other than employees. More and more, we see workers lose all rights under our labor laws through misclassification—where employers misclassify an employee as an independent contractor or something other than a bona fide employee. Indeed, the Bush Administration encourages this practice—of pulling more and more workers out from under our laws. For example, the Bush National Labor Relations Board has been very keen to reclassify entire categories of workers as something other than workers, stripping them of their rights—whether it is newspaper carriers, graduate teaching assistants, disabled workers, and now possibly, in a pending case, nurses and highly skilled construction trades workers.

So when we set up a system of employment verification before first making sure employers are treating all their workers as employees, we have put the cart before the horse. When we pass an ill-conceived immigration bill and then hold hearings about it, we have put the cart before the horse. It is time that we stop putting other considerations ahead of the interests of the American people. It is time that we focus on practical solutions to the immigration crisis. It is time that we get serious about enforcement. It is time that we get serious about workers' rights. And it is time that we get serious about doing our jobs when it comes to oversight.

Chairman JOHNSON. Thank you, Mr. Tierney.

I might add that those of you who couldn't understand everything he said, he is from Massachusetts.

I would at this time now yield to my distinguished colleague, Congressman Joe Wilson, from South Carolina, for whatever statement you wish to make.

Mr. WILSON. Thank you, Mr. Chairman. I am glad to be from Southern Massachusetts of South Carolina.

I want to thank Chairman Sam Johnson for conducting today's hearing. It is an honor to be in the home of one of America's great heroes. I am a 31 year veteran myself, of the Army National Guard. I have four sons who serve in the military, and we look at Sam Johnson as a model of being a hero for the American people, Mr. Chairman, so thank you.

And I feel of course at home being here in Plano, in that South Carolina shares the bond of having had persons serve at the Alamo, and so we again respect the heritage that we have between South Carolina and Texas.

Our discussion will center on the key issue of debate surrounding illegal immigration, that is, employee verification systems and employer enforcement. The House border security bill incorporates

stringent measures for verifying and complying with employee eligibility.

Such provisions are sadly absent from the Reid-Kennedy Senate bill. I particularly understand the differences because in my legal career, I practiced some immigration law as a strong supporter of legal immigration.

As an indication of the gaps, for example, employers are currently required to inspect employees' Government-issued identification and require them to complete an I-9 form attesting to their work eligibility.

In addition to these requirements, employers may choose to screen employees through the basic pilot program which electronically verifies employees work eligibility through the Social Security and Department of Homeland Security.

While both the House border security bill and the Reid-Kennedy bill make participation in the basic part of the plan mandatory, the House bill requires employers to ensure that all of the employees are legally able to work in the United States. That is current and in the future.

In contrast, the Reid-Kennedy bill only extends the requirement to employees hired after the bill is law, not to the current employees.

Mr. Chairman, this defines logic. Employers should be held accountable for all of their employees, not just those hired after an arbitrary date. I believe, strongly, that as House Republicans take our case to the American people in August, with such hearings as we are conducting today, we will hear the same response.

The American people understand the historic differences between the House bill and the Reid-Kennedy bill. We are at a crossroads today in the United States. We can choose to effectively address our growing illegal immigration problem or we can turn a blind eye.

As we continue this debate, I hope Democrats in Congress will realize that what the average American already understands, we cannot address illegal immigration without addressing security at the border.

This passed the House in December with only strong Republican support. It is my belief that progress has been blocked by the Democratic closure threat in the Senate.

In conclusion, God bless our troops and we will never forget September the 11th.

[The prepared statement of Mr. Wilson follows:]

Prepared Statement of Hon. Joe Wilson, a Representative in Congress From the State of South Carolina

Thank you, Mr. Chairman. I want to thank Chairman Sam Johnson for conducting today's hearing. Our discussion will center on a key issue in the debate surrounding illegal immigration: employee verification systems and employer enforcement.

The House border security bill incorporates stringent measures for verifying and complying with employee eligibility. Such provisions are sadly absent from the Reid-Kennedy Senate bill.

For example, employers are currently required to inspect employees' government-issued identification and require them to complete an I-9 form attesting to their work eligibility. In addition to these requirements, employers may choose to screen employees through the Basic Pilot Program, which electronically verifies employees'

work eligibility through the Social Security Administration and Department of Homeland Security.

While both the House border security bill and the Reid-Kennedy bill make participation in the Basic Pilot Program mandatory, the House bill requires employers to ensure that ALL of their employees are legally able to work in the United States. In contrast, the Reid-Kennedy bill only extends the requirement to employees hired AFTER the bill's enactment. Mr. Chairman, this defies logic. Employers should be held accountable for ALL of their employees—not just those hired after an arbitrary date.

In conclusion, I believe strongly that as House Republicans take our case to the American people in August with such hearings as we are conducting today, we will hear the same response: the American people are on our side!

We are at a crossroads today in the United States. We can choose to effectively address our growing illegal immigration problem or we can turn a blind eye.

As we continue to debate this issue, I hope Democrats in Congress will realize what the average American already understands: We cannot address illegal immigration without addressing border security.

Chairman JOHNSON. This hearing is going to be conducted under the rules of the House of Representatives. As such we have invited witnesses for a thorough discussion of the issues. I know many of our attendees today want the opportunity to have their voices heard on the subject of today's hearing, and I would invite you to submit your statement for the record.

I know that some of you have received cards or paper to make comments on. It is not allowable for you to make comments publicly in the hearing. Our witnesses will and we will question them. But you are welcome to write your comments on those comment cards, which are in the back of the chamber, and if you want to provide your statement to the committee, we would thank you for your interest.*

With that, let me say that even any emotion, such as clapping, is not allowed in the House. However, I am going to allow that here today as long as it doesn't get out of hand, and I think you all recognize that one of our members is a Democrat, the other member on my left is a Republican, and we have structured our witnesses in the same manner.

Thank you, Mr. Wilson, for your comment.

We have a very distinguished panel of witnesses before us today, and I would like to thank all of you for coming and begin by introducing them.

Mr. John Chakwin currently serves as special agent in charge of the United States Customs and Enforcement Office of Investigation in Dallas. Mr. Chakwin oversees the immigration and customs-related investigation for North Texas and Oklahoma. He has more than 27 years of law enforcement experience and holds degrees from the University of Delaware and from George Washington University. I think we are going left to right; is that right? Right to left. OK.

Abel Martinez is a vice president, primarily responsible for risk management and compliance at H–E–B in San Antonio. He has extensive experience representing management and employers in Texas, and the Federal courts relating to labor disputes, discrimination suites, OSHA and Texas Workforce Commission pro-

*Submitted and placed in permanent archive file, comments submitted by public attending hearing. Plano, Texas. July 31, 2006.

ceedings, and all other matters involving the employer-employee relationship.

Mr. Martinez holds degrees from St. Mary's University and the University of Houston Law Center.

Ms. Geri Simmons is testifying on behalf of the Society for Human Resource Management. Ms. Simmons has more than 15 years experience as an executive in human resources and business development. She is well-versed in employment law, labor relations, and other human resources practices.

Ms. Simmons holds degrees with honors from MidAmerica University and the University of Kansas.

Professor Bill Beardall is a clinical professor of law at the University of Texas School of Law. Professor Beardall's practice has focused on civil rights and employment law for low-income individuals. He is also the executive director of the Equal Justice Center which is active in projects to assist workers.

Professor Beardall holds degrees from Rhodes College and Harvard Law School.

Mr. Jon Luther is the chief executive officer of Dunkin' Donuts, and is a 35 year veteran of the food service industry. He has a distinguished career building brands for various food service outlets. Mr. Luther holds a degree in hotel and restaurant management from Paul Smith College.

I thank you all for being here and before the witnesses begin their testimony, I would like to remind members, we will be asking questions after the entire panel has testified. In addition committee rule 2 imposes a 5-minute time limit on all questions. Also, we would ask you to limit your comments to 5 minutes, and any additional comments you wish to place in the record will be approved, without objection.

OK. I will call on Mr. John Chakwin.

STATEMENT OF JOHN CHAKWIN, JR., SPECIAL AGENT IN CHARGE, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Mr. CHAKWIN. Chairman Johnson and members of the subcommittee, it is an honor for me to appear before you today to share U.S. Immigration and Custom Enforcement's perspective on worksite enforcement and how ICE investigates and prosecutes employers who engage in the hiring of illegal aliens.

Working throughout the nation's interior, together with our DHS and other Federal counterparts, and with the assistance of state and local enforcement entities, ICE is vigorously pursuing the most egregious employers of illegal workers.

ICE is educating the private sector to institute best hiring practices, and with its support is identifying systemic vulnerabilities that may be exploited to undermine immigration and border controls.

A large part of our worksite enforcement efforts focus on preventing access to critical infrastructure sectors and sites to prevent terrorism and to apprehend those individuals who aim to do us harm.

In the past, immigration investigators, to different degrees over the course of time, focused on worksite violations by devoting a

large percentage of investigative resources to enforcement of the administrative employer sanctions provisions of the IRCA.

The resulting labor-intensive inspections and audits of employment eligibility documents only resulted in serving businesses with a Notice of Intent to Fine. Monetary fines that were routinely mitigated or ignored had little to no deterrent effect. Egregious violators of the law viewed the fines as just a cost of doing business and therefore the system did not serve as a true economic inducement for them to change their business model.

ICE's current worksite enforcement strategy is part of a comprehensive layered approach that focuses on how illegal aliens get into our country, the ways in which they obtain identity documents allowing them to become employed, and the employers who knowingly hire them.

ICE is bringing criminal prosecutions and using asset forfeiture as tools against employers of illegal aliens far more than administrative fines as a sanction against such activity.

Using this approach, ICE worksite investigations now support felony charges and not just the traditional misdemeanor worksite violations.

Of course a key component of our worksite enforcement efforts target the businesses and industries that deliberately profit from the wholesale employment of illegal aliens.

In April of 2006, ICE conducted the largest such worksite enforcement operation ever undertaken. This case involved IFCO, a Houston-based company. ICE agents executed nine Federal arrest warrants, 11 search warrants, and 41 consent searches at IFCO sites throughout the United States.

In addition, ICE agents apprehended 1,187 unauthorized workers at IFCO worksites. The criminal defendants have been charged with conspiracy to transport and harbor unlawful aliens for financial gain, as well as fraud and misuse of immigration documents.

ICE launched several investigations to enhance national security and public safety here in Texas and throughout the nation. Operation Tarmac, a worksite enforcement investigation of companies that employed illegal aliens in secure areas of the Dallas/Fort Worth International Airport, resulted in the removal of over 65 illegal aliens. An ICE spin-off investigation of this worksite enforcement operation subsequently focused on two Dallas/Fort Worth employers, Midwest Airport Services, Midwest and its parent company, Service Performance Corporation.

As a result of ICE's continued efforts, both companies were convicted in May 2006 of immigration violations related to the employment of illegal aliens and were fined a total of $750,000. Furthermore, seven managers, including the former president of Midwest, were convicted of immigration violations. Another example of ICE's worksite enforcement efforts is the arrest and removal last year of 60 illegal aliens that had been employed Brock Enterprises in their petrochemical refineries, power plants and other critical infrastructure facilities in six states. of those 60 illegal aliens, more than 40 were apprehended and removed from Brock Enterprise facilities located here, in the State of Texas.

The magnet of employment is clearly fueling illegal immigration, but the vast majority of employers do their best to comply with the law.

However, the growing prevalence of counterfeit documents interferes with the ability of legitimate employers to hire lawful workers. In short, the employment process cannot continue to be tainted by the widespread use and acceptance of fraudulent identification documents.

Accordingly, in April 2006, Deputy Attorney General Paul McNulty, and Assistant Secretary of Homeland Security for ICE, Julie Myers, announced the created of a ICE-led Document and Benefit Fraud Task Force in 11 major metropolitan areas.

These task forces focus on the illegal benefit and fraudulent document trade that caters to aliens in need of fraudulent documents in order to obtain illegal employment.

The DBF Task Forces are built on strong partnerships with U.S. Citizenship and Immigration Services, the Social Security Administration, the Postal Inspection Service, and the Departments of State, Justice and Labor.

The task forces identify, investigate, and dismantle organizations that supply identity documents that enable illegal aliens, terrorists, and other criminals to integrate into our society undetected and to obtain employment or other immigration benefits.

We look forward to working with Congress as it considers comprehensive immigration reform, including proposals to enhance worksite enforcement.

The administration has sought the authority to have additional access to Social Security administration no-match data to improve immigration enforcement. Greater access to no-match data would provide important direction to ICE investigators to target their enforcement actions toward those employers who have a disproportionate number of these no matches, who have reported earnings from multiple employees on the same number, and who are therefore likely to be engaging in unlawful behavior.

Chairman JOHNSON. Could you try to tighten up, please.

Mr. CHAKWIN. Yes. The administration has proposed a streamlined administrative fines and penalties process that gives the DHS secretary the authority to administer and adjudicate fines and penalties.

And thank you for inviting me. I would be glad to answer any questions at this time.

[The prepared statement of Mr. Chakwin follows:]

Prepared Statement of John Chakwin, Special Agent in Charge, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security

Chairman Johnson and members of the subcommittee, it is an honor for me to appear before you today to share U.S. Immigration and Customs Enforcement's (ICE's) perspective on worksite enforcement and how ICE investigates and prosecutes employers engaged in the hiring of illegal aliens.

Introduction

Among the Department of Homeland Security (DHS) law enforcement agencies, ICE has the most expansive investigative authority and the largest force of investigators. Our mission is to protect our Nation and the American people by targeting the people, money and materials that support terrorist and criminal activities. The men and women of ICE accomplish this by investigating and enforcing the nation's

immigration and customs laws. Working throughout the nation's interior, together with our DHS and other federal counterparts and with the assistance of state and local law enforcement entities, ICE is vigorously pursuing the most egregious employers of illegal workers. ICE is educating the private sector to institute best hiring practices, and with its support is identifying systemic vulnerabilities that may be exploited to undermine immigration and border controls. A large part of our worksite enforcement efforts focuses on preventing access to critical infrastructure sectors and sites to prevent terrorism and to apprehend those individuals who aim to do us harm. That is why the Administration has proposed a comprehensive overhaul of the employment verification and the employer sanctions program as part of the President's call for comprehensive immigration reform.

The 1986 IRCA and Lessons Learned

ICE has substantial experience as a result of its role in implementing the 1986 Immigration Reform and Control Act (IRCA). We know its strengths and shortcomings and I believe it will be beneficial to provide a quick review of worksite enforcement under IRCA.

In the past, immigration investigators, to different degrees over the course of time, focused on worksite violations by devoting a large percentage of investigative resources to enforcement of the administrative employer sanctions provisions of IRCA. The resulting labor-intensive inspections and audits of employment eligibility documents only resulted in serving businesses with a Notice of Intent to Fine (NIF) or a compliance notice. Monetary fines that were routinely mitigated or ignored had little to no deterrent effect. The results were far from effective and the process involved endless attorney and agent hours in discovery and litigation to adjudicate and resolve cases. Egregious violators of the law viewed the fines as just a "cost of doing business" and therefore the system did not serve as a true economic inducement for them to change their business model.

Moreover, while IRCA required employers to review identity documents demonstrating employment eligibility, its compliance standard rendered that requirement meaningless and essentially sheltered employers who had hired unauthorized aliens. Under the 1986 law, an employer could comply with the eligibility verification process by reviewing a document that reasonably appeared to be genuine. Employers were not required to verify the validity of a document and were not required to maintain a copy of the documents that they reviewed. The ability of the employer to rely on the facial validity of a single document and the lack of available evidence permitting after-the-fact review of the employer's assessment routinely prevented the government from proving that the employer knew the employee was not authorized to work. Thus, the law should reasonably require the employer to retain copies of relevant documents and information obtained during the verification process, as well as during the subsequent employment of a worker. It should also not allow unscrupulous employers to ignore highly questionable documentation or other facts indicative of unauthorized status.

Another detrimental result of the documentation compliance standard established under IRCA was explosive growth in the profitable false document industry catering to undocumented workers seeking employment.

Worksite Enforcement: A New and Better Approach

ICE's current worksite enforcement strategy is part of a comprehensive layered approach that focuses on how illegal aliens get to our country, the ways in which they obtain identity documents allowing them to become employed, and the employers who knowingly hire them.

The ICE worksite enforcement program is just one component of the Department's overall Interior Enforcement Strategy and is a critical part of the Secure Border Initiative.

ICE is bringing criminal prosecutions and using asset forfeiture as tools against employers of illegal aliens far more than administrative fines as a sanction against such activity. Using this approach, ICE worksite investigations now support felony charges and not just the traditional misdemeanor worksite violations under Section 274A of the Immigration and Nationality Act.

Of course, a key component of our worksite enforcement efforts targets the businesses and industries that deliberately profit from the wholesale employment of illegal aliens. In April of 2006, ICE conducted the largest such worksite enforcement operation ever undertaken. This case involved IFCO Systems, a Houston-based company. ICE agents executed nine federal arrest warrants, 11 search warrants, and 41 consent searches at IFCO worksite locations throughout the United States. In addition, ICE agents apprehended 1,187 unauthorized workers at IFCO worksites. This coordinated enforcement operation also involved investigative agents and offi-

cers from the Department of Labor, the Social Security Administration, the Internal Revenue Service, and the New York State Police. The criminal defendants have been charged with conspiracy to transport and harbor unlawful aliens for financial gain (8 U.S.C. 1324 and 18 U.S.C. 371), as well as fraud and misuse of immigration documents (18 U.S.C. 1546).

Worksite enforcement combats alien smuggling. Alien smuggling is the importation of people into the United States involving deliberate evasion of immigration laws. This offense includes bringing illegal aliens into the United States, as well as the unlawful transportation and harboring of aliens already in the United States. In the last few months, we have made arrests at employment agencies that served as conduits between the criminal organizations that smuggle illegal aliens into this country and the employers that willfully employ them.

As a result, and in immediate response to 9/11, ICE launched several investigations to enhance national security and public safety here in Texas and throughout the Nation. In 2002, Operation Tarmac, a worksite enforcement investigation of companies that employed illegal aliens in secure areas of the Dallas/Ft. Worth International Airport (DFW), resulted in the removal of over 65 illegal aliens. An ICE spin-off investigation of this worksite enforcement operation subsequently focused on two DFW employers, Midwest Airport Services (Midwest) and its parent company, Service Performance Corporation (SPC). As a result of ICE's continued efforts, both companies were convicted in May 2006 of immigration violations related to the employment of illegal aliens and were fined a total of $750,000. Furthermore, seven managers, including the former president of Midwest, were convicted of immigration violations.

In June of this year, an ICE investigation apprehended 55 illegal aliens working at a construction site at Dulles International Airport, just outside Washington, DC. Effective homeland security requires verifying not just the passengers that board the planes, but also the employees that work at the airports and have access to secure and sensitive areas that can be exploited by terrorists or other criminals.

Another example of ICE's worksite enforcement efforts is the arrest and removal last year of 60 illegal aliens that had been employed by Brock Enterprises in their petrochemical refineries, power plants and other critical infrastructure facilities in six states. Of those 60 illegal aliens, more than 40 were apprehended and removed from Brock Enterprise facilities located here, in the State of Texas.

