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IMMIGRATION ENFORCEMENT AT THE WORKPLACE: LEARNING FROM THE MISTAKES OF 1986

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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IMMIGRATION ENFORCEMENT AT THE WORKPLACE: LEARNING FROM THE MISTAKES OF 1986

MONDAY, JUNE 19, 2006

U.S. SENATE,
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CITIZENSHIP,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:05 p.m., in room SD–226, Dirksen Senate Office Building, Hon. John Cornyn, Chairman of the Subcommittee, presiding.

Present: Senators Cornyn, Kyl, and Sessions.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Chairman CORNYN. Good afternoon. This hearing of the Senate Subcommittee on Immigration, Border Security, and Citizenship will come to order.

First of all, I would like to express my appreciation to Senator Specter, the Chairman of the Judiciary Committee, for scheduling today's hearing, as well as my appreciation to Senator Kennedy, the Ranking Member, and his staff for working with us on the hearing.

I also want to acknowledge, given the subject matter of worksite verification, being within the jurisdiction of the Finance Committee we were fortunate to have both the Chairman and other members of the Finance Committee also on the Judiciary Committee to work very closely on Title III, or this worksite provision that is actually contained in the Senate version of the bill, and those would be Chairman Grassley and Senator Jon Kyl, and I want to express my appreciation for their leadership on that critical issue.

More than 3 weeks ago, the Senate passed the Comprehensive Immigration Reform Act of 2006. In my judgment, that bill contains fundamental flaws, and I voted against its passage. But I also recognize that the Senate bill reflects a comprehensive approach to immigration reform, and I have consistently advocated for a comprehensive reform, and I believe if we can get the bill to conference, we can significantly improve the bill and come out with a bill that both reflects our National interests and our National values.

And while the differences between the House and the Senate immigration bills are many, we need to roll up our sleeves and get to work to find common ground. There is really no other option. I

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invite anyone who thinks this issue can wait to come down to Texas and just take a look firsthand at how this problem manifests itself along our borders, in our hospitals, in our schools, and in our criminal justice system. It simply cannot wait.

The legislative history of the 1986 Immigration Reform and Control Act—the floor debates and Committee reports—reveal how similar the current immigration reform debate is to one held 20 years ago.

Americans were assured then that there would be a one-time amnesty and better enforcement, and that that better enforcement, including a system to prevent undocumented workers from obtaining employment in the United States, would reduce the flow of illegal aliens into our country.

The American people are now once again being asked to accept the same bargain today, and the cornerstone of this deal is a new electronic employment verification system.

Unfortunately, the Senate has conducted virtually no open debate on this subject. Not a single amendment was debated or marked up during the Judiciary Committee hearing, and less than 1 hour of floor time was devoted to this subject during the debates on the Senate floor.

Now, this concerns me because not only do I see worksite enforcement as the critical means or linchpin, really, of successful immigration reform, but also because the Secretary of the Department of Homeland Security has told me that several provisions in the Senate bill would make the system unworkable. And the Government is not the only one to express concerns regarding the current proposal. Some groups have expressed concerns that an electronic verification system will increase opportunities for employers to discriminate against employees.

Business groups, meanwhile, have also expressed concern with the Senate proposal. Under the Senate bill, an employer might not receive confirmation of a worker's status for up to 50 days. That lengthy waiting period yields two results: a loophole for unscrupulous employers and a prolonged period of uncertainty for law-abiding employers.

We have a diverse group of witnesses today, including current and former Government officials, and I am optimistic that their testimony will allow us to explore those issues in an open setting and build momentum for conference with the House. But a perfect verification system accomplishes nothing if we are not committed to enforcing the law against those who do not comply. And the Government's track record on employer sanctions does not inspire confidence. In 1999, there were 2,849 worksite arrests for immigration violations. By 2004, that number had dropped to 159.

And in 2003, Immigration and Customs Enforcement, ICE, devoted only 90 full-time equivalent employees to worksite enforcement. Let me just repeat that because the numbers are significant. Ninety employees to enforce laws that apply to every employer in the United States. Ninety.

It is no wonder that many employers view enforcement as a remote possibility and any civil penalties that might potentially be assessed as merely a cost of doing business. And it is also no won-

der that many Americans are skeptical about how serious the Federal Government is about enforcing its own laws.

As we discuss these technical issues, we must not lose sight of the bigger question. Will this new electronic system eliminate the magnet of illegal employment? It is my belief we cannot control illegal immigration unless we stop illegal employment, as 45 percent of those who are currently in this country illegally have not come across the border illegally, but have come legally and overstayed and melted into the American landscape.

This hearing will explore these issues, and it is my hope that we will be in a better position to improve the legislation during a conference with the House.

Senator Kennedy has asked that his full statement be made part of the record, and it will be, without objection. And I know that we will probably have other Senators come in and out during the course of the day, as they have conflicting obligations. But since Senator Kyl is here with us, I would like to offer him an opportunity to make any opening remarks he would like to make.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman. We certainly want to get to the witnesses, but I do want to commend you for the work you have done on this, not only as Chairman of this Subcommittee, but working alongside me and others to try to approach this whole question of comprehensive immigration reform in a sensible way. You have certainly done that, and I appreciate the hearing that you are holding here today.

If you would pardon an anatomical analogy, it seems to me that not only is the workplace verification the backbone of any system, but it is also potentially the Achilles heel. As we saw in 1986, if you do not have a system that works well, then the rest of your program, however well intentioned it might be, is bound to fail. And what some people fail to appreciate is that you are not just talking about proper documents for guest workers, though, of course, that is included; but you are also talking about documentation for every American who is seeking a job, because the people who are here as guest workers will gladly show you valid documentation of their guest worker status. It is those who are not willing to participate in that kind of program, but, rather, will try to continue to get away with the use of false and fraudulent documents that you are concerned about. And those people contend that they have the right to work here because they have a Social Security card, a driver's license, a passport, or other document that has been fraudulently prepared.

So that is the challenge that exists, and I note that Mr. Baker in his testimony talks about the key components of the current failed employment verification and enforcement system: fake documents and no requirement for employers to verify with the electronic system; broad safe harbors for employers and high standards to prove malfeasance; insignificant penalties which do not provide deterrence; lack of information sharing to target those who significantly abuse the system; and a failure, and I might even say, to

some extent an inability to follow the fraud when new fraud schemes have developed.

The plan that the administration lays out in general terms here I think is a good plan. One reason I think that, Mr. Chairman, is because it is very similar to the plan you and I laid out in our bill, and I think that the elements of a workable system are embodied in our legislation. But, there are some things that I hope that this panel and the subsequent panels can flesh out for us, which would include precisely how a plan will be implemented, for example, as to people who are currently employed, not just prospective employees; for all Americans, not just people that we think of as illegal employees today; how we will ensure that audits will occur so that it is known by employers that they will be audited within a relatively short period of time; therefore, appreciating the fact that they need to get into compliance quickly; how much it is going to cost; and in that regard, has the administration's budget submission this year reflected a serious attempt to get ahead of this problem. In other words, much of what the administration proposes is not dependent on congressional legislation. And so as the first step toward implementing a program is, a little over $100 million adequate to begin this program? What will the costs be? And does that depend to some extent on whether a card is involved in the system, as both the administration and Senator Cornyn and I propose? If so, what does that cost?

Importantly, the timeline. Is 18 months as good as we can do? If so, there are a lot of people that would like to ensure that the system is up and running before benefits of the legislation apply to people? And I think that is a reasonable issue to raise.

There are other issues as well, but all of the things that have been raised in your testimony I think are appropriate for discussion. And as the Chairman pointed out, probably the most important part of the legislation, after border security, was given the least amount of time for debate on the floor.

Now, in fairness, one of the reasons was because the small group that helped to put together Title III I think did a very good job of starting the process. It is a very good first step, but it is by no means complete and it is only the beginning. And because it is the most important part of the legislation, in my view, we need to spend a lot of time making sure that we get it right.

So thank you for holding the hearing, Mr. Chairman. I thank our witnesses for being here. We have got the right people to tell us what needs to be done, and we need to get about it.

Chairman CORNYN. Well, we are pleased to have a distinguished panel with us today, and I will introduce each member of the panel, and we will swear you in together and then ask each of you to give your opening statement.

First, Stewart Baker was appointed by President Bush to be Assistant Secretary for Policy for the Department of Homeland Security and confirmed by the U.S. Senate on October 7, 2005. Before his appointment and confirmation as Assistant Secretary, Mr. Baker served as General Counsel of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, where he headed the drafting team for the Commission's report. He also served as General Counsel of the National

Security Agency and Deputy General Counsel of the Department of Education. Earlier, Mr. Baker served as a law clerk to John Paul Stevens on the U.S. Supreme Court and to Frank M. Coffin on the First Circuit.

Joining Mr. Baker on the first panel is Julie Myers. Ms. Myers is the Assistant Secretary of Homeland Security for the United States Immigration and Customs Enforcement. In that role, she leads the largest investigative component of the Department of Homeland Security and the second largest investigative agency in the Federal Government.

Before her appointment by President Bush on January 4, 2006, Ms. Myers served as Special Assistant to the President for Presidential Personnel. Before that, she was nominated by President Bush and unanimously confirmed by the U.S. Senate to serve as Assistant Secretary for Export Enforcement at the Department of Commerce. Before her service with the Commerce Department, Ms. Myers served as the Chief of Staff for the Criminal Division of the Department of Justice.

Martin Gerry is our third witness. He was appointed Deputy Commissioner of Social Security for Disability and Income Security Programs in November of 2001. Before assuming his current position, Mr. Gerry served as research professor and director of the Center for the Study of Family, Neighborhood, and Community Policy at the University of Kansas, where he was also a faculty member within the university's School of Law and Education. Before that, Mr. Gerry served as the Assistant Secretary for Planning and Evaluation of the U.S. Department of Health and Human Services, where his responsibilities included overseeing the formulation and implementation of all Department policy were, as I say, his responsibilities.

If I can ask each of you to rise and let me swear the witnesses in. If you will raise your right hand and repeat after me, do each of you swear that in the matter before the Committee you will tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BAKER. I do.

Ms. MYERS. I do.

Mr. GERRY. I do.

Chairman CORNYN. Thank you.

Mr. Baker, let's go ahead and start with you, if we may. Of course, each of your written statements will be made part of the record, without objection, and if you would care to summarize that for us in 5 minutes or so, and we will ask each of the other witnesses to do the same. And then I know all of us are eager to get to the Q&A.

STATEMENT OF STEWART BAKER, ASSISTANT SECRETARY FOR POLICY DEVELOPMENT, U.S. DEPARTMENT OF HOMELAND SECURITY, WASHINGTON, D.C.

Mr. BAKER. I am glad to summarize it, although I actually feel as though you and Senator Kyl have already pretty well summarized what I was planning to say.

Thank you very much for having us here. This is, as you said, perhaps the most important topic that the bill addresses in the im-

migration reform area, and it deserves the attention that you are giving to it.

We share your support for a comprehensive solution—we think that is the only way to address this issue—and also your concerns about the Senate bill and the practicality of some of the worksite enforcement provisions in it.

As you said, 1986 was a long time ago, and yet it is a very familiar debate. Just to show how long ago it was, I looked up some things that happened in 1986. There were only three networks before 1986, and there had always been three networks. Fox just got started in 1986, and there was a little daytime TV show called "AM Chicago" that was changing its name to "The Oprah Winfrey Show" for the first time in 1986. So a lot of things have changed since then, and yet when you read those debates, it feels like today. The debate was over an immigration crisis. There were 3 million illegal immigrants in the country. Everyone knew they were drawn here by jobs, and the question was: How could the immigration be controlled?

The answer was an effort to say we will grant amnesty, as you said, one time to the illegal immigrants who are here and we will have a tough worksite enforcement program. Up until 1986, it was not illegal to employ people who had entered the country unlawfully, and there was no particular requirement that you show an ID to get a job. So Congress enacted what I think it was sure would be sufficient measures by making it unlawful to hire an illegal immigrant and by requiring that all workers show ID and go through a process of having that ID recorded by the employer.

Obviously, that has not worked. We have got close to 12 million illegal immigrants in the country today. They are still being drawn here by the prospect of getting work. So the question is: What went wrong?

It turned out that we probably put to many eggs in one basket. We thought that just making it illegal to hire illegal immigrants and requiring ID would solve the problem. Instead, employees who wanted jobs who were here illegally just got fake IDs. They made up Social Security numbers, and that was the end of the enforcement mechanisms.

The reason that it was not possible to go beyond that solution I think lies also in some of the compromises that were made in 1986. It is worth remembering that the business groups that were a part of that debate wanted to make sure that they did not have an excessive burden in hiring people. The immigrants' rights groups wanted to make sure that employers did not have too much discretion so that they could not use the rules for discriminatory purposes, and the result was employers were given a very narrow window. They were to look at the ID. If it was not obviously fake, it was not clear that they could do anything other than accept it. And so when fake IDs that did not misspell "California" came onto the market, it was very difficult for employers to do anything other than accept them.

It was obvious that there was a problem. There are 9 million people who are the subject of no-match letters each year. Those are mostly people who have made up Social Security numbers, based on our experience, and the employers who get those rarely do any-

thing about the fact that they have received a letter that indicates that their employee's Social Security number and name do not match. They do not have an obligation to do that under the statute, and they have not had much clarity about how they should address that problem.

We have come out with a proposed rule that will give more clarity and provide a clear safe harbor for employers so they know what they can do to clear up those problems and hopefully discourage workers who are working on false Social Security numbers. But, in general, it has been very difficult to squeeze solution to these new forms of fraud into a statute that was written on the assumption that everything could be solved with an ID requirement.

We want to avoid making that same mistake with the new legislation, and our proposal is to address this in a number of ways.

First, we ought to end the most obvious fraud, the made-up Social Security numbers, by requiring electronic verification of the name and the Social Security number, by sharing data from the Social Security Administration's records, and by improving identification cards.

Second, we need to have a much more pervasive partnership with employers. We have to make sure that employers do not mechanically carry out a limited number of tasks without asking the question: Do I really think this person is here in the country legally? We have got to get beyond a series of obligations that depend on not knowingly hiring an illegal alien and ask people not to recklessly or negligently hire illegal aliens. We cannot expect employers to be detectives, but we can expect them to be our partners in enforcing the laws of the land. And that is something that the statute needs to reflect.

Third, we need to increase the penalties on employers who do not obey the law. As the President said, some of the penalties that are in the law now are less than a speeding ticket in many jurisdictions. We have got to substantially increase those, and we have got to particularly increase them very aggressively for repeat offenders so that we have the ability to take this well beyond the cost of doing business and making people put their business at risk if they are going to violate the law.

And, finally, while we expect that these changes are going to make it much harder for people to work with a made-up or false Social Security number, we need to be very careful to not put all our eggs in one basket again. We need to have the regulatory flexibility to address new forms of fraud as they arise and to give employers a new sense of the steps that they ought to take to address these new frauds. I think you may have seen the story in the paper over the weekend about Audra Schmierer, who is a housewife in California who discovered that her Social Security number and name had been used by 81 people in 17 States.

Now, that is a form of fraud that electronic verification by itself is not going to address, and we need to be alert to the fact that there will be new forms of fraud even if we stamp out the existing made-up Social Security fake ID business, and that is why we need broad authority to address new problems.

So I will close there, Mr. Chairman. I think this has been an enormously helpful exercise, and I hope to be able to address any further questions you may have at the end.

[The prepared statement of Mr. Baker appears as a submission for the record.]

Chairman CORNYN. Thank you, Mr. Baker. I have a copy of the Associated Press story that you just alluded to, 81 people in 17 States using this woman's Social Security number, and obviously creating havoc in her life, not to mention the fraud that it perpetrated upon others. We will get to that in a minute.

Ms. Myers, would you please give us your opening statement?

STATEMENT OF JULIE L. MYERS, ASSISTANT SECRETARY, IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY, WASHINGTON, D.C.

Ms. MYERS. Thank you, Chairman Cornyn and members of the Subcommittee. Thank you for having me here today with my colleague, Stewart Baker, to talk about immigration enforcement in the workplace.

ICE is reinvigorating our worksite enforcement efforts as a core part of our interior enforcement strategy. We are seeking to change the culture of illegal employment across the country by pursuing the most egregious employers engaged in the employment of illegal workers and educating the private sector to institute best hiring practices.

I appreciate the opportunity to elaborate a little bit about what Assistant Secretary Baker talked about, our historical experience implementing the 1986 Immigration Reform and Control Act.

The INS focused primarily on the enforcement of administrative employer sanction provisions. This approach resulted primarily in the issuance of Notices of Intent to Fine. After extensive litigation, the typical result was a small fine that was routinely litigated or ignored and had little to no deterrent effect. In short, the system did not serve as a true incentive to change their business model.

Moreover, under the 1986 law, employers were not required to verify the validity of a document and were not required to even maintain a copy of the documents that they reviewed. This resulted, as Secretary Baker testified, in an explosive growth in an increasingly profitable false document industry that catered to undocumented workers who purchased the documents necessary to gain employment.

Cognizant of these lessons, ICE's current worksite enforcement strategy is targeting felony charges to bring in appropriate worksite enforcement investigation. And how does this approach work differently than the old approach used by the INS? Well, you could take the Kawasaki restaurant chain case as an example. Back in March, ICE executed warrants at three Kawasaki restaurants and at four related residences, where we encountered 15 undocumented aliens living in completely deplorable conditions in an apartment with non-working bathrooms and these aliens were being paid $2 an hour to work at these restaurants.

At the same time that the aliens were suffering, the owners of these restaurants had created a lavish lifestyle for themselves, purchased themselves several houses, fancy cars. Fortunately, the ICE

agents were able to criminally arrest them on money-laundering charges and harboring illegal aliens for commercial advantage. We seized their assets. We seized eight luxury vehicles and ten bank accounts. The owners have since pleaded guilty to these felony charges and agreed to forfeit approximately $1.1 million in assets.

Now, how would this have been handled differently prior to ICE's new approach? Well, historically, the INS agents would have simply conducted an I–9 inspection, which would likely have led to the issuance of a fine based on paperwork violations. The owners would have likely escaped even a misdemeanor charge available under 274A, and the maximum fine would have been $20,000 or $30,000. And in any case, that would have been negotiated to something even further.

With such a paltry end result, it is not surprising that the old employer sanction regime had simply become a cost of doing business.

There are several other recent cases that demonstrate ICE's new tougher approach that is designed to really attack egregious employers where it hurts—their bank accounts and by bringing criminal charges. For example, in April we had the IFCO Systems worksite case, where mid-level managers and employees at IFCO were charged with conspiracy to transport and harbor illegal aliens for financial gain, as well as with document fraud.

Another example is the Fischer Homes case in May where several Fischer Homes employees were also charged with harboring illegal aliens for commercial advantage. Some of the penalties in these cases carry up to 10 years in prison.

I firmly believe that charging egregious employers with criminal felonies will create the kind of deterrence that was previously absent in enforcement efforts. In fact, we are already starting to see that businesses are responding. We have seen a substantial increase in requests for training and for other information. And to be clear, while the magnet of employment is fueling illegal immigration, we do find that the vast majority of employers do their best to comply with the law. Accordingly, we are also providing good tools on our website and providing presentations to employers to tell them how to avoid getting into trouble with the law.

Moreover, as part of our comprehensive strategy and since 9/11, we have continued to prioritize critical infrastructure for worksite enforcement. Just 5 days ago, an ICE investigation apprehended 55 illegal aliens working at Dulles Airport. In our view, effective homeland security requires verifying the identity of not just the passengers who board the planes, but also the employees who work at the airports and the employees who staff our critical infrastructure sites.

Additionally, to more effectively combat the significant role that fraudulent documents play in the illegal employment of aliens, we have created with the Department of Justice Document and Benefit Fraud Task Forces throughout the United States. These task forces focus on the illegal benefit and fraudulent document trade that caters to aliens looking to obtain illegal employment. By reshaping our enforcement efforts, I believe ICE will be able to more effectively reduce the magnet of illegal employment using existing authorities. And as the Congress seeks to learn from the lessons of

the 1986 Act, there are also several tools that would be of substantial aid to us in our efforts:

As Assistant Secretary Baker noted, we need fuller access to information, access to the no-match data. Second, we believe we need a new and improved process for issuing fines, and larger fines so that they serve as more than just a cost of doing business. And, third, we need additional resources, as requested by the President in the 2007 budget.

We are dedicated and committed to the worksite enforcement mission, and we look forward to working with the Subcommittee in our efforts.

Thank you.

[The prepared statement of Ms. Myers appears as a submission for the record.]

Chairman CORNYN. Thank you very much, Ms. Myers.

Mr. Gerry.

STATEMENT OF MARTIN H. GERRY, DEPUTY COMMISSIONER FOR DISABILITY AND INCOME SECURITY PROGRAMS, SOCIAL SECURITY ADMINISTRATION, BALTIMORE, MARYLAND

Mr. GERRY. Thank you, Mr. Chairman.