Worksite enforcement also combats human trafficking. Through its worksite enforcement actions, ICE has dismantled forced labor and prostitution rings, be they Peruvian aliens in New York or Chinese aliens in Maryland. The common threads are the greed of criminal organizations and the desire of unwitting aliens to come here to work. Human trafficking cases represent the most egregious forms of exploitation, as aliens are forced to work and live for years in inhumane conditions to pay off the debt they incur for being smuggled into the country.

Worksite enforcement combats trafficking in counterfeit goods, commercial fraud, financial crimes, and export violations. ICE enforcement efforts leverage our legacy authorities to fully investigate offenses that involve the employment of illegal aliens to promote and further these other crimes.

By careful coordination of our detention and removal resources and our investigative operations, ICE is able not only to target the organizations unlawfully employing illegal workers, but to detain and expeditiously remove the illegal workers encountered. For example, in a recent case in Buffalo, New York, involving a landscape nursery, 34 illegal workers were apprehended, detained, and voluntarily repatriated to Mexico within 24 hours.

Such actions send a strong message to illegal workers here and to foreign nationals in their home countries that they will not be able to move from job to job in the United States once ICE shuts down their employer. Rather, they will be detained and promptly deported.

Another recent example of our worksite efforts occurred in May of 2006, when 85 unauthorized workers employed by Robert Pratt and other sub-contractors for Fischer Homes, Inc., were arrested as part of an ICE-led joint federal, state, and local investigation. In this case the targets of the investigation knowingly harbored, transported, and employed undocumented aliens. Five supervisors were arrested and charged with harboring illegal aliens.

What impact will this have? Criminally charging employers who hire undocumented aliens will create the kind of deterrence that previous enforcement efforts did not generate. We are also identifying and seizing the assets that employers derive from knowingly employing illegal workers, in order to remove the financial incentive to hire unauthorized workers and to pay them substandard wages.

The magnet of employment is clearly fueling illegal immigration, but the vast majority of employers do their best to comply with the law. ICE has provided training

and tools on its website to help employers avoid violations. However, the growing prevalence of counterfeit documents interferes with the ability of legitimate employers to hire lawful workers. In short, the employment process cannot continue to be tainted by the widespread use and acceptance of fraudulent identification documents.

Accordingly, in April 2006, Deputy Attorney General Paul McNulty and Assistant Secretary of Homeland Security for ICE Julie Myers announced the creation of ICE-led Document and Benefit Fraud (DBF) Task Forces in 11 major metropolitan areas. These task forces focus on the illegal benefit and fraudulent document trade that caters to aliens in need of fraudulent documents in order to obtain illegal employment. The DBF Task Forces are built on strong partnerships with U.S. Citizenship and Immigration Services, the Social Security Administration, the U.S. Postal Inspection Service and the Departments of State, Justice and Labor. The task forces identify, investigate, and dismantle organizations that supply identity documents that enable illegal aliens, terrorists, and other criminals to integrate into our society undetected and to obtain employment or other immigration benefits.

New Tools

ICE has made substantial improvements in the way it investigates and enforces worksites. DHS supports several of the additional tools contained in pending legislation. We look forward to working with Congress as it considers comprehensive immigration reform, including proposals to enhance worksite enforcement.

Social Security No-Match data

The Administration has sought the authority to have additional access to Social Security Administration no-match data to improve immigration enforcement. Greater access to no-match data would provide important direction to ICE investigators to target their enforcement actions toward those employers who have a disproportionate number of these no-matches, who have reported earnings for multiple employees on the same number and who are therefore more likely to be engaging in unlawful behavior.

Fines and Penalties: A Proposed Model

Although criminal prosecution of egregious violators is our primary objective in worksite cases, a need exists for a new and improved process of issuing fines and penalties that carry a significant deterrent effect and that are not regarded as a mere cost of doing business. The United States can have an effective worksite enforcement program only with a strong compliance program, combined with issuance of meaningful, enhanced penalties that compound for repeat offenders.

The Administration has proposed a streamlined administrative fines and penalties process that gives the DHS Secretary the authority to administer and adjudicate fines and penalties. We would further propose a penalty scheme that is based on clear rules for issuance, mitigation and collection of penalties.

As I have outlined in my testimony, ICE has greatly advanced its worksite enforcement program and its efforts are part of a comprehensive strategy that focuses on several different layers of the problem simultaneously, including illegal employment, document and benefit fraud, and smuggling.

Our responsibility at ICE is to do everything we can to enforce our laws, but enforcement alone will not solve the problem. Accordingly, the President has called on Congress to pass comprehensive immigration reform that accomplishes the following objectives: strengthening border security; ensuring a comprehensive interior enforcement strategy that includes worksite enforcement; establishing a temporary worker program; and addressing the population of undocumented workers already in the United States. Achieving these objectives will dramatically improve the security of our infrastructure and reduce the employment magnet that draws illegal workers across the border, while eliminating the mistakes that accompanied the 1986 legislation.

ICE is dedicated and committed to this mission. ICE agents are working tirelessly to attack the egregious unlawful employment of undocumented aliens that subverts the rule of law. We are working more intelligently and more efficiently to ensure the integrity of our immigration system. That is why we, and the President, support comprehensive immigration reform that includes interior and border enforcement in addition to a temporary worker program and a plan for addressing the current illegal population. We look forward to working with this Subcommittee in our efforts to secure our national interests. Thank you for inviting me and I will be glad to answer any questions you may have at this time.

Chairman JOHNSON. Thank you, sir.

I appreciate your comments. Mr. Martinez, you are welcome to begin.

STATEMENT OF ABEL MARTINEZ, VICE PRESIDENT, PARTNER RELATIONS, RISK MANAGEMENT AND COMPLIANCE, H–E–B

Mr. MARTINEZ. Chairman Johnson, committee members, I want to say thank you, first of all, not just for allowing me the opportunity to be here and give you my views and opinions on an employment verification system, but thank you for all the work that you do each and every day.

Chairman JOHNSON. Get a little closer to the mic.

Mr. MARTINEZ. I was going to say I just want to thank the committee, and Chairman, the work that you do every day to help our great country and the great State of Texas. I know this is a very contentious issue, regardless of which side you are on. Everybody has their opinions on this very important issue, and it is a very important issue for our country and the State of Texas.

I just really want to introduce myself, Abel Martinez. I am with H–E–B. I don't know how much you guys know about H–E–B out there in the audience, but, you know, what we do is we are a company that have been around for a 100 years.

We grew up small. We started in 1905. We started with one store. We think of ourselves as retailers who focus on the grocery business. We now have 300 stores. We do business in Texas and Mexico. We have over 12 billion in sales, and I think one thing that really sets us apart from a lot of our competitors or other companies is that we donate over 5 percent of our pretax dollars to nonprofit organizations in communities that we serve and in communities that we don't serve.

So I think that kind of explains a little bit about our culture and what we do, and when it comes to immigration enforcement, I think we are very good on making sure we follow the law, and we expect the people we do business with, our vendors and contractors, to also follow the law.

Of course we comply with I-9 requirements. We train our folks that do the interviewing and the hiring on I-9 requirements. We have had INS come in, Department of Homeland Security come in to do training for us, as well on I-9 requirements.

We conduct annual audits, and on 60,000 employees who we call partners, that's not always an easy and inexpensive task, but we do that because we realize how important it is to make sure our workforce is here legally.

We also require our contractors to ensure, both contractually, that they are complying with I-9 laws, and we require them to sign a notarized written affidavit under the law, under the penalties of perjury, that they are complying with all I-9 requirements as well.

And I can sit here and testify about the need for stronger enforcement because I think we need it. I can testify about the need for better verification systems because I think we need it. I also can testify about the needs we have to make sure that we fix our system, and we have a comprehensive immigration reform system that will address the issues that we face today.

As far as the Senate Bill 2611, and the House Bill 4437, each one of those bills takes into consideration some employment verification

measures. We believe that some of the provisions in each bill are good. We think some of the provisions in each bill aren't so good, they need some work, and so I would like to hit on a few of them, and I strongly support a verification system that is fast, that is efficient, and accurate. I think those are extremely important in any type of verification that we have.

And when it comes to making sure our system is fast, I think we should strive toward a system that allows employers to be able to determine whether or not they should hire somebody within 24 hours.

Chairman Johnson, you stated earlier that the Social Security Administration told you that it was instant. I have a hard time understanding that because I know from time to time, it does take days and days to get back confirmation on someone you are running a check on.

So I see an issue there. We need to speed up the process, and I am hoping that Congress can dedicate enough resources to make sure that we have a system that will work.

At H–E–B, we conduct a criminal background check on every single employee we hire, and we usually get those results back within 24 hours, and it's a third party independent company that we use. They, at some times, will go in and check courthouse records manually, to determine whether or not somebody has a criminal background, and as part of that process, they are able to turn around those results within 24 hours.

I am hopeful that Social Security Administration, with one data base, would be able to have that information and be able to turn that around within 24 hours. That would be extremely helpful to employers and be extremely helpful to enforce the laws of the United States.

So I ask the committee to look at that and really push very, very aggressively on a system that would be fast, 24 hours, and a system that will allow us to also have a conditional offer of employment based upon conducting that verification on employment status.

Right now, what we have is within 3 days of hire, you have to fill out the I-9 form, a paper form, and then after that you wait for, you know, basically some results from the basic pilot program to give you those results back. And sometimes it takes days.

But if we could have a system that allows employers to make a conditional offer of employment, that is, to tell the applicant you have the job subject to passing what we have, a criminal background check or background reference check, and then also your work status.

If we can have it as a conditional offer, allow us to get moving on that, so that we don't have delays of days and days, that would certainly help the system become much more efficient, rather than having or requiring employers to wait until after somebody physically starts working in order to gather that information. It would also be efficient if we could do away with any paper type requirements. Requiring employers to have a paper I-9 form, and then also requiring them to have an electronic verification system, becomes very burdensome on employers. It is very difficult to do both on the recordkeeping side.

Right now, we have to basically fill out the I-9 forms, and in order to have a process, in order to get those forms back because we are a large employer, we scan those in, image each one of those in, so that we can retrieve those quickly, so that we can conduct an audit. Because every year we conduct an audit, and so it makes it much easier and faster for us.

If we went through an electronic system, that would be even faster but it would not require the need for us to keep paper documents. And also looking at making sure it is accurate. Both sides have their versions of which system would be better as far as when it comes to verification. We have got to have a system that is accurate.

The error rates under the basic pilot program are very high, regardless of who you talk to, percentage-wise, they are very high, and so I would ask the committee to ensure that we have got a system that is accurate and if fast.

And finally, there is verification requirement under both bills. We ask the committee to seriously consider not going too far back and making it large employers or any employer go back and have to reverify the workforce when they have already been complying with the laws.

Just to wrap it up, I would like to thank you for your time, and I appreciate you giving me the opportunity to be here on behalf of H–E–B and EWIC, the Essential Workers Immigration Coalition, and I again thank you for your time.

[The prepared statement of Mr. Martinez follows:]

Prepared Statement of Abel Martinez, Vice-President, H–E–B

Mr. Chairman and Members of the Committee: On behalf of H–E–B, I would like to take this opportunity to thank you for your service to our country and for your efforts in developing a reasonable and comprehensive immigration reform initiative that will benefit our great country and the great State of Texas.

From our beginning as a small grocery store in Kerrville, Texas, H–E–B has grown to be the largest, privately held company in Texas. Since 1905, H–E–B has grown to include more than 300 stores in Texas and Mexico. H–E–B is also one of the few companies in the nation that donates over 5% of its pretax earnings to charitable and non-profit organizations. We employ 60,000 people whom we call Partners. We recently celebrated our 100th anniversary, and for over 75 years, we have served the communities of South Texas.

I am very pleased that this Committee is addressing the critical issue of security and guest worker programs and their impact on immigration policy. My testimony, however, will focus on the employment verification issues raised by the Committee.

Although H–E–B, like many other employers, takes great care to ensure that its employees are authorized to work in the United States, H–E–B supports a new EEVS, within the context of comprehensive immigration reform. The prevalence of false documents makes it difficult for an employer to know who is authorized to work and who is not. Employers need an efficient, accurate, and reliable system to ensure that the workers they hire are indeed authorized to work.

There are currently two differing versions of electronic employment verification procedures in the House and Senate bills, one found in Title VII of the House-passed Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) and the other found in Title III of the Senate-passed Comprehensive Immigration Reform Act of 2006 (S. 2611). Both proposals seek to establish a new way of verifying the employment eligibility of the American workforce. The House version relies on the current I-9 system for identity verification while modifying and expanding the current voluntary "Basic Pilot Program" and imposes it on all employers. The Senate version modifies the current I-9 system and builds on the principles of the Basic Pilot, but takes a much different approach overall.

The Basic Pilot Program is the only EEVS in use, and the strengths and weaknesses of that program can be used to guide decision-making concerning the development of any new mandatory system when expanded to over seven million employ-

ers and over 140 million employees. It is also worth noting that although the program is commonly referred to as "electronic" in nature, both the House and Senate EEVS versions will retain paperwork requirements designed to verify the identity of workers at least until such time as a system imposes biometric identifiers on all workers. This is an issue which has not received a great deal of attention, and is beyond the scope of this testimony, but is clearly a major issue that will have to be dealt with in the future.

Accuracy of the Underlying Databases for the Basic Pilot Program

The accuracy of the underlying databases, maintained by DHS and SSA, continues to be an issue for the Basic Pilot Program. These databases struggle to keep pace with status or name changes among our fast growing population.[1] Historically, the error rates of government agency databases tend to be extremely high.[2] For example, error rates for Internal Revenue Service data and programs are typically in the range of 10-20%.[3] A Government Accounting Office ("GAO") study on databases used for alien employment verification, pre-Basic Pilot, found that 20% of a sample of Immigration and Naturalization Services ("INS") data on aliens was incomplete and 11% of the files contained information that was erroneous.[4] The National Law Journal reported approximately ten years ago that files on 50,000 Guatemalan and Salvadoran aliens regularly contained the first, middle, and surnames in the wrong field.[5] This is still a common occurrence today because Hispanics tend to have compound names and the first part of the last name is routinely written as the middle name.

The National Law Journal also discovered that proper name searches came out blank because other data was also routinely entered into the wrong data field; there were rampant misspellings, and numbers were often entered where letters should have been.[6] Even Social Security files have been found to contain error rates in 5-20% of cases.[7] In fact, INS itself estimated that it would be unable to electronically verify employment eligibility in some 35% of all cases due to delays in updating computer records, name-matching problems, and errors in the database.[8]

Error Rates

The law that created the Basic Pilot Program required the INS to have an independent evaluation of the program before it would be extended.[9] The INS chose two research firms, the Institute for Survey Research at Temple University ("ISR") and Westat, to do the independent evaluation.[10] In January 2002, the Basic Pilot Evaluation Summary Report was published and in June 2002, the "more in-depth empirical evaluation," Findings of the Basic Pilot Program Evaluation, was published.[11] The latter, as the U.S. Citizenship and Immigration Services (CIS) readily admits, is an excellent, comprehensive, and well-researched report that continues to serve as the basis for the debate, in part because the subsequent DHS publications and responses have not been as thorough or as well documented.[12]

As these reports found, there are deficiencies with the Basic Pilot Program. For example, while the final outcome for 87% of the verification submissions was employment authorization confirmation at one of the four stages, less than 0.1% (159 persons) were found between 1999 and 2002 to be unauthorized to work in the United States.[13] The remaining 13% never reached a final determination.[14] In other words, approximately one in eight verification submissions was never resolved, which leads to the conclusion that the Basic Pilot Program does not have the appropriate consistency checks, and that the information caught by the submission database is not sufficient for evaluation purposes and quality control.[15] There are many reasons for these and other inconsistencies.[16]

The most compelling error-rate is the false-negatives. The generally published statistic is that the rate of false-negatives is 20%. This data is found on page 88 of the June 2002 ISR and Westat report. It shows that out of 364,987 transactions, only about 69.9% came out authorized on the first attempt, while about 17.1% came authorized only after two or more attempts or stages, the latter percentage (17.1%) comprises all the verified false-negatives. As mentioned, 13% of the total never reached a final determination and through statistical modeling, the study team estimated that up to 10% of total submissions were probably unauthorized workers, which means that at least the other 3% that never reached a final determination were also false-negatives.[17] And, of course, 17.1% plus 3% gives the 20% false-negatives estimate that most experts have been using.

The 20% is a conservative estimate and other groups and individuals sometimes use higher rates. For example, the rate of false-negatives for foreign-born workers-even naturalized U.S. citizens-is estimated to be anywhere between 35% and 50%. In addition, the numbers above are based on 364,987 "transactions."[18] During the period tested there actually were 491,640 "queries."[19] A query occurs every time an

employer enters a submission in the SSA or DHS database.[20] An employer may have multiple queries for one employee.[21] There are a number of reasons for these multiple queries, which include entering new information for the same employee after a tentative non-confirmation is issued-done instead of a worker initiating an appeal.[22] The independent evaluation uses transactions as the unit for analysis, which combines, and counts as just one, multiple queries for a specific Social Security Number by the same employer.[23] Thus, using transactions as the unit of analysis, instead of queries, and considering multiple entries with corrected information due to a tentative non-confirmation as just one submission, leads to a lower rate of false-negatives.

Translating Error Rates into Basic Terms

The basic translation of error rates is that 20% of properly work authorized individuals are told initially that they are not authorized to work. The independent evaluation stated that "[a]pproximately one-third of employers using the pilot system reported that it is easy to make errors when entering information."[24] In fact, relying on informal INS surveys, the independent study indicated that "approximately 20 percent of employees who faxed or visited an INS status verification office did so because of employer input errors."[25] Last name changes due to marriage and compound last names are two of the explanations for this error. The independent study stated that "a specific employer data entry problem noted by some Federal respondents is the difficulty of entering compound surnames. * * * The problem is especially likely to arise with certain foreign-born employees and could contribute to the much higher error rate observed among these employees."[26] The result is often an incorrect tentative non-confirmation (false-negative).[27]

When an employer does not catch an error, it results in "more significant burden on employees, employers, and the Federal Government."[28] The independent study went on to say, back in 2002, that DHS could probably solve part of the problem by modifying "the software * * * to check Federal records to determine whether the entered Social Security number or Alien Number has been issued to someone with a compound name containing the name in question * * * improv[ing] the user friendliness of the Basic Pilot system and mak[ing] it less error prone." The in-depth ISR and Westat independent evaluation and independent analysis is approximately 400 pages long. Before expanding the Basic Pilot to all 50 states, Congress mandated DHS to submit a report to Congress by June 1, 2004.[29] DHS acknowledged that the most serious deficiency, noted by the evaluation, was that the Basic Pilot Program frequently resulted in work-authorized employees receiving tentative non-confirmations (false-negatives).[30] It stated further that employers and employees incur costs in the process of resolving these erroneous findings.[31] DHS also acknowledged that since foreign-born employees were more likely to receive erroneous tentative non-confirmations than were U.S.-born employees, these accuracy problems were also a source of "unintentional discrimination against foreign-born employees," including many that are U.S. citizens.[32] As DHS stated before Congress, the vast majority of employers wish to comply with the law, but the government also needs to provide them with the tools needed to properly and easily screen for undocumented workers.[33]

Current Proposals

The possible harm to employers, United States citizens, and legal immigrants, due to a flawed EEVS should not be taken lightly or understated. The high consequences of government errors should be paired with real safeguards for those most affected by such errors. Obviously, delays in the hiring of workers while verification problems are sorted out will have an adverse impact on the ability of businesses, especially smaller businesses, which inherently have less flexibility, to operate.