Mr. Chairman and members of the Subcommittee, first I want to thank you for the opportunity to discuss how the Social Security Administration issues Social Security numbers and processes wage reports, which I think are the key parts of the testimony that relate to the theme of this hearing. These important activities are part of our core mission of determining eligibility and the benefit amounts for the Social Security retirement and disability programs that we administer.

At the heart of these determinations are records of the amounts earned by each individual over his or her working years. Maintaining accurate records is of utmost importance, and the Social Security Administration developed the Social Security number to keep an accurate record of workers' earnings. The Social Security card was provided to individuals as a record of their number. The Social Security card was never intended—and does not serve as a personal identification document. Possession of the card does not establish that the person presenting it is actually the person whose name and Social Security number appear on the card.

Over the years, the use of the Social Security number has proliferated as Government agencies and private industry have used the Social Security number as a convenient recordkeeping method. Consequently, the Social Security Administration continually improves its processes for issuing numbers and cards to ensure the integrity of both. We have developed processes for issuing Social Security numbers to newborns and to immigrants with permanent work authorization. In addition, the Social Security Administration has developed more stringent verification processes and requirements, which I have discussed at some length in my written statement.

As the uses of the Social Security number have increased, the need for counterfeit-resistant Social Security cards has also grown. Congress and the Executive Branch have worked together to increase the security features of the card.

You asked me to discuss the costs related to replacing cards currently in use with a different kind of card. The major cost of replacing cards is not the cost of the card itself, regardless of how elaborate that card might be. It is the cost of interviewing every individual and carefully verifying the documents that are submitted as evidence.

Last year, we estimated that a card with enhanced security features would cost approximately $25 per card, not including the startup investments. According to those estimates, reissuance of all new cards for the 240 million cardholders over age 14 would cost approximately $9.5 billion. Since that estimate, we know that the cost of issuing Social Security cards has increased by approximately $3 per card due to new requirements for additional verification of evidence developed as a result of legislation passed by Congress.

Last year, we estimated that we would need about 67,000 work-years to process 240 million new cards. This would require hiring approximately 34,000 new employees if we were required to complete the work within 2 years. If the new card was issued to only a limited number of individuals each year, such as 34 million, which would represent the individuals changing jobs and individuals reaching working age—new entrants to the labor force—the costs would be approximately $1.5 billion per year.

The Social Security Administration offers many alternatives to assist employers in verifying that the name, number, and date of birth submitted by a new employee matches Social Security Administration records. Employers can call a toll-free number. They can submit a paper list to our local office of names and numbers, they can submit magnetic media, or they can use an Internet-based service which we call SSNVS.

Last year, we processed over 25.7 million verifications for over 12,000 employers through SSNVS. This is the new Internet-based service. We estimate that we provide an additional 41 million employer verifications through other methods. Employers may also use the Basic Pilot Program administered by the Department of Homeland Security to verify work eligibility of new hires. In 2005, the Social Security Administration processed approximately 1 million queries to the Basic Pilot.

We also send letters, often called "no-match letters," to employers who submit wage reports that meet a certain threshold for errors. In 2004, we sent approximately 120,000 no-match letters to employers, which covered 7.3 million mismatched records. For privacy reasons, the letter includes only the Social Security number, not the name of the individuals. These letters are generated as part of the wage-reporting process, and the source of information is the tax return information on Form W–2. SSA receives and processes Form W–2s for the Internal Revenue Service.

The use and disclosure of tax return information is governed by Section 6103 of the Internal Revenue Code. SSA currently has the authority to use this information only for the purpose of determining eligibility for and the amount of Social Security benefits.

Although under current law the Social Security Administration cannot release no-match data to the Department of Homeland Se-

curity, the Administration supports allowing this disclosure for national security and law enforcement purposes.

In closing, the Social Security Administration remains committed to maintaining the security of the Social Security number and the card to ensure that the American public's hard-earned wages are properly credited so that they will be able to receive all of the benefits to which they may be entitled.

Thank you very much for the opportunity to appear before you today, and I will be pleased to answer any questions you may have.

[The prepared statement of Mr. Gerry appears as a submission for the record.]

Chairman CORNYN. Thank you very much, Mr. Gerry.

We will now proceed to 5-minute rounds of questions, and I can think of a lot of them based on what you have told us so far.

Secretary Baker, you mentioned that we have all tried to learn from what happened in 1986, and I think the way you put it is, "What went wrong?" And as I recall, former Attorney General Ed Meese wrote an op-ed in the New York Times. He said that Ronald Reagan was persuaded that the only way that we could get beyond where we were in 1986 would be to grant amnesty, but then the trade-off, the quid pro quo, would be effective worksite verification and sanctions against employers who cheat.

Here we are today, as several of you pointed out, with the number not 3 million but closer to probably 12 million, and no one knows for sure. We have had lengthy and I think very helpful debates both in the House and the Senate on this issue, and a lot of the focus has been on the border, some suggesting that we need to do more along the border. I certainly agree. We need to secure our border. We need to know who is coming into the country and what their intentions are when they get here in the interest of our national security.

But as I pointed out, and as Senator Kyl reiterated, we spent about 1 hour on the Senate floor talking about this issue, which is essential to getting some handle on the 45 percent of illegal immigration that takes place from people who come in legally but who overstay and who are attracted to this huge magnet known as America, prosperity and jobs.

How much of this problem—assuming we did not do anything else, how much of this problem could we address effectively if we just allowed information sharing between the Social Security Administration and the Department of Homeland Security when it came to no-match letters? The figure I had that Mr. Gerry mentioned, in 2004 we sent approximately 120,000 employer no-match letters, which covered 7.3 million mismatched records.

Mr. BAKER. We could certainly make a big dent in the problem. In the long run, I think we believe that the electronic verification system is more effective. The Social Security system is not designed for addressing illegal immigration. It simply has revealed a lot of illegal immigration and has given us a clue as to where that is, or at least it has given the Social Security Administration a clue as to where that is. Since we cannot see it, we cannot use that as a tool to guide our investigations.

We obviously need that. There are employers who are using the same Social Security number over and over again for dozens of em-

ployees. We need to know who those employers are because they obviously ought to be at the top of our list for investigation.

So it would be a useful tool, if not perfect. It is delayed. It arrives up to a year or more after the employee has begun working so that for seasonal workers, they may well have moved on by the time we would get notice of a no-match, which is why we think the electronic verification also is necessary.

Chairman CORNYN. Well, I certainly agree with you that both are necessary.

Ms. Myers, recently ICE conducted a large raid on a pallet manufacturer who had refused to respond to—I believe it was up to 13 different inquiries from the Social Security Administration about a number—as it turned out, more than 50 percent of their employees who were on the no-match list. Could you explain how you were able to conduct that enforcement action in spite of this law that prohibits information sharing as a rule?

Ms. MYERS. Absolutely, Senator. In the IFCO case, we first started the investigation when an employee kind of came to us, came to local police and said they had seen some things inside IFCO that were wrong. People were ripping up W–2s and, you know, that certainly sent—this employee realized there was something wrong.

As we worked through this investigation, we were able to bring Social Security in on this investigation, but if we had had this information at the beginning, we could have targeted IFCO. As you mentioned, approximately 13 letters, each letter saying more than 1,000 employees had no-match. This would have been an employer that we would have targeted from the beginning and not had to work this case through other means. So it would have kind of tremendous value having access to this information up front to really drive our investigations to the most egregious employers.

Chairman CORNYN. Mr. Gerry—and thank you for doing it—you gave us some proposals for how much money it would cost to change the Social Security card, and if we looked at doing it for everyone, some $9.5 billion, but if we targeted it, more; at least perhaps on a phased-in basis, it could be done for less than that. But, really, my question goes to all three of you about what the American people are being asked to accept when it comes to comprehensive immigration reform. Knowing that it is going to cost a lot of money and take some time and take development of considerable infrastructure when it comes to border security and the systems that it would be necessary to expand the Basic Pilot Program so that employers could actually verify employment eligibility, and perhaps even change the nature of the Social Security card to verify that, in fact, this person is actually the person who claims that is their card to prevent things like identity theft.

Isn't it realistic to say that this comprehensive reform, which I support, should be phased in once we have had an opportunity to get some of these systems up and running so that we can actually have some confidence that they will work? I am going to throw that hot potato to you, Mr. Baker, to start with.

Mr. BAKER. Thank you. Well, certainly, on the question of what the American people will be asked to accept, you and Senator Kyl have both identified not just the costs. We all now when we get jobs have to fill out I–9 forms, and there will be more requirements

beyond paying taxes on Americans who want jobs because, as Senator Kyl pointed out, it is very easy for someone to pretend to be a U.S. citizen. And so if we do not ask everyone who takes a job to go the electronic verification system, then the system will not work. So this is not cost-free for anyone.

On the question—you asked me a hot-potato question. Sorry.

Chairman CORNYN. Well, the question is: Should the American people just accept comprehensive immigration reform based on the Government's promise to follow through with the means to actually make it work? Or should there be a phased-in system where once the border is secure and once the worksite was—we were able to verify eligibility of prospective employees, then we could work on phasing in other aspects of the program?

Mr. BAKER. The phasing of this is tricky, but there is no doubt that it is going to take us a little while to get many of these systems ramped up. This is not something that can be done overnight, or at least it cannot be done well overnight. And at the same time, I think that there would be considerable difficulty if you began aggressive worksite enforcement and had nowhere for the people who were going to lose their jobs as a result of that to go, if you did not have a temporary worker program for them to enter into. So that there are difficulties with beginning all of enforcement without also providing a place for people to go when they are driven out of the shadows and hopefully into the light.

Ms. MYERS. If I could just add to Secretary Baker's comments, as the enforcement agency we are committed to stepping up our worksite enforcement efforts and, in fact, are doing so, regardless of whether Congress will pass a law. This year alone, on criminal investigations of egregious employers, we are already up over 121 percent over last fiscal year, and that is only based on the end of May totals. So we are aggressively ramping up worksite enforcement, as directed by Secretary Chertoff, and we will continue to do so, regardless of whether there is a change in the law.

Chairman CORNYN. Thank you.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Let's break this down a little bit. In your testimony, Mr. Baker, on page 7, you quoted the President talking about a key part of the system being a new identification card for every legal foreign worker. As I mentioned in my opening statement, the people least likely to be engaged in fraud would be those people who seek a new identification as a temporary worker. They would have every incentive to use that. It would probably be something like a laser visa that people from Mexico obtain today to come into the country for short periods of time.

Would all of you agree or, in effect, stipulate that for the guest worker program, some kind of legal document that can be easily verified and has biometric data in it would be a logical step to take. Any disagreement there?

So the key question is then what you do with everybody else, namely, American citizens and everybody who has claimed to or will claim to be an American citizen. And my question is: What are we going to do to verify the eligibility? Let me just state a couple predicates and then ask all three of you to relate to this.

Madam Secretary, you talk about the ICE worksite investigations, and you say the law should reasonably require to review and retain relevant documents and information obtained during the verification process, as well as during the subsequent employment of a worker. I am just going to posit that if we are relying upon employers to look at documents, we are starting off on the wrong foot here. So just put that away for a moment.

And, Mr. Gerry, you say on page 2 of your testimony that, "Our ability to determine the identity of the person to whom a number has been assigned, whether that individual was entitled to an SSN, and whether the individual was authorized to work in the U.S. at the time the SSN was issued, has been improved with the development of SSA's more stringent verification processes and requirements."

You go on to point out that the bulk of the expense and the issuance of a card for everyone who seeks employment—it would not have to be everybody in the United States, but at least if you seek employment, you would have to have this case—that the bulk of that expense is in the background checks to determine eligibility for it. It is not in the issuance of the piece of paper itself, as I recall.

So with those background notes here, would all three of you speak to what the administration proposes with respect to verifying the employment eligibility, not of foreign workers but of everybody else, starting with Policy Secretary, Mr. Baker?

Mr. BAKER. Thank you. The administration has been supportive of the idea of having a tamper-proof Social Security card, not one that is an identity card but a card that is not easily forged. As a way of preventing what happened to Audra Schmierer and the identity theft problem, that has considerable value. You do not have to go to an identity card or require—

Senator KYL. May I just interrupt you? Would it have biometric data or at least a photograph? Otherwise, how would you identify the number with the person who is seeking employment?

Mr. BAKER. Well, the important thing—we have not suggested that it necessarily include biometrics because even without biometrics, as long as a limited number are issued, as long as you do not issue more than one, then there is only one. And you cannot have 81 people walking around with the same card.

Senator KYL. But if the card is stolen, I can contend it is my card, even though it is not, unless there is a way for the employer to see obviously that I am not the picture on that card. So don't you have to have some identifier connected to the card?

Mr. BAKER. We have not gone as far as that. That changes substantially the Social Security—

Senator KYL. Wait, let me just interrupt and go on to the rest of the panel here. You are going to have to persuade me that somehow not only can Social Security verify the legitimacy of the number, but that you can connect it up to the individual who is presenting the card to you when you offer the job. So would all three of you address that?

Mr. BAKER. And I would just point out that many—most Social Security cards now are issued at birth, and most people, unlike me, don't look as much like they did when they were born. And so it

is unlikely that the picture will do much good, or you are going to have to have them renewed regularly.

Ms. MYERS. I don't know that I have too much to add on the particular point that Secretary Baker raised, but to the point about whether or not the card is enough, we think the card is not enough. You need to have kind of a comprehensive approach and a comprehensive view of how you do effective worksite enforcement. So from an enforcement agency's point of view, we would be looking at, you know, beefed-up document and identify fraud cases. That is where for us I think it would be helpful if the employers were required to retain the documents. It is also helpful for us—we have had a number of employers come to us recently and say, "We are not sure we are doing this right. How do we do this?" It is helpful, if they were required to keep the back-up documents, to see, you know, who was trained, how were they trained, what sort of things they were doing. So in terms of enforcing the law, it is helpful for us to be able to use all the criminal statutes to go after it and not depend on just one tool.

Senator KYL. Let me get to Mr. Gerry, but let me just say that if we are going to rely upon documents, you are going to have to persuade me that they are not counterfeitable or that the employers can easily determine that they are not counterfeitable, or every employer is going to have to continue to play cop and try to figure out whether this birth certificate is real or not or the driver's license is real, or whatever. I do not see how the administration can support a temporary worker program and an employment verification system that does not clearly connect a valid Social Security number to the applicant for the job in some very specific governmentally determined way. If you are going to rely upon the employer to figure it out, the system is bound to fail. It has a fundamental flaw, the same as the 1986 law did.

Chairman CORNYN. Senator Sessions.

Senator KYL. I am sorry. I interrupted Secretary Myers.

Mr. GERRY. I was going to add on the point of the biometric identifier. The cost numbers that I gave you, the estimate we have right now is $28–$25 for the card; and we estimate an additional $3 per card due to new verification requirements. Adding pictures or other biometric information is not a large part of the cost.

On the other hand, as Secretary Baker mentioned, if you use a picture, you are going to have downstream updating costs, and, of course, those costs will be the $25 part of the $28. That is, every time you have to have someone come back in and add a picture, of course, you want to be sure that the picture is the picture of the person, so you would have to go through that process.

We have been looking at some of these cost issues, as well as how often we would have to update the card. Obviously, we would have to up date the card even for people who started with adult pictures, because over time the value of the biometric identifier would decrease.

Chairman CORNYN. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman and Senator Kyl. Both of you have worked very hard to identify the weaknesses in the workplace enforcement and have been active in attempting to develop a system that will actually work.

Secretary Baker, you are exactly correct, but I would be a little more critical of the Congress than you have been. You said they passed in 1986 a bill they thought would work. I submit they probably thought it would not work and maybe never intended for it to work, at least the interest groups who blocked the stronger legislation. The bill was not workable.

So early on we realized, did we not, that the 1986 law was unenforceable as a practical matter? Wouldn't you agree?

Mr. BAKER. I think that by the middle 1990's, at least, it was pretty clear that it was going to have major problems.

Senator SESSIONS. Now, it strikes me, Mr. Baker, that the President takes the oath to enforce the laws of the United States and ensures that the laws are enforced. The executive branch—I used to serve in the Department of Justice—is the branch with the responsibility to enforce the laws. My question to you is: Are you coming forward with a comprehensive plan to tell this Congress that we are now setting about to deal with the problem of immigration? Are you coming forward with a plan that would actually work? And do you have one?

Mr. BAKER. We are doing two things. As Assistant Secretary Myers said, we are enforcing the law and we are enforcing it in creative, new ways, and we will continue to do that. And I think that that will demonstrate our resolve and our willingness to work within the current system to try to make it work. But as you said, we do not have today a civil enforcement scheme that works well. The fines are too low, and we cannot meet all of the administrative procedures and the knowing standard and still have an effective, fast-moving regulatory process. We have asked for that.

Senator SESSIONS. T.J. Bonner with the Border Patrol Officers Association said, "Absolutely we can create a lawful system. You have border enforcement and you have workplace enforcement to eliminate the magnet, the jobs magnet."

Mr. BAKER. Absolutely.

Senator SESSIONS. I think he is exactly correct. Would you agree with that?

Mr. BAKER. I would. Those are the two critical things.

Senator SESSIONS. All right. Then, is the President committed to a program that will work?

Mr. BAKER. Yes. We have asked for a lot of new worksite enforcement capabilities as well as, as you know, a lot of resources for the border, and those are a critical part of this comprehensive program.

Senator SESSIONS. Secretary Myers, you mentioned Secretary Chertoff, and I have been pleased in recent weeks that he has begun to speak out in ways that indicate he is serious. I thought one of the most helpful things was his statement—I believe in a conference call maybe some of the other Senators were involved in—in which he said that S. 2611, the immigration bill that passed the Senate, with regard to the Social Security number question and the ability to identify those who have fraudulent numbers and are submitting fraudulent numbers, he concluded that is a poison pill and that it would not work. Yet when Senator Cornyn objected to it, it was ratified anyway by a vote. I voted against it.

At any rate, the Senate has passed a bill. Would you agree that, with regard to enforcement at the workplace through utilization of the Social Security number, that will not be effective?

Ms. MYERS. Well, certainly at this point, Senator Sessions, we have such limited access to the data. It is on a very limited case-by-case—we have to petition on each particular case only after we have articulable facts. Certainly we want free and complete access to this data. We think that would allow us to target the employers more effectively and do a better job.

I also think, following up on what Assistant Secretary Baker said, that one of the mistakes in 1986 is thinking about worksite enforcement as simply enforcing 274A, that criminal misdemeanor and low fines statute. I think as Senator Kyl pointed out, unless we go after document fraud, the document fraud rings, unless we go after the other—the alien-smuggling rings that bring people into this country to find jobs, unless we go after the other parts of the problem, border security and interior enforcement, we will not be able to really stem the magnet of illegal employment.

Senator SESSIONS. Well, the matter is very serious. Mr. Chairman, I would just note that we created a wall between CIA and FBI that we recognize helped keep us from enforcing the law against terrorists, and we removed that wall. We now have one between the Department of Homeland Security and Social Security. Both of you work for the Government of the United States of America and the people, and we need to have that information readily shared. Under the bill that we passed, this Senate passed, Homeland Security has to ask for the specific information in writing, and Social Security is only required to respond if the employer that you are inquiring about has over 100 employees whose names do not match their individual taxpayer identifying number and more than 10 employees are using the same taxpayer identifying number.

That indicates to me that Congress, at least, is not very alert to what needs to be done. I thank the Secretary for at least objecting to that.

Mr. Chairman, thank you.

Chairman CORNYN. To summarize what I understand you are telling us, Mr. Baker, first of all, I know the President has made a speech about the need for effective worksite verification, but until today, has the Department of Homeland Security actually come forward and asked the Congress to embrace the elements of this proposal for an electronic employment verification system, to share no-match data, to ensure that all legal foreign workers have secure employment authorization, and to stiffen the penalties for employers who violate those laws?

Mr. BAKER. Well, as you know, we have had a long and extensive engagement with the Senate, the Senate Committees, but I think we have not made a formal statement to that effect before today.

Chairman CORNYN. Well, suffice it to say these elements which you consider essential to effective worksite verification, to your knowledge are they present in the current Senate bill? Or are these things that need to be added to improve it to actually make it workable?

Mr. BAKER. We think the Senate bill needs substantial work along those lines.

Chairman CORNYN. The Senate bill would require all employers in the United States to participate in a mandatory electronic verification system within 18 months. Right now, only 8,600 employers participate in the voluntary Basic Pilot verification system. Is 18 months a realistic timeframe?

Mr. BAKER. It is an aggressive timeframe. We were pressed pretty hard in the discussions to say what can you do. We have the advantage that the current budget proposal that is pending before Congress for next year actually includes about $100 million that is designed to ramp up electronic verification so that we could get started and we could have the money beginning in September or October.

So as I say, it is aggressive, but the CIS experts who have followed this have looked at it and believe that they can meet it.

Chairman CORNYN. Secretary Baker and Secretary Myers and Mr. Gerry, you all are dedicated public servants, and we appreciate your service. But the American people feel like they were scammed the last time we were on this subject 20 years ago. And if we are going to effectively solve this problem, we are going to have to regain their confidence. And I know that you have a gift for understatement, Mr. Baker, when you said that this is very aggressive to get this online in 18 months. But I feel very strongly that, unless we are serious about making the system work and we actually appropriate the money, hire the people, train the people, actually put them in place, create the databases, create the secure identification card to make this work, we will find ourselves here once again with not 12 million people illegally in the United States but maybe 24 million or more. And the list goes on and on. And I for one do not want to look back with regret that I did not do everything within my power, as someone representing 23 million people, to make sure that we do not scam the American people, that we are serious with them, we mean what we say, and we are going to do what we say.

Ms. Myers, we talked a little bit about the several hundred workers who were arrested in the IFCO case. That is the pallet company. And the GAO, the Government Accounting Office, reports that officials in 8 of the 12 field offices they interviewed told them that the lack of sufficient detention space has limited the effectiveness of worksite enforcement. This is an issue Senator Kyl and I have focused a lot on during the course of our hearings and our joint Subcommittee hearings. But we only currently have somewhere around 20,000 detention beds, and I know we have tried to add to those, but it seems like we are sticking our finger in a hole in a dike trying to hold the ocean back, when we had 1.1 million people come across the border illegally last year, yet we only have 20,000 detention beds. And we say, the Secretary has said he wants to eliminate the catch-and-release program, particularly insofar as it relates to people coming from countries other than Mexico. But that was some 250,000 or so last year, and 20,000 detention beds are not enough to hold enough people to make that a credible deterrent.

Can your agency expand worksite enforcement along the lines of what you are suggesting here if you do not have sufficient detention space?

Ms. MYERS. Well, certainly we will continue to prioritize the beds we have. As you noted, we have 20,800 beds. In the supplemental, we were just given an additional 4,000 beds through the end of this fiscal year. The President's 2007 budget seeks an additional 6,700 beds.

What we are trying to do is to use the beds we have more efficiently by turning them over quickly, by utilizing things such as expedited removal, which we are using along the borders, and other tools, such as stipulated removal and administrative removal, to send aliens home more quickly.

One of the things that I have implemented in worksite enforcement cases kind of after the IFCO case and looking at kind of the large number of worksite cases we have coming up is I am requiring my agents, the SACs, to meet with the head of their detention and removal local office before they start any worksite investigation and see is there a way that we can detain these people or do we have a JPATS that can come in, that can take these people if they want to stipulate to removal right away. That has been very effective in some recent cases in using the beds that we have and making sure everyone is detained.

Another thing that we are doing and we did in the Fischer Homes case is we worked very successfully with the U.S. Attorney there and got them to agree to prosecute each and every one of the aliens that were arrested in the case on the misdemeanor 1325 charge, and that allowed us to borrow the Bureau of Prison beds and not use the ICE detention beds, but also ensure that we were detaining these aliens before we were able to remove them.

So it certainly is a challenge, but I think we are making some good progress.

Chairman CORNYN. Senator Kyl.

Senator KYL. Let me go back to the question of what kind of verification system will be used for other than temporary workers. First of all, let me ask all of you this question: Does it make any sense necessarily to have a standard for temporary workers that requires the use of a fraud-proof document that in some way identifies the individual but not require the same kind of system for people who are seeking employment, 12 million of whom we know not to be United States citizens? Is there a reason for that double standard?

Mr. BAKER. Let me try to address that. It is not our expectation that there will be no identification requirement for employees, prospective employees who say, "Well, I am not a temporary worker."

Senator KYL. That is obvious. My question is: Why would you have a double standard? When you know there are 12 million people who are here illegally and more coming every day, why would you have an easier standard for them to be employed than for people who voluntarily step forward and say, "I would like to be a temporary worker"?

Mr. BAKER. Well, we are working to raise the standards for documents. In the longer run, the REAL ID—

Senator KYL. Look, Secretary Baker, let's get to the point here. You are in charge of policy. Secretary Myers has to then figure out a way to enforce that policy. And Mr. Gerry has pointed out that for a nice sum of money but, nevertheless, his agency can verify the

eligibility of people to hold a Social Security card and run a system that uses a card for verification.

Now, what you have outlined in your statement is a double standard. For temporary workers, they have got to have a fraud-proof document that identifies them. But for everybody else, we are going to have a requirement to share no-match data—which could be at least a year old, as we have heard—and a mandatory electronic verification of the validity of the Social Security number system. But I have not heard any other fleshing out of what you propose to do to ensure that when I apply for a job, you verify that not only is my number valid but that I am who I say I am.

Mr. BAKER. We would expect employees to show ID and to allow the Secretary to set standards for that ID that would be designed to make sure that it is high-quality ID.

Senator KYL. Okay. Now, let me just ask you: Since you have had that authority in the last several years, is there a suggestion that the ID that is required today is adequate or that nobody has gotten around to requiring that it be improved?

Mr. BAKER. We think that probably too many documents currently are permissible, and we propose in the legislation to trim those back. And if the legislation does not pass, we will have to take action in—

Senator KYL. Well, have you suggested to us what documents you are talking about?

Mr. BAKER. Yes, and I do not have that list, but it would be a relatively limited list.

Senator KYL. Give me the two or three most usable ones.

Mr. BAKER. REAL ID-compliant driver's license, which contains a lot of double-checks on IDs, on identity, and also on tamper-proof standards; a passport. Now, not everybody has those things. Birth certificates are going to have to be accepted. Those are the documents.

Senator KYL. Okay. So let me just interrupt. We have got the same basic thing we have got today except that in 2½ years REAL ID kicked in, and when it does, there may or may not be better driver's licenses because there is still no foolproof way of the motor vehicle department personnel verifying the legitimacy of the person who is asking for a driver's license. Not everybody has a passport, as you note. I do not know very may employers who are good at detecting counterfeit birth certificates.

Are we going to improve this situation with what you are suggesting here?

Mr. BAKER. I think it will improve it. I recognize that there are still gaps in the process that could be exploited. At the same time, there are great costs to saying to Americans, you are going to have to show up and get in line for a new form of ID that is going to be issued by an agency that has not been in the ID-issuing business before. Those are heavy costs, and not just in Government funds but in the time and energy and hassle that it would impose on every American. And so we want to be cautious before concluding that that is the only solution.

Senator KYL. Okay. Let me just say that we require that for many, many other things in life, including a driver's license or to get credit to go down to the store. I mean, people do not consider

it a huge burden to show some identification purposes at a store. It just seems to me that Americans want us to ensure that the rule of law is respected and enforced, and if they see us coming in with something that is second-best, that does not guarantee that people can be found out if they seek employment illegally, they are going to consider our efforts no better than 1986, as we talked about before.

Now, you talked about what life was like in 1986. That was a big year for me. That is the year I was elected to the Congress. So since I did not come here until January 1987, I can say I had nothing to do with the 1986 law. But I do have something to do with this law, and I will just tell you this: We cannot repeat the mistake of 1986. You cannot rely on the same kind of documents and expect to get a different result. There must be a governmental-issued document that verifies employment eligibility, or this system will not work.

Mr. Gerry has said that they have the ability to do that, and I do not think that Americans will consider it too much of an imposition when they are seeking a job—that is the only time they have to do it. Now, some people seek jobs relatively frequently, but most people do not. So on that one occasion where you are going to have to get a job or show your prospective employer you are eligible, is it too much to ask that you get something that looks like a driver's license or an old Social Security card, but, in any event, that is fraud-proof, has your picture on it, and that the employer can verify is a properly issued card? It seems to me the American people are perfectly willing to bear that kind of expense to get back with the rule of law and end this problem of illegal immigration.

Senator SESSIONS. I could not agree more with Senator Kyl in the fundamental premise that we have got to get it right this time. I will not support a bill and I will oppose as vigorously as I can any legislation that from a reasonable analysis of it, will not work. I am convinced S. 2611 will not work, and to the extent to which it has been sold to the American people, that is not legitimate.

Mr. Baker, you mentioned objections from the business community. You know, it is kind of like the farmers. I think the farmers do not want open borders. There may be some lobbyist groups that do. I think some of the lobbying entities for businesses seem to favor almost—they do not want any restrictions on immigration. But looking at a recent poll from the National Federation of Independent Business in April, 76 percent said they would work with an electronic eligibility verification system and would not consider it a burden. That is over three-fourths. And over 90 percent of small businesses believe immigration is a problem. So I think we would have support if we would come up with a system that can work.

Mr. Gerry, with regard to the Social Security match problem, that is, when an employer sends in a Social Security number and that number does not match some other number, or someone is already using that number I guess would be some of the things that show, did I understand you earlier to say that the Social Security Administration supports removing this wall between you and ICE and that the administration supports removing that wall for law enforcement purposes?

Mr. GERRY. Yes, I did say that, Senator. I think the Administration's position is that, it would be appropriate for Congress to amend Section 6103 in order to remove the restriction that currently prevents us from sharing information on no-match letters, except in the extraordinary circumstances that Assistant Secretary Myers indicated. But the—

Senator SESSIONS. What if it was—would that include all immigration offenses, civil and criminal?

Mr. GERRY. Well, that would be the point, Senator. It would include all information that we have. We would provide the Department of Homeland Security with whatever information we have about the no-match—the no-match letters themselves, and the Social Security numbers that did not match. Then it would be up to the Department of Homeland Security to decide what, if anything, to do with that information. Right now we are actually precluded from doing that, unless Homeland Security is in the stage that Secretary Myers described earlier where they are in an active investigation. In which case, we are now allowed in that very limited circumstance to share information.

The proposal that you are talking about would be to remove the barrier so that we could freely share information about no-match letters.

Senator SESSIONS. Secretary Myers, do you think that would meet the needs of the Department of Homeland Security and ICE?

Ms. MYERS. Absolutely. That would be a terrific tool. Every time we have been able to work with Social Security in the middle of an investigation, it has been terrific, and we would love to have that information on the front end so we could talk to—

Senator SESSIONS. It would give you an easy red alert that something is wrong in this business if they have a lot of no-match or improper Social Security numbers.

Ms. MYERS. That is exactly right.

Senator SESSIONS. Let me ask you, how many ICE investigators are there? And how many do we have working on workplace enforcement today?

Ms. MYERS. There are approximately 5,600 ICE agents, and then working on—40 percent of them work on various immigration-related topics full-time. I would say that it is—I cannot give you a precise work-year number. I think it is higher than the number that GAO had from a few years ago, but I would have to get back to you on that. I would say it is in the range—I would have to get back to you with the precise number.

Senator SESSIONS. Well, our numbers from the GAO report in August of 2005, just less than a year ago, said there were 90 agents, which is down from 1995, when there were 240. But when you figure based on that full-time equivalent evaluation of how many hours were actually spent on it, it totaled 65 agents. Isn't that an awfully small number if you want the American people to think you are serious about workplace enforcement, 65 for the whole United States of America?

Ms. MYERS. Yes, it is, and the President is proposing some additional 171 agents to be dedicated solely to workplace enforcement. Since I have been in the job, I have made workplace enforcement a priority. As I mentioned earlier, we are up in terms of investiga-

tions, criminal investigations of egregious employers, over 121 percent already over all of fiscal year 2005. We are also up 48 percent in terms of investigations on critical infrastructure protection sites, and this year we have already apprehended and arrested on administrative charges almost twice as many individuals, illegal aliens, as we did all of last year on worksite enforcement. So we are increasing this as a priority, and we are also looking at what can we do that is not pure worksite, but how can we do document fraud cases more effectively, because if the aliens do not have those phony documents, they will not be able to bring them in and trick employers who want to do the right thing.

Senator SESSIONS. Well, the numbers show that the actual enforcement actions went to virtually insignificant numbers. They were so low in early 2000, and I am glad to see they are coming up. In my view there is a tipping point, and we are way away from it. But it is not impossible to reach it. And that tipping point is the point at which every business in America knows that they are likely to be audited and likely to be disciplined if they hire people illegally.

We are not there yet. Doubling from 100 or 50 is not significant when you consider the nationwide challenge, so I think we need to get serious about it. I think some of that can be done through a reallocation of existing resources, and some may have to be done with new resources.

Thank you, Mr. Chairman. My time has expired.

Chairman CORNYN. Thank you, Senator Sessions.

We are winding down here with this panel. We have another panel. Senator Kyl wanted to send you off with some concluding thoughts and maybe requests for additional information. By the way, we will leave the record open until 5 p.m. next Monday, June 26th, for members to submit additional documents or written questions to you, which we would ask for you to promptly respond to.

But, Senator Kyl, I will recognize you.

Senator KYL. Just this to close. The bill that the Senate passed in Title III does require a way of verifying the eligibility of all people who apply for a job that does not rely on documents that are currently relied upon. And my understanding from the administration's position was that there was support for implementing that kind of a system, though the suggestion was it would take longer than the 18 months that we are seeking here.

We need clarification of that from the administration, because I believe if we simply rely upon the kind of documents that we have been talking about and employers are required to verify it, we will not have a system that will work.

And, second, Mr. Gerry, I think it is very important for us—and I would like to submit some additional questions to you—to find out what is necessary for, including the cost of, determining eligibility when you issue a Social Security number to an adult to ensure that the individual that receives the number is, in fact, legally entitled to be employed, whether U.S. citizen, green card holder, other kind of visa, or whatever the status might be, because it seems to me that those are the critical elements of not only making a system work but also providing that it can be enforced. And I think people have to know it can be enforced.

Finally, for Secretary Myers, I am going to do some followup questions regarding how many people would be required to perform the audits that employers must know are coming, because if they do not know that they are going to be audited—if they know they are going to be audited within a 3- or 4-year period for sure, then we are much more likely to have good compliance with this.

Thank you, Mr. Chairman.

Chairman CORNYN. Secretary Baker and Secretary Myers and Commissioner Gerry, thank you very much for being here with us today. We appreciate your service.

If we could have the second panel assume their position at the table as soon as they are given an opportunity, we would appreciate it.

[Pause.]

Chairman CORNYN. We are pleased to have as a distinguished second panel today a number of individuals, and I will introduce you individually and turn the floor over for opening statements. On this panel we will hear from Mr. Richard Stana, Director of Homeland Security and Justice for the Government Accountability Office.

Stewart Verdery is joining Mr. Stana to his left. Following his confirmation by the U.S. Senate in 2003, Mr. Verdery served as the Assistant Secretary for Homeland Security, and he is also an adjunct fellow at the Center for Strategic and International Studies.

Cecilia Muñoz is Vice President of the National Council of La Raza, the Office of Research, Advocacy, and Legislation. She has been actively involved in comprehensive immigration reform, and I know we will benefit from her testimony here today.

Linda Dodd-Major is creator and director of the INS Office of Business Liaison. She worked with the attorneys, employers, and associations throughout the United States to explain regulations, policies, and procedures relating to the employment verification process. I know we will benefit from your experience.

Let me at this time turn the floor over to Mr. Stana for a 5-minute opening statement. We will go down the line, and then we will open it up for questions. Thank you.

STATEMENT OF RICHARD M. STANA, DIRECTOR, HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, D.C.

Mr. Stana. Thank you, Mr. Chairman, members of the Subcommittee. I appreciate the opportunity to participate in this hearing today on worksite enforcement and employer sanctions efforts. My prepared statement is drawn from our recent work on the employment verification process and ICE's worksite enforcement program. I would like to summarize it now and also briefly discuss our ongoing study of foreign countries' programs for guest workers and worksite enforcement.

As we and others have reported in the past, the opportunity for employment is a key magnet attracting illegal aliens to the United States. In 1986, Congress passed the Immigration Reform and Control Act, which made it illegal to knowingly hire unauthorized workers. IRCA established an employment verification process for employers to verify all newly hired employees' work eligibility and

a sanctions program for fining employers who do not comply with the Act, and these programs have remained largely unchanged in the 20 years since passage of IRCA.

The current employment verification process is primarily based on employers' review of work authorization documents presented by new employees. However, the availability and use of counterfeit documents and the fraudulent use of valid documents belonging to others have made it difficult for employers who want to comply with the employment verification process to ensure that they hire only authorized workers. This is further complicated by the fact that employees can present 27 different documents to establish their identity and/or work eligibility. Counterfeit documents have also made it easier for employers who do not want to comply with the law to knowingly hire unauthorized workers without fear of sanction.

DHS and the Social Security Administration currently operate the Basic Pilot Program, which is a voluntary, automated system authorized by the 1996 immigration act for employers to electronically check employees' work eligibility information against information in DHS and SSA data bases. Of the 5.6 million employers in the U.S., about 8,600 employers have registered to use the program, and about half of them are active users. This program shows promise to help identify the use of counterfeit documents and assist ICE in better targeting its worksite enforcement efforts, particularly if the program is made mandatory as envisioned under various legislative proposals. Yet, a number of weaknesses exist in the pilot program that DHS will have to address before expanding it to all employers. They include the inability to detect the fraudulent use of valid documents and DHS delays in entering information into its data bases. Furthermore, according to DHS, additional resources may be needed to complete timely verifications under an expanded or mandatory program.

Turning to worksite enforcement, the low priority given to it by both INS and ICE has been a major factor in the ineffectiveness of IRCA. In fiscal year 1999, INS devoted about 240 FTEs to worksite enforcement. It now devotes around 100 FTEs to address the employment of millions of unauthorized workers. After 9/11, ICE focused its worksite enforcement resources mainly on identifying and removing unauthorized workers from critical infrastructure sites, such as airports and nuclear power plants. As a result, the number of non-critical infrastructure worksite investigations declined. Furthermore, the number of Notices of Intent to Fine issued to employers for knowingly hiring unauthorized workers or improperly completing the employment verification forms dropped from 417 in fiscal year 1999 to only 3 in fiscal year 2004.

In addition to limited resources, a number of issues have hampered worksite enforcement efforts. In particular, the availability and use of counterfeit documents have made it difficult for ICE agents to prove that employers knowingly hired unauthorized workers. Further, although guilty employers could be fined from $275 to $11,000 for each unauthorized employee, fine amounts are often negotiated down in value during discussions between ICE attorneys and employers, to a point so low that employers might view it as a cost of doing business rather than an effective deterrent.

ICE recently announced a new interior enforcement strategy under which the agency will seek to bring criminal charges against employers for knowingly hiring unauthorized workers, and ICE has reported an increased number of criminal arrests, indictments, and convictions. However, it is too early to tell whether this revised strategy will materially affect ICE's impact on the millions of unauthorized workers in the U.S. and those employers who hired them.

As I mentioned earlier, we are currently studying foreign countries' guest work programs and worksite enforcement efforts. Among the issues we are studying are the types of guest workers involved and the incentives used to help ensure their return to their home countries, the nature and effect of regularization policies, foreign countries' experiences with integration and assimilation programs, and worksite enforcement activities and resources. We plan to report on the result of this work later this summer.

In closing, both a strong employment verification process and a credible worksite enforcement program are needed to help reduce the employment of unauthorized workers. It is important to consider what resources would be needed to make these programs successful and how to balance these resources with those devoted to border enforcement and to other immigration management priorities.

This concludes my oral statement, and I would be happy to address any questions that the Subcommittee may have.

[The prepared statement of Mr. Stana appears as a submission for the record.]

Chairman CORNYN. Well, thank you very much, Mr. Stana.

Mr. Verdery.

STATEMENT OF C. STEWART VERDERY, JR., FORMER ASSISTANT SECRETARY OF HOMELAND SECURITY, AND ADJUNCT FELLOW, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, WASHINGTON, D.C.

Mr. VERDERY. Chairman Cornyn, Senator Kyl, Senator Sessions, thanks for having me back to the Committee again as you consider the most critical issue of how to get this employment system correct. I hope you will make sure that 2006 is not the immigration version of the movie "Groundhog Day." We do need to get it right, and I think we have made a lot of progress over this year in trying to figure out the best employment system that we can come up with.

I appeared here about a year ago as you were beginning your hearings. Now is the time to act. Senator Cornyn, as you said in your opening statement, each day that goes by the problem gets worse. The issues get more inflamed. The number of workers becomes greater. The politics become worse. This cannot be solved solely by enforcement or by what you might put on an appropriations bill. Now is the time to act. The issues are hard, but this is the time to act now that both bodies have acted and you have a chance to go to conference, I urge you to try to push this over the finish line this year, if you can.

In that vein, I wanted to ask for your indulgence to put in the record an open letter from a number of former Immigration and

Homeland Security officials asking for a comprehensive approach to immigration strategy, which I believe your staff has.

Chairman CORNYN. That will be made part of the record, without objection.

[The letter appears as a submission for the record.]

Mr. VERDERY. In particular, I would mention in terms of this comprehensive approach, is the issue of whether we should wait to turn on a guest worker program before the employment verification system were to come online 18 months or so after a bill were to pass. We have systems to vet foreign workers right now. They work for things like H1–Bs and other programs. Those systems should be used while we build out a better system down the line. But if you essentially wait to turn on that foreign guest worker program for another 18 months or more, you are only adding to the hole. You are having another 18 months of workers being attracted to employment and hired and employed illegally rather than channeling that flow through legal means.