Under both the House and Senate versions, employees will be responsible for appealing wrongful determinations and dealing with the federal bureaucracy to fix errors. The ISR and Westat evaluation found that when employers contacted the INS and SSA in an attempt to clarify data, these agencies were often not very responsive or accessible with 39% of employers reporting that SSA never or only sometimes returned their calls promptly and 43% reporting a similar treatment by the INS.[34]

Hence, Congress needs to ensure that any new EEVS minimizes errors to de minimis levels, is prompt under real-life working conditions, and contains a mechanism in which errors can be quickly rectified. Even an extremely low error rate of 1% would still translate into about 1.4 million false-negatives, and, thus, the improper disqualification of millions of potential workers, including U.S. citizens.

Both employers and employees should receive a fast, accurate, and reliable response within a reasonable amount of time. Keeping employees in a "tentative non-

confirmation" limbo is unfair to everyone. Forbidding employers from firing tentatively non-confirmed employees, but then using this data to investigate employers is unfair and impractical. Employers must be able to receive a final, accurate, answer upon which they can rely, within a reasonable period of time. One measure voiced by employers to accelerate the verification process is to allow employers the opportunity to make conditional offers of employment to applicants, which would allow the employer to obtain employment verification prior to the actual start or hire date of the applicant. This would also allow the applicant/employee the opportunity to correct their information, if needed, prior to his/her start date and reduce the likelihood of any interruption in their work.

Further, the Senate version creates a final default confirmation/non-confirmation when DHS cannot issue a final notice of employment eligibility within two months of the hiring date. While two months for a final default notice is too long, this provision is still incredibly important in cases where the government is unable to reach a final decision within a reasonable timeframe. It works as a default confirmation until the accuracy rates reach acceptable levels. Without this provision, millions of authorized workers could potentially be denied employment because of a government error. Once the GAO can certify that the EEVS is able to issue a correct final notice 99% of the time, then, instead of default confirmations, the system will issue default non-confirmations and the employer will be legally required to fire the worker.

There are ways to reduce the lag time from two months to a more reasonable time frame: reducing the time allowed for the reply from DHS when the initial electronic request is submitted (e.g., from 10 days to 3 days), reducing the time period for the default notice after the contest has been submitted (e.g., from 30 days to 10 days), and allowing employers to submit the initial inquiry about two weeks before the first day of employment so the clock starts running earlier. To prevent the latter provision from being used as a pretext for pre-screening, there would have to be a set start date in place and the date could not be changed based on an initial tentative non-confirmation. These three changes would allow the new employer to have a final determination within two weeks of an employee's first day at work, instead of about 60 days as currently envisioned in S. 2611. Of course, an employer should continue to have the option of submitting its initial inquiry shortly after the new employee shows up for his or her first day at work or, in the case of staffing agencies, when the original contract with the agency is signed.

Cost Concerns for Employers of a Nationwide Mandated Program

H.R. 4437 has targeted the Basic Pilot Program for conversion into a mandate on employers-rather than a mostly voluntary program-and seeks its expansion to all 140 million U.S. workers. Currently, only about 4% of employers use the system.[35] The Senate version will also rely on the same databases used by the Basic Pilot Program and, thus, will have similar challenges.

In addition to the government cost of hiring more verifiers, modernizing the system, and purchasing and monitoring additional equipment, the GAO, in its most recent report, relying in part on the ISR and Westat independent evaluation, estimated "that a mandatory dial-up version of the pilot program for all employers would cost the federal government, employers, and employees about $11.7 billion total per year, with employers bearing most of the costs."[36] (Emphasis added.) This would be the cost of mandating the other 96% of employers to be linked into the database.

Employers would also need to train employees to comply with the new law's requirements and devote a great deal of human resources staff time to verifying and re-verifying work eligibility, resolving data errors, and dealing with wrongful denials of eligibility.[37] In particular, data errors and technological problems would lead many employees to start work as "would-be employees."[38] This could lead to a substantial decrease in productivity, especially when the work to be done is seasonal or time-sensitive.[39] Employers would also have to deal with the possibility of another level of government bureaucracy with random "on-site auditing" powers.[40] Finally, employers who already will incur many internal costs of meeting the requirements of a new EEVS, should not be subject to a fee to pay for the cost of building the system itself-this should be and is a government function.

Implementation Timetable

GAO continues to call attention to the weaknesses in the Basic Pilot Program that have been reported, including delays in updating immigration records, false-negatives, and program software that is not user friendly.[41] Specifically, GAO has reported on additional problems and emphasizes "the capacity constraints of the system [and] its inability to detect identity fraud."[42] Also, in fiscal year 2004, 15% of

all queries handled by the Basic Pilot Program required manual verification because of data problems.[43] Recently, GAO reiterated its conclusion that as of now the Basic Pilot Program is not prepared to handle the abrupt increase in participation, particularly at the degree mandated by H.R. 4437.[44]

Given these concerns, the EEVS should be phased in and tested at each stage, and expanded to the next phase only when identified problems, the "kinks" in the system, have been resolved. The best approach would be for the program to move from one phase to the next only when the system has been improved to take care of inaccuracies and other inefficiencies ascertained through the earlier phase. This would also allow DHS to properly prepare for the new influx of participants. In addition, employers should only be required to verify their new employee, as existing employees have already been verified under the applicable legal procedures in place when they were hired. Re-verifying an entire workforce is an unduly burdensome and costly proposition-and unnecessary given how often workers change jobs in the United States.

Conclusion

H–E–B urges you to work with the business community to create a workable EEVS within the context of comprehensive immigration reform. This includes:

- An overall system that is fast, accurate and reliable under practical real world working conditions;
- A default confirmation/non-confirmation procedure when a final determination is not readily available;
- A phase-in to guarantee proper implementation at every level;
- A reasonable approach to the contractor/subcontractor relationship;
- An investigative system without artificially created incentives in favor of automatic fines and frivolous litigation;
- Accountability structures for all involved-including our government;
- Provisions to protect first-time good faith violations caused by the ever-changing federal regulations;
- Congressional oversight authority with independent studies.

Employers will be at the forefront of all compliance issues. Thus, employers should be consulted from the start in the shaping of a new EEVS-to ensure it is workable, reliable, and easy to use.

Finally, H–E–B would like to reiterate that the new EEVS needs to be done within the framework of comprehensive immigration reform.

I wish to thank you again for this opportunity to share our views, and I look forward to your questions.

ENDNOTES

[1] NILC, Basic Information Brief: Employment Verification Programs, at 4.
[2] John J. Miller and Stephen Moore, A National ID System: Big Brother's Solution to Illegal Immigration, Policy Analysis no. 237, September 7, 1995.
[3] Daniel J. Pilla, How to Fire the IRS, at 68-69, 1994.
[4] General Accounting Office, Immigration Reform: Alien Verification System Data Base Problems and Corrective Actions, June 1989.
[5] Anne Davis, Digital IDs for Workers in the Cards, National Law Journal at 1-21, April 10, 1995.
[6] Anne Davis, Digital IDs for Workers in the Cards, National Law Journal at 21.
[7] Consumers Union, What Are They Saying about Me?, April 29, 1991.
[8] National Immigration Law Center, Basic Information Brief: Employment Verification Programs at 4.
[9] Tyler Moran, National Immigration Law Center, Written Statement to the U.S. Senate Committee on the Judiciary on Employment Verification Systems in Comprehensive Immigration Reform, at 2, October 18, 2005.
[10] F. James Sensenbrenner, Committee on the Judiciary, Report Together With Dissenting Views to Accompany H.R. 2359, 108th Congress Rept. 108-304, at 4, October 7, 2003.
[11] U.S. Citizen and Immigration Services, Employment Verification Pilot Evaluations, found at *http://uscis.gov/graphics/aboutus/repsstudies/piloteval/PilotEval.htm* on February 15, 2006.
[12] Id.
[13] Institute for Survey Research at Temple University (ISR) and Westat, Findings of the Basic Pilot Program Evaluation, at 81-82, June 2002.
[14] ISR and Westat, Findings of the Basic Pilot Program Evaluation, at 84.
[15] ISR and Westat, Findings of the Basic Pilot Program Evaluation, at 87.
[16] Id.
[17] ISR and Westat, Basic Pilot Evaluation Summary Report, at vi, January 2002.
[18] ISR and Westat, Findings of the Basic Pilot Program Evaluation, at 81, footnote 63.
[19] Id.
[20] ISR and Westat, Findings of the Basic Pilot Program Evaluation, at 81, footnote 63.
[21] Id.
[22] Id.

[23] Id.
[24] ISR and Westat, Findings of the Basic Pilot Program Evaluation, at 122-123.
[25] Id.
[26] Id.
[27] Id.
[28] Id.
[29] NILC, "Basic Pilot" Employment Eligibility Verification Program Expanded Nationwide, Immigrants' Rights Update, Vol. 18, No. 8, December 22, 2004.
[30] NILC, "Basic Pilot" Employment Eligibility Verification Program Expanded Nationwide.
[31] Id.
[32] Id.
[33] Stewart A. Baker, Assistant Secretary for Policy at DHS, Testimony Before the Subcommittee on Oversight of the House Committee on Ways and Means, February 16, 2006.
[34] ISR and Westat, Basic Pilot Evaluation Summary Report, at 18, January 2002.
[35] Government Accountability Office, Immigration Enforcement: Weaknesses Hinder Employer Verification and Worksite Enforcement Efforts, at 20-21 and Appendix IV, August 2005.
[36] GAO, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, at 29.
[37] Sparapani, Memorandum on Problems with Employment Eligibility.
[38] Id.
[39] Id.
[40] DHS, Report to Congress on the Basic Pilot Program, at 8.
[41] Barbara D. Bovbjerg, Director, Education, Workforce, and Income Security Issues at GAO, Testimony Before the Subcommittee on Oversight of the House Committee on Ways and Means, February 16, 2006.
[42] Id.
[43] GAO, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, GAO-05-813, at 23, August 2005.
[44] Barbara D. Bovbjerg, Testimony Before the Subcommittee on Oversight, during Questions and Answers period. Failure to Comply with the Regulatory Flexibility Act: IRS Endangering Small Businesses Yet Again.

Chairman JOHNSON. Thank you. I appreciate your testimony. You know, we were discussing it here, a moment ago, it should be instant, and when I asked Social Security Administration if it was, they said it was. I didn't realize you had to have a paper trail. I don't understand that, but as a matter of fact, being on the Social Security subcommittee, I remember, well, in 1995, that is what? 10 years ago, we gave them 5 million bucks to get their computer system up to speed so it would be instantaneous.

And they have yet to do it. What you guys don't realize out there, sometimes you tell these Government agencies to do something, and they actually don't do it.

And it isn't always the Senate's fault either.

Ms. Simmons, go ahead with your testimony, please.

STATEMENT OF GERI SIMMONS, HUMAN RESOURCES MANAGER, SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Ms. SIMMONS. Thank you, Chairman Johnson.

Chairman Johnson, members of the Subcommittee on Employer-Employee Relations, I am Geri Simmons.

Chairman JOHNSON. Get into your microphone, please.

Ms. SIMMONS. I am Geri Simmons, H.R. manager for a large food processing corporation here in Texas. I appear today on behalf of the Society of Human Resources and am grateful for this opportunity to provide testimony.

SHRM, which is the Society for Human Resources, is well-positioned to provide insight on the current and proposed employment verification system as we H.R. professionals are on the front line with organizations and administer the current verification requirements.

We agree that the current employment verification system is in need of reform. The details of a new employment verification and

worksite enforcement system do matter. We caution Congress to carefully consider the implications of any new employment system, as it will touch all our lives, both employer and employee.

As you know, we, as employers, are required to review documents presented by employees, and after review, employers are required to attest on a I-9 that they have reviewed the documents, and that they appear genuine and authentic.

Even in the best circumstances, H.R. professionals encounter a number of challenges complying with the current employment verification requirements.

According to a survey conducted by SHRM in 2006, 60 percent of H.R. professionals indicate that they continue to experience problems with the current verification requirements.

This, unfortunately, has been my experience as well. In my H.R. role, I have seen documents presented for employment verification purposes that are clearly fraudulent, while the validity of others are uncertain.

Another challenge is the reverification of workers authorized documents that expire. Approximately 30 percent of the employees that come to our organization use documents that have an expiration date. When an individual work authorization document nears an expiration date, my office must contact the employee and require him or her to update and reverify the work authorization form or the I-9 form.

In addition to the electronic verification, as employers, we are also required to do the I-9 verification. So there is that double documentation that we do.

The Basic Pilot Program is required to respond to employers within 3 days with either a confirmation or a tentative non-confirmation. And those requiring that tentative non-confirmation, they have 10 days to provide those documents.

My organization has participated in Basic Pilot for about 5 years or more. In about 95 percent of the cases, the employees are confirmed in the initial verification process in just a few minutes. You know, I do get a lot of confirmation within just a few seconds or up to 5 minutes.

There have been a few cases that have taken up to 10 days, and then a secondary confirmation does take those 10 days. One of my challenges in the H.R. field is my colleagues in the fast-food industry didn't participate in the Basic Pilot Program. We had a few people that did participate and were administered through the system, and they came back and were timed out at the secondary verification and they were not confirmed to work here.

But then, after the 10 day verification program, they were eligible to work here. They were documented. They were able to work here in the United States.

SHRM supports an electronic verification system that is easy to use, expedites the employment verification process, and does not expose employers to new liabilities. 92 percent of the H.R. professionals surveyed stated that they would support an electronic employment verification system if it meets these standards.

However, we continue to have practical concerns about the feasibility and workability of employment verification proposals currently before Congress. Both the House and Senate bills implement

the electronic verification system at specific points in time. However, as we have reported, and we had reported by the GAO in June of 2005, with the relatively small amount of employers, that is a percentage, we have 5.6 million employers in the United States, a small percentage of us, 2300, use the Basic Pilot Program.

We found that 15 percent of all inquiries required additional verification. SHRM recommends that the current Basic Pilot Program should be required to meet a high level of accuracy with regard to the confirmation status of U.S. citizens and work-authorized employees, before it is implemented, or phased into operation. SHRM has several concerns with the lengthy verification process proposed by the Senate bill, which would allow an employee to be on the payroll up to 43 days before the final verification.

At the same time, employers seeking to comply with the law would risk losing a substantial investment in training and compensation costs for employees if they are eventually deemed ineligible to work.

In addition, many employers offer health coverage within that 30 day period, and then they would be obligated to go into the COBRA and obtain health coverage for that employee.

It is a strong recommendation to allow employers the option of using the electronic verification system after an offer of employment is accepted but before the employee commences.

Employers that hire employees on the spot, of course, will have to allow the employee to begin work immediately and confirm eligibility after commencement. Many employers currently conduct post-acceptance, pre-employment background checks on employees under the requirements of Fair Credit Reporting, and of course follow the ADA guidelines.

Both the House and Senate bill promotes an electronic verification system but require employers to attest, complete paperwork, which means completing paperwork similar to I-9 or an I-9 document.

SHRM supports moving to a truly electronic verification process by allowing entire verification efforts to be conducted electronically as opposed to requiring employers to check work authorization electronically and verify identify manually.

Both the House and Senate bill would increase civil and criminal penalties for recruiting, hiring and referral violations. Our members do not dispute that there should be appropriate punishment for hiring unauthorized workers. However, employers are often penalized, especially for paperwork or technical violations.

I would like to thank the committee for the opportunity to appear here, and if you have any questions, please forward them to me. Thank you.

[The prepared statement of Ms. Simmons follows:]

Prepared Statement of Geri Simmons, Human Resources Manager, on Behalf of the Society for Human Resource Management

Chairman Johnson, Ranking Member Andrews, and members of the Subcommittee on Employer-Employee Relations, my name is Geri Simmons and I am the Manager of Human Resources for a large food-processing corporation located in Lufkin, Texas. I have over 15 years of experience in Human Resources, 7 years as an adjunct professor teaching in an MBA program and several years of experience in profit and non-profit business. I appear today on behalf of the Society for Human

Resource Management (SHRM) and I am grateful for the opportunity to provide commentary to the Subcommittee on this important issue.

SHRM is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

SHRM is well positioned to provide insight on the current and proposed employment verification system as the discussion of immigration reform and how to maintain a safe and secure border is at the forefront of the national conversation on immigration reform, currently taking place among the general public as well as federal and state governments. It is in the interests of our economy and national security to establish a reliable, efficient, and predictable employment verification system.

Human resource (HR) professionals are on the front line when organizations administer the current verification requirements. HR professionals are committed to the proper application of the Immigration Reform and Control Act (IRCA) of 1986 in the workplace and the hiring of only work-authorized individuals. While we agree that the current employment verification system is in need of reform, the details of a new employment verification and worksite enforcement system do matter. We caution Congress to carefully consider the implications of any new employment system as it will touch all of our lives—employees and employers alike.

My remarks today will focus on the current employment verification process, including my experience working with the Basic Pilot Program that was created in The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, as well as on legislation passed by the House, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437); and the Senate, the Comprehensive Immigration Reform Act 2006 (S.2611), to reform the immigration system.

Current Law

Mr. Chairman, as you know, under IRCA employers are required to review documents presented by employees within three business days of hire demonstrating identity and work authorization in the United States. After reviewing these documents, employers are required to attest on Form I-9 that they have reviewed the documents and that they appear genuine and authentic. In the current employment verification process, (27) documents are available to employees to demonstrate work eligibility, with (12) different documents authorized under law to prove identity.

As noted above, IIRIRA of 1996 created the Basic Pilot program for employers to voluntarily confirm an employee's eligibility to work using an electronic verification system. Under the Basic Pilot program, employers are required to review an employee's identity and work authorization documents consistent with IRCA requirements, including completing all Form I-9 paperwork. Employers are then required to check each new employee's work eligibility using the electronic verification system. The Basic Pilot system is required to respond to the employer within three days with either a confirmation or a tentative non-confirmation of the employee's work eligibility. In the cases of a tentative non-confirmation, a secondary verification process lasting ten days is initiated to confirm the validity of the information provided and to provide the employer with a confirmation or non-verification of work eligibility. Employers are not permitted to terminate individuals that they have received a tentative non-confirmation on until the employer has received a final non-verification or the ten-day period has elapsed.

Mr. Chairman, even under the best of circumstances, HR professionals encounter a number of challenges complying with the employment verification requirements under IRCA. These challenges include: maintaining the I-9 records when an employee presents a document that has an expiration date; the authenticity, quality, and quantity of documents presented by an employee for work authorization and identification purposes; and the time that an employer spends administering the current I-9 process. According to SHRM's 2006 Access to Human Capital and Employment Verification survey, 60 percent of responding HR professionals indicated they continue to experience problems with the current verification requirements of IRCA 20 years after its enactment. The most common challenges cited in the survey are maintaining records when presented with a document that has an expiration date (31 percent); authenticity of documents presented for employment (28 percent); and the quality of documents presented by employees (22 percent).