Turning to the employment issues, it is hard to imagine a situation worse than the current one, and it is not solely the fault of the 1986 law. It is a mix of law, of enforcement policy, of employer practices, and of legal decisions from the courts. But it has been mentioned by prior witnesses and by the Senators on the dais that essentially prospective employees are allowed to prove their identity by producing a number of identification documents which are illegally obtained, easily forged, and could be used multiple times. In essence, we have tried building an enforcement regime on quicksand.

Prospective employers who would like to do the right thing have been provided no tools to ascertain anything but the very worst frauds, and there has been no system to confirm employment eligibility. Prospective employers who would like to break the law or are willing to look the other way have essentially been given a green light due to lack of enforcement resources and the fact that INS and DHS announced that enforcement activity would be focused on employers in a handful of critical infrastructure industries with national security implications. And despite the fact that Social Security has an elaborate system to vet down to the last penny the amount of retirement benefits and tax charges that people owe, that system has essentially been of little use to enforcement authorities.

The American people rightfully are concerned about this situation, but they are also willing to accept the reality that a new employment verification scheme cannot be expected to be foolproof and universally applied from day one. This is not missile defense. Some measure of error is to be expected and tolerated, so long as it does not result in U.S. citizens being denied the right to work.

Thus, as you begin and continue the process of building the electronic employment verification system, the EEVS, I make the following recommendations that are more thoroughly discussed in the written testimony.

It should be a phased-in approach. You should go after the most critical industries first—aviation, chemical plants, other critical infrastructure—as your Senate bill does.

In terms of employee rights, during the initial phases of the EEVS, enforcement activities should err on the side of employees claiming to be U.S. citizens before they would be terminated. Eventually, over 50 million people are likely to be enrolled on an annual basis in the system, and nothing will cause support for it to collapse more quickly than horror stories of legitimate U.S. citizens being denied the right to work because of faulty Government data bases.

Third, on REAL ID enforcement, the regulation process is ongoing at DHS, but the question is: Where is the funding? Are we going to stay on track with the regulations and tell States what they have to do? And are we going to help States pay for this? It is expensive. But we are building an immigration system, a voter ID system, and even perhaps a cross-border traffic system on REAL ID, and we have to keep it on track and have it be adequately funded.

In terms of biometrics, basing this system on non-biometric identifiers, such as Social Security numbers and immigration control numbers, may be a good short-term fix, but over the long haul you have to nail down the person with a biometric identifier. This will be especially helpful for people who are likely to be discriminated against because you can tell one person from another with surety.

In conclusion, I would also like to make two other points. We have to involve the private sector in building this system. The Herculean task of building this system on the back of a U.S. Citizenship and Immigration Services agency that is already busy is going to require private sector involvement.

And, last, on fees, asking U.S. employers to pay for this beyond what they have to do in their own internal workplaces to make themselves into compliance is not right. Employers should be ready to comply with laws, whether it be environmental laws, tax laws, accounting compliance, immigration laws, but they should not have to pay for the Government to build this system. This is a core governmental function, and the taxpayers ought to pay for it.

Again, I congratulate you on having the oversight of the legislation. There is nothing more critical than getting this right. It is the linchpin to this bill, and I hope that you will continue your oversight. And good luck during the summer on this most important project.

Thank you.

[The prepared statement of Mr. Verdery appears as a submission for the record.]

Chairman CORNYN. Thank you, Mr. Verdery.

Ms. Muñoz.

STATEMENT OF CECILIA MUÑOZ, VICE PRESIDENT, OFFICE OF RESEARCH, ADVOCACY, AND LEGISLATION, NATIONAL COUNCIL OF LA RAZA, WASHINGTON, D.C.

Ms. MUÑOZ. Thank you very much, Mr. Chairman, and thanks for the opportunity to come and talk about this very critical issue in the immigration reform debate.

This is perhaps the least discussed element of the bill, as you mentioned, and it is arguably the one which is going to have the biggest impact in the sense that it is going to affect everybody in

the United States work force. And I could not agree more with all of your assertion that it is essential that this provision of employment verification work. It needs to work in order to make immigration control more effective so that employers can efficiently and accurately verify their employees, and it needs to work to ensure that American workers and immigrant workers who are fully authorized to work in the United States do not experience delays and denial of employment as a result of what we do on immigration reform, and that they do not experience discriminatory practices.

The potential for impact on the United States work force is enormous, and we have experience on what this is likely to do and the problems that may well be caused if we do not address them as Congress proceeds with immigration reform.

We know that U.S. workers are likely to be—could be negatively affected if we do not fix problem in the data base, if we do not change the incentives that are in the law which affect discriminatory practices. And we must not move forward unless we are prepared to address the potential for mistakes to make sure that, as we are creating avenues for employers to effectively verify their employees, we are making sure that American workers and immigrant workers who are authorized to work do not experience delays or denials of employment.

We have almost 20 years of experience with employer sanctions and nearly a decade of experience with the Basic Pilot Program that you mentioned, and in 2002, the Department of Justice conducted a study of the Basic Pilot and found that a sizable number of workers who were found by the program not to be work authorized actually were work authorized, about 4 percent of the verifications. If you multiply that times 54 million or so new hires every year, a 4-percent error rate means about 2 million American workers every year could face denials or delay in employment as a result of Government errors. That is an unacceptable level, and it needs to be addressed, and building in mechanisms to address it is essential to moving forward on this issue.

For those people who the system said were not authorized to work when, in fact, they were, and they or employers attempted to address that with the immigration authorities or SSA, 39 percent of employers reported that SSA never or only sometimes returned their calls promptly, and 43 percent reported a similar experience with the INS, the precursor to DHS.

The evaluators also discovered that employers engaged in prohibited practices. Forty-five percent of employees surveyed who contested the information coming out of the system were subject to pay cuts, delays in job training, and other restrictions on working, and a full 73 percent of employees who should have been informed of work authorization problems in the system were not. Those numbers should really give us pause. That is something that we need to fix as we move forward because the impact on the American work force would be substantial.

The evaluators also found enormous problems with employers not complying with the terms of memoranda of understanding that they themselves had signed when they began to participate in the Basic Pilot. That includes pre-employment screening, which employers are not supposed to do, which essentially could deny work-

ers the ability to even find out that there is a data problem with their own data in the system and, therefore, address the system. It means they lose access to the job, but that they are likely to run into a problem the next time they apply for a job without an opportunity to address the mistake in the data base. These are things employers agreed not to do and ended up doing anyway as they participated in the Basic Pilot.

We were pleased to see the amendment by Senators Grassley, Kennedy, Obama, and Baucus on S. 2611. We think it improves substantially the original Senate language. And the most critical protections that are now in the bill which passed the Senate include language protecting against discrimination, due process protections, and key language protecting privacy. We believe all of that needs to be maintained and strengthened as we move forward because of these problems that I just outlined.

I want to highlight two particular concerns: Default confirmation. My colleague, Mr. Verdery, also mentioned this as well. It is incredibly important in the case that the Government data bases are unable to reach a final decision within the 30-day timeframe.

And administrative and judicial review. When there are problems in the data for people where the names and the Social Security data base do not match up, for example, a lot of people in my community have multiple first names, multiple last names. I am one of those. The name on my Social Security record is different from the name that is on my W–2, and that is a very common issue. That could lead to employment problems. If that, in fact, leads to denial and delay of employment, I would hope that somebody like me would have the ability to address that expeditiously, certainly before I lost wages, the ability to support my family.

We would also ask, just briefly, as we move forward with this legislative process, that we talk about a phase-in, again described by my colleague, Mr. Verdery, measures to ensure the accuracy of the data and to improve expeditiously the accuracy of the data before we subject the entire work force to verification under this system.

Changes and greater efficiency in the issuance of immigration documentation. Immigrants workers, in particular, who are authorized to work should have an employment authorization document, but we know that thousands of them experience delays in renewing those documents. We have examples from all around the country of people experiencing delays in getting driver's licenses, delays in employment, because even though they are, in fact, authorized to work but because the authorities have not gotten their documents or their renewals on time. That affects people's ability to feed their families. It is something that we should address.

Enforcement of labor laws ultimately is critical to the success of the overall effort and sufficient resources for the agencies to clean up their data and implement this swiftly and efficiently are essential.

So, in conclusion, Mr. Chairman, we recognize that worksite verification is an essential element of the immigration debate, and we are prepared to play a constructive role in making sure that the policy is effective. But it would be morally and substantively disastrous to put a system in place without addressing serious flaws

which have been identified by 10 years of experience with the Basic Pilot and 20 years of experience with employer sanctions. We believe there is ample evidence of what we need to do. We believe that we have the capacity to do it, and we would urge you to look at those issues as we move this forward.

Thank you.

[The prepared statement of Ms. Muñoz appears as a submission for the record.]

Chairman Cornyn. Thank you, Ms. Muñoz.

Ms. Dodd-Major.

STATEMENT OF LINDA DODD-MAJOR, FORMER DIRECTOR OF OFFICE OF BUSINESS LIAISON, IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C.

Ms. DODD-MAJOR. Good afternoon, Senators. Thank you for the opportunity to address these issues today. I also look forward to doing that. I also consider it extremely important. I do not disagree with—

Chairman CORNYN. Would you double-check to make sure your microphone is on?

Ms. DODD-MAJOR. Okay. Now the light is on.

Chairman CORNYN. Thank you very much.

Ms. DODD-MAJOR. I do not disagree with what my colleagues on both panels have said. However, I probably of all of the panelists have more hands-on experience with the I–9 process. Not only did I direct and run the Office of Business Liaison, but I spent many years almost embedded, as we know it today, into many worksite operations, into audits, into raids, just as the media representatives do in the Middle East now. I did that so that I could better explain to employers who wanted to comply what the law expected of them, what the consequences could be so that they could be more likely to—so they could be persuaded toward voluntary compliance. I also was in charge of the I–9 regulation at INS for years. I also was the chairperson of the interagency task force on birth certificate standardization.

So in terms of all these documents, in terms of the process, I have a lot of experience. I also have a different perspective.

First of all, with respect to the new enforcement priorities, most employers are not engaged in criminal activity. Furthermore, most undocumented workers are not working for criminal employers. In fact, not only are most employers not engaged in criminal activity, they are furious that the difficulties they have had with the I–9 process have not resulted in any enforcement that is meaningful to them. Those who try to get assistance do not get it. Those who call up to try to get removals of undocumented aliens do not get responses. And they feel that all of their efforts—and I am talking now of the huge percentage of compliance-minded employers. They feel that their efforts have been useless. They feel—and I think it is a justified position for them to take—that they have been victims in this process. Yes, they are often portrayed in the media and elsewhere as being addicted to low-cost labor. They will do anything for cheap labor. That is not true for most employers. In the private sector, I represent three Fortune 100 level companies that are in industries that have historically attracted undocumented workers.

They have tried their absolute best to keep undocumented workers out of the workplace. Two of them participate in the Basic Pilot at all of their worksites. Even that, for reasons that I will discuss, has not worked for them.

Furthermore, to say that the penalties included in IRCA were not deterrents to undocumented employment is an understatement. The worst consequences of worksite enforcement were not penalties. They were not money damages. They were the business consequences of—now, they do not do this anymore, but what they were doing in the late 1990's were raids on the work force. They were doing it at an Indian restaurant in Houston. They were doing it at a Denny's-type restaurant in Scottsdale. All of these I participated in. I did not participate as a law enforcement officer, but I saw what happened firsthand. They were doing it in food-processing plants, in meat-packing plants. And if you think when they did those raids that all of those undocumented workers and certain legal workers who had fear of the immigration system exited calmly from those workplaces, you are wrong. Every exit and entry was jammed with people trying to leave. There were raw materials ruined. And those employers faced sometimes months and expenses of maybe $1,500 to $2,500 apiece trying to replace those workers, all under circumstances where their Forms I–9 were absolutely flawless. In other words, the system did not work for them. And yet when they called for assistance—now, in the early 1990's, employers used to be able to call on local INS offices who would help them verify name and number matches for a number. After Salinas v. Pena—that was a lawsuit in the early 1990's—there was a consent agreement after which Deputy Commissioner of INS Chris Sale prohibited all—and there were reasons for this. I am not saying there were not—any investigations offices from providing that type of assistance to employers. After that, they basically had nothing.

Not only that, but contemporaneously came out certain GAO reports regarding discrimination that had resulted admittedly from overzealous following of the I–9 requirement and what has come to be known as "document abuse." I think that there is far less evidence that that kind of thing is going on today than there was then. Nevertheless, the resources that had been dedicated to employer outreach were transferred more or less to antidiscrimination, with the result that the message that employers got was thou shalt not discriminate outside of the context of the regular I–9 compliance. They were told accept any document that might be genuine and might belong to that person, or you may face a lawsuit for discrimination.

Some other issues that I want to highlight—they are fleshed out in more detail in my written statement—are some other parts of the process that are largely overlooked.

First, there is an employee attestation section in the Form I–9. It is Section 1. It is there where the employee states under penalty of law, signed under penalty of perjury, "I am an authorized worker." This is unfortunately—or maybe fortunately, I do not know. It depends on your perspective. The I–9 is seen as a document-driven and a number-driven process. There is a process during which and at which point employees themselves, with their personal signatures, have to attest to their current work authorization. That part

of the process has been almost completely overlooked. When you do audits of I–9s, you often see that part not completed, and there has been very little followup and enforcement against individuals who have provided, intentionally provided false data, for whatever personal reasons they have, that have gotten them into the work force and have not seen the consequences.

Employers who have experienced consequences themselves try to get enforcement to come in and pick up people and have seen those people just move on to their competitors have a very, very difficult time with this process.

There is another thing that is not addressed in the I–9 rule, and that is self-employment. A person who is an independent contractor does not have to complete an I–9, which has led to a widespread misimpression that if there is not an employer-employee relationship between the individual performing services and the payor for services, that that person can work whatever way he pleases.

Now, while those people may not be working for some of these criminal employers where there are worksite enforcement actions under the current enforcement model, they are competing with U.S. workers, and that, after all, was the purpose why IRCA was passed in the first place.

Discrimination. There is a lot that we could say here, but I will say that I have never once in any discussion with any employer or any organization ever heard—and we are talking about tens and tens of thousands—ever once heard anyone do anything but want to get more workers. Think about it. If an employer is in a labor shortage area, they do not want to discriminate against workers. As a matter of fact, in some cases they feel the I–9 process hampers them from getting workers that they could otherwise get and who have proven to be very good workers.

I do not think discrimination—there may have been disproportionate impact on certain ethnic groups, but that may be more because of the huge volume of those ethnic groups in the workplace than it is a reflection of discrimination.

Electronic verification.

Chairman CORNYN. Ms. Dodd-Major, could I get you to conclude?

Ms. DODD-MAJOR. Yes, yes.

Chairman CORNYN. Unfortunately, we are under a little bit of a time constraint.

Ms. DODD-MAJOR. Okay. This is the end. Electronic verification. The problem with this, as has been pointed out by other panel members is that it has driven fraud or exacerbated the movement of fraud from use of fake documents to use of false documents—fake being counterfeit, false being falsely used.

This is a very slippery slope that is not going to be improved unless, as has been pointed out also by several of the Senators, there is a biometric link or there is a tamper-proof document, not just for the alien workers but for U.S. workers as well. Now, whether this is a passport or some other secure document for U.S. workers, such as the dreaded national ID card, I do not know. But without that, the Basic Pilot is going to continue to give false results even if it can be administered on a nationwide basis.

Thank you.

[The prepared statement of Ms. Dodd-Major appears as a submission for the record.]

Chairman CORNYN. Thank you, Ms. Dodd-Major. Your testimony has been enormously helpful so far, and my only regret is that Senator Sessions and I both have to go to an Armed Services meeting and a classified briefing at 4 o'clock, and so we are going to have to cut this a little bit short—shorter than we would otherwise. But we hope you will understand and will also allow us to send you questions in writing that will allow us to followup on some of the excellent testimony you have given us.

Let me ask Mr. Verdery—and this also touches on some of the other testimony we have heard here in terms of worksite verification. It seems like there is a proliferation of documents that the Federal Government is mandating, whether it is a REAL ID or the Western Hemisphere Initiative travel documents, where people in South Texas, in order to go across the border and come back, they are going to have to have a passport or some equivalent of that, to, I know, because it is so popular in South Texas, the laser visa that Mexican visitors use under the US–VISIT program, and I know you have helped initiate a biometric identifier.

You mentioned a phased-in program. Is it possible for the Federal Government to come up with some means to take current documents that are in place or going to be coming in place soon to use that as some means of verifying eligibility until such time as we can come up with a $9.5 billion appropriation to give everybody a new Social Security card?

Mr. VERDERY. Well, it is a very difficult question. The problem is, as you mentioned, I am not sure anybody is really looking for the solution. There are four things going on at the same time: the Western Hemisphere requirement for travel back into the country for U.S. citizens and Canadians; the US–VISIT program itself, where they are going to enroll people leaving and going; REAL ID; and then a guest worker program. They all have to work together in some way.

I do think that you can have an interim step. The REAL ID would essentially have to suffice for people claiming to be U.S. citizens, and then you would have a foreign worker card, as the President has said, which is essentially already a tamper-resistant, biometrically based visa for foreign workers.

The real question is people who are not U.S. citizens but claiming to be, as Senator Kyl was getting at quite a bit, and that is where REAL ID I think can help a bit. Even if the EEVS does not work perfectly, essentially you have to trust in the card, and you have to make sure that works.

I do think that the next generation has to be a biometrically based system so you are actually tying the person to the card to a data base. If that is a national ID card system, so be it. But I think that is the only way you essentially can tie the person to the card and the person to a watchlist check and a data base check.

Chairman CORNYN. Mr. Stana, until such time as we are able to figure out and to actually solve the identification card issue, do you agree that we could make great strides forward in bringing down the wall between the Social Security Administration and the De-

partment of Homeland Security and other law enforcement officials by allowing some sharing of the no-match list?

Mr. Stana. Yes, there is no question that there are opportunities to get valuable data from the Earnings Suspense File, and the IRC Section 6103 limitations could be addressed to enable proper use. Of course, you also have privacy concerns. You do not want another laptop somewhere in suburban Washington with 13 million names on it from the ESF. There have to be appropriate safeguards.

But I would also say this: Let's not kid ourselves. Technology is not a panacea here. Without the proper procedures and a sufficient number of resources to followup with employers and employees alike, this whole system that we are proposing could face some real challenges. So you have to have all three. You have to have the technology, you have to have the people, and you have to have the processes that everyone understands and everyone knows how to use.

Chairman CORNYN. And, Ms. Muñoz, I take it you would agree that one of the best protections we would have to some means to avoid either unintentional or intentional discrimination against lawful workers would be some type of verifiable card that would eliminate discretion on the part of the employer.

Ms. MUÑOZ. Well, it is a mixed bag. I think experience tells us it is a mixed bag. On the one hand, you are right that it is possible that having a single document that everybody in the country would have and having some confidence that that document is reliable would have some good impact on some of the discriminatory practices out there. I will tell you that experience in our community also leads to a real fear that it could become a document that a lot of us have to show in a lot of other contexts as well and that only some of us are going to be asked to show in the same way that my former boss, the former president of my organization, who grew up in a border town in Texas, carried a card issued by the Border Patrol as he was growing up so that he could prove that he belonged in his own community.

There are some concerns that may be eased by such a document and other concerns that would be raised by such a document, and we need to be mindful of that, if we move in that direction, to make sure that we do not create new forms of discrimination.

Chairman CORNYN. Ms. Dodd-Major, perhaps more than anyone else, you have had some real-life experience here, and I just have to ask you: Given the difficulties in both getting Congress to respond in a comprehensive way and in a way that actually works, given the political resistance of some in the employer community about sanctions or other ways to actually enforce the worksite verification requirement, and just given the difficulties of making all these moving pieces come together in some smoothly running, efficient machine, are you optimistic or are you pessimistic about Congress' ability to actually learn from its mistakes in the past and actually make the system work?

Ms. DODD-MAJOR. Oh, boy, that is a hard question.

Chairman CORNYN. I knew you were up to it.

Ms. DODD-MAJOR. I think that the pressures from the competing sides are so difficult and in a political year the advantages are so likely to cancel one another out politically that the incentive to

move this forward as a matter of public policy is—and there are different stakeholders here. There are employers. There is the general public. There are all those aliens who have never had opportunities here before. And I am not confident that all of those things can be brought together to pass legislation now.

Chairman CORNYN. Well, you may be right. I hope you are not. I remain optimistic. And one thing, depending on your point of view, whether you are optimistic or less than optimistic about our chances, from my perspective doing nothing is not an option. And this is the responsibility that our constituents have sent us up here to undertake to try to solve difficult problems. And I recognize as much as anyone the upcoming elections, but there are always going to be elections in the future for those who hold office or those who aspire to public office. And I just believe that this is absolutely critical for us to deal with.