This has unfortunately been my experience as well. In my HR role, I have seen documents presented for employment verification purposes that are clearly fraudulent while the validity of others is uncertain. To try and ensure compliance within the employment verification requirements, employers spend a great deal of time and financial resources training their staff on Form I-9. For example, one organization wanted to train their HR staff on document fraud detection, contacted the then Immigration and Naturalization Service (INS) and asked the Service to give training classes on the identification issue. The INS officer stated that if our company participated in classes and made a mistake in our review of the documents, we would increase our liability. I verified this with our corporate attorney and then made the decision not to take classes for identifying false documents.

Another challenge is the re-verification of work authorization documents that expire. For example, our company tracks the expiration date of all of the work authorization documents that are used by employees in the verification process. Approximately 30 percent of our employees use work authorization documents that contain an expiration date. When an individual's work authorization document nears its expiration date, my office must contact the employee and require him or her to update and re-verify their work authorization documents on the Form I-9.

While I was working in another business, the company was trying to take the extra step to ensure compliance with IRCA. It was the job of one of our HR generalists at the company to call the Social Security Office for verification of the Social Security number of a new employee. The Social Security office would only allow us to submit five numbers and names at a time to be checked; the generalist would have to call back to verify the next group of five new employees.

My organization has been a participant in the Basic Pilot program for approximately five years and generally has had a positive experience with the program. Our company typically hires 15 to 20 new employees each month. Each new employee is subject to the employment verification process through the Basic Pilot program. In about 95 percent of the cases, the employees are confirmed in the initial verification process in just a few minutes. The individuals unable to be confirmed in the initial process are then subject to the secondary verification process which on average has taken five to six days to get a final confirmation but we have had several cases of the system taking up to ten days for the employee to receive a final confirmation from the system.

I have encountered a few challenges of my own in the process. For example, I have an employee who works for me who is from El Salvador. He is a United States citizen and has worked legally in the U.S. for over 20 years. His initial verification screening came back as a non-confirmation indicating that he needed to report to the Social Security office. This employee's information was correct and up-to-date but the verification system was unable to confirm his work authorization. As a result, he had to take the time off work, go to the Social Security office, and clarify his work status even though he was eligible to work in the United States. While my colleague was eventually able to get confirmed by the secondary verification process, it's clear that the system has some challenges.

One of my HR colleagues working in the fast food industry and participating in the Basic Pilot program has had a few employees administered through the system who actually have "timed" out of the secondary verification process with the system unable to confirm the employee's eligibility within the ten day period. The employer, believing the employees were work authorized based on the documents and information presented, as well as the previous work history of the individuals in question, continued to employ them hoping the system would eventually be able to confirm the eligibility of the employees. Eventually, within another few days, the system was able to confirm the work eligibility of these employees. However, if the employer would have made his decision to terminate the employees in these examples at the end of the ten day period, he would have been firing individuals that were legally eligible to work in the United States.

Another challenge that occurs with the Basic Pilot is that individuals may not pass the initial verification because their last name submitted for verification purposes is different then the records maintained by the Social Security system or the Department of Homeland Security. For example, work authorized male employees from Latin American countries typically have two last names; with the first last name from their mother's side of the family and the second last name from that of their father. If the name is not entered into the system exactly as it appears on the work authorization documents, the individual will receive a non-confirmation for employment. A similar situation arises with a female U.S. citizen who may have married and not yet had the opportunity to apply for a new Social Security card reflecting her new name.

Areas of Concern to SHRM with the House-Senate passed Immigration Bills

SHRM supports an electronic verification system that is easy to use, expedites the employment verification process, and does not expose employers to new liabilities in using the system and, most importantly, restores integrity to our immigration system. In SHRM's 2006 Access to Human Capital and Employment Verification survey, 92 percent of HR professionals surveyed stated that they would support an electronic employment verification system if it meets these standards. However, we continue to have practical concerns about the feasibility and workability of the employment verification proposals currently before Congress. These concerns include the accuracy, certainty, responsibility and enforcement of the employment verification and worksite enforcement proposals.

Accuracy of the Electronic Employment Verification System

Both the House and Senate bills implement the electronic employment verification system at a specific point in time. H.R. 4437 would require all employers to begin to verify a new hire's eligibility for employment within two years of the bill becoming law; S. 2611 would require all employers to use the electronic verification system within 18 months after funding for the system has been authorized by Congress. The proposed legislation is based on the current Basic Pilot system and is designed to verify employment electronically. However, as reported by the Government Accountability Office (GAO) in June of 2005, only 2,300 out of 5.6 million current U.S. employers actively participated in the Basic Pilot in 2004, and even with the relatively low participation rate, the GAO found that about 15% of all queries require additional verification because the automated system is unable to provide confirmation responses on the initial attempt. The total number of participating employers has risen to about 10,000, according to the government's latest figures, still a small fraction of the total number of employers who would be using the system once the legislative proposals become effective. Expanding this system to cover all employers within such limited time frames as proposed in the legislation absent federal certification that the system is adequately staffed and prepared to handle the increased workload is likely to cause confusion, denied employment opportunities and significant employer penalties.

U.S. employers and employees want an accurate and fair electronic employment verification system, but should not have to participate in such a system program until the federal government provides assurances that the system works. SHRM recommends that Congress provide sufficient financial resources and planning to reduce the possibility of administrative delays for employers as well as inaccurate and unfair work authorization determinations.

In addition, the current Basic Pilot system should be required to meet a high level of accuracy with regard to the confirmation status of U.S. citizens and work authorized employees before it is implemented or phased into operation.

Certainty of the Employment Verification System

As noted previously, employers choosing to participate in the Basic Pilot system are provided an initial response to an inquiry to the system within three days, and, if necessary in the case of a tentative non-confirmation, in another ten days for the secondary verification. H.R. 4437 is identical to the current Basic Pilot in terms of the time frames of the verification system. The Senate bill, S. 2611 however, would extend the initial time that the system has to respond with either a confirmation or a tentative non-confirmation of work eligibility to ten days, and provide for a secondary verification response to last as long as 30 days.

SHRM has several concerns with the lengthy verification process proposed in S.2611. First, it creates a giant loophole to circumvent the verification system for unscrupulous employers and a prolonged period of uncertainty for law-abiding employers. Creating a lengthy waiting period for a response allows bad-actor employers to intentionally employ an unauthorized temporary worker for a substantial period of time without penalty. At the same time, employers seeking to comply with the law would risk losing substantial investments in training and compensation costs for employees if they are eventually deemed ineligible to work. Second, most employers that offer health care and benefits coverage to employees begin coverage for these employees and their dependents within 30 days of the employee starting work. Mandating such an extensive verification time period after an employee begins work would trigger continuing health care coverage under COBRA if the worker is later deemed ineligible at the end of the 30-day verification process. Third, such an extended verification phase would present companies with the dilemma of not knowing whether to start the employee on a long-term assignment, and consequently, could cause the loss of valuable opportunities for business development during this period of uncertainty.

Employers and employees want an electronic verification system that provides a reliable and efficient confirmation of a new employee's eligibility to work in the United States. An effective system must address concerns of hardship to the legitimate employers and at the same time not discriminate against workers. A verification system that is timely, reliable, and conclusive should minimize verification-related discrimination and streamline the employment verification system by allowing employers the option of using the electronic verification system screening after an offer of employment is accepted, but before the employee commences work. The employer may begin the process of verification immediately upon acceptance of the offer of work by the employee. Employers that hire employees on the spot, of course, will have to allow the employee to begin work immediately and confirm eligibility after commencement. As long as the employer uniformly follows either of the procedures above, discrimination concerns should not be present. The post-acceptance, pre-employment approach would not be unique to this particular employment law. Many employers currently conduct post-acceptance, pre-employment background checks on employees under the requirements of the Fair Credit Reporting Act (FCRA). Also, some jobs—municipal police officers, for example—are required to pass certain physical or job-related tests governed by protections of the Americans with Disabilities Act and the Civil Rights Act in a post-acceptance, pre-employment approach.

Finally, in order to assist in the accuracy and streamlining of the verification process, SHRM believes that individuals themselves should be permitted to check on their own employment authorization status and correct any errors prior to the employment process. Similar to individuals checking their credit, and with measures to ensure the privacy and security of personal information, potential employees should be provided access to the data bases populating the employment verification system to correct any discrepancies in their respective work authorization areas.

Paper-Based System

Both House and Senate bills promote an electronic employment verification system, but still require employers to attest to the new hire's employment and identification documents to ensure authenticity; record the Social Security number of each new hire; and record the verification code received through the electronic verification process on a paper-based Form I-9 or similar documents as part of that process. This will significantly increase, not decrease, the amount of staff time and resources that an employer must spend in the verification process. As reported in the Access to Human Capital and Employment Verification survey, 21 percent of responding HR professionals indicated that they continue to experience administrative challenges in the current employment verification process, even without adding the additional administrative burden of the untested electronic employment verification system to the process. SHRM supports moving to a truly electronic verification process by allowing the entire verification effort to be conducted electronically as opposed to requiring employers to check work authorization electronically and verify identity manually.

Documents Establishing Work Authorization and Identity

As under current law, both the House and Senate bills base the worksite enforcement procedure of the legislation on an employer examining documents presented by the employee to establish work authorization and identity. Unfortunately, neither H.R. 4437 nor S. 2611 effectively addresses the challenges presented to employers regarding the authenticity or proliferation of documents presented in the verification process. H.R. 4437 makes no changes to the number or standards of the documents establishing employment eligibility or identity. S. 2611 does curtail the number of documents for establishing identity to a U.S. passport or documents that satisfy the REAL ID requirements for U.S. citizens; for permanent residents, a permanent resident card; for other aliens, an employment authorization card; or for those that are unable to obtain above documents, a document designated by the Secretary of the Department of Homeland Security with various identifying information and security features. While the Senate bill is a step in the right direction, SHRM believes any government documents that are required should be secure and have biometric features to curtail the use of fraudulent documents for employment purposes.

Responsibility for Hiring Decisions

Both the House and Senate bills would place new requirements on employers for their subcontractors' hiring practices if a subcontractor hires an illegal worker. Employers should be liable for their own hiring decisions, not the hiring decisions that are made outside of their control. However, SHRM recognizes there have been instances where an unscrupulous employer has used a subcontractor to hire unauthor-

ized aliens to avoid IRCA requirements. H.R. 4437 seeks to address this issue by requiring that an employer have actual knowledge that a subcontractor is using unauthorized workers before imposing fines or sanctions on the contracting employer. SHRM supports the House provision. S. 2611, however, places a new, untested, standard on employers by requiring employers to attest in a contract with a subcontractor that the employer is not using the subcontractor to "knowingly or in reckless disregard" hire labor irrespective of the individual's work status. In addition to the new undefined standard, the Senate bill will place additional data collection and reporting requirements on employers to collect information from each of their subcontractors. SHRM believes these requirements are burdensome, unnecessary and exposes the employer to unwarranted penalties and fines for the actions of another employer. In addition, making employers liable for the actions for subcontractors blurs the line in the legal relationship between employers and subcontractors. SHRM believe this requirement should be eliminated.

Enforcement

Both the House and Senate bills would increase civil and criminal penalties for recruiting, hiring, and referral violations. Our members do not dispute that there should be appropriate punishment for hiring unauthorized workers. However, employers are often penalized strictly for paperwork or technical violations. For example, employers have been fined for transposing the document number and issuing authority on consecutive lines, even though it was clear that the employer had examined a valid document. With a new electronic employment verification system, it is likely that paperwork errors will increase, at least initially, as employers implement new systems for retaining information and subsequently enter confirmation or non-confirmation codes in the system. This will not be a small task for firms that hire thousands of individuals annually.

SHRM believes that enforcement of the employer sanction program needs to be vigorous and fair for employers and employees. In addition, civil fines and criminal sanctions should be appropriate to the seriousness of the violation. This is particularly true with the increased administrative load of the new system proposed in both the House and Senate bills, particularly in the early years of implementation. A strong enforcement effort should allow employers to receive a warning and a fair time to correct any typographical or other administrative errors without suffering the consequences of having violated worksite laws. Employers that fail to correct errors within an appropriate timeframe following a warning should face penalties.

Conclusion

I would like to thank the committee again for the opportunity to appear before you today and again emphasize that SHRM supports the concept of a reliable employment verification system. However, we are extremely concerned with the practicality and feasibility of the employment verification system currently proposed. We look forward to working with Congress to create an approach that improves and strengthens the employment verification process.

I will be pleased to respond to any of your questions regarding both my written and oral statements.

Chairman JOHNSON. Thank you, ma'am. Appreciate your testimony. Professor, you are welcome to begin your testimony.

STATEMENT OF BILL BEARDALL, CLINICAL PROFESSOR OF LAW, EXECUTIVE DIRECTOR, EQUAL JUSTICE CENTER, UNIVERSITY OF TEXAS SCHOOL OF LAW

Mr. BEARDALL. Thank you. Chairman Johnson, Representatives Tierney and Wilson, I appreciate the opportunity to be here today to offer some comments. My name is Bill Beardall. I have practiced as an employment lawyer for low-income working people for 28 years now, as well as directing the Transnational Worker Rights Clinic at the University of Texas Law School. I am testifying today on behalf of the Equal Justice Center and the National Immigration Law Center, which are both nonpartisan, nonprofit organizations that protect the rights of low-income working people and immigrant families.

In my remarks today, I'd like to highlight five key points that are laid out in more detail in the written testimony I have submitted.

The central, and most important point, I hope to emphasis today, is that in your current consideration of immigration reforms, the most effective thing you can do to support and protect U.S. workers is to fully enforce employment protections for undocumented immigrant workers as well as U.S. citizens and documented immigrants.

Continuing to allow the widespread employment exploitation of undocumented workers, not only subjects the undocumented worker to unfair and inhumane treatment, it hurts U.S. workers by creating an incentive for unscrupulous employers to prefer hiring vulnerable, undocumented workers and thus reducing good job opportunities and wages and working conditions that are available to all workers, including U.S. workers.

The only effective way, really, to prevent the reduction in good jobs and decent wages is to ensure that all workers, documented and undocumented, enjoy full and equal employment rights, and fully effective means to protect their rights without regard to their immigration status.

Chairman JOHNSON. Hold it. Hold it. We can't have that. Please continue.

Mr. BEARDALL. And, unfortunately, enforcement of employment rights for U.S. workers and all other workers has plummeted in recent years.

The second point I would like to make is that it is a mistake to try to rely mainly on the approach of cracking down on employment verification and tightening employer sanctions to address the problems associated with unauthorized employment.

Our 20 year history of utilizing that approach shows that it is not only ineffective but counterproductive, doing more harm than good.

Now why do I say it is ineffective and counterproductive? Because placing employment eligibility requirements and penalties on employers has already created an incentive that has pushed a huge number of employers into now hiring workers off the books, paying them in cash, under the table. Intensifying employment verification requirements on employers will elicit compliance from some, like the legitimate employers that are here, but it will likely push even more employers into this unrecorded off-the-books employment labor market.

In addition, the exclusive use of employment verification requirements has already encouraged a vast number of employers to evade those requirements by misclassifying their employees as independent contractors. More rigorous employment sanctions will now encourage more of these independent contractor schemes, and fostering these illegal employment schemes, that is, off-the-books employment and independent contractor scams, has a terribly counterproductive effective on everyone in our society, especially U.S. workers.

These practices reduce the payment and collection of pay roll and income taxes. They reduce participation in the unemployment insurance, workers compensation and Social Security safety net programs.

They reduce the ability of Government regulators and workers to monitor and enforce basic wage, workplace safety, and other labor protections, and they foster increased disrespect for the law among previously law-abiding citizens.

There is another very ironic way in which the overreliance on employment eligibility restrictions is counterproductive. Unscrupulous and opportunistic employers have adroitly used workers unauthorized status as a threat to hold over their heads of their undocumented workers, to keep them in line and get rid of any worker who might complain about illegal treatment, or ask for a raise, or get injured on the job.

This very vulnerability on the part of undocumented workers gives many employers a positive incentive to hire and exploit the undocumented workers, which, in turn, lowers job opportunities, wages, and working conditions for all workers, including U.S. workers.

The third observation I want to offer is that no verification system, including the employee eligibility verification system, the electronic system that's being discussed here, no system can successfully address the problems associated with undocumented immigration unless it is accompanied by a realistic path to earn legal status for currently undocumented workers and their families, and accompanied by——

Chairman JOHNSON. Let's maintain the decorum, and would you try to tighten it, sir. You are over 5 minutes. Thank you.

Mr. BEARDALL. And that it should provide an orderly mechanism for legally accommodating the inevitable future flow of immigrant workers, ensuring that they have full and equal employment rights that they can effectively enforce.

My fourth comment, related to specifically the proposed employment eligibility verification system, is similar to those that have been reflected by the other witnesses here, and that is that these systems should not be implemented unless critical problems that have been identified with the basic pilot program that has been used so far are corrected.

That includes the inaccuracy of databases because they are notoriously inaccurate. There need to be protections that prevent employers from misusing their access to this computer data on all workers, not just immigrant workers. Every U.S. worker is subject to these employment verification requirements, and there need to be provisions to ensure that that data is not misused by employers, or used selectively, or used to discriminate against people who look or sound or seem foreign and yet may be United States citizens and legal immigrants.

The final concern I would like to mention, briefly, is that the recent rules, proposed by the Department of Homeland Security, to begin using Social Security no-match letters as an enforcement tool are unwise and will be counterproductive.

It is an effort to inappropriately turn employees, all employees' Social Security numbers and accounts into a law enforcement tool, an immigration enforcement tool, and that's not the purpose of the Social Security system that we rely on as one of our basis social benefit programs. I am grateful for this opportunity to testify be-

fore the committee. I would be happy to answer any questions that you may have later in the hearing.

[The prepared statement of Mr. Beardall follows:]

Prepared Statement of Bill Beardall on Behalf of the Equal Justice Center and the National Immigration Law Center

Members of the Committee, thank you for the opportunity to address the critical issue of employment verification laws and the pending proposals to create a new Employment Eligibility Verification System (EEVS). I am testifying today on behalf of the Equal Justice Center and the National Immigration Law Center. The Equal Justice Center (EJC) is a non-profit employment justice and civil rights organization based in Texas which empowers low-income working families, individuals and communities to achieve systemic reforms that improve their lives. EJC provides the critical support, legal rights advocacy, and infrastructure that enables low-income working people to achieve fair treatment in the workplace, in the justice system, and in the larger civil society. The National Immigration Law Center (NILC) is a nonpartisan national legal advocacy organization that works to protect and promote the rights and opportunities of low-income immigrants and their family members. Since 1979, NILC has established a national reputation for its expertise on immigration law and the public benefit and employment rights of low-income immigrants. NILC is also a convener of the Low Wage Immigrant Worker Coalition, a nationwide coalition of labor unions, civil rights organizations, immigrant rights organizations, and others concerned with the rights of low wage immigrant workers in the U.S.

A Punitive Enforcement-Only Approach will not Reduce Undocumented Migration but Will Exacerbate the Harms Associated with Undocumented Migration

Contrary to popular opinion, our current immigration woes are not merely the result of a failure of will. Rather, increased migration is a worldwide phenomenon resulting from the powerful economic, demographic, technological and political forces that have made our world smaller and have given birth to a truly global labor market. These include explosive increases in global trade and the resulting political and social upheavals, the telecommunications revolution that has brought peoples into unprecedented proximity, and the reduced cost of travel. The United States has played a historical role in adapting and integrating large numbers of newcomers into our political, social and economic lives. Given our history as an immigrant receiving nation and our economic and political position in the world, there is little to suggest that we could significantly reduce the current levels of migration—setting aside whether this is a good or a bad thing—without taking a sledge hammer to our economy and our way of life.

We have tried. Congress has enacted almost one bill per year in the last two decades intended to further strengthen immigration enforcement as the resources devoted to immigration enforcement have grown exponentially. This trend began in 1986 with the passage of the Immigration Reform and Control Act (IRCA) of 1986, which for the first time made it unlawful for employers to "knowingly" hire unauthorized workers and created civil penalties (known as "employer sanctions") for those who do so. The intent of this change was to stem the flow of undocumented immigrants to the United States, by removing the job magnet. Although employer sanctions have not been vigorously enforced since then, it should be noted that neither have any other employment laws such as wage and hour, employment discrimination, collective bargaining, and health and safety protections for workers.

The enforcement-without-reform policy of the last 20 years, including the initiation of employer sanctions, has been a resounding and obvious failure. Although undocumented migration appears to have plateaued, it has done so at an all time high, with 7.2 million unauthorized workers now employed in the U.S., representing almost 5 percent of the civilian labor force.[1] If we are going to be realistic, we have to recognize that our economy is now highly dependent upon low-wage, low-skill labor provided by undocumented workers. The share of undocumented workers in agriculture, cleaning, construction, food service, and other low-wage occupations is approximately three times the share of native workers in these types of jobs.[2] In the aggregate, these hard-working, enterprising workers are not going away, and neither are their spouses or the children who have grown up in this country and integrated into our society. Like it or not, they will play a role in our nation's future.

Given this fact, and the reality that high immigration levels are likely to be a part of our future, the focus of our immigration policy should be on maximizing the benefits and minimizing the harms of their arrival and established presence, both for the immigrants themselves, and even more importantly, for those of us who were lucky enough to be born here.

We need to recognize that the impact of immigration is not merely a matter of numbers. Like all complex social phenomenon, immigration is neither all good nor all bad. There are winners and losers. And the impact of immigration on all of us will be substantially different depending on how we treat the immigrants. Do we punish them, marginalize them, make it harder for them to rely on labor or law enforcement protections, steer them into dangerous substandard jobs? Or do we invest in them, provide them with equal rights, protection against exploitation, the tools to learn English and to upgrade their skills, and the ability to be productive, upwardly mobile participants in the economy?

If immigrants enjoy the same workplace protections and economic mobility as others, they will be less subject to exploitation at the hands of employers whose practices will then undermine the wages and working conditions of other workers. In addition, there is evidence that raising the wages and working conditions of low-wage workers will actually reduce immigration by making the existing workforce relatively more attractive to employers.[3] Therefore, it is imperative, for the benefit of all workers, to eliminate the vulnerabilities and marginalization inherent in the existence of a large, economically vulnerable undocumented workforce. The only practical way to do this is to legalize those who are already working and raising families here. And it is equally important to ensure that all immigrants—current and future, documented and undocumented—have full labor protections.

It is in this context that efforts to impose electronic verification and increase workplace immigration enforcement should be examined. Many Americans believe that such changes would be a magic bullet, painlessly solving our immigration woes. The theory is that if there were no employment market, unauthorized workers would not come, and those who are here would leave. This might be true, but there is no evidence the measures that have been proposed to date would dry up the employment market. Rather, to the extent these measures are effective in initially reducing employment opportunities, their main effect will be to make America's 7.5 million undocumented workers even more desperate for employment and willing to accept even more marginal jobs.

History teaches us that such a willing and desperate workforce will find employers willing to take advantage of their availability and reduced-cost. This is not theory. It is exactly what happened in the late 1980's and 1990's in response to the impositions of employer sanctions in the IRCA.[4] Experience with the current employer sanctions system gives us some indication of the increased us of exploitative practices by unscrupulous employers and the increased pressure that even legitimate employers feel to engage in similar practices or risk going out of business. Under the current system, many employers twist immigration law into a tool to punish workers seeking to enforce their labor rights. Many of them knowingly violate IRCA's employment verification provisions to hire undocumented workers whom they know will then be reluctant to hold them accountable for labor law violations. It is common practice for these same employers to use the existence of the employer sanctions scheme to threaten undocumented workers with deportation if they do indeed complain about their deplorable working conditions. For example, an employer may not verify a worker's employment authorization at the time of hire but will conveniently remember the requirements under IRCA only after the worker complains of some labor violation or attempts to organize a union to improve their working conditions. Implementation of a system that only enforces hiring sanctions without increased enforcement and improvement of existing labor and employment protections will further exacerbate these problems, and create additional incentives for unscrupulous employers to recruit, hire and exploit unauthorized workers. This exploitation of course not only harms the undocumented worker, it just as surely harms U.S. born workers who find their job opportunities, wages and working conditions undermined by the incentives thus created for employers to hire and take advantage of vulnerable undocumented workers.

In addition to increasing the opportunity for exploitation of vulnerable workers, an exclusive reliance on employer sanctions will be counter-productive for three other important reasons. First, it will create an economic incentive for even more employers to hire workers "off-the-books" in unreported, cash- based employment relationships. Second, it will encourage more employers to evade employer sanctions by misclassifying their employees as "independent contractors." Third it will encourage companies to interpose substandard, middleman labor contractors between themselves and their employees, pretending the workers are employees of these sham contractors and exposing the workers to marginal fly-by-night employment practices by the middlemen. All of these practices in fact increased dramatically following the imposition of employer sanctions in the 1986 IRCA. And all of these practices have harmful economic and social impacts beyond the increased exploitation of workers. For example, they increase our reliance on an unregulated cash econ-

omy; reduce the collection of payroll and income taxes; reduce participation in the unemployment insurance, workers compensation and social security safety net programs; reduce the ability of government regulators and workers to monitor and enforce basic labor protections; and reduce employers' general respect for operating legally and above-board. These substandard practices have an adverse effect on everyone in our society, but they are especially—and ironically—harmful for U.S. workers, whose employers will be forced to compete with a growing sector of businesses that are unconstrained by the regulatory apparatus that is supposed to protect us all and is designed to underpin our basic standard of living.

As a practical matter, the only law enforcement approach that is very likely to succeed in addressing the problem of unauthorized employment in our economy is the comprehensive enforcement of labor and employment protections for all working people without regard to their immigration status. This would be by far the most effective way to remove employers' incentive to hire and exploit unauthorized workers, while also removing employers' incentive to adopt substandard employment practices that evade our core tax, social benefit, and regulatory systems. On the other hand, ramping up enforcement of employer hiring sanctions alone will surely do more harm than good, at least without vastly increased enforcement of employment protections for both undocumented and documented workers.

As Congress considers creating a mandatory Employment Eligibility Verification System (EEVS), this Committee must understand that an approach that relies only on enforcement of hiring sanctions will not solve the problems associated with unauthorized employment. In fact it is doomed to fail—again, as it did after 1986. An employment verification system has no real chance of succeeding unless it is also accompanied by (1) a comprehensive opportunity for currently undocumented immigrants to earn legal status; (2) a realistic opportunity for the future flow of immigrant workers to work in our economy with fully effective employment rights; (3) vigorous, status-blind enforcement of our nation's labor and employment laws for U.S. workers, documented immigrant workers and undocumented immigrant workers alike.

Concerns about Expanding the Basic Pilot Program

The pending legislative proposals for a mandatory Employment Eligibility Verification System (EEVS) will also do more harm than good if the EEVS is not regulated by strict safeguards and cautious implementation. These pending EEVS proposals are based on the existing Basic Pilot Program. Unfortunately, the Basic Pilot program has been plagued by problems since its inception in 1997. Most notably, the program, which is so far used only by a relatively small number of employers, has been hindered by inaccurate and outdated information in the Department of Homeland Security (DHS) and Social Security Administration (SSA) databases, lack of adequate privacy protections, and misuse of the program by employers.

The Basic Pilot Program is an internet-based program that allows employers to electronically verify workers' employment eligibility by directly checking the records maintained by the DHS and the SSA.

The program is one of the three pilots created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and began operating in six states in 1997. The other two pilot programs were discontinued. However, in December 2004 Congress extended the Basic Pilot to all 50 states, and it is now available to employers who voluntarily choose to participate in the program, although certain employers who have been found to unlawfully hire unauthorized workers or who have discriminated against workers on the basis of national origin or citizenship status may be required to participate. According to the Government Accountability Office (GAO), as of June 2006, approximately 8,600 employers were registered to use the Basic Pilot program out of the approximate 5.6 million employer firms nationwide, though only 4,300 employers are active users.[5] A July 26, 2006 press release from DHS states that 10,000 employers are registered to use the program.

In creating the pilot programs in 1996, Congress required the former Immigration and Naturalization Service (INS) to have an independent evaluation conducted before the pilot programs could be extended. The INS selected two firms—the Institute for Survey Research at Temple University and Westat—to conduct the independent evaluation. In January 2002, an evaluation of the Basic Pilot Program was issued. The evaluation report identified several critical problems with the pilot program and concluded that it "is not ready for larger-scale implementation at this time." Significant problems included:

- *Database inaccuracies*

One of the most significant problems identified by the independent evaluation was that the program was seriously hindered by inaccuracies and outdated information

in SSA and INS databases. For example, a sizeable number of workers who were not identified as having work authorization were in fact authorized, but for a variety of reasons the databases did not have up-to-date information. While the database accuracy has somewhat improved, a 2004 DHS report to Congress notes that SSA's databases currently are able to automatically verify the status of less than 50 percent of work-authorized non-citizens (versus 99.8 percent for native-born citizens).[6] While most of these cases eventually are favorably resolved, resolution often requires costly and time-consuming manual reviews. Additionally, an unknown number of work-authorized applicants abandon their employment plans rather than pursuing the uncertainty of the appeals process, while another group of work authorized individuals are wrongfully terminated before they even have the opportunity to prove that they are indeed authorized to work in the U.S.

Evaluators also found that when employers contacted the INS/DHS and SSA in an attempt to clarify data, these agencies were often not accessible; 39 percent of employers reported that SSA never or sometimes returned their calls promptly and 43 percent reported a similar experience with the INS.

- *Employer misuse of the program*

The independent evaluators also discovered that employers engaged in prohibited employment practices, including pre-employment screening, which denies the worker not only a job but also the opportunity to contest database inaccuracies; taking adverse employment action based on tentative nonconfirmations, which penalizes workers while they and the appropriate agency (DHS or SSA) work to resolve database errors; and the failure to inform workers of their rights under the program. Some employers also compromised the privacy of workers in various ways, such as failing to safeguard access to the computer used to maintain the pilot system, including leaving passwords and instructions in plain view for other personnel to potentially access the system and employees' private information.

Although employers are prohibited from engaging in these practices under a Memorandum of Understanding that they sign with DHS, U.S. Citizenship and Immigration Service officials have told the GAO that their efforts to review employers' use of the pilot program have been limited by lack of staff available to oversee and examine employer use of the program.[7]

The Basic Pilot Program Extension and Expansion Act, which authorized expansion of the Basic Pilot Program to all 50 states, also required DHS to submit a report to the Committees on the Judiciary of the House of Representatives and the Senate. This report should have evaluated whether the problems identified by the independent evaluation of the Basic Pilot had been substantially resolved, and it should have outlined what steps the DHS was taking to resolve any outstanding problems before undertaking the expansion of the Basic Pilot program to all 50 states.

While the DHS did submit a report to Congress in June 2004, it failed to adequately address the concerns laid out in the independent evaluation. Most importantly, it failed to address the explicit recommendation by the independent evaluation against expanding the Basic Pilot program into a large-scale national program until the DHS and the SSA address the inaccuracies in their databases that prevent those agencies from confirming the work authorization of many workers.

In August 2005, the GAO noted in its report, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, that although DHS has taken some steps to improve the timeliness and accuracy of information in its database, it cannot effectively assess increased program usage without information on the "costs and feasibility of ways to further reduce delays in the entry of information into DHS databases." According to the GAO, DHS staff stated that they may not be able to complete timely verifications if the number of employers using the Basic Pilot Program were to significantly increase.

Employment Eligibility Verification Systems in the Context of Comprehensive Immigration Reform

The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) and the Comprehensive Immigration Reform Act of 2006 (S. 2611) both include a mandatory EEVS but there are significant differences between these two proposals. Most notably, S. 2611 attempts to address some of the shortcomings of the Basic Pilot program by including privacy, anti-discrimination, and due process protections, while H.R. 4437 simply expands the Basic Pilot program without addressing any of the concerns outlined above.

The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437)

H.R. 4437 creates a mandatory EEVS that would make use of toll-free telephone lines and other toll-free electronic media through which workers' identities and employment authorization could be verified by the DHS. Within six years of the bill's enactment, employers would be required to verify the employment eligibility of all employees via the EEVS. Use of the EEVS would be required three years from enactment for all employees of federal, state, or local governments, including for all workers at a federal, state, or local government buildings, military bases, nuclear energy sites, weapons sites, airports, or other critical infrastructures.

Use of the EEVS would apply not only to employers but also to those who recruit or refer individuals for employment, including labor service agencies and nonprofit groups. This means that temporary worker agencies, worker centers, and other similar job placement or referral programs (including job fairs and websites such as monster.com) would have to comply with a process similar to the current I-9 process before referring workers to a job. This represents a radical expansion of the current I-9 system beyond the overly regulated employment relationship, and mandates an unworkable system whereby service providers and for-profit employment services would be deputized as immigration officials as well. This will likely result in vastly limited employment opportunities for minorities who often use these services and job fairs to meet employers who may be seeking to diversify their workforce.

While the bill requires that the government correct and update inaccurate records that would make the EEVS unworkable, it includes no procedures, funds, or safeguards for ensuring that this requirement is carried out. If workers are unjustly fired due to errors in the EEVS, a provision of the bill would prevent them from filing class action lawsuits against the government or the employer to redress this injustice. Instead, they would be allowed only to file a claim against the government under the Federal Tort Claims Act, which is not equipped to handle large numbers of claims or lawsuits of this nature. Additionally, the Federal Tort Claims Act process is cumbersome, expensive, and time-consuming, making it an unrealistic form of relief from government database errors.

The Comprehensive Immigration Reform Act of 2006 (S. 2611)

S. 2611 also creates a mandatory EEVS where employers would electronically transmit information to SSA and DHS for purposes of verifying workers' employment authorization. S. 2611 requires the new EEVS to be implemented with respect to new hires 18 months after the date that at least $400 million have been appropriated and made available to DHS; however, DHS has the authority to require "critical" employers (based on an assessment of homeland security or national security needs) and employers that DHS has reasonable cause to believe have engaged in material violations related to unlawful employment of immigrants to use the EEVS to verify the work authorization status of all employees before the 18-month period.

S. 2611 does include important worker protections that seek to address the shortcomings of the Basic Pilot program. Specifically, the bill includes the following:

- Anti-discrimination protections. S. 2611 amends the section of the Immigration and Nationality Act (INA) relating to unfair immigration-related employment practices to explicitly apply to employment decisions related to the new EEVS. Additionally, it increases fines for violations of the INA's anti-discrimination provisions and provides funding to educate employers and employees about anti-discrimination policies.
- Due process protections. S. 2611 includes important due process protections intended to ensure that workers can challenge erroneous findings and fix inaccurate information in the DHS and SSA databases. Specifically, it requires employers to provide employees with information in writing (in a language other than English if necessary) about their rights to contest a response from the EEVS, and the procedures for doing so, and allows individuals to view their own records and contact the appropriate agency to correct any errors through an expedited process. It also creates an administrative and judicial review process where individuals can contest findings by DHS, and seek compensation for the wages lost where there is an agency error.
- Privacy protections. S. 2611 includes important privacy protections intended to protect against misuse of information and identity theft. Specifically, it requires minimization of the data to be both collected and stored, and creates penalties for collecting or maintaining data not authorized in the statute. It also places limits on the use of data, and makes it a felony to use the EEVS data to commit identity fraud, unlawfully obtain employment, or any other purpose not authorized in the

statute. Lastly, it requires the GAO to assess the privacy and security of the EEVS, and its effects on identity fraud or the misuse of personal data.

Provisions That Must Accompany Any Nationwide, Mandatory Employment Eligibility Verification System

After nearly a decade of experience with the Basic Pilot Program and two decades with the employer sanctions scheme, it is clear that the existing programs have significant flaws that must be addressed if Congress is to pursue the creation of a new EEVS. The creation of such a system without addressing the fundamental flaws in the current program is unadvisable and will result in severe negative consequences for immigrant and U.S. workers on a much larger scale than they currently experience. Provisions of S. 2611 take a step in the right direction by including important worker protections, and we have additional suggestions below, but these provisions are meaningless without addressing the need to legalize the undocumented population in this country, and punish employers who flout labor laws.

The following components are essential to any mandatory EEVS—

• The EEVS must have measurable and enforceable standards. The best way to ensure implementation of an EEVS that is accurate and implemented in a non-discriminatory manner is to set standards and expectations for system performance upfront and to hold DHS accountable for meeting those standards (e.g. the databases must have a specific level of accuracy). Experience confirms that federal agencies do not meet expectations if the standards they are given are vague and optional. The EEVS program is particularly vulnerable to poor planning because of its unprecedented scope, and the disconnect between the agency mandate to get something up and running quickly and the requirements that would ultimately determine whether it is successful, such as the need for speed, efficiency, reliability, and information security. It is much easier to make design changes in a system before it goes fully online than afterwards. That is why software manufacturers produce "beta" versions of their programs to be tested in the real world before mass public marketing distribution. Once a system is designed and put in place for all employers and workers in our economy it will be costly and difficult to implement needed changes.

• The EEVS should be phased-in with a realistic timeline. Any mandatory universal verification system must be implemented incrementally, with vigorous performance evaluations taking place prior to any expansion. Moving forward rapidly without addressing ongoing problems within the system will not help to achieve stated goals and will result in harm to U.S. workers. Additionally, an unrealistic timeframe would likely delay implementation of the new system. It is easy for Congress to pass a law requiring that something be done by some arbitrary date, but that doesn't necessarily make it happen. If the deadline is unrealistic, it will not be met no matter how many laws Congress passes. For example, in 1996 Congress mandated implementation of an electronic entry-exit system within 2 years. Yet after repeated extensions the system still is not online. Setting an unrealistic timeframe is more than just an exercise in futility. It actually delays implementation because it leads to inadequate and unrealistic planning and misallocation of resources and taxpayer monies.