We can go back to our voters and explain to them why we voted the way we did and why we did what we did. And if we do not have a good explanation, then they know what to do with that. If we do, then I think those who try to do their best and come up with a realistic solution will be rewarded accordingly.

Unfortunately, due to the time constraint of this conflicting hearing, Armed Services hearing, we are going to have to conclude there, but please rest assured that your written testimony and your oral summary has been enormously helpful, and we are not going to let you off the hook. We are going to stay in touch with you and ask you more questions and ask you to contribute further in this effort. Thank you so much.

We will leave the record open until 5 p.m. on Monday, June 26th, for members to submit additional documents to the record or ask additional questions in writing of the panelists.

This hearing is adjourned.

[Whereupon, at 4:05 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follows.]

QUESTIONS AND ANSWERS

Questions for the Record

Senate Judiciary Immigration, Border Security, and Citizenship Subcommittee
"Employment Eligibility Verification System"
All Responses are current as of the Date of the Hearing: June 19, 2006
Assistant Secretary Stewart Baker & Assistant Secretary Julie Myers

Questions from Senator Grassley

1. The Basic Pilot Program is being used today by more than 33,000 sites. This program has been voluntary for employers since 1996. For years, I have been seeking the Department's help in encouraging more businesses to use this program. The Department also has the authority to mandate the use of the basic pilot in certain circumstances.

a) What is the Department of Homeland Security doing to encourage more use of the basic pilot program?

Response: We are currently developing an outreach plan to educate employers about the benefits of participating in the Basic Pilot Program ("basic pilot" or "program") and to encourage them to join. We have reached out to the states that have shown the most interest in having their employers join the program, such as Georgia and Colorado. In addition, U.S. Citizenship and Immigration Services provides information about the program on its website, www.uscis.gov, and permits easy on-line registration to facilitate employer participation. Further, a new ICE program, ICE Mutual Agreement between Government and Employers (IMAGE), is designed to encourage the use of the basic pilot by employers. The IMAGE program is further explained in a response below.

b) In what instances does the Department have the authority to mandate the use of basic pilot? How many times has the Department used this authority? How many times has the Department had the authority but did not use it?

Response: The Department of Homeland Security (DHS) has the authority to mandate that an employer use basic pilot only when issuing a final order finding a "knowing hire" or "knowing continuing employment" of an unauthorized alien under section 274A of the Immigration and Nationality Act (INA) in a case where the employer has not requested a hearing before a Department of Justice (DOJ) Administrative Law Judge (ALJ). If the employer does request such a hearing, DHS can request that the ALJ's final order in the case order participation in the basic pilot program. ALJs also have the authority to order basic pilot participation in orders under section 274B of the INA finding that an employer engaged in unlawful immigration-related discrimination, but section 274B cases are entirely outside the jurisdiction of DHS. DHS is not aware of any INA 274A or 274B case in which pilot participation has been either requested or ordered by DOJ or DHS. However, we are aware of at least one case in which the former INS cooperated with a U.S. Attorney's Office to provide for pilot participation as a condition of a plea bargain in a criminal case involving an employer's pattern or practice of knowing employment of undocumented aliens.

2. Some ICE officials have confirmed that many of the illegal aliens working in the companies being investigated were initially detained, but then let go. For example, the 1,200 people arrested for working at IFCO Systems across the country in April have not been deported. The arrests came after a year-long probe of IFCO. Yet, the aliens were released shortly after the

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arrests. You have only done one half of the job – that is, to find and arrest illegal aliens. The other half of deporting these illegal aliens is not getting done.

• What does ICE need to close the loop on these worksite enforcement efforts? Do you need funding from Congress? Do you need more bed space? How do we do the 2nd half of this operation?

Response: ICE worksite enforcement efforts against those who blatantly violate the immigration laws of this country have been robust and aggressive. Under the leadership of Assistant Secretary Myers, the Office of Investigations (OI) has significantly increased its pursuit and criminal prosecution of egregious employers, as in the case of IFCO Systems. ICE has always worked to ensure that its two key components in the area of immigration enforcement, OI and the Office of Detention and Removal Operations (DRO), work closely to apprehend, detain and remove aliens from the United States.

Under our current immigration laws, many aliens are eligible for release pending removal proceedings based on an assessment by an Immigration Judge or an immigration official. In the IFCO criminal case, OI worked closely with DRO in the planning stages of the operation. The unprecedented number of unauthorized workers apprehended on April 19, 2006, was an unanticipated positive result of this extremely successful enforcement operation. Sufficient detention bed space to detain every alien arrested in this large-scale operation was not immediately available locally. Accordingly some of the aliens placed into removal proceedings were released pending a hearing before an immigration judge, following a custody determination that considered the aliens potential threat to the public and a community-nexus assessment. Nonetheless, it is important to clarify the status of those apprehended at IFCO. As of April 27, 2006, eight days after 1187 workers were apprehended in the enforcement action, 461 were detained after initial processing, 399 were placed into formal removal proceedings and released pursuant to reporting conditions, 312 were processed to return to their native countries, nine were turned over to other law enforcement agencies to face pending non-immigration charges, while six were able to satisfactorily establish that they were lawfully in the United States. Since that operation, ICE has continuously ensured that unauthorized workers are held in custody in as many instances as possible. ICE is fully committed to the successful apprehension and removal of all illegal aliens in the most expeditious and efficient manner possible. Furthermore, DRO and OI are coordinating closely to develop apprehension projections for fiscal year 2007, and to calculate the detention and removal resources necessary to ensure support of the entire immigration enforcement continuum.

3. I share your point of view that the Electronic Employment Verification System – no matter how perfect we think it will be – will not be able to detect all fraud that will surely arise. You mentioned that the Department would like more flexibility so that investigators could follow the new fraud and take action.

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• Specifically, what kind of flexibility do you need that the bill approved by the Senate does not provide? Does Title III of S. 2611 prohibit you from cracking down on new abuses and fraud schemes?

Response: Title III of S. 2611 did not include important provisions that would allow the Secretary to designate additional documents that establishes identity and/or work authorization, and to define "good faith compliance" for employers. We believe that these provisions would assist us in "following the fraud" and assist prosecution of employers that comply with verification requirements in a mechanical way yet exhibit an indifference to other information that may indicate fraud. Further, providing additional discretion to the Secretary to designate acceptable documentation would provide greater leeway for the Department to recognize newly developed secure documentation evidencing employment eligibility or identity, thereby reducing the likelihood that U.S. citizens and work authorized aliens would suffer adverse employment consequences based upon documentation issues.

4. Ms Myers appeared before the Finance Committee a few months ago, right after the IFCO arrests. I said that more worksite enforcement measures had to be taken so that the American people would gain more trust in the Department's willingness to enforce our immigration laws. Shortly after that hearing, you said that we could expect more worksite investigations. And, you have lived up to your word. You stated in your testimony that "ICE is educating the private sector to institute best hiring practices and garnering their support in identifying systemic vulnerabilities that may be exploited to undermine immigration and border controls."

• Can you elaborate on this initiative? What has ICE learned from the private sector?

Response: ICE has reinvigorated one of its most important enforcement tools to stop violators of U.S. immigration laws: worksite criminal investigations. Since Assistant Secretary Myers assumed leadership of ICE, worksite enforcement efforts have been accelerated against those employers who continuously ignore the country's employment laws and regulations. As a result, criminal arrests of egregious violators are at an all-time high and growing. With the ICE commitment to serious worksite enforcement comes the necessity to make available to all employers the tools that will ensure the most secure and legal workforce possible. On July 26, 2006, DHS announced a new initiative and best business practices to help employers ensure that they are building a legal workforce through voluntary partnerships with the government.

Called the ICE Mutual Agreement between Government and Employers (IMAGE), the program is designed to build cooperative relationships between government and businesses to strengthen hiring practices and reduce the unlawful employment of illegal aliens. The initiative also seeks to accomplish greater industry compliance and corporate due diligence through enhanced federal training and education of employers. When interacting with the private sector, ICE personnel have found that many companies are seeking clearer and more specific guidance and assistance from the government on compliance with the employment provisions of the Immigration and Nationality Act, including proper employment eligibility verification practices and avoiding the knowing hire or employment of workers who are not authorized to work in the United States;

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IMAGE will enable businesses to achieve those aims. ICE is fully committed to assisting those businesses across America that seek to do the "right thing." ICE will continue to develop and refine IMAGE to ensure that it becomes a comprehensive compliance, outreach, and education program, to intelligently supplement ICE's robust enforcement efforts.

5. The current version of Title III contains a provision to compensate workers who are wrongfully discharged because they received an erroneous final non-confirmation. There has been some criticism of this provision. So, I would like to get a clarification.

• Do you believe that if the worker can demonstrate he lost his job through no fault of his own, he should be able to recover lost wages? If not, what sort of compensation do you believe is appropriate, and under what circumstances?

Response: Any claims for lost wages should be considered in accordance with the particular facts and circumstances of each case, applying the appropriate federal and/or state laws. Of course, workers that suffer adverse employment consequences based upon an employer's discriminatory implementation of the Basic Pilot may be entitled to relief from the employer under existing federal anti-discrimination law.

6. The current version of Title III contains an automatic default confirmation that would provide a final response to all inquiries within 30 days after a person contests a tentative non-confirmation. There has been some criticism of this provision. So, I would like to get a clarification.

• Do you believe there should be a limit on the amount of time a tentative non-confirmation can remain in effect? If so, how long should it be? Once a final confirmation has been given, under what circumstances, if any, do you believe it could be changed to a non-confirmation?

Response: The basic pilot requires the employer to immediately provide a referral letter to an employee upon receipt of a DHS tentative nonconfirmation. If the employee contests the tentative non-confirmation, he or she has eight federal workdays to contact DHS or SSA, as appropriate, to clarify his or her employment eligibility. Once contacted by the employee, DHS will immediately conduct records searches to resolve the tentative non-confirmation and then electronically submit the response to the employer. If the employee does not contact DHS, the tentative non-confirmation is treated as a final non-confirmation and the case is closed after 10 federal workdays. If the employee contacts SSA in order to update or correct his/her records, SSA frequently must verify with the custodian of record the information contained in the evidence document(s) submitted in support of the requested change. In many cases, verifying such information takes more than 30 days. While we share the intention of bringing closure to the verification process within a reasonable time frame, there should be appropriate flexibility to handle unusual cases that may require more time. With respect to changing final confirmations, a reason to do so could be identity or other fraud perpetrated by an employee or employer using the system, upon its detection. We would also note that notwithstanding a final confirmation, an

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employer may still be subject to liability if it otherwise has knowledge that an employee is unauthorized.

7. The current version of Title III contains a provision that provides DHS with limited access to certain Social Security data containing mismatched names and social security account numbers. There has been some criticism of this provision. So, I would like to get a clarification.

• Do you believe there are any specific instances in which this information should be made available to DHS, but would not be available under the current provision?

Response: While the Department appreciates efforts taken by the Senate to authorize greater data sharing between the Social Security Administration and DHS, we have concerns with some of the limitations included in the current provision. The provision should also require SSA to provide DHS with information relating to employers who have received a high number or disproportionate percentage of no-match notices; cases where a social security account number was used with multiple names; or cases where an employee has multiple employers reporting earnings for him during a single year. By contrast, the Senate bill would limit the scope of the information to employers with more than 100 employees whose names and social security numbers do not match or with more than 10 employees with the same social security number. We should also seek authority to request SSA to conduct data searches to assist in identifying individuals (and their employers) who are using false names or social security numbers; who are sharing among multiple individuals a single valid name and social security number; who are using the social security number of persons who are deceased, too young to work or not authorized to work; or who are otherwise engaged in a violation of the immigration laws. We look forward to working with Congress to address these concerns as the bill advances through the legislative process.

Questions from Senator Edward Kennedy

1. I understand that you would like DHS to have more discretion to adapt to changing enforcement challenges than is provided by the Senate bill. Here's a partial list of actions the Secretary may already take under the bill:

- He may require any employer to conduct an internal review of his or her compliance with worksite enforcement provisions, to certify that compliance, and/or to identify additional steps taken to come into compliance
- He may prohibit the use of identification documents deemed insecure
- He may require individual employers or classes of employers to participate in an EVS prior to the 18 month timeline based on their national security or critical infrastructure significance, or because the Secretary's has reason to believe that the employer has a record of previous violations
- He may impose additional penalties on non-compliant employers
- He may add additional data fields to the EVS system
- He may modify essentially any of the requirements "to improve the efficiency, accuracy, and security of the System."

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Questions for the Record
Senate Judiciary Immigration, Border Security, and Citizenship Subcommittee
"Employment Eligibility Verification System"
All Responses are current as of the Date of the Hearing: June 19, 2006
Assistant Secretary Stewart Baker & Assistant Secretary Julie Myers

What additional discretion do you believe should be provided to the Secretary beyond the existing provisions of the bill?

Response: Title III of S. 2611 did not include important provisions that would allow the Secretary to designate additional documents that evidence identity and/or work authorization, and to define "good faith compliance" for employers, and to obtain sufficient access to information maintained by the Social Security Administration (SSA) to effectively pursue violators of immigration and employment laws. The absence of these authorities in the existing bill will reduce DHS's ability to adapt to changing enforcement challenges and will hamper DHS's efforts to investigate and prosecute many employers. Title III's provision to DHS of certain limited forms of discretion, such as the discretion to modify the EVS system, unfortunately does not allow DHS to address the absence of needed authorities.

We also have concerns about the inflexibility of some of the EVS provisions in title III, including a strict 3-day rule for submitting inquiries, automatic final confirmations after a period of time, overly complex and burdensome appeal and back wage liability provisions, limitations on data collection and use, a requirement to provide self-verification capability to employees, requirement for a 24/7 telephone service, a requirement to collect and verify past Employer Identification Numbers, and INA 274B (antidiscrimination) amendments that appear on their face to prohibit reasonable uses of the EVS system such as reverifying employment eligibility upon expiration of work authorization, or submitting an inquiry more than 3 days after the hire to rectify a past omission to do so.

2. You testified that worksite enforcement would be made more difficult in the absence of a plan to bring undocumented immigrants out of the shadows.

Can you please comment, from an enforcement perspective, on the viability of an "enforcement first" approach which would crack down on employers of undocumented immigrants prior to passing a guest-worker program or an earned legalization for current undocumented workers?

Response: ICE fully believes that a comprehensive approach to immigration reform is necessary to effectively solve the problem of illegal hiring. ICE has reinvigorated one of its most important enforcement tools to stop violators of U.S. immigration laws: worksite criminal investigations. Since Assistant Secretary Myers assumed leadership of ICE, worksite enforcement efforts have been accelerated against those employers who continuously ignore the country's immigration laws and regulations. As a result, criminal arrests of egregious violators are at an all-time high and growing. The criminal prosecution of unlawful employers across the country will make a clear and convincing statement to businesses that they must obey the current compliance laws and avoid the temptation of larger profits that may be generated by illegal activities. Knowing that ICE will pursue egregious violators, American businesses will look to ensure that they are doing everything they can to hire a legal workforce. A temporary worker program is integral to addressing problems with our immigration system and must be part of any overall effort to reform our country's immigration laws.

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3. Many worry, with good reason, that sharing of data across agencies for purposes other than it was intended for leads to government tracking of innocent people. All three of the government witnesses emphasized in their statements that DHS should have access to SSA no-match letters for purposes of immigration enforcement. As you know, current law prohibits such information sharing in order to protect taxpayer privacy, but the consensus Title III in the Senate bill would require SSA to give DHS the taxpayer ID data of employers and employees for any employer with over 100 non-matched employees. We estimate that this would allow DHS to target for enforcement the 10,000 or so most egregious immigration violators, while continuing to protect the privacy of the vast majority of US citizens. In your comments today and in previous discussions, you seem to suggest that this amount of information sharing is inadequate, and that DHS should essentially have unchecked access to citizens' taxpayer ID information and their Social Security data.

Is this a correct characterization of the administration's position, and if not can you please explain exactly what information DHS should have access to?

Response: DHS is seeking information that could be used to identify any employers who consistently submit large numbers of invalid name and Social Security Number combinations (commonly referred to as "no match" information). This data will contain the names and addresses of employers who have been issued "no match" letters. When SSA receives names and Social Security numbers (submitted by employers on earnings reports) that do not match SSA records, a "no match" letter may be generated and sent to the employee and the employer. The letter outlines the steps that SSA recommends the employee and employer take to correct the discrepancy. Greater access to this information will allow DHS to better focus limited enforcement resources on employers that receive a high volume of these letters and on employers in critical infrastructure sectors.

ICE has announced an enforcement strategy of mainly focusing on the most egregious violators. The Senate bill requires SSA to provide this information, and also requires data sharing about workers apparently engaged in identity fraud and about employers who fail to participate in the EVS. Can you explain the ways in which you view the data sharing provisions in the Senate bill as inadequate?

Response: DHS seeks greater access to the names and addresses of employers and the Social Security Numbers referenced in the "no match" letters. DHS would utilize this information to better focus resources on those employers that receive a high volume of these letters and on employers in critical infrastructure sectors. In addition, data derived from the SSA's files could identify the employers with the greatest number of mismatches, in total and as a percentage of their workforce. This information would allow ICE to focus its limited enforcement resources on those target employers that are likely to be egregious violators.

As you know, the reason we have 6103 protections is because highly sensitive tax data were not always protected in the past, and the 6103 protections have made SSA and IRS among the best

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federal agencies when it comes to data security. Given the recent breaches of data security by the Veterans Administration and by the Department of Energy, how can the American people feel secure in this massive transfer of their private information from one federal agency to another? How can they feel secure that the data will not be misused or misplaced by enforcement agents if they are granted open access to the data?

Response: DHS does not seek open access to all SSA data contained in the Earnings Suspense File. DHS is only seeking access to the names and addresses of employers and Social Security Numbers referenced in the "no match" letters.

4. My understanding is that the former Immigration and Naturalization Service and DHS have been developing regulations to narrow the list of I-9 documents from about two dozen to fewer than 10 for several years now.

Can you comment on whether such regulations are being developed, when we can expect to see them published, and why it has taken so long to develop a shorter list of I-9 documents?

Response: Currently, USCIS is reviewing the list of I-9 documents for the purpose of this regulation. Although this initiative has taken longer than we would have liked, it is now a top agency priority being led by the newly formed Verification Division.

5. During the first four years of the Bush administration the former Immigration and Naturalization Service and DHS completed an average of just 2,200 worksite investigations per year, down from 5,500 under the Clinton administration. At the same time, fines collected have fallen from $2.4 million per year under the Clinton Administration to just $750,000 under the current administration (2001-03 only).

Can you comment on why worksite enforcement seems to have been such a low priority for this administration?

Response: Worksite enforcement has never been a "low priority" for this Administration. Worksite enforcement has evolved in many ways since the 1990s. ICE monitors and evaluates the success of its worksite efforts in a different way than the previous Immigration and Naturalization Service (INS) did. ICE has refocused its worksite efforts to reflect its overall mission of protecting national security and ensuring public safety. Worksite enforcement under ICE is a two-pronged effort that includes critical infrastructure protection (CIP) and criminal prosecution of egregious employers. CIP includes the investigation of those sites and sectors of our economy that are essential to the nation's well being. ICE agents remove unauthorized workers from sensitive areas within many industries. Additionally, ICE agents have been pursuing and prosecuting the most egregious criminal employers in the United States. As a result, criminal arrests of such violators are at an all-time high and growing. Under the old deterrence methods of INS, agents administratively investigated businesses by conducting time consuming paperwork audits that resulted, at most, in the issuance of notices of intent to fine. More often than not, those fines were mitigated and considered by the private sector to be just

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another cost of doing business. Consequently, a culture of illegal hiring and employment often continued even after fines were issued. The events of 9/11 understandably required a major shift of investigative activity to national security priorities, including worksite enforcement. ICE's new and effective way of enforcing the nation's immigration laws is appropriate and efficient. Deterrence is the key with any worksite enforcement program, and ICE strongly believes that its approach is being heeded by the American business community.

Questions from Senator Sessions

1. During your testimony, you indicated the critical importance of information sharing between DHS and the Social Security Administration. Please tell us:
A. Exactly what information does SSA have that if shared with DHS would permit greater enforcement of our immigration laws?

Response: ICE worksite enforcement efforts have been enhanced and refocused to include the robust pursuit and prosecution of employers who knowingly hire and employ unauthorized workers. Greater access to Social Security Administration (SSA) "no-match" information, such as the name of employers, employees and the SSN that doesn't match, would be useful to ICE in these cases. Worksite enforcement investigations could be significantly more efficient and effective with this data. ICE seeks "no-match" information regarding employers and the frequency of "no-match" instances that relate to those employers. A high percentage of "no-match" Social Security numbers (SSNs) within a company's workforce may be a strong indicator of the use of fraudulent SSNs at the time of hire, and that an employer has hired unauthorized workers. Greater access to such information would allow ICE agents to identify employers who appear to rely on illegal workers as part of their business practice and to more quickly identify and remove unauthorized workers.