• The EEVS must only apply to new hires. Requiring employers to re-verify their existing workforce is adding more bureaucracy to the process, will be extremely expensive and burdensome for human resource departments, and will inevitably lead to many workers losing time from work to correct the inaccuracies in the system. The current workforce has already been authorized to work under the law using the current I-9 system. Moreover, the circularity in the workplace today, with a turnover/separation rate of 40 percent a year (50-60 million employees each year), means that eventually most people will be verified by the new system in a relatively timely manner without forcing employers to go through old records and re-verify all existing employees.

• The EEVS must be designed to prevent misuse and abuse, and must not lead to increased discrimination against workers who look or sound foreign. Experience has taught us that unscrupulous employers will use the system to unlawfully prescreen potential employees, re-verify work authorization, and engage in other unlawful activities when an employee lodges a complaint or engages in organizing. It is therefore essential that employers are explicitly prohibited from: 1) using the system selectively or without authorization; 2) using the system prior to an offer of employment; 3) using the system to exclude certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required; 4) using the System to deny certain employment benefits, otherwise interfere with the labor rights of employees, or any other unlawful employment practice;

and 5) taking adverse action against any person, including terminating or suspending an employee who has received a tentative nonconfirmation.

• The EEVS must protect the privacy of information in the system. The employment verification system must protect information in the database from unauthorized use or disclosure. It is critical that privacy protections be included so that the information contained in the databases is not used for non-employment verification purposes. The 2002 evaluation of the Basic Pilot program found several instances where employers or other non-authorized individuals gained access to the program for uses other than the designated purpose.

• The EEVS must be independently assessed for program performance. Any EEVS should be independently evaluated to ensure that the program is meeting the needs of both employers and employees. Reports should specifically evaluate the accuracy of DHS and SSA databases, the privacy and confidentiality of information in the databases, and if the program has been implemented in a nondiscriminatory manner.

The DHS Proposal to Use SSA "No-Match" Letters as an Enforcement Tool Should Be Withdrawn

In an attempt to address immigration enforcement at the worksite, DHS issued proposed rules on June 14, 2006, regarding an employer's legal obligations upon receiving a letter from the SSA stating that the information submitted for an employee does not match SSA records (otherwise known as an SSA "no-match" letter). Under the proposed rule, ICE could use the receipt of a no-match letter as evidence that the employer has "constructive knowledge"[8] that an employee is unauthorized to work. The proposed rule includes "safe harbor" procedures that such an employer should follow in order to avoid liability under section 274A(a)(2) of the Immigration and Nationality Act.

Although the rule will cause enormous upheavals in the workplace, it will have no impact on undocumented immigration. Our past experience with no-match firings and workplace audits is very clear: the fired workers will not leave the country. They will simply find other more marginal jobs, most likely in the unregulated underground cash economy. Because of this, the proposed rule will result in growth of this underground economy. It will also erode our privacy rights, and it represents an end-run around the federal legislative process.

Proposals to use the SSA no-match letter as an enforcement tool, such as the DHS proposed rule, should be rejected for the following reasons:

• The proposed rule will harm all workers regardless of immigration status. The DHS rule will result in unnecessary, unjust, and potentially discriminatory mass firings. Out of caution, panic, and confusion employers will fire workers who receive an SSA no-match letter before workers have a chance to correct their records with SSA. The SSA database is notoriously inaccurate, and often times "no-matches" occur because of name changes and clerical errors. Hundreds of thousands of workers—including U.S. citizens and authorized noncitizens—could lose their jobs. Such firings may run afoul of federal and state anti-discrimination laws and other worker protections, and lead to costly and protracted litigations against employers for wrongful terminations. Unscrupulous employers already use the SSA no-match letter to stymie labor organizing campaigns and to retaliate against workers who have been injured on the job or complain of unpaid wages or other labor violations. In documented cases (including arbitration decisions) from across the country, employers initially ignored SSA no-match letters, and then decided to use them as a pretext to fire workers who participated in efforts to improve working conditions and wages. The proposed rule would only exacerbate this problem.

• The proposed rule will expand the unregulated underground cash economy. Although the proposed rule purports to provide employers with general guidance on SSA no-match letters, DHS is in fact imposing a new set of legal obligations on millions of employers. These new legal obligations will increase pressure on businesses to employ workers "off the books," or to misclassify their employees as independent contractors, thereby promoting the unregulated underground cash economy which results in potentially billion-dollar losses in federal, state, and local tax revenues, unfair competition, and further exploitation and abuse of citizen as well as immigrant workers by unscrupulous employers. The proposed rule also has the perverse effect of punishing "good" employers who keep good records and want to stay on the books. These "good" employers will be put at a disadvantage compared with "bad" employers with whom they compete and who pay in cash and do not keep records, or who misclassify employees as independent contractors, and who consequently will not be reached by the new rule.

• The proposed rule is an end-run around the legislative process. The proposed rule is badly timed. Any worksite immigration enforcement proposal should happen

in the context of comprehensive immigration reform. The House and the Senate have both passed bills that contain worksite enforcement mechanisms. Implementing the proposed regulations at this time would be an end-run around that process. Immigrant workers should not be subjected to unnecessary, unjust, and potentially discriminatory mass firings while the current law is clearly under debate and reformulation.

• The SSA no-match letter program is ill-suited as a tool for immigration enforcement. The proposed rule attempts to transform the SSA no-match letter into an immigration enforcement tool when the SSA database does not have the capacity to fulfill this objective. In addition to being error prone, the database does not contain complete information about a worker's immigration status or employment authorization. Indeed, the database contains information about both U.S. citizens and work-authorized noncitizens who employers will presume to be undocumented simply because they appear on a no-match list. The letter is not indicative of immigration status, and explicitly states on its face that a worker's identification in the letter does not make a statement about his or her immigration status. Moreover, as an evidentiary matter, an employer's receipt of a SSA no-match letter by itself does not constitute "constructive knowledge" of immigration status under current law. The proposed rule dramatically alters the definition of "constructive knowledge" and makes a stark departure from existing case law and long-standing federal guidance in this area despite the fact that the SSA no-match letter provides no evidence of immigration status.

• The proposed rule is an erosion of our privacy rights. DHS is currently barred from direct access to the SSA database by laws protecting our privacy and tax confidentiality. These laws were put in place to protect sensitive and personal information, and to ensure compliance with tax laws. This proposed rule is an attempt by DHS to end-run these privacy protections and commandeer personal information in the SSA database for their own purposes.

• The costs of implementing the proposed rule are prohibitive. If the proposed rule is to be carried out as envisioned, DHS and SSA will need to make a massive investment in employer and worker education programs in order to combat the rampant panic and confusion that is almost certain to follow. The proposed rule also contains unrealistic timetables for compliance that will derail its implementation. Further, although this rule purports to make changes to how DHS interprets these letters, it has a significant impact on the way in which SSA has to respond to the inevitable increase in employer and worker inquiries about this confusing rule. The actual costs of administrating the program will be astronomical for SSA, an agency whose limited resources should go towards administering Social Security benefits rather than enforcing immigration law. The proposed rule should therefore be withdrawn.

Conclusion

An enforcement-only approach (as embodied by a mandatory EEVS, the use of the SSA no-match letter as an enforcement tool, and misplaced reliance on increased worksite enforcement) will never solve the problem of unauthorized employment. If anything, the lessons of IRCA have taught us that an enforcement-only approach actually creates incentives for employers to hire unauthorized workers. If Congress is serious about addressing this issue, it must muster up the political will to address the root causes of migration in sending countries and to address the need for improved working conditions for all workers in the U.S. Congress can begin by 1) creating a legalization program for workers who are filling the jobs in demand by employers, and 2) enforcing existing labor and employment laws. If not, unscrupulous employers will continue to have a financial incentive to hire and exploit undocumented workers, legitimate employers will be placed at a competitive disadvantage, and both documented and undocumented workers will be increasingly subject to workplace abuses.

ENDNOTES

[1] Jeffrey S. Passel, Size and Characteristics of the Unauthorized Migrant Population in the U.S. , Pew Hispanic Center (March 2006).

[2] Jeffrey S. Passel, Unauthorized Migrants: Numbers and Characteristics, Pew Hispanic Center (June 2005), pp. 26-28

[3] "How L.A. kept out a million migrants" Ivan Light, Los Angeles Times, April 16, 2006.

[4] Donato, K. M., J. Durand and D. S. Massey. 1992. Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act, Demography 29: 139-158.

[5] Richard M. Stana, Testimony Before the Subcommittee on Immigration, Border Security, and Citizenship, Committee on the Judiciary, U.S. Senate, Immigration Enforcement: Weaknesses Hinder Worksite Enforcement Efforts, U.S. Government Accountability Office (June 2006)

[6] See Report to Congress on the Basic Pilot Program, U.S. Citizenship and Immigration Service, June 2004.
[7] Richard M. Stana, Testimony Before the Subcommittee on Immigration, Border Security, and Citizenship, Committee on the Judiciary, U.S. Senate, Immigration Enforcement: Weaknesses Hinder Worksite Enforcement Efforts, U.S. Government Accountability Office (June 2006)
[8] As defined in 8 CFR 274a.1(l)(1).

Chairman JOHNSON. Thank you. I think sometimes we forget what the word illegal means.

Mr. Luther. Mr. Luther, you are welcome to testify.

STATEMENT OF JON LUTHER, CHAIRMAN AND CEO, DUNKIN' DONUTS, BASKIN–ROBBINS, TOGO'S, DUNKIN' BRANDS, INC.

Mr. LUTHER. Thank you, Mr. Chairman and members of the subcommittee. It is my great pleasure to be here today. I know that applause wasn't for me, so I'll move right on.

My name is Jon Luther. I am the chairman and CEO of Dunkin' Brands. Dunkin' Brands is one of the largest quick service restaurant companies in this country, represented by nearly 8,000 Dunkin' Donuts, Baskin-Robbins and Togo's restaurants, here, in the United States, and an additional 4,000 restaurants abroad.

Our three brands are stalwarts of the franchise industry, collectively representing over 143 years of experience.

And further, our system is totally franchised, meaning that all of our U.S. restaurants are owned and operated by small business owners who implement our standards while they totally control the day to day operations, including deciding whom to hire and setting the conditions of employment.

And we have approximately 2,600 franchisees and they, in turn, employ well over one hundred thousand people.

As franchisors of Dunkin' Donuts, Baskin-Robbins and Togo's systems, Dunkin' Brands has the responsibility to set the standards that define our concepts—everything from what the restaurant looks like to what products it sells. We are the stewards of the brands, contractually committed to protecting our trademarks, our systems, and the investment of our great franchisees.

And each of those franchisees is the owner and operator of his or her business, and each has total day-to-day control of the operation, and promises to meet the standards that define our brands to the consumer.

And one of those contractual promises that every franchisee makes is to obey the laws, Federal, state and local, and anything like that that pertains to the operation of our restaurant. That includes the laws that pertain to the entitlement to work. The knowing hiring or employment of an undocumented worker is a violation of law, and Dunkin' Brands has enforced that requirement for many years, long before the topic became so controversial.

While we enforce that requirement, we also recognize the necessity of giving our franchisees the best tools currently available, so they can comply with the law.

A note, that many of our franchisees do not have the large, centralized human resources apparatus available to them. They are small business owners. Because of the prevalence of these counterfeit documents, it is not always easy for our franchisees to be confident that a new hire is lawfully entitled to work, especially if they

do not have the benefit of this well-staffed, well-resourced, Human Resource Department that is staffed by experienced hiring professionals. These are small business owners.

We determined that our franchise community needed help to comply with the law and in the hiring process. We began to examine the Basic Pilot Program in the summer of 2005, and while I understand that many businesses have had problems, many other businesses have problems, I would like to say that the personnel of the Department of Homeland Security were very helpful to us, and went way out of their way to familiarize all of us with the aspects of this program.

When we determined to implement the Basic Pilot Program as a mandatory standard, so that our folks can obey the laws, the Department of Homeland Security employees played an important role in training our personnel and our franchisees, making themselves available at our convention earlier this year and at many of our regional meetings.

They have also done a great job with their telephone help line, and the assistance of the Department of Homeland Security contributed to the broad acceptance of the program by our franchisees across our system. In fact, I can characterize the response by our franchise community broadly as enthusiastic.

As of June 1, the use of the Basic Pilot Program has been required by all of our franchisees and we have gotten broad-based acceptance. We do not have a wealth of experience so far, but based on the preliminary canvassing of our system, our franchisees are finding the tool easy to learn and use.

They have not experienced any real difficulty with resolving tentative non-confirmation, the mismatches. Usually the issue is caused by an input error by the franchisee, perhaps mixing up a first and middle name.

In those situations where there is a genuine mismatch, the circumstances strongly suggest that the employee was not a documented worker, meaning that they don't contest the results, and guess what? They don't return for the job. It weeds them out.

I would also add that if a mismatch is truly a record error, and the employee is entitled to work, then resolving the issue ensures that the employee gets proper credit for the Social Security contributions, which is to his or her benefit.

So I cannot say that a data base error may not result in an arduous, and even costly effort, by someone to establish his or her rightful entitlement to work. This could happen. I can only say that we have not seen it in situations as yet. The Basic Pilot Program appears to be working well for our franchisees, and their applicants.

Now while the Basic Pilot Program is working for Dunkin' Brands, I want to emphasize that we and our industry need a comprehensive solution to deal with the need for an adequate employee base. The National Restaurant Association projects that over the next decade, the number of jobs in the food service business will grow one and a half times as fast as the U.S. labor force. At the same time, the number of 16- to 24-year-olds in the labor force, half of our industry's workforce, will not grow at all.

Unfortunately, America's legal immigration system does not easily satisfy our need for workers. Our economy provided 13.4 million

jobs last year. And my testimony says 134 million. It would be nice; but it was 13.4. I want to adjust that for the record.

But the Federal Government only makes 10,000 green cards available for service industry workers each year. There is a huge disconnect. An enforcement-only solution could have severe economic consequences for the restaurant industry.

According to some estimates, undocumented workers account for approximately 5 percent of the workforce, and although never documented for the restaurant industry, the same ration holds true, which I believe is higher—but if that holds true, then roughly 625,000 of the 12.5 million restaurant workers and food service jobs are held by undocumented workers. Enforcement only isn't going to work.

We need a comprehensive solution, one that will realistically come to terms with the needs of our industry and the presence of millions of undocumented workers already here in the United States.

One last comment. Recently, President Bush visited one of our restaurants in Alexandria, Virginia, to commend our system for adopting the Basic Pilot Program. While there, he noted that the owners of the franchise, and several of their managers, were first generation Americans who were immigrants, and the president noted that this was a healthy sign that the pattern of immigration and assimilation, that has always been the strength of our country, is well-represented at Dunkin' Brands. And I am proud to say that our system was, in substantial part, built by first generation Americans, and the success of our system represents the achievement of the American dream for thousands of families, and I hope that working together, Government and industry can fashion and enact a comprehensive solution that ensures the continued vibrancy of our economy and the perpetuation of this country's unique role as a safe harbor for those seeking a better life. Thank you very much..

[The prepared statement of Mr. Luther follows:]

Prepared Statement of Jon L. Luther, Chairman and CEO, Dunkin' Brands, Inc.

My name is Jon L. Luther, Chairman and CEO of Dunkin' Brands.

Dunkin' Brands is one of the largest quick service restaurant companies, represented by nearly 8,000 Dunkin' Donuts, Baskin-Robbins and Togo's restaurants in the United States and an additional 4,000 abroad. Our three brands are stalwarts of the franchise industry, collectively representing over 143 of years of existence. Further, our system is totally franchised, meaning that all of our U.S. restaurants are owned and operated by small business owners, who implement our standards while they totally control the day-to-day operations, including deciding whom to hire and setting the conditions of employment. We have approximately 2,600 franchisees, and they in turn employ well over one hundred thousand people.

Dunkin' Brands and our Franchise System:

As franchisors of the Dunkin' Donuts, Baskin-Robbins and Togo's systems, Dunkin' Brands has the responsibility to set the standards that define our concepts—everything from what the restaurant looks like to what products it sells. We are the stewards of the brand, contractually committed to protecting our trademarks, our system, and the investment of our great franchisees. Each of those franchisees is the owner and operator of his or her business. Each has total day-to-day control of the operation, and promises to meet the standards that define our brands to the consumer.

One contractual promise every franchisee makes is to obey all the laws, federal, state and local, that pertains to the operation of the restaurant. That includes the laws pertaining to entitlement to work. The knowing hiring or employment of an

undocumented worker is a violation of law, and Dunkin' Brands has enforced that requirement for many years, long before the topic became so controversial. While we enforce the requirement, we also recognize the necessity of giving our franchisees the best tools currently available to comply with the law.

Dunkin' Brands' Decision to Embrace the Basic Pilot Program:

Many of our franchisees do not have large, centralized human resources apparatus available to them. Because of the prevalence of counterfeit documents, it is not always easy for our franchisees to be confident that a new hire is lawfully entitled to work, especially if they do not have the benefit of a well-resourced human resources department staffed by experienced hiring professionals. We determined that our franchisee community needed help to comply with the law in the hiring process. We began to examine the Basic Pilot Program in the summer of 2005. I would like to say that the personnel of the Department of Homeland Security were very helpful to us, and went out of their way to familiarize us with all aspects of the program. When we determined to implement Basic Pilot as a mandatory standard, DHS employees played an important role in training our personnel and our franchisees, making themselves available at our convention earlier this year and at many of our regional meetings. They have also done a great job with their telephone help line. The assistance of DHS has contributed to the broad acceptance of the program by franchisees across our system. In fact, I can characterize the response broadly as enthusiastic.

As of June 1, the use of the Basic Pilot Program has been required of all of our franchisees and we have gotten broad-based acceptance. We do not have a wealth of experience so far, but based on preliminary canvassing of our system, the franchisees are finding the tool easy to learn and use. They have not experienced any real difficulty with resolving tentative non-confirmations (mismatches). Usually, the issue is caused by an input error by the franchisee, perhaps mixing up a first and middle name. In those situations in which there is a genuine mismatch, the circumstances strongly suggest that the employee was not a documented worker, meaning that they do not contest the results and do not return to work. I would add that if the mismatch is truly a record error, and the employee is entitled to work, then resolving the issue ensures that the employee gets proper credit for social security contributions, which is to his or her benefit.

I cannot say that a database error may not result in an arduous and even costly effort by someone to establish his or her rightful entitlement to work; this could happen. I can only say that we have not seen those situations yet. The Basic Pilot Program appears to be working well for our franchisees and their applicants.

Basic Pilot Program—Support and Evolution:

While the Basic Pilot Program is working for Dunkin' Brands, I want to emphasize that we and our industry need a comprehensive solution to deal with our need for an adequate employee base. The National Restaurant Association projects that over the next decade, the number of jobs in the foodservice business will grow one and a half times as fast as the U.S. labor force. At the same time, the number of 16- to 24-year-olds in the labor force—half our industry's workforce—will not grow at all. Unfortunately, America's legal immigration system does not easily satisfy our need for workers. Our economy provided 134 million jobs last year, yet the federal government makes only 10,000 green cards available for service-industry workers each year.

An enforcement-only solution could have severe economic consequences for the restaurant industry. According to some estimates, undocumented workers account for approximately five percent of the U.S. workforce. Although never documented for the restaurant industry, if this same ratio holds true, then roughly 625,000 of the 12.5 million restaurant and foodservice jobs are held by undocumented workers.

We need a comprehensive solution, one that will realistically come to terms with the needs of our industry and the presence of millions of undocumented workers already here in the United States.

Recently, President Bush visited one of our restaurants to commend our system for adopting the Basic Pilot Program. While there he noted that the owners of the franchise and several of their managers were first-generation Americans, and the President noted that it was a healthy sign that the pattern of immigration and assimilation that has always been the strength of our country is well represented at Dunkin' Brands. Indeed, I am very proud to say that our system was, in substantial part, built by first-generation Americans, and the success of our system represents the achievement of the American dream for thousands of families.

I hope that, working together, government and industry can fashion and enact a comprehensive solution that ensures the continued vibrancy of our economy and the

perpetuation of this country's unique role as a safe harbor for those seeking a better life.

Chairman JOHNSON. Thank you, sir. I would like to ask how you know all your owners are legal?

Mr. LUTHER. We use the Basic Pilot Program also to verify——

Chairman JOHNSON. When someone tries to buy into your system, you check them out?

Mr. LUTHER. That is right. We have a very vigorous selection process, and one of those selection processes for new franchisees is to be run through the Basic Pilot Program to ensure that they are legal.

Chairman JOHNSON. OK. You have the ability to do that at your headquarters, I am sure, and how do you provide that capabilities to the small business owner? I mean, do you provide a computer system for them?

Mr. LUTHER. No. When a franchisee—we know who they are because they have signed franchise agreements, so when they sign these agreements, we then make sure that they are validated and verified through the——

Chairman JOHNSON. Yes, but when they hire somebody, how do they get into the system?

Mr. LUTHER. They have to go directly to the Basic Pilot Program. Most, if not all, have computer systems, or because they are located in geographies where they can go and use one, they are able to use the Basic Pilot Program in that manner.

Chairman JOHNSON. And do they have delays, such as you spoke of earlier?

Mr. LUTHER. Well, again, I said we started in June, we mandated and made a requirement in June, for all franchisees to subscribe to that, or they would be violating the laws, that we made sure that they comply. But it is early. It is only since June we put it in. But in our canvassing, we have not heard of any incidences so far, and we continue to monitor.

Chairman JOHNSON. Let me ask about ICE. You have to work with other Federal agencies and departments. Do you believe cooperation is existing between those other Federal entities and, you know, the no-match data—are we sure that we are checking that information positively, and is Social Security working with it?

Mr. CHAKWIN. Congressman, ICE is working very closely with our state and local and Federal partners. Here, in Dallas, we were one of the Document and Benefit Fraud Task Forces that were stood up by DHS, and we have 22 individual participants, Government agencies, from the Department of Labor, Social Security Administration's OIG office, a cadre of state and local agencies with us.

So cooperation is immense. There are 32 people that are there, either full time or part time, working on Document and Benefit Fraud Task Force. So the interagency cooperation is great. Even the United States Attorney's Office sends over two assistants to meet with us on a monthly basis for these meetings. So cooperation is great in the Dallas area, and the dialog between the agencies is great.

As far as the no-match data, we certainly need total access to the no-match data. We have got to be able to drill down and see what companies are the most egregious violators.

We spend a lot of time looking and researching what companies we should be looking at, who are the most egregious violators. People involved in smuggling, human smuggling, trafficking, what have you, and if we had access to this data, it would cutoff all that research time.

Chairman JOHNSON. Who is keeping you from getting it? Is it the IRS? Social Security? Who?

Mr. CHAKWIN. Well, what we have to do is, in writing, we can ask for it and we will get it, and we have forged a good relationship. But it has to go to their headquarters in Washington and all that data has to be run out of Washington.

We would like to have total access to it, without having to go back and ask the Social Security Administration for permission.

Chairman JOHNSON. I agree with you. But are you working with IRS as well?

Mr. CHAKWIN. Yes, we are. They are one of the members of the Document and Benefit Fraud Task Forces, a matter of fact.

Chairman JOHNSON. OK. Thank you.

You know, Mr. Martinez, you alluded to the difficulty an employee faces in dealing with Federal bureaucracy, when he is denied work authorization, but you refer earlier, that the Social Security administration or CIS must resolve the employee's situation within 10 working days. Is that turnaround figure being met?

Mr. MARTINEZ. From what I understand, Chairman, the difficulty is in getting that information fast enough on a plan. When you first make the request, a good number—I mean, I think the Basic Pilot Program is making some good steps and getting information quickly, but it is not always within those first 10 days on the confirmation or non-conformation. So, I mean, that is an issue.

What we would like to see is just ensure that the system is faster and working toward a goal of turning those requests within 24 hours. That would be extremely helpful.

Chairman JOHNSON. Are you getting it?

Mr. MARTINEZ. In some cases, yes. We have just signed up, again, for the Basic Pilot Program, so I don't have a wealth of knowledge on how quickly.

Chairman JOHNSON. Well, is any one agency stiffing you more than another one?

Mr. MARTINEZ. No. No, not at all, and I will say that they are all equal. No, I will say that they are much, much better now. They are more responsive, and so I think there are some substantial improvements to be made, but I still think we have got to have goals in place and hold people accountable, for making sure that they can create a system that is staffed appropriately and the resources are used to make sure we have got an accurate, fast, and efficient system.

Chairman JOHNSON. Thank you.

Mr. Tierney, you are recognized for questions.

Mr. TIERNEY. Thank you, Mr. Chairman.

Mr. Chakwin, I want to thank you for your service on that. One of my other roles is on the Intelligence Committee, so I know the great work that ICE is doing, and the stress that you are under.

Mr. CHAKWIN. Thank you.

Mr. TIERNEY. And you heard me in my testimony talk about our efforts to get you more border patrol agents, and 2700 more immigration agents to hep you with that work.

I think once we enforce it, and have the people out there doing it, then the laws are going to be somewhat meaningless on that.

Are you aware that—this slide here just basically shows that under the Bush administration, they have cut personnel for worksite immigration forces by 63 percent.

Now I assume that you could use more agents to assist you in your job. Am I right?

Mr. CHAKWIN. Well, under the administration's proposal, the administration has proposed 171 additional agent positions and 35 auditor positions, which we could use. You know, we are always willing to work with Congress and the administration to get more, or whatever.

Mr. TIERNEY. So we are going to make an effort to increase those numbers, and to increase the number of audits as well.

Mr. CHAKWIN. But I might say that that statistic is a little misleading. We haven't gotten out of the worksite enforcement arena at all. In fact, we have become more vigilant in going after the most egregious violators. As a matter of fact, last year, I believe it was 445 criminal arrests and worksite enforcements. The year before, it was 176. You know, we are targeting the most egregious violators and working well with the United States Attorney's Office.

So I think we have made great strides. Now critical infrastructure has always been a priority with us. National security and public safety, of course, and along with that is critical infrastructure, and we have not lost focus of that we are still going after the most egregious violators in worksite enforcement.

Mr. TIERNEY. And you are talking a bit of a change of strategy, then, as to how you go about on that?

Mr. CHAKWIN. Well, before the merger, we went after, we had fines, civil fines. We are getting away from civil fines. They are a nuisance. Most employers think of them as a nuisance fine. What we have done is have worked with the United States Attorney to go after people criminally, and use the asset forfeiture laws to take away their ill-gotten gains.

Mr. TIERNEY. Now with the expense of our friends here getting a little out of control, but the number that we had had with 1999 was 2849 arrests on that. It had fallen, in 2003, to 445. Is that going to be reversed?

Mr. CHAKWIN. Well, so far this year, administrative arrests, we have made over 2100 administrative arrests.

Mr. TIERNEY. So you are moving back up to the numbers of the last decade, then?

Mr. CHAKWIN. And plus, we have got to add in those criminal arrests. We are going after criminal indictments and working with the United States Attorneys. There is a lot of work involved in, you

know, working with the United States Attorney's Office in prosecuting these corporations, and the officers of the corporation.

Mr. TIERNEY. Mr. Beardall, under the Sensenbrenner bill, the House bill, the employment verification system indicates that every citizen, every citizen and lawful permanent resident of the country will have to be, I think, forced to obtain the Government's consent to work; is that right? Essentially, all have to go through the system?

Mr. BEARDALL. Right. If the system is going to work, then every single employee in the United States has to go through this verification system. You can't just single out people you think might be immigrants.

Mr. TIERNEY. OK. Now Mr. Chakwin, again, I think you would be the one to answer this. What would the National Data base contain? I assume it would have the personally identifiable information regarding every citizen and every visa holder. So it would have their name, their birth date, their Social Security number, their address. What else would it have?

Mr. CHAKWIN. You are talking about what is on an I-9?

Mr. TIERNEY. Was it an I-9? And what would be needed for the new system when we go through a pilot to a full-blown system where everybody has to be checked?

Mr. CHAKWIN. That is really a CIS matter. Citizenship and Immigration Services is developing that system and——

Mr. TIERNEY. Will it be more information than is on the current pilot program, or the same?

Mr. CHAKWIN. You know, I am not really sure. I have been to a meeting at headquarters recently in reference to that, and it is a work in progress on what they are going to be needing on that.

Mr. TIERNEY. Thank you.

Mr. CHAKWIN. But that should be directed, really, toward CIS.

Mr. TIERNEY. Mr. Martinez, the Basic Pilot Program, we understand, has about a 20 percent—I think you mentioned, that is why I come to you, but it could be any one of the witnesses—had about a 20 percent error rate.

Now the Chairman and I were talking about how we think this ought to be instantaneous and so we ought to be able to check. But it is, I think, a little bit unnerving, to think that if everybody in the country has to go into this system, there is a 20 percent error rate, and that happens not just in the pilot program but into the full-blown program, we have 150 million working age U.S. citizens, that looks like about 30 million of them are going to have trouble on their job, I mean, probably most of them improperly so.

They are going to have to go through some sort of a verification system and a corrections system, or whatever.

Mr. MARTINEZ. That is correct, Congressman, and that is the issue that concerns us most, is what we call these false negatives. Those are people that are authorized to work in the United States, whose family, whose livelihood is being impacted because somebody typed in the wrong spelling of the name. They had a situation where they reversed the middle name or the first name. We have had a situation—I hope they don't mind me using their name—but an individual at work called, the last name is Van Brandt. We had to send them off to the Social Security office to get their informa-

tion checked on these mismatch letters because there was no space in between Van Brandt. And so that type of information comes up and is shown as an error.

So that individual has to spend time, effort, to go down to the Social Security office to get that information corrected, and it probably would have been easier for them to change their name than to go in and try to get it corrected.

Mr. TIERNEY. So if 5 percent of the workforce are immigrants but 30 percent of the workforce could end up with problems in this system, unless we correct that error rate.

Mr. MARTINEZ. Correct. Right. And when it comes to those that are foreign born, the percentages from the reports I have read indicate that there is a 30 to 35 percent error rate among foreign-born individuals.

Mr. TIERNEY. Tens of millions of people, and employers, numerous employers going through this and having to spend all this time correcting it.

Mr. MARTINEZ. Absolutely. And that's why the reverification system becomes extremely burdensome on everyone, if you have to go back and reverify.

Chairman JOHNSON. The time of the gentleman has expired.

Mr. TIERNEY. Thank you.

Chairman JOHNSON. Mr. Wilson, you are recognized.

Mr. WILSON. Thank you, Mr. Chairman.

Mr. Chakwin, we appreciate very much your service and professionalism. You have indicated that the Immigration and Customs Enforcement agency provides training tools for employers, to help avoid violating the law. Can you explain how ICE is available to employers?

Mr. CHAKWIN. Well, recently, the assistant secretary rolled out IMAGE, which stands for ICE Mutual Agreement Between Government and Employers, and what it is is we will go out and work with the employers to establish what we consider the ten best hiring practices.

One of the cornerstones of the ten best hiring practice is the use of the basic pilot verification program. And what we will do is we will have individuals go out and meet with the employer on what documents to look for, you know, detection for—we don't expect that people are going to be fraud experts.

I am not a fraud expert. I don't think that the employer should be a fraud expert. But, you know, every state requires a biometric on their driver's license, and if the person has a driver's license, doesn't look like them, well, I guess maybe that's not their driver's license. Something basic like that.

We will work with the employer, what documents to look for, we train them, we'll go out—anybody who is interested in it, you know, we will be more than willing to work with that company.

Mr. WILSON. And this is for small and large businesses?

Mr. CHAKWIN. That is correct.

Mr. WILSON. Mr. Luther, I want to thank you for your commitment to comply with the law, and I have worked, firsthand, with first generation Americans from India, who are very proud to be Dunkin' Donuts franchisees, and your company has a great reputation.

Mr. LUTHER. Thank you.

Mr. WILSON. Before your company enrolled in the Basic Pilot Program, your human resource managers had to review all documents and simply maintain I-9 records.

How did your company or franchise owners ensure that they were not accepted fraudulent documents, and are there ways to improve the documents, to ensure that your personnel are comfortable with the documents presented?

Mr. LUTHER. Prior to the Basic Pilot Program, the requirement was a Social Security number and an I-9, and all that was verified. The problem was we didn't know if that verification met that actual employee. And these are small business owners. Like I mentioned before, we don't have large human resources departments. So it is the individual small business owner who is required to make that determination, and when it is difficult to determine counterfeit documents, sometimes they would just have to use their own judgment, which is why the Basic Pilot Program, when it came along, was, we felt, the only true verification system we could use, and we have required that and mandated that to all franchisees to comply with. So we have taken a little bit of that guesswork away, and although there may be errors, many of those errors, as my good counterpart here, Abel, has just said, there is a lot of mismatches, but those mismatches get corrected pretty easily.

So the millions of people you are talking about get reduced pretty significantly on that first mismatch round. And what we do find, though, is after a mismatch, and it is a true mismatch, they don't come back for employment verification. They rule themselves out. So that helps our small business owner as well.

Mr. WILSON. Saves time and complies with the law.

Mr. LUTHER. Right.

Mr. WILSON. Ms. Simmons, your testimony highlights a serious flaw in the Reid-Kennedy bill passed by the Senate. When non-confirmation is given by a verification system, the Senate bill allows for up to 30 days to determine eligibility. As you point out, this could expose employers to provide someone who is not in our country benefits.

What do you believe is the appropriate time limit for non-confirmation?

Ms. SIMMONS. The system that we use right now, it gives you the 10 days for non-conformation. By that time, we should have it. When I run BPI, it is almost instantaneous, so I don't have an issue when people are run through the system. We did have a few mismatches. I guess I like, you know, looking at the shorter timeframe, without the 30 days. Or 43 days.

Mr. WILSON. And how short could it be?

Ms. SIMMONS. I guess I like the system right now. You know, I like the 10 days for the second verification, reverification.

Mr. WILSON. Thank you.

And Mr. Martinez, in your testimony you highlight the error rates of the Government data bases. We all rely on major credit card companies to provide almost instantaneous approval. From your experience, is there a solution to update the data bases and provide for better accuracy and speed?

Mr. MARTINEZ. Absolutely, Congressman. I think we have just got to make sure we recognize that we need the resources, both from the Government side, and be committed to spending those resources to hire the people we need to, and involve the consultants that we need to to develop the software that will be accurate. That is the big issue, is can we make it as accurate as possible? Because we are going to have some issues, and we will continue to have issues. We all realistic about that.

But making sure we have got a system in place, that is going to be accurate, is really the biggest issue, and I think when we look at rolling in the process, and right now there is an eighteen—I think it is basically either a 180 day, or 18 month roll-in process, of phase-in for this new system, the bigger the ship, the harder it is for a corporation. The more you employ, to turn around and phase in everyone into this new system. So I ask, and a side point is, to really consider the phase-in, and look at a 2-year phase-in based upon the size of the employer, to make sure we can get these accurate results, and then making sure that when people come in and apply for their visas or their work permits, that we can input that information into the system as quickly as possible.

Waiting 3 months, 6 months, really affects everybody, if you cannot verify, when somebody comes in, gets an updated visa, put that information into the system, so that when you check to see whether or not they are authorized, you can get that information quickly.

Mr. WILSON. Thank you.

Chairman JOHNSON. The gentleman's time has expired.

I want to thank the witnesses for their valuable time and testimony, and both the witnesses and the members for their participation. A couple of our members from out of state have airplanes to catch. Thankfully, we have a transportation system in this country that can get us back and forth pretty rapidly.

So I appreciate that and I would just like to point out that, you know, Visa and Mastercard can have instantaneous recognition of who is right and who is wrong——

[Applause.]

Chairman JOHNSON. This points out that free enterprise and freedom do work, and that is what America is all about.

If there is no further business, the subcommittee stands adjourned. Thank you all.

[Whereupon, at 12:25 p.m., the subcommittee was adjourned.]

[Additional submissions for the record follow:]

[Prepared statement of the U.S. Citizenship and Immigration Services follows:]

Prepared Statement of U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security

I. Introduction

Mr. Chairman, Ranking Member Miller, and Members of the Committee: We appreciate the opportunity to submit testimony for the record to the Committee about the U.S. Citizenship and Immigration Services' (USCIS) Basic Pilot Employment Verification Program (Basic Pilot), which provides information to participating employers about the work eligibility of their newly hired workers. We will also describe the agency's plans to improve and expand the Basic Pilot in preparation for a nationwide mandatory Employment Verification Program.

An Employment Verification Program is a critical step to improving worksite enforcement and directly supports the President's goal of achieving comprehensive im-

migration reform. In his speech to the U.S. Chamber of Commerce on June 1, President Bush endorsed the Basic Pilot as "a quick and practical way to verify Social Security numbers" that "gives employers confidence that their workers are legal, improves the accuracy of wage and tax reporting, and helps ensure that those who obey our laws are not undercut by illegal workers."

Clearly, if we are to control illegal immigration, we can't just focus on the border. Illegal immigrants are living and working in every state of the nation, and our solution must be just as comprehensive. We must make sure that our immigration laws are enforced in New York and Ohio and Georgia, not just along the southwest border. Today, an illegal immigrant with a fake ID and Social Security card can find work almost anywhere in the country without difficulty. It's the prospect of jobs that leads people to risk their lives crossing a hundred miles of desert or to spend years in the shadows, afraid to call the authorities when victimized by criminals or exploited by their boss.

That is why the Administration has proposed a comprehensive overhaul of the employment verification and employer sanctions program as part of the President's call for comprehensive immigration reform.

There is much we can do in advance of the enactment of comprehensive immigration reform. Here's what we are working on at USCIS to improve and expand the Basic Pilot:

- Ensuring that more aliens authorized to work have secure biometric cards.
- Accessing our card databases for verification of work authorization—which will decrease the number of Basic Pilot queries that require a manual check.
- Streamlining the enrollment process for employers by making it completely electronic.
- Creating monitoring and compliance units that will search Basic Pilot and Employment Verification Program data for patterns to detect identification fraud and employer abuse.