B. What laws need to be changed to allow that information sharing?

Response: The Administration has proposed language that would authorize appropriate sharing of "no-match" information notwithstanding 26 U.S.C. 6103.

C. What impact would limiting the information sharing between DHS and SSA to 3 years (instead of authorizing information sharing on a permanent basis), have on ICE's ability to conduct effective worksite enforcement investigations after the information sharing stops?

Response: Limiting information sharing between DHS and SSA to a period of three years would limit ICE's ability to conduct more focused, effective worksite enforcement investigations, would limit each investigation's scope and breadth of evidence, and would be counter-productive to interagency cooperation in investigations of unscrupulous employers. ICE believes that permanent access to limited SSA "no-match" information as well as data from the Earnings Suspense file would enable us to more efficiently focus our investigations on

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employers with an abnormally high incidence of "no-match" occurrences, which will enhance our efforts to stem and discourage illegal employment.

2. You state that worksite enforcement has recently become a higher priority and investigations and arrests have increased. How many agents (or their full time equivalents) are currently dedicated to worksite enforcement and were dedicated to worksite in 2005?

Response: ICE worksite enforcement efforts against those who blatantly violate the immigration laws of this country have been robust and aggressive. Under the leadership of Assistant Secretary Myers, the Office of Investigations (OI) has significantly increased its pursuit and criminal prosecution of egregious employers. Because worksite enforcement is part of a fully integrated interior enforcement program, many investigations that commence as, for example, alien smuggling cases, result in ICE taking worksite enforcement actions. However, the hours dedicated to the worksite portion of those investigations are not reflected in worksite enforcement statistics. This results in underreporting of specific program hours, to avoid the potential of over-reporting total hours.

The necessary specifics to respond in detail to your question are law enforcement sensitive. Immigration and Customs Enforcement staff is available to provide a briefing on the issue in an appropriate venue upon request.

3. You discussed the need for an increase in civil fines for employers who knowingly hire illegal workers. How much of an increase would it take to deter employers from hiring illegal workers? What fine levels and structure do you suggest?

Response: ICE strongly believes that the current fine structure for employers who knowingly hire illegal workers is insufficient for enforcement and deterrence. The Administration has proposed a streamlined administrative process for fines and penalties that would give the Secretary of Homeland Security the authority to administer and adjudicate fines and penalties.

4. Please provide the following statistics for each fiscal year between 1993 and 2005:
a. The numbers of worksite cases initiated;
b. The number of worksite cases closed;
c. The number of Notices of Intent to Fine issued;
d. The number of Final (Civil) Fine Orders and amounts of Fines ordered;
e. The amount of (civil) fines collected;
f. The number criminal arrests made;
g. The number of criminal cases accepted for prosecution for violations of INA 274(f);
h. The number of criminal cases accepted for prosecution for violations of INA 274(a)(3);
i. The number of Final (Criminal) Fine Orders and amounts of fines ordered; and
j. The amount of (criminal) fines collected.
k. The number of criminal convictions for violations of INA 274A(f);
l. The number of criminal convictions for violations of INA 274(a)(3); and

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m. Other criminal convictions obtained as a result of a worksite investigation (e.g. alien smuggling, document fraud); and the code sections the conviction was obtained under.

Response: The information this question requests is law enforcement sensitive. Immigration and Customs Enforcement staff is available to provide a briefing on the issue in an appropriate venue upon request.

5. ICE has recently increased investigations of employers at "critical infrastructure" sites, and against that are egregious violators of worksite laws. However, this approach ignores "routine" worksite violators, leaving the majority of employers and illegal alien workers with realistic chance of apprehension.
• What is ICE's strategy for enforcing the worksite laws against the, "routine" illegal alien employer?

Response: The Administration is developing a comprehensive strategy to increase the compliance of all employers with worksite laws. ICE is hiring forensic auditors who will specifically target the general compliance efforts you describe. ICE has developed the IMAGE program for companies to utilize "best hiring practices" that have been proven to ensure thorough compliance with this country's laws. Utilization of the suggested practices will also minimize the possibility of hiring an illegal workforce. Greater access to SSA "no-match" information would allow ICE agents to identify employers who appear to rely on illegal workers as part of their business practice and to more quickly identify and remove unauthorized workers. ICE investigators will also continue to target the most egregious violators for criminal prosecution.

6. What changes to INA Section 274, and INA Section 275 are needed to provide for the more effective enforcement of worksite laws? Does DHS need new statutory provisions to effectively enforce the laws against knowingly hire or continue to employ unauthorized workers?

Response: 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 merely as a cost of doing business. Only with a strong compliance program, combined with issuance of meaningful penalties, will the United States have an effective worksite enforcement program. To this end, the Administration has proposed substantial increases to civil money penalty amounts for those violators found to have hired an alien (including by contract) or continued to employ an alien knowing or with reason to know that the alien is unauthorized to work in the United States. In addition, the Administration has proposed a streamlined administrative process for issuance of these fines and penalties that would give the Secretary of Homeland Security the authority to administer and adjudicate the penalty process.

USCIS is also reviewing the list of supporting documents currently accepted under INA Section 274 as evidence of identity and work authorization for the purposes of completing the Form I-9 Employment Eligibility Verification Worksheet. The purpose of this review is to update and narrow the list of acceptable I-9 documents which will help combat document fraud and identity

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theft. These provisions would assist ICE in identifying fraud and aid in the prosecution of employers that comply with verification requirements in a mechanical way yet exhibit an indifference to other factors that may indicate fraud.

Another necessary change is providing DHS with sufficient access to SSA "no-match" data. Greater access to such data would allow ICE agents to identify employers who appear to rely on illegal workers as part of their business practice and to more quickly identify and remove unauthorized workers. From a national security standpoint, access to SSA "no-match" data is essential to ICE's efforts to identify criminal employers and vulnerabilities in critical infrastructure industries and sectors throughout the country. Under current law, sufficient access is not provided. This is one legislative fix that would significantly assist ICE's efforts to uphold our nation's workplace laws.

7. What documents does DHS propose be used to establish identity and work authorization to an employer? How will these documents ensure that the information on the document relates to the individual actually presenting the document? Are biometric identifiers necessary?

Response: DHS has proposed that specific documents be acceptable for establishing *both* identity and employment authorization, including a U.S. passport, a permanent resident card or other documents designated by the Secretary, if the document includes a photograph and other personal identifiers, is evidence of employment authorization and has security features. The Administration proposes that evidence of *identity only*, could include such documents as a REAL ID compliant State identity card or driver's license, a non-REAL ID compliant State issued identity card or driver's license that was issued prior to implementation of the REAL ID Act requirements and contains a photograph and other identifying information, or other Federal, State or Tribal documents that meet the same criteria. In addition, DHS seeks the authority for the Secretary to prohibit the use of such documents if the Secretary finds that such documents or class of documents is not reliable or is being used fraudulently to an unacceptable degree.

8. What changes in current law are necessary to provide DHS with the authorities necessary to enforce the laws against knowingly hire or continue to employ unauthorized workers?

Response: 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 merely as a cost of doing business. Only with a strong compliance program, combined with issuance of meaningful penalties, will the United States have an effective worksite enforcement program. To this end, the Administration has proposed substantial increases to civil money penalty amounts for those violators found to have hired an alien (including by contract) or continued to employ an alien knowing or with reason to know that the alien is unauthorized to work in the United States. In addition, the Administration has proposed a streamlined administrative process for issuance of these fines and penalties that would give the Secretary of Homeland Security the authority to administer and adjudicate fines and penalties.

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Questions for the Record
Senate Judiciary Immigration, Border Security, and Citizenship Subcommittee
"Employment Eligibility Verification System"
All Responses are current as of the Date of the Hearing: June 19, 2006
Assistant Secretary Stewart Baker & Assistant Secretary Julie Myers

USCIS is also reviewing the list of supporting documents currently accepted under INA Section 274 as evidence of identity and work authorization for the purposes of completing the Form I-9 Employment Eligibility Verification Worksheet.

Another necessary change is providing DHS with sufficient access to SSA "no-match" data. Greater access to such data would allow ICE agents to identify employers who appear to rely on illegal workers as part of their business practice and to more quickly identify and remove unauthorized workers. From a national security standpoint, access to SSA "no-match" data is essential to ICE's efforts to identify criminal employers and vulnerabilities in critical infrastructure industries and sectors throughout the country. Under current law, sufficient access is not provided. This is one legislative fix that would significantly assist ICE's efforts to uphold our nation's workplace laws.

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SOCIAL SECURITY

Office of Disability and Income Security Programs

AUG 03 2006

The Honorable John Cornyn
Chairman, Committee on Judiciary
Subcommittee for Immigration, Border Security and Citizenship
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of June 29, 2006, which requested additional information in order to complete the record for the June 19, 2006 hearing regarding "Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986." Enclosed you will find the answers to your questions.

I hope this information is helpful. Please let me know if I can be of further assistance or your staff may contact Mr. Robert M. Wilson, Deputy Commissioner for Legislation and Congressional Affairs, at (202) 358-6030.

Sincerely,

Martin H. Gerry

Enclosure

SOCIAL SECURITY ADMINISTRATION BALTIMORE MD 21235-0001

Responses to Questions for the Record
Subsequent to the June 19, 2006 Hearing Regarding
"Immigration Enforcement at the Workplace:
Learning from the Mistakes of 1986"

Response to Questions for the Record from Senator Jeff Sessions

1. **You testified that the Administration was in favor of sharing "No Match" information with DHS for national security and law enforcement purposes. Does that include all immigration enforcement purposes?**

   Yes, the Administration supports granting access to Social Security "no match" data in the interest of national security and for law enforcement purposes. We defer to the Department of the Treasury on all questions related to the nature and extent of the "No Match" information which the Social Security Administration (SSA) would be allowed to share with the Department of Homeland Security (DHS) as a result of any amendments to Section 6103 of the Internal Revenue Code.

2. **Is the Administration in favor of the Social Security Administration sharing all "No Match" information with DHS, or only those "No Match" records where an employer has been notified?**

   As noted above, the Administration supports allowing DHS access to Social Security "no match" data in the interest of national security and for law enforcement purposes. We defer to the Department of the Treasury on all questions related to the nature and extent of the "No Match" information which SSA would be allowed to share with DHS as a result of any amendments to Section 6103 of the Internal Revenue Code.

3. **Does the Administration support the sharing of "No Match" information on a permanent basis (beyond the 3 year limit found in S.2611)?**

   The Administration supports granting the access to Social Security "no match" data in the interest of national security and for law enforcement purposes. If Congress amends Section 6103 of the Internal Revenue Code to allow such disclosure beyond the 3-year limit in S. 2611, SSA will work with DHS to provide the necessary support and access. We defer to the Department of the Treasury on all questions related to the nature and extent of the "No Match" information which SSA would be allowed to share with DHS as a result of any amendments to Section 6103 of the Internal Revenue Code.

4. **You testified that in 2004, the Social Security Administration issued "No Match" letters to 120,000 employees. Those letters were associated with 7.3 million, "No Match" records.**

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a. **How many total "No Match" records were received by the Social Security Administration in 2004, but not covered in the 120,000 letters sent to employers?**

In 2004, 2.0 million "No Match" records were received that were not covered by the 120,000 "No Match" letters to employers.

b. **How many employees (of the 7.3 million) whose records were mismatched were notified by the Social Security Administration?**

SSA sends notification to all employees whose wages could not be credited to the Master Earnings File.

c. **Were they notified that the error may not be simply administrative, but that another person may be using their social security number to work illegally?**

The notice does not contain a reference to illegal employment by another individual.

d. **Of those notified, how many attempted to correct their mismatched records so that they could receive proper credit for their work history?**

For 2004 (Tax Year '03 - the latest year for which complete data is available), there were 206,000 items taken out of Suspense and moved to the Master Earnings File based on the return of individual Decentralized Correspondence (DECOR) notices with corrected information. We do not have data regarding how many DECOR letters were returned with data that did not result in items being removed from Suspense.

5. **How many "No Match" letters did the Social Security Administration issue in FY 2005? How many "No Match" records were those letters associated with?**

   a. **How many total "No Match" records were received by the Social Security Administration in 2005?**
   b. **How many employees whose records were mismatched were notified by the Social Security Administration?**
   c. **Were they notified that the error may not be simply administrative, but that another person may be using their social security number to work illegally?**
   d. **Of those notified, how many attempted to correct their mismatched records so that they could receive proper credit for their work history?**

The data needed to answer this question will not be available until October 2006. The information requested for 2004 is included in the answer to the previous question.

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6. How many "No Match" records must come from a single employer to trigger a "No Match" notice letter being sent to the employer?

Currently we send Educational Correspondence (EDCOR), known as "No Match" letters, to employers when:

1. The total number of Form W-2s on the employer report exceeds 2,200 and more than 0.5% (one half of one percent) of the FormW-2s on an employer report have name/Social Security number mismatches.
2. The total number of Form W-2s on the employer report is less than 2,201 and the absolute number of mismatches is 11 or more.

Generating the EDCOR letters is part of the wage reporting process. It should be noted that a company may report wages under more than one Employer Identification Number or may submit multiple wage reports.

Response to Questions for the Record from Senator Ted Kennedy

(1) According to Commissioner Barnhart's testimony in March of this year, issuing new hardened Social Security cards to 300 million US citizens and legal immigrants would cost about $9 billion, and require 67,000 agent work-years.

1. My understanding is that the collateral verification and evidentiary requirements established by the Intelligence Reform and Terrorism Prevention Act (IRTPA) have already produced a 40% increase in visitors at SSA field offices. How would these new requirements affect the cost of issuing new social security cards, and what is your revised cost estimate?

One of the areas impacting SSA field office workloads and the public is the implementation of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) on December 17, 2005. This law significantly strengthened the rules for issuing new and replacement Social Security cards. One result was a change in the documentation required from individuals seeking new or replacement cards. This may call for a somewhat longer interview in the field office, or the review of additional documents. As a result, visitors may have to return to the field office, sometimes more than once, in order to provide the appropriate documents. At this time, we do not have a definitive cost estimate.

2. I also understand that the IRTPA has caused an increase in the number of people who must make multiple trips to an SSA office in order to obtain a new card—that the number has climbed from 20% to 30% of all visitors. In many cases, especially in western districts, that extra trip to an SSA field office may involve up to 400 miles of round trip driving. Do your cost estimates take account of the lost productivity associated with people waiting in lines at SSA field offices, or of the additional costs for the 100 million or so Americans who will have to make multiple trips to SSA field offices to obtain a new card? Can

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you make a ballpark estimate of the amount of time a typical American will spend replacing his or her card?

Our cost estimates do not include the time a Social Security card applicant spends in the waiting room or traveling to and from the field office. We do not have definitive data on the extent to which office visitors are currently returning to provide additional documentation.

3. **Currently, the vast majority of Social Security Cards issued to U.S. citizens are issued at birth. Can you describe the procedures you would recommend for incorporating biometric data into cards for newborn babies?**

The Enumeration at Birth (EAB) process is a voluntary program on the part of the hospitals and the States and other jurisdictions. The program is administered under the provisions of a contract between each State and SSA that includes safeguards to ensure that the process is not vulnerable to fraud. Thus, to incorporate biometric data into Social Security cards for newborns through the EAB process, SSA would first need to obtain concurrence from State and jurisdictional contractual partners to include the collection and transmission to SSA of this data. As part of this process, States would need to ensure that participating hospitals were willing to take on this added workload. Because we have never analyzed or taken a position on incorporating biometric data into Social Security cards for newborns, we have not identified a biometric process that is appropriate for newborns and remains appropriate as the child ages into adulthood.

4. **My office met with a group of SSA field office managers this month, and they told us that lack of staff has caused every one of their offices to cut back on services to the public. The offices have also essentially stopped doing re-determinations of eligibility for disability benefits in the Social Security and Supplemental Security Income programs, because they do not have the staffing and financial resources to do these determinations. Yet failing to do these re-determinations could cost the Social Security Trust Fund and the general fund of the Treasury billions of dollars each year. How would core field office duties be affected by imposing a requirement on your field office staff to process hundreds of millions of new Social Security cards?**

Reissuing Social Security cards to all current cardholders (240 million cardholders over age 14) would require an estimated additional 67,000 work years. To put this in perspective, SSA currently has 65,000 employees. The effect of a requirement to issue large numbers of replacement cards on SSA's core workloads would depend on the number of cards that would have to be issued in a given year and the extent to which the Agency was provided sufficient time and resources to implement new legislative requirements.

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(2) Many worry, with good reason, that sharing of data across agencies for purposes other than it was intended for leads to government tracking of innocent people. All three government witnesses emphasized in their statements that DHS should have access to SSA no-match letters for purposes of immigration enforcement. As you know, current law prohibits such information sharing in order to protect taxpayer privacy, but the consensus title III in the Senate bill would require SSA to give DHS the taxpayer ID data of employers and employees for any employer with over 100 non-matched employees. We estimate that this would allow DHS to target for enforcement the 10,000 or so most egregious immigration violators, while continuing to protect the privacy of the vast majority of U.S. citizens. In your comments today and in previous discussions, you seem to suggest that this amount of information sharing is inadequate, and that DHS should essentially have unchecked access to citizens' taxpayer ID information and their Social Security data.

5. **Is this a correct characterization of the Administration's position, and if not can you please explain exactly what information DHS should have access to?**

   The Administration supports allowing DHS access to SSA's "No Match" information in order to strengthen worksite enforcement of immigration law, which is a critical component of comprehensive immigration reform. We defer to the Department of the Treasury on all questions related to the nature and extent of the "No Match" information which SSA would be allowed to share with DHS as a result of any amendments to Section 6103 of the Internal Revenue Code.

6. **ICE has announced an enforcement strategy of mainly focusing on the most egregious violators. The senate bill requires SSA to provide this information, and also requires data sharing about workers apparently engaged in identity fraud and about employers who fail to participate in the EVS. Can you explain the ways in which you view the data sharing provisions in the Senate bill as inadequate?**

   As noted above, the Administration supports allowing DHS access to SSA's "No Match" information in order to strengthen worksite enforcement, which is a critical component of comprehensive immigration reform. We defer to the Department of the Treasury on all questions related to the nature and extent of the "No Match" information which SSA would be allowed to share with DHS as a result of any amendments to Section 6103 of the Internal Revenue Code.

7. **As you know, the reason we have 6103 protections in the first place is because highly sensitive tax data were not always protected in the past, and the 6103 protections have made SSA and IRS among the best federal agencies when it comes to data security. Given the recent breaches of data security by the VA and by the Department of Energy, how can the American people feel secure in this massive transfer of their private information from one federal agency to**

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another? And how can they feel secure that the data will not be misused or misplaced by enforcement agents it they are granted open access to data?

With respect to the security of the data, safe, high-speed methods of communicating data in a secure fashion are available and used for the transfer of data between SSA and other Federal agencies.

As we understand the legislation, the transfer of data between SSA and DHS would be similar to the data exchanges SSA has in place with other Federal agencies. It would be an ongoing but tightly controlled environment in which DHS matches data it receives from employers against SSA records. Both agencies would be required to have strict technical, security and audit standards in place to ensure the appropriate use of data in the System by both agency personnel and contractors. The data exchange would not provide open access to the data by either agency, but instead would require controls limiting access to only necessary personnel. Additionally, as noted above, both agencies would have to ensure that all Privacy Act requirements regarding the collection, maintenance and use of the data are met prior to implementation to safeguard the confidentiality of the data.

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Written Responses to Senator Ted Kennedy
U.S. Senate Judiciary Committee
Subcommittee on Immigration, Border Security, and Citizenship
"Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986"
June 19, 2006

Question: *Do you believe discrimination against legal residents and U.S. citizens of Latino descent would really be a problem in this day and age? Are you aware of any evidence that asking employers to make a judgment call about individuals' work eligibility would create special hardship for Latinos?*

Answer: There is ample evidence of widespread discrimination against Latinos and other immigrants and minorities as a result of employer sanctions, starting with a 1991 study mandated by IRCA and conducted by the GAO, which found a widespread pattern of employment discrimination caused solely by employer sanctions. The GAO results were confirmed by nearly a dozen separate studies conducted by a variety of local groups, civil rights commissions, and other concerned organizations in the 1990s. Neither Congress nor the Department of Justice did anything significant to address this discrimination once it was uncovered; funding for the Office of Special Counsel for Unfair Immigration Related Employment Practices remains modest and the office's ability to address discrimination after the fact has evidently not had substantial impact on the problem.

A mandatory electronic verification system (EVS) would not, as some claim, resolve the problem of discrimination by requiring all workers to present work authorization documents. The I-9 system and the Basic Pilot both require employers to check the work authorization documents of all employees, but as we have seen, this has not eliminated discrimination; indeed, there is evidence that the existence of the Basic Pilot has facilitated some forms of discrimination, such as selectively checking the documents of job applicants before the hire takes place. In this case, authorized workers whose information is not accurately reflected in highly problematic government databases would be denied employment before they ever get the chance to challenge the inaccurate data.

We also know that some employers have knowingly hired unauthorized workers and used verification or reverification of employment eligibility as a means to retaliate against workers who complain about labor conditions thereby severely restricting workers' ability to organize or improve labor conditions. Other employers incorrectly reverify only those workers they perceive to be "foreign," further discriminating against and intimidating workers who look ethnic. This behavior is not likely to improve if a mandatory employment verification system is implemented – in fact, without proper labor law enforcement, the problem will remain.

In the current political context we are perhaps even more concerned about the potential negative impact of employer sanctions. Given the heightened debate over undocumented immigration and the vilification of immigrants that permeates the airwaves, Latinos – regardless of citizenship status – are reporting an increase in discrimination across the U.S. We know that this

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discrimination does not affect only undocumented immigrants or foreign-born Latinos. Because of their appearance, surname, or national origin, Latinos – including U.S. citizens – are victims of discrimination. A recent Pew Hispanic Center poll found that more than one-half of all Latinos see an increase in discrimination as a result of the immigration policy debate.

As a result of the immigration debate, the potential for discrimination is broadening to the state and local levels, as well. For example, the city of Hazelton, Pennsylvania recently passed legislation requiring that the city deny business permits and city contracts to any business that hires or "aids or abets" by any means, "no matter how indirect" any undocumented immigrant. Business owners would also be penalized for failing to report any individuals they suspect of being undocumented immigrants. Other cities and states, including Colorado, Tennessee, and Georgia, have passed similar legislation, and many other states are considering legislation.

In this current climate, and given the increased penalties for employers who do not comply, the potential for discrimination – particularly discrimination against Latinos – increases dramatically. The Administration has recently increased worksite enforcement activities, and both the House and Senate bills dramatically increase the penalties for employers who do not comply with the EVS leaving them even more fearful of the risks of hiring the "wrong" workers. While an electronic verification system may help to alleviate some forms of discrimination – such as asking for additional documentation from some workers – we believe that other forms of discrimination are still probable. For example, some employers may institute unlawful "citizen only" policies, and others may conclude that "foreign looking" persons are too risky to hire. It has already been established though experience with employer sanctions that persons perceived to be immigrants, including native-born U.S. citizens of Hispanic descent, may have their documents rejected or subjected to additional scrutiny; for example, there are well-documented cases of Puerto Ricans, who are U.S. citizens by birth, having birth certificates rejected by employers insisting on "green cards" or naturalization papers. NCLR believes these practices are likely to continue under an expanded system. Additionally, the 2002 evaluation of the Basic Pilot program cited that participating employers continued to engage in prohibited practices including pre-screening. Pre-screening is particularly dangerous because, due to errors in the databases, large numbers of workers would be denied employment, with no recourse since the proper procedures were not followed. Furthermore, prescreening also denies the worker the opportunity to contest database accuracies since the worker is never informed that a pre-screen indicated a nonconfirmation.

In summary, we have ample evidence to demonstrate that discriminatory practices continue as a result of the implementation of the I-9 system and the Basic Pilot Program. Given the current climate of increased hostility to immigrants, proposed increased penalties for hiring unauthorized workers, and the low priority given to the Office of Special Counsel, we believe that discrimination will continue to be a significant problem for Latinos and other minority groups in the foreseeable future.

Question: *One of the criticisms of the Senate worksite enforcement provisions is that the bill is overly generous in its judicial review procedures. Are these measures necessary in your*

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opinion? Would the Federal Tort Claims Act be a viable alternative to the Senate's judicial review language?

Answer: We believe that the Federal Tort Claims Act (FTCA) process is not sufficient in dealing with the large numbers of individuals who may be negatively affected by problems with the EVS. As stated in my testimony, the government's own reports have shown that there are many data errors in current government databases. Currently the Basic Pilot has erroneous data that cannot be resolved despite repeated reverification attempts for approximately 4% of all employees. If the proposed EVS were to attempt to verify the work authorization of approximately 54 million new hires in the U.S. each year, a 4% error rate would affect more than two million workers. That would mean potentially two million lawsuits under the FTCA.

The FTCA is not equipped to handle these large numbers or lawsuits of this nature. The FTCA process is cumbersome, expensive, and time-consuming making it an unrealistic form of relief from government database errors. FTCA claims can take many months, if not years, to be settled. Payments are often further delayed because the DOJ must submit settlements or judgments to the GAO for payment, and the U.S. Attorney's Office or the Department of Justice Attorney must process the payments. These cases are also very expensive as plaintiffs generally must pay up front costs and attorney fees which could equal or exceed any settlement awarded. Additionally, the FTCA does not permit recovery of punitive damages against the government, and workers could only recover damages claimed in a claim presented to an administrative agency. Lost wages which continued after the time the claim was submitted would not be recoverable.

Furthermore, the DOJ is simply unprepared to process the large number of cases stemming from data errors in the EVS. The DOJ's entire Torts Branch of its Civil Division has approximately 120 attorneys to handle the approximately 3,000 lawsuits that are pending before the federal courts at one time. The potential for large numbers of new cases will only further hamper DOJ's ability to handle its caseload and will cause further delays for wronged employees.

Furthermore, FTCA suites are limited to government negligence, and data errors might not be deemed acts of negligence. Under the FTCA, the U.S. is only liable for a negligent or wrongful act or omission if a private person would be liable in accordance with the law of the place where the act or omission occurred. If no analogous tort exists, then no liability under the FTCA exists. The FTCA may not provide relief for wrongful acts or omissions such as those resulting from mistaken processes or procedures used, or other kinds of erroneous system information not the result of acts or omissions. In a wrongful discharge or negligence case arising out of, for example, improper maintenance of a database, the government would undoubtedly argue that the claim was barred by the "discretionary function exception." Under 28 U.S.C. § 2680 (a), the United States cannot be held liable for any claim which is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused." This exception would deny relief to employees harmed by agency action.

It is critical to remember that an aggrieved worker will not be able to work or receive a paycheck while the process is ongoing. A simple government database error resulting in the loss of even

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one week's wages can financially devastate an American family. Many of these workers will no doubt contact their Representatives in Congress, thereby adding to the burdens of Member's caseworkers. For all of these reasons it is incumbent on Congress to create a full administrative and judicial review process separate from the FTCA, such as that contained in Title III of S. 2611.

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United States Government Accountability Office
Washington, DC 20548

July 20, 2006

The Honorable John Cornyn
Chairman, Subcommittee on Immigration, Border Security, and Citizenship
Committee on the Judiciary
U.S. Senate

Dear Mr. Chairman:

The enclosed information responds to the post-hearing questions in your letter of June 29, 2006, concerning our June 19, 2006 testimony before your committee on employment verification and worksite enforcement efforts. If you have any questions or would like to discuss this information, please contact me at (202) 512-8816.

Sincerely yours,

Richard M. Stana, Director
Homeland Security and Justice Issues

Enclosure

48837.025

ENCLOSURE ENCLOSURE

The enclosure provides your questions and our responses for the record and supplements information provided to your committee in our testimony, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts* (GAO-06-895T, Washington, D.C.: June 19, 2006).

Questions for the Record
The Honorable John Cornyn, Chairman
Subcommittee on Immigration, Border Security and Citizenship
Committee on the Judiciary

1. **Can you comment on the feasibility of effective worksite enforcement in the absence of the other elements of comprehensive reform being debated, including the legalization of undocumented immigrants already in the country and a program to increase the number of legal immigrant workers in the future? Do you believe, based on previous experience with worksite and border enforcement, that "enforcement first" is a viable reform strategy?**

There are a variety of factors that affect consideration of comprehensive immigration reform. One such factor is the need for foreign workers to fill jobs in the United States. In determining whether and to what extent foreign workers are needed, it is important to consider the number of workers and the skills required to fill jobs, the type and length of permits to be issued, processes to recruit and admit foreign workers, and policies and controls for ensuring employer and worker compliance with program requirements.

A second factor is an employment eligibility verification system that allows employers to reliably verify employees' work authorization status. Key elements of such a system include tamper-resistant documents that can be linked to the document-holders, training and guidance for employers to help ensure their compliance with program procedures, and methods for monitoring and enforcing employers' compliance. A third factor is a credible system of worksite enforcement to help ensure that employers are complying with the law and hiring only authorized workers. Development and implementation of a strong worksite enforcement program require, among other things, an assessment of enforcement resource needs—both personnel and supporting technology; methods to identify and investigate employers who hire unauthorized workers; and penalties to effectively deter employers from hiring unauthorized workers. A fourth factor for consideration is ways to address the existing unauthorized immigrant population in the United States. Important questions related to this factor are what resources are available or needed for implementing programs to address this population and how can the United States efficiently and effectively implement such programs while also accounting for immigrants' varied circumstances, such as their employment and family connections. Consideration of these factors and priorities given to them depend on the desired policy outcomes of immigration reform.

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In addition, there are a range of policy options that could be implemented as part of immigration reform. Any of these options would require appropriate resources, direction, and oversight. However, it is up to Congress to debate the sequence and priorities of the various options and to determine the best framework for immigration reform.

2. Are there any risks to requiring employers to participate in an electronic verification system which does not work well? Do you believe a flawed enforcement regime might encourage some employers to move their operations "off the books"?

In our August 2005 report on employment verification and worksite enforcement efforts, we said that, if implemented on a larger scale, the Basic Pilot Program, or a similar electronic employment eligibility verification system, shows promise for enhancing the employment verification process and reducing document fraud. However, we also stated that weaknesses in the current pilot program, including its inability to detect identity fraud, delays in the entry of employment authorization information into DHS databases, and employer noncompliance with program procedures could, if not addressed, have a significant impact on the program's success. In particular, if the electronic verification system cannot detect identity fraud (use of valid documentation belonging to a work-authorized person, or counterfeit documentation that contains valid information and appears authentic) it is possible that such fraud could increase with mandatory electronic verification, as unauthorized workers could have new incentives to use identities of work-authorized individuals. Moreover, the delay in the entry of employment authorization information into DHS databases is one of the primary reasons why pilot program queries require secondary verification by immigration status verifiers. Secondary verifications lengthen the time needed to complete the pilot program verification process, and employers may experience losses in work time or training when employees contest tentative nonconfirmations through the secondary verification process. Such experiences could adversely affect a greater number of employers and workers under a mandatory electronic employment verification system if these weaknesses are not fully addressed.

U.S. Citizenship and Immigration Services (USCIS) is taking steps to reduce the number of pilot program queries that require secondary verification by, for example, improving the timeliness and accuracy of data entered into its databases. USCIS is also working with U.S. Immigration and Customs Enforcement (ICE) to develop plans for monitoring employers' use of the pilot program to help address identity fraud. However, these plans are still in the beginning stages, and, according to USCIS officials, an 18 month schedule for establishing a mandatory electronic employment verification system for all employers is ambitious.

Regardless of the enforcement regime in place, some employers have incentives to employ workers "off the books," as it is typically less costly for employers to employ unauthorized workers. Limited enforcement efforts could provide further

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ENCLOSURE ENCLOSURE

incentives for employers to hire unauthorized workers because employers could do so with little fear of sanction. We have previously reported that worksite enforcement has been a relatively low priority for ICE and that employers, particularly those not located at or near critical infrastructure sites, faced little likelihood that ICE would investigate them for employing unauthorized workers. We stated that efforts to reduce the employment of unauthorized workers require both a strong employment eligibility verification process and a credible worksite enforcement program to help ensure compliance with the law and that employment does not take place "off the books."

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Senator Edward M. Kennedy
Senate Subcommittee on Immigration, Border Security and Citizenship
"Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986"
Questions for the Record
Monday, June 19, 2006

V. Question for Stewart Verdery

One of the issues that we have been grappling with as we have worked on these new enforcement provisions is how much responsibility to place on employers to police the worksite, and how much responsibility to place on the government. On one hand, employers should be the eyes and ears of the government, and that enforcement agents should hold employers accountable if, in a court's judgment, an employer should have known an immigrant lacked legal status. On the other hand, the best way to obtain a high level of compliance is to provide employers with a user-friendly system and a set of simple rules to follow, and that asking employers to be pro-actively involved in enforcement is risky.

Question: Can you comment on these competing schools of thought?

Question: What would you expect to be the likely effect on public confidence in our overall immigration enforcement efforts if we design an electronic verification system that makes incorrect determination for hundreds or thousands, or more US citizens and legal residents?

(2) You have a great deal of experience with immigration enforcement and border security as a former DHS official.

Question: Can you please comment, from an enforcement perspective, on the viability of an "enforcement first" approach which would crack down on employers of undocumented immigrants prior to passing a guest-worker program or an earned legalization for current undocumented workers?

VII. Questions for Linda Dodd Major

An issue the Senate is concerned with is whether it is more important to give employers a certain response about a worker's eligibility, or whether it is more important to give DHS ample time to make a correct determination. As you know, the solution we came up in the Senate bill was to require the DHS to give a definitive answer after 30 days—and answer which will be a default confirmation until the system is at least 99 percent accurate and a default non-confirmation after that.

Question: The alternative, which is favored by the DHS, is to give the agency up to 180 days to make a final determination about an employee's eligibility. Can you discuss what kind of impact it would have on US businesses if their employees are left in legal limbo for up to 180 days in this manner?

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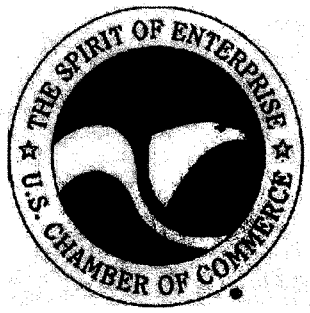
SUBMISSIONS FOR THE RECORD



Statement of the U.S. Chamber of Commerce

ON: IMMIGRATION ENFORCEMENT AT THE WORKPLACE: LEARNING FROM THE MISTAKES OF 1986

TO: IMMIGRATION, BORDER SECURITY AND CITIZENSHIP SUBCOMMITTEE OF SENATE JUDICIARY COMMITTEE

BY: ANGELO I. AMADOR

DATE: JUNE 29, 2006

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

48837.030

Statement on

Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986

Before the

Immigration, Border Security and Citizenship Subcommittee

of Senate Judiciary Committee

By

Angelo I. Amador

Director of Immigration Policy

U.S. Chamber of Commerce

June 29, 2006

Chairman Cornyn, and members of the Subcommittee, thank you for keeping the record open and allowing us to submit these comments today. I am Angelo I. Amador, Director of Immigration Policy at the United States Chamber of Commerce. Immigration enforcement at the workplace is based on the employers' responsibility to follow proper procedures in verifying a worker's employment eligibility. Thus, we are submitting comments to you today on the many issues raised by the creation of a new employment eligibility verification system ("EEVS") and its impact on the business community, including small businesses. The U.S. Chamber also co-chairs the Essential Worker Immigration Coalition.

The U.S. Chamber of Commerce and the Essential Worker Immigration Coalition

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing more than three million businesses and organizations of every size, sector and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. The Chamber is also a founding member and co-chair of the Essential Worker Immigration Coalition ("EWIC"), a coalition of businesses and trade associations that support reform of U.S. immigration policy to facilitate a sustainable workforce for the American economy while ensuring our national security and prosperity.

The Chamber and EWIC support a new EEVS, within the context of comprehensive immigration reform. Employers need a fast, accurate, and reliable way to ensure that the workers they hire are indeed authorized to work.

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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 Chamber, with some caveats, has expressed its support for the Senate approach.

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 employers 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 submission, but is clearly a major issue which will have to be dealt with in the future.

Basic Pilot Benefits

An employer using the Basic Pilot Program, after the initial I-9 verification procedure, submits the identification data provided by an employee for verification by the Social Security Administration ("SSA") or the Department of Homeland Security ("DHS").[1] The benefit of participating in the program is that employers who do participate gain certain legal benefits, including a presumption, that in the event of a DHS investigation, the employer did not violate the employer sanctions provisions in immigration law.[2] Further, employers who terminate or otherwise take action against employees based on information provided through the Basic Pilot's verification process would not be liable under other laws as long as the employer can show reliance on such information in "good faith."[3]

Accuracy of the Underlying Databases for the Basic Pilot Program

The accuracy of the underlying databases, maintained by DHS and SSA, continues to be a problem for the Basic Pilot Program. These databases struggle to keep pace with status or name changes among our fast growing population.[4] Historically, the error rates of government agency databases tend to be extremely high.[5] For example, error rates for Internal Revenue

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[1] Department of Homeland Security, Report to Congress on the Basic Pilot Program, at 2, July 2004.
[2] National Immigration Law Center (NILC), Basic Information Brief: Employment Verification Programs – The Basic Pilot and SSNVS, at 3, April 2005.
[3] NILC, Basic Information Brief: Employment Verification Programs, at 3.
[4] *Id. at 4.*
[5] John J. Miller and Stephen Moore, A National ID System: Big Brother's Solution to Illegal Immigration, Policy Analysis no. 237, September 7, 1995.

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Service data and programs are typically in the range of 10-20%.[6] A General Accountability 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.[7] 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.[8] 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.[9] Even Social Security files have been found to contain error rates in 5-20% of cases.[10] 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.[11]

How Does the Basic Pilot Program Work?

There are four stages in the program. First, for each newly hired worker, the employer—using a computer—must access the Social Security Administration's main database, also known as the Numerical Identification File ("NUMIDENT"), to verify the worker's social security number.12 If NUMIDENT does not produce a confirmation, a tentative non-confirmation, or negative response, is reported to the employer.[13] If the person that received the negative response is later confirmed, it is called a "**false-negative**" because the original negative response was incorrect. Second, when an employer has a non-confirmation, it is asked to send its submission to DHS for review. Note that the prospective employee has the option of contesting the tentative non-confirmation with SSA and providing additional documentation and/or clarification.[14] At the second stage, the submission is checked against DHS's Alien Status Verification Index ("ASVI").[15]

If once again after checking with DHS the response comes out negative—ASVI fails to confirm work authorization—the submission moves to the third stage, which is to be given to an Immigration Status Verifier ("ISV").[16] This individual manually reviews the submission against DHS's internal records to either confirm authorization or issue a second tentative non-

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[6] Daniel J. Pilla, How to Fire the IRS, at 68-69, 1994.
[7] General Accounting Office, Immigration Reform: Alien Verification System Data Base Problems and Corrective Actions, June 1989.
[8] Anne Davis, Digital IDs for Workers in the Cards, National Law Journal at 1-21, April 10, 1995.
[9] Anne Davis, Digital IDs for Workers in the Cards, National Law Journal at 21.
[10] Consumers Union, What Are They Saying about Me?, April 29, 1991.
[11] National Immigration Law Center, Basic Information Brief: Employment Verification Programs at 4.
[12] Kevin Jernegan, Eligible to Work? Experiments in Verifying Work Authorization, at 3, November 2005.
[13] *Id.*
[14] Jernegan, Eligible to Work? Experiments in Verifying Work Authorization, at 3.
[15] *Id.*
[16] *Id.*

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confirmation.[17] If the determination is again negative, the fourth stage is for the prospective employee, within two weeks, to present additional evidence to establish that he or she is authorized to work.[18] If he or she is unable to prove work eligibility, or fails to respond within the allotted two weeks, the tentative non-confirmation determination becomes final and the employer must fire the worker.[19]

As an explanatory note, it is important to clarify that false-negatives should not be confused with "false-positives." A false-positive occurs when a person comes back as authorized to work, a "positive" response, when in reality the person was not authorized, thus, the original positive response was incorrect or, in other words, was false. Under the I-9 system, the main issue is that a worker without employment authorization that presents to an employer authentic looking papers will be checked by the employer as eligible to work, a positive, when in reality he or she is not. It is then, under the I-9 system, the duty of the government to catch these false-positives, which account for about 5% of the working population. In those cases, the worker can continue in his employment until the government realizes the error and informs the unsuspecting employer that the positive result was false in relation to that employee—at which point the employer must fire the worker.

Under the Basic Pilot Program, the main issue is negative results for individuals that are in fact authorized to work. Furthermore, instead of the government trying to establish that an approved individual is not authorized to work once he checks positive under the I-9 system, the burden under the Basic Pilot Program is shifted to the employee who must prove that he is authorized to work once he checks negative against the government databases.