The President's FY07 budget requests $110 million for expansion of the Basic Pilot to make it easier for employers to verify electronically the employment eligibility of workers. Based on our planning to date, we believe a feasible timetable allowing for phased-in expansion of mandatory verification along with flexible, user-friendly program requirements are essential to expand and operate the program as efficiently and effectively as possible.

We will also reach out to employers, including small businesses, for feedback and real-world input, such as ideas on the best ways to submit data on new hires with the least collective burden and how to make electronic employment verification as user-friendly as possible.

II. The Current Basic Pilot Program and Employment Verification Program

With that backdrop, we would like to take this opportunity to outline how the current Basic Pilot works and the plans USCIS is putting in place to expand and improve it in preparation for a national mandatory program.

Congress established the Basic Pilot as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, creating a program for verifying employment eligibility, at no charge to the employer, of both U.S. citizens and noncitizens. The Basic Pilot program began in 1997 as a voluntary program for employers in the five states with the largest immigrant populations—California, Florida, Illinois, New York and Texas. In 1999, based on the needs of the meat-packing industry as identified through a cooperative program called Operation Vanguard, Nebraska was added to the list. The program was originally set to sunset in 2001, but Congress has twice extended it, most recently in 2003 extending its duration to 2008 and also ordering that it be made available in all 50 States. However, the program remains only voluntary, with very limited exceptions. A small percentage of U.S. employers participate, although the program is growing by about 200 employers a month to a current 10,000 agreements between USCIS and employers. These employers are verifying over a million new hires per year at more than 35,000 work sites.

We seek in operating the Basic Pilot program to encourage the voluntary participation of small businesses, and to be responsive to their needs and concerns. Most (87%) of our participating employers have 500 or fewer employees. We would welcome your support in reaching out to enroll even more employers in the program. Interested employers can register by going to our Basic Pilot Employer Registration Site at: *https://www.vis-dhs.com/employerregistration.*

How the Basic Pilot Works

After hiring a new employee, an employer submits a query including the employee's name, date of birth, Social Security account number (SSN) and whether the per-

son claims to be a U.S. citizen or work-authorized noncitizen (for noncitizens, DHS issued identifying # is also submitted) and receives an initial verification response within seconds. For an employee claiming to be a U.S. citizen, the system transmits the new hire's SSN, name and date of birth to the Social Security Administration (SSA) to match that data, and SSA will confirm citizenship status on the basis of its Numident database. For the 88% of employees whose status can be immediately verified electronically, the process terminates here; in the remaining cases, the system issues a tentative nonconfirmation to the employer. The employer must notify the employee of the tentative nonconfirmation and give him or her an opportunity to contest that finding. If the employee contests the tentative nonconfirmation, he or she has eight days to visit an SSA office with the required documents to correct the SSA record.

Noncitizen employees face a more elaborate process. Once SSA verifies the name, date of birth, and SSN, the system will attempt to verify the person's work authorization status against the Basic Pilot database. (If a noncitizen's SSN information does not match, the individual is first referred to SSA) If the system cannot electronically verify the information, an Immigration Status Verifier will research the case, usually providing a response within one business day,[1] either verifying work authorization or, in 19 percent of cases, issuing a DHS tentative nonconfirmation. If the employer receives a tentative nonconfirmation, the employer must notify the employee and provide an opportunity to contest that finding. An employee has eight days to call a toll-free number to contest the finding and cannot be fired during that time because of the tentative nonconfirmation. Once the necessary information from the employee has been received, USCIS generally resolves the case within three business days,[2] by issuing either a verification of the employee's work authorization status or a DHS Final Nonconfirmation.

As you know, the House and Senate have both passed significant immigration legislation this Congress, including provisions that require a mandatory electronic employment eligibility verification program for all 7 million U.S. employers. Although the House and Senate provisions differ in some significant ways, both bills would require the eventual expansion to all U.S. employers of an Employment Verification Program generally modeled on the Basic Pilot.

USCIS is already planning for the expansion of the program. The President's FY07 budget request includes $110 million to begin expanding and improving the Basic Pilot, including conducting outreach, instituting systems monitoring, and compliance functions. USCIS is exploring ways to improve the completeness of the immigration data in the Basic Pilot database, including adding information about nonimmigrants who have extended or changed status and incorporating arrival information in real time from U.S. Customs and Border Protection. In addition, USCIS is enhancing the Basic Pilot system to allow an employer to query by the new hire's card number, when that worker has a secure I-551 ("green card") or secure Employment Authorization Document. This enhancement will improve USCIS' ability to verify promptly the employment eligibility of noncitizens because the system will validate the card number against the repository of information that was used to produce the card, thereby instantly verifying all legitimate card numbers.

Planned Monitoring and Compliance Functions

No electronic verification system is foolproof or can fully eliminate document fraud, identity theft, or intentional violation of the required procedures by employers for the purpose of hiring unauthorized persons or keeping them on the payroll. But an Employment Verification Program that includes all U.S. employers, along with monitoring and compliance functions and a fraud referral process for potential ICE Worksite Enforcement cases, can substantially deter and detect the use of fraud by both employers and employees as the Administration works to strengthen its overall interior enforcement strategy.

The current Basic Pilot is not fraud-proof and was not designed to detect identity fraud. In fact, a recent analysis of Basic Pilot systems data found multiple uses of certain I-94 numbers, A-numbers, and SSNs in patterns that could suggest fraud. As currently envisioned, the Employment Verification Program will include robust processes for monitoring and compliance that will help detect and deter the use of fraudulent documents, imposter fraud, and incorrect usage of the system by employers (intentionally and unintentionally). USCIS will forward enforcement leads to ICE Worksite Enforcement in accordance with referral procedures developed with ICE. The monitoring unit will scrutinize individual employers' use of the system and conduct trend analysis to detect potential fraud. Findings that are not likely to lead

[1] Statistics gathered from the Basic Pilot database, Oct. 1, 2005 to March 31, 2006.
[2] Ibid.

to enforcement action (e.g., a user has not completed training) will be referred to USCIS compliance officers for follow-up. Findings concerning potential fraud (e.g., SSNs being run multiple times in improbable patterns; employers not indicating what action they took after receiving a final nonconfirmation) will be referred to ICE Worksite Enforcement investigators.

It is essential that DHS have the authority to use information arising from the Employment Verification Program to enforce our Nation's laws, including prosecuting fraud and identifying and removing criminal aliens and other threats to public safety or national security. It is also important that the system contain security and other protections to guard personal information from inappropriate disclosure or use, and to discourage use of the system to discriminate unlawfully or otherwise violate the civil rights of U.S. citizens or work-authorized noncitizens.

Planning for the Employment Verification Program

We are confident in our ability to get a substantially expanded Employment Verification Program operational with the President's budget request.

The Administration supports a phased-in Employment Verification Program implementation schedule on a carefully drawn timeframe to allow employers to begin using the system in an orderly and efficient way. We favor having the discretion to phase in certain industry employers ahead of others. As noted elsewhere in my testimony, USCIS already is working to improve and expand the Basic Pilot program to support the proposed expansion.

USCIS is also committed to constructing a system that responds quickly and accurately. In order for this system to work, it must be carefully implemented and cannot be burdened with extensive administrative and judicial review provisions that could effectively tie the system, and DHS, up in litigation for years.

III. Improved Documentation

In the President's May 15, 2006 address to the nation on comprehensive immigration reform, he indicated that businesses often cannot verify the legal status of their employees because of widespread document fraud. We need, he said, "a better system for verifying documents and work eligibility. A key part of that system should be a new identification card for every legal foreign worker. This card should use biometric technology...to make it tamper-proof. A tamper-proof card would help us enforce the law, and leave employers with no excuse for violating it."

Many foreign workers already possess a secure, biometric card evidencing their immigration status as either an immigrant (an I-551 card, commonly known as a "green card") or a work-authorized nonimmigrant (an Employment Authorization Document or EAD). Some nonimmigrants currently have non-secure EADs, but USCIS is planning to eliminate the issuance of these cards in favor of secure cards. In addition, USCIS is considering requiring more classes of work-authorized nonimmigrants to obtain a secure EAD. Requiring all work-authorized nonimmigrants to obtain secure documentation would help ensure that their work eligibility can be instantly verified in the Basic Pilot or Employment Verification Program. As discussed previously, USCIS already is developing the system capability to verify a new hire's immigration card number against the card information repository. Under this new system, a legitimate card number matched with a name and date of birth will electronically verify in a matter of seconds—and only a fraudulent card would fail to verify.

IV. Conclusion

We in USCIS are in a unique position to understand the importance of having legal means for individuals to enter and work in the United States. That is why we, and the President, support comprehensive immigration reform that includes interior and border enforcement in addition to a temporary worker program.

We thank both the House and the Senate for recognizing the need for change in this area. With a strong cooperative effort now, the prospect of a truly effective national mandatory Employment Verification Program, combined with improved documentation, will reduce pressure on border and interior enforcement, simplify today's processes, put employers on an equal footing, and support a temporary worker program that is vital to our economy.

[News release and fact sheet from the U.S. Citizenship and Immigration Services follow:]

News Release

Proven Employment Verification Tool Attracts More Than 10,000 U.S. Employers

Record Numbers Now Using the Basic Pilot Employment Verification Program

WASHINGTON, DC—U.S Citizenship and Immigration Services (USCIS) today announced that more than 10,000 U.S. employers are now participating in the Basic Pilot Employment Verification Program. The program allows employers to remove the guesswork involved with the hiring process by running online employment authorization checks against Social Security Administration and DHS databases.

"Participation in the Employment Verification Program is the solution for businesses committed to maintaining a legal workforce," said USCIS Director Emilio Gonzalez. "Through the program, DHS is providing employers with information needed to ensure their newly hired employees are fully eligible to work in the United States. In the process, we're protecting jobs for authorized U.S. workers."

Participation in this free program has more than doubled during the first three quarters of this fiscal year. Nearly 200 new employers are joining the Employment Verification Program each month. These businesses are verifying the work authorization of more than one-million new hires a year at 36,000 hiring sites across the United States.

Employers can register for the Employment Verification Program on-line at *https://www.vis-dhs.com/EmployerRegistration.* Additional information for employers about the program is available by calling 202-272-8720 or visiting *www.uscis.gov.*

On March 1, 2003, U.S Citizenship and Immigration Services became one of three legacy INS components to join the U.S. Department of Homeland Security. USCIS is charged with fundamentally transforming and improving the delivery of immigration and citizenship services, while enhancing the integrity of our nation's security.

Fact Sheet

Basic Pilot Employment Verification Program

Removing the Guess Work from Employment Document Review

> The Employment Verification Program * * * "is a quick and practical way to verify social security numbers giving employers confidence that their workers are legal * * * "
>
> PRESIDENT GEORGE BUSH,
> *June 1, 2006.*

The Basic Pilot Employment Verification Program allows employers to remove the guesswork involved with hiring new employees. Conducted jointly by the Department of Homeland Security (DHS) and the Social Security Administration (SSA), the Employment Verification Program allows employers to use an automated Internet-based system to run employment authorization checks against DHS and SSA databases during the hiring process. In the process, it assists employers in maintaining a legal workforce and protects jobs for authorized U.S. workers. The program is administered by U.S. Citizenship and Immigration Services.

The Employment Verification Program became available to all employers in California, Florida, Illinois, New York and Texas in November 1997, and to Nebraska employers in March 1999. On December 20, 2004, the program expanded to allow employers in all 50 states and the District of Columbia to voluntarily participate.

More than 10,000 employers are currently using the program to verify that their new hires are authorized to work in the United States. There is no charge to participate. The President's FY07 budget request includes $110 million to expand and improve the Employment Verification Program.

Employers can register on-line at *https://www.vis-dhs.com/EmployerRegistration*, which provides instructions for completing the Memorandum of Understanding (MOU) needed to officially register for the program.

Once registered, employers use the Employment Verification Program through a simple search function which asks for information captured on the I-9 Form (Employment Verification form). Each Employment Verification search compares employee information against more than 425-million records in the SSA database and more than 60-million records in DHS databases. Most responses are returned within seconds.

The Basic Pilot Extension and Expansion Act of 2003 extended the Basic Pilot Employment Verification Program until November 2008. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorized the program.

Additional information for employers about the Employment Verification Program is available by calling 202-272-8720 or visit *www.uscis.gov*.

On March 1, 2003, U.S Citizenship and Immigration Services became one of three legacy INS components to join the U.S. Department of Homeland Security. USCIS is charged with fundamentally transforming and improving the delivery of immigration and citizenship services, while enhancing the integrity of our nation's security.

[Prepared statement of the American Staffing Association follows:]

Prepared Statement of the American Staffing Association

Introduction

The American Staffing Association appreciates the opportunity to offer comments on the topic of enforcing employee work eligibility laws and implementing a stronger employment verification system. While we strongly support an electronic employment verification system, such as the type proposed in both House and Senate immigration reform bills, there are several issues that need to be addressed to make such a system fair and workable.

ASA has been the voice of the U.S. staffing industry for 40 years. Along with its affiliated chapters, ASA promotes the interests of the industry and flexible employment opportunities through legal and legislative advocacy, public relations, education, and the establishment of high standards of ethical conduct.

ASA members provide a wide range of employment-related services and solutions, including temporary and contract staffing, recruiting and placement, outsourcing, training, and human resource consulting. Member companies operate more than 15,000 offices across the nation and account for more than 85% of U.S. staffing industry sales.

The staffing industry employs almost 3 million employees a day and more than 12 million each year. Staffing firms recruit and hire their employees and assign them to businesses to assist in special work situations such as employee absences, skill shortages, and seasonal workloads, or to perform special assignments or projects. Employees work in virtually every skill level and job category, including industrial labor, office support, engineering, IT, legal, accounting and health care.

Problems with the Current Employment Verification Efforts

The current employment verification process is based on the employers' review of documents presented by new employees to prove their identity and work eligibility. Employers use a form known as the I-9 form to certify that they have reviewed documents presented by their employees and that the documents appear genuine and relate to the individual presenting the documents. However, as technology continues to improve, document fraud and identity fraud have undermined the employment verification process. Simple proposals to revise the I-9 process, such as reducing the number of acceptable work eligibility documents, have yet to be acted on.

Worksite Enforcement Issues

According to a recent GAO report, the worksite enforcement program has been a low priority under both the former Immigration and Naturalization Services (INS) and its successor the Immigration and Customs Enforcement (ICE). During fiscal year 1999, INS devoted about 9 percent of its total investigative agents' time to worksite enforcement, while in fiscal year 2003 it allocated about 4 percent. ICE officials reported difficulties in proving employer violations and setting and collecting fine amounts that meaningfully deter employers from knowingly hiring unauthorized workers. In addition, INS and then ICE shifted its worksite enforcement focus to critical infrastructure protection after September 11, 2001.[1]

The Need for a Stronger Employment Verification System

Throughout the entire debate on immigration reform, one of the few points that both members of the House and Senate agree on is the need to expand the current voluntary Basic Pilot program into a mandatory electronic employment verification system.

While the basic pilot program has been very successful with enhancing the employment verification process, there are still several issues that need to be addressed before a mandatory system can be introduced. The cost and time table for

---

[1] United States Government Accountability Office, Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts, June 21, 2005.

creating and implementing an electronic verification system that every employer in the United States was required to use is a major concern. Also, while the pilot program helps detect document fraud, it is unable to detect identity fraud.

In implementing a new employment verification system, Congress needs to address not only the issues raised above, but they must also address the following issues that affect staffing firms in particular.

As Under Current Law, Employers Should Have the Option of Verifying Employees Upon Offer of Employment Or When They Actually Commence Work

Under current law, staffing firms and other employers have the option of verifying employment eligibility upon offer of employment or at the time work actually commences. [52 F.R. 16218, May 1, 1987] Staffing firms generally opt to treat individuals who successfully complete a job application and are deemed qualified for job assignments as having been offered employment for the purpose of completing the I-9 verification, even though a specific job assignment is not immediately available.

Most temporary and contract workers wait anywhere from a day to several weeks before being contacted by the staffing firm for a job assignment with a staffing firm customer and most never have an occasion to return to the staffing firm's offices. Once notified of a job assignment, employees typically go from home directly to the customer's work site. Because many assignments must be filled on short notice, it would be difficult if not impossible for most employees to return to the staffing firm's office to complete the attestation and document examination process prior to going on the job. Moreover, getting to the staffing firm's office would be a significant hardship for employees who live far from the staffing firm's offices or who rely on public transportation.

Accordingly, staffing firms and other similarly situated employers must continue to have the option of completing the attestation and document examination phase of the verification process at the time they are offered employment.

Employers should have the same flexibility in using the new electronic employment verification system. Staffing firms and other employers whose employees do not commence work immediately should have the option of accessing the system at the time the individual is offered employment (e.g., when the individual has successfully completed the application process and been approved for employment) or when work actually commences.

The Employment Verification System Should Not Apply to All Recruiters and Referrers

Under current law, the obligation to verify employment eligibility generally applies only to employers, not to those who merely recruit or refer individuals for employment by others. The only exception is for those who recruit agriculture or farm workers. [8 U.S.C. Section 1324a(a)(1)(B)(ii).] Congress narrowed the verification requirements to agriculture or farm recruiters in 1991 recognizing that it was unnecessary to also impose those requirements on traditional placement agencies and executive recruiting firms whose clients already have the obligation to verify eligibility upon hire.

Both House and Senate immigration reform bills would make it unlawful to hire "or to recruit or refer for employment" an individual without complying with the employment verification requirements. We are concerned that this broad reference to those who recruit and refer could again be construed inappropriately as expanding the verification obligations to all recruiters. While we have been advised by staff members of the House and Senate Judiciary Committee that this is not the intent of the legislation, in order to avoid any misinterpretation, we urge that the bill be amended to make that unequivocally clear.[2]

Employers Should Not be Charged a Fee for Using The System

According to a Congressional Budget Office cost estimate report, the cost to develop and fully implement a viable electronic employment verification system will be more than $400 million over a 4-year period. While some believe employers should be charged a fee for using this system, we believe that would place an unwarranted burden on businesses. A fee-based system will also have an unfair and disproportionate impact on employers with large numbers of part-time and temporary employees and high employee turnover, such as staffing firms, restaurants, and retail establishments.

---

[2] Sections 705 and 708 of H.R. 4437 appears to limit the reference to recruiting and referring in Section 703 to labor services agencies that operate hiring halls or day labor shelters, which would be appropriate. But the Senate bill contains such limitation.

Businesses Should Not be Required to Reverify Current Employees

Any new verification system must be fair to all employers. The new system proposed in the House immigration bill requires all employers to verify their entire work force through the new system by the year 2012. This requirement is unnecessary because these employees will have already been verified by their employers through the current I-9 process. It will also cost employers time and money and will discriminate against employers with disproportionately large temporary and part-time work forces and high turnover. Instead of requiring blanket reverification for all employers, Congress should allow the Secretary of Homeland Security to require reverification only if an employer has engaged in material violations of the law.

Conclusion

Efforts to reduce the employment of unauthorized workers in the United States require both a strong employment eligibility verification process and a credible worksite enforcement program to ensure that employers meet verification requirements. The American Staffing Association strongly supports Congress's efforts to achieve this goal, and we look forward to working with members of Congress and others to bring such a system to fruition.

○