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.[20] The INS chose two research firms, the Institute for Survey Research at Temple University ("ISR") and Westat, to do the independent evaluation.[21] 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.[22] 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.[23]

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[17] Jernegan, Eligible to Work? Experiments in Verifying Work Authorization, at 3.
[18] *Id.*
[19] *Id.*
[20] 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.
[21] 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.
[22] 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.
[23] *Id.*

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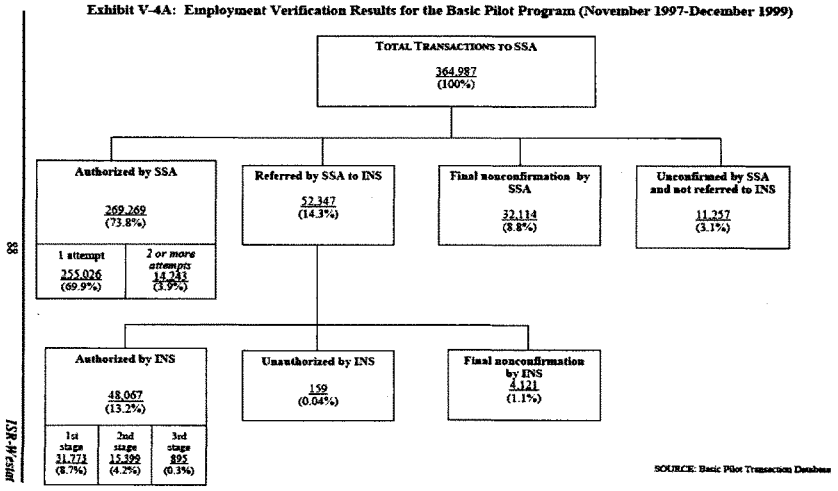
As these reports found, there are deficiencies with the Basic Pilot Program. For example, while the final outcome for 87% of the verification submissions was employment authorization confirmation at one of the four stages, less than 0.1% (159 persons) were found between 1999 and 2002 to be unauthorized to work in the United States.[24] The remaining 13% never reached a final determination.[25] 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.[26] There are many reasons for these and other inconsistencies.[27]

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 in the June 2002 ISR and Westat report. The exhibit below is copied from that report and can be found on page 88 of the same. 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.[28] And, of course, 17.1% plus 3% gives the 20% false-negatives estimate that most experts have been using.

Exhibit V-4A: Employment Verification Results for the Basic Pilot Program (November 1997-December 1999)



[24] Institute for Survey Research at Temple University (ISR) and Westat, Findings of the Basic Pilot Program Evaluation, at 81-82, June 2002.
[25] ISR and Westat, Findings of the Basic Pilot Program Evaluation, at 84.
[26] ISR and Westat, Findings of the Basic Pilot Program Evaluation, at 87.
[27] *Id.*
[28] ISR and Westat, Basic Pilot Evaluation Summary Report, at vi, January 2002.

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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."[29] During the period tested there actually were 491,640 "queries."[30] A query occurs every time an employer enters a submission in the SSA or DHS database.[31] An employer may have multiple queries for one employee.[32] 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.[33] 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.[34] 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 Layman's 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."[35] 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."[36] 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."[37] The result is often an incorrect tentative non-confirmation (false-negative).[38]

When an employer does not catch an error, it results in "more significant burden on employees, employers, and the Federal Government."[39] 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."

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[29] ISR and Westat, Findings of the Basic Pilot Program Evaluation, at 81, footnote 63.
[30] *Id.*
[31] ISR and Westat, Findings of the Basic Pilot Program Evaluation, at 81, footnote 63.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] ISR and Westat, Findings of the Basic Pilot Program Evaluation, at 122-123.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

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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.[40] 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).[41] It stated further that employers and employees incur costs in the process of resolving these erroneous findings.[42] 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.[43] 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.[44]

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.[45]

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,

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[40] NILC, "Basic Pilot" Employment Eligibility Verification Program Expanded Nationwide, *Immigrants' Rights Update,* Vol. 18, No. 8, December 22, 2004.
[41] NILC, "Basic Pilot" Employment Eligibility Verification Program Expanded Nationwide.
[42] *Id.*
[43] *Id.*
[44] 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.
[45] ISR and Westat, Basic Pilot Evaluation Summary Report, at 18, January 2002.

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but then using this data to investigate employers is unacceptable. Employers must be able to receive a final, accurate, answer upon which they can rely, within a reasonable period of time.

To address this issue, 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.

Moreover, a provision in the Senate version holds the government accountable for the proper administration of an EEVS through the creation of an administrative and judicial review process that would allow employers and individuals to contest findings. Through the review process, workers could seek compensation for lost wages due to agency error. Meanwhile, if an employer is fined by the government due to unfounded allegations, the employer could recover some attorneys' fees and costs—capped at $25,000—if they substantially prevailed in an appeal of the determination.

While the government has some exposure to compensate for its mistakes, and properly so, much of the new enforcement procedures are directed at employers. In addition to more government investigatory powers, new and increased fines and penalties, there is also an expansion of anti-discrimination laws. Following lengthy discussions with a broad group of interested parties, which included unions and civil rights' groups, the Chamber and EWIC did not object to the inclusion of language containing a reasonable expansion of the categories of immigrants who can file an immigration-related unfair employment practices complaint under the Immigration and Nationality Act ("INA") and a provision to provide $40 million in funding for the Office of the Special Counsel for Immigration-Related Unfair Employment Practices, as part of an overall amendment addressing many concerns.

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However, the Chamber and EWIC continue to oppose a fines and fees mechanism contained in S. 2611 that would lead the government to seek cases in search of monetary settlements rather than based on the merits. The so called "Employer Compliance Fund", found in Section 302 of S. 2611, would create a statutory incentive for litigation by enforcement agencies to supplement their budgets. Any new EEVS will be an entirely new system, which will most likely lead to legitimate compliance questions, and employers need reasonable protections from abuse from over zealous prosecutors. Thus, in addition to civil fines and criminal penalties being commensurate to the violation, the system should allow for the issuance of warnings and/or a reasonable time for employers to correct any typographical or other administrative errors without automatically being subject to an enforcement action.

Furthermore, the high cost of defending oneself, even where the underlying complaint is merit less, against well-staffed government agencies, is a major impediment to a small business's ability to challenge government allegations of wrongdoing. Thus, especially when facing the prospect of agency budgets relying, in part, on increased fines and fees on employers, recovering some portion of attorneys' fees when an employer prevails on appeal becomes even more important. Similar attorneys' fees recovery provisions are commonly found in both federal and state statutes.

The two versions of EEVS also differ in the treatment of employers that use subcontractors. The employer community wants to ensure that direct liability for subcontractor actions is not imposed unreasonably. Perhaps the most important language found in the House version on this issue was the result of an amendment by Congressman Lynn Westmoreland. The language provides an exemption from liability for an initial good faith violation of the provisions and a safe harbor for contractors who have subcontractors that hire unauthorized workers without the knowledge of the general contractor.

In contrast, the Senate version could be construed in a way that makes the general contractor responsible for the hiring practices of their subcontractors. The paperwork burden alone of managing the information sharing required by S. 2611 would be noticeably increased for the general contractor. For example, the construction-contractor industry involves a system consisting of a general contractor and could involve as many as 40 to 50 different subcontractors on one single project. Not only would the general contractor have to submit each subcontractors' Employer Identification Number ("EIN") to the new verification system, but it seems the general contractor could also then receive the non-confirmation notices of each subcontractor. Furthermore, it remains unclear in S. 2611 how the established contracts will be affected, what steps must be taken, and what level of liability the general contractor will face should the subcontractor receive non-confirmation notices for their employees.

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.[46] The Senate version will

[46] Government Accountability Office, Immigration Enforcement: Weaknesses Hinder Employer Verification and Worksite Enforcement Efforts, at 20-21 and Appendix IV, August 2005.

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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**."[47] (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.[48] In particular, data errors and technological problems would lead many employees to start work as "would-be employees."[49] This could lead to a substantial decrease in productivity, especially when the work to be done is seasonal or time-sensitive.[50] Employers would also have to deal with the possibility of another level of government bureaucracy with random "on-site auditing" powers.[51] 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—that is a government function and should be paid for by the government.

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.[52] Specifically, GAO has reported on additional problems and emphasizes "the capacity constraints of the system [and] its inability to detect identity fraud."[53] Also, in fiscal year 2004, 15% of all queries handled by the Basic Pilot Program required *manual* verification because of data problems.[54] 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.[55]

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

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[47] GAO, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, at 29.
[48] Sparapani, Memorandum on Problems with Employment Eligibility.
[49] *Id.*
[50] *Id.*
[51] DHS, Report to Congress on the Basic Pilot Program, at 8.
[52] 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.
[53] *Id.*
[54] GAO, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, GAO-05-813, at 23, August 2005.
[55] Barbara D. Bovbjerg, Testimony Before the Subcommittee on Oversight, during Questions and Answers period.

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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

In conclusion, the Chamber and EWIC urge 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 offenders caught in the web of 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, the Chamber and EWIC 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 the views of the U.S. Chamber of Commerce and the Essential Worker Immigration Coalition and we look forward to continuing our work with Congress in our joint search for solutions.

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STATEMENT OF STEWART BAKER
ASSISTANT SECRETARY FOR POLICY DEVELOPMENT
DEPARTMENT OF HOMELAND SECURITY
BEFORE THE
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP
SENATE COMMITTEE ON THE JUDICIARY
ON
"IMMIGRATION ENFORCEMENT AT THE WORKPLACE: LEARNING FROM THE MISTAKES OF 1986"

JUNE 19, 2006

I. Introduction

Chairman Cornyn, Ranking Member Kennedy, and members of the Subcommittee, I wish to thank you for inviting the Department to testify today on the importance of enhancing worksite enforcement of immigration laws, and I am happy to be here with Assistant Secretary Julie Myers of Immigration and Customs Enforcement (ICE), who will certainly give you a detailed accounting of why her investigators need new tools to enforce immigration laws in the workplace. I will attempt to provide an overview of the Administration's position on this issue, and outline some of the problems with the worksite enforcement provisions of the 1986 Immigration Reform and Control Act (IRCA) and how we arrived where we are today.

Worksite enforcement is a priority of the Department and the Administration and the President recently laid out his priorities for comprehensive immigration reform in a speech before the U.S. Chamber of Commerce by saying: "A comprehensive reform bill must hold employers to account for the workers they hire. It is against the law to hire someone who is in the country illegally. Those are the laws of the United States of America, and they must be upheld."

If we are going 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 has to be just as comprehensive. We must make sure that our immigration laws are enforced in Maine and Georgia and Oregon, 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 good-paying 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 in the Immigration and Nationality Act as part of the President's call for comprehensive immigration reform. We are proposing this now, because it is clear that the system set up in the 1986

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Immigration Reform and Control Act (IRCA) didn't work. I'd like to take this opportunity to outline some of the reasons why we believe it did not work, and how our new proposal will improve the system.

II. Why 1986 Employer Sanctions System didn't work

In 1986 Congress passed the Immigration Reform and Control Act, which for the first time made knowing employment of unauthorized aliens unlawful, and introduced a system requiring that the employment eligibility of every new employee be verified. However, many loopholes remained. Unless a prospective employee's ID was obviously fake, the employer had to accept it. In fact, an employer who tried to do more ran the risk of being sued for discrimination.

Not surprisingly, this system just created a brisk trade in fake IDs. An immigrant with a fake ID and fake Social Security card could get a job. And that's what they did, by the millions. And because employers didn't have any way to verify the documents that were presented to them, the fraudulent documents became the method by which unscrupulous employers could avoid the consequences of hiring illegal aliens, by hiding behind the mechanical verification process.

Congress attempted to cure this problem in 1996, by creating a pilot program for verifying employment eligibility. Called the Basic Pilot program, it 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. And frankly, a small percentage of employers participate, although we note that the program is growing by about 200 employers a month.

In addition to the problems of fraudulent documents and lack of a mandatory verification system, IRCA also set the penalties for violations of the law very low, and the standard for proving a violation by an employer very high. The government has to prove that an employer "knew" that the individual was unauthorized, and the employer has an affirmative defense as long as it can show it conducted the verification in good faith - - although it is not required to keep copies of the documents they reviewed or any subsequent documents they may receive that bear on the work authorization of the individual, such as Social Security no-match letters.

Even when we think we can prove a case, the fines are ridiculously low. Today, the fine for a business that fails to do the one thing it is supposed to do -- check an employee's documents -- can be as low as $110. This is less than a New York City parking ticket. And the penalty for blatantly violating the law – for knowingly hiring an illegal immigrant -- can be as low as $275 and cannot exceed $2200 for a first offense. Even

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when a violation is proven, half of all fines assessed cannot be collected, because scofflaw employers simply disappear or switch corporate identities.

As a result, worksite enforcement has been dropping steadily. Rather than try to prove knowing violations of the law and collect small fines, the Department of Homeland Security has in recent years emphasized criminal investigations of hardcore violators. Use of criminal enforcement authority has proven successful, resulting in millions of dollars in forfeitures and related civil penalties – more in the last three years than was collected in the entire history of the civil enforcement program. But while criminal prosecutions are proper for the worst offenders, we need to create a civil enforcement regime that works and that commands the respect of all employers. Existing penalties need to be substantially increased and multiplied for recidivist violators. In addition, to effectively collect fines, we need to be able to place liens on business property, to ensure the violators cannot avoid a penalty simply by reincorporating under a different name.

Which brings us to another key issue we have learned from 1986 – the Federal Government must be permitted to share data that can assist in determining if unauthorized individuals are gaming the system to work. The key repository of that data is the Social Security Administration. Every employer is required to obtain the Social Security number of every employee as part of the process of determining employment eligibility and so they can correctly report the employee's earnings to the Social Security Administration for social security benefit purposes.

Every year, some employers get letters about employees whose names don't match the Social Security numbers reported for them. These mismatches may be clerical errors or the result of workers' failing to report changes to update information in SSA's databases—or they may provide evidence of immigration fraud. Immigration investigators are not told about these mismatches. Employers who get the notices are also warned not to take adverse action against an employee just because his or her Social Security number is listed as a "no match".

DHS has recently published a proposed regulation describing an employer's current obligations under the immigration laws, and its options for avoiding liability, after receiving a no-match letter. It describes exactly what steps will provide the employer with a "safe harbor" and provide certainty that DHS would not find, based on receipt of a no-match letter, the employer in violation of their legal obligations. But this is only a small step. We need to have the flexibility that is necessary to respond to fraud schemes that are continually evolving to beat the system.

So there you have the key components of a failed employment verification and enforcement system:

- fake documents and no requirement for employers to verify them with an electronic system,
- broad "safe harbors" for employers and high standards to prove malfeasance,
- insignificant penalties which do not provide deterrence,

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- lack of information sharing to target those who are significantly abusing the system, and
- failure to "follow the fraud" when new fraud schemes and existing schemes changed.

III. New proposals

DHS worksite enforcement efforts fully necessitate a more streamlined process to penalize those employers who violate the immigration employment laws of the nation. In order to have an effective and far-reaching illegal employment deterrence system, DHS must be afforded the leeway to enforce the law without extensive administrative and judicial review. The responsibilities of employers should be clear and well-defined. Additionally, enforcement personnel must have the legal authorities to make a solid case against employers who hire or continue to employ aliens "knowing or with reason to know" the alien is unauthorized to work. A thorough and comprehensive worksite enforcement program is paramount to DHS's goal of changing the culture of illegal employment in the United States.

The Administration has outlined a proposal that would give DHS the tools it needs to effectively enforce employment immigration laws. The major new elements of this proposal are:

- a mandatory electronic employment verification system (EEVS) for employers that will ensure that businesses have a clear and reliable way to check work documents, including social security numbers,
- allowing the Social Security Administration to share no-match data with the Department to permit us to better focus our enforcement efforts,
- ensuring all legal foreign workers have a secure employment authorization card that will reduce the ability of foreign workers to engage in document fraud, and
- stiffening the penalties for employers who violate these laws.

While we propose to give employers the tools they need to verify their employees work authorization, we also want them to be aware of other factors that may impact on this determination. We need the ability to set clear, reasonable standards of good conduct for employers – asking them to take all reasonable steps, including reviewing employee documents, using the electronic verification system and retaining all documents relevant to their employees' eligibility to work, to make sure their employees are authorized to work. Employers who are shown to have hired a significant number of unlawful aliens in a year should face a presumption that they have knowingly hired these individuals. We also need to tighten the rules to ensure that employers cannot use contract arrangements to "wall themselves off" from complicity in the illegal hiring of their contractors.

While most of these proposals involve improvements to the existing employment verification and sanctions system, the President has proposed two major new improvements – the mandatory electronic verification system and sharing of Social Security Data.

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IV. Electronic Employment Verification System (EEVS)

Description of the Basic Pilot. As stated above, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) mandated that the Federal Government provide, at no charge to the employer, employment eligibility information about new hires (both U.S. citizens and noncitizens) to employer sites volunteering to participate in the Basic Pilot program. Currently, the Basic Pilot has almost 10,000 participating employers and more than 33,000 work sites in all 50 states and processes over a million queries a year. In his speech to the U.S. Chamber of Commerce on June 1, President Bush acknowledged that the Basic Pilot gives employers "a quick and practical way to verify social security numbers" and "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."

Employers submit queries (including the employee's name, date of birth, SSN and whether the person claimed to be a U.S. citizen or work authorized noncitizen) through the system and receive an initial verification response within seconds. The system first electronically sends the new-hire's Social Security number, name and date of birth to the Social Security Administration to match that data, and SSA will confirm citizenship status (if the employee claimed to be a U.S. citizen) based on data in the Social Security Administration's Numident database. If a query cannot be immediately verified electronically, the system will issue an SSA tentative non-confirmation to the employer. The employer must notify the employee of the tentative non-confirmation and give him/her an opportunity to contest that finding. If the employee contests the SSA tentative non-confirmation, he or she has 8 days to visit an SSA office with the required documents to correct the SSA record. He or she must contact SSA to correct the SSA record.

Once SSA verifies the SSN (and name and date of birth) of a noncitizen, the system will attempt to electronically verify the person's work authorization status against several DHS databases. If the system cannot electronically verify the information, an Immigration Status Verifier will research the case, usually providing a response (generally, either verifying work authorization or issuing a DHS tentative nonconfirmation) within one business day. If the employer receives a tentative nonconfirmation, the employer must notify the employee of that finding and give the employee an opportunity to contest that finding. An employee has 8 days to call a toll-free number to contest the finding. Once received, USCIS generally resolves the case within three business days, by issuing either a verification of the employee's work authorization status or a DHS Final Nonconfirmation.

Description of EEVS. As you know, the House and Senate have both passed pieces of comprehensive immigration legislation this session that include provisions authorizing a mandatory electronic employment eligibility verification program for all 7 million U.S. employers. USCIS is already planning for the expansion of the program. The President's FY07 budget request includes $110.5 million to expand and improve the Basic Pilot so that it can be used for all employers as EEVS, including components for outreach,

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systems monitoring, and compliance. USCIS currently is exploring ways to improve the completeness of the immigration data in VIS, including adding information about students from the SEVIS database, information about nonimmigrants who have extended or changed status, and real-time arrival information from U.S. Customs and Border Protection. In addition, USCIS is currently enhancing VIS 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 significantly improve the speed at which USCIS will be able to verify the employment eligibility of the noncitizen new hires of employers because the system will verify the card number against the repository of the information that was used to produce the card: a one-to-one match that should instantly verify all legitimate card numbers.

Planned Monitoring and Compliance Functions. 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. EEVS will include robust systems monitoring and compliance functions that will help detect and deter the use of fraudulent documents, imposter fraud, and incorrect usage of the system by employers (intentionally and unintentionally). EEVS also will promote compliance with correct program procedures. 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 to enforcement action (e.g., user has not completed training) will be referred to compliance officers for follow-up. Findings concerning potential fraud (e.g., SSNs being run multiple times, employers not indicating what action they took after receiving a final nonconfirmation) will be referred to ICE Worksite Enforcement investigators.

However, it should be emphasized that no electronic verification system is foolproof or can eliminate document fraud or identity theft (with or without the employer's knowledge or facilitation), or intentional violation of the required procedures by employers for the purpose of hiring or keeping unauthorized persons in their workforces. But an EEVS program that includes all U.S. employers (which will virtually eliminate SSN mis-matches), monitoring and compliance functions, along with a fraud referral process for potential ICE Worksite Enforcement cases can substantially help deter the use of fraud by both employers and employees as we work to strengthen the Administration's overall interior enforcement strategy.

DHS is confident in its ability to get EEVS off the ground, with sufficient support from Congress. We also support employers paying a fee to offset the cost of the system. This would share the cost burden of the system across the universe of employers and those who hire more would be paying more for the system.

The Administration supports a phased-in EEVS 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

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others. As noted elsewhere in my testimony, USCIS already is working to improve and expand the Basic Pilot program to support the proposed expansion.

DHS is also committed to the timeliness and accuracy of the system. We have proposed that the system not be made mandatory until the Secretary can certify the capacity, integrity and accuracy of the system. In order for this system to work, however, 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.

II. Social Security Data Sharing

In addition to the EEVS, which will have significant Social Security Administration participation, we are proposing that SSA share with DHS information it receives regarding mismatches of social security numbers and names from employers' annual reporting requirements. Of course we all hope that as the EEVS is expanded and becomes mandatory, the instances of no-match for new hires will significantly decrease, as these mismatches will be detected at the time of hire. However, sharing of this data is necessary to examine instances of unlawful employment by those hired prior to the implementation of the system.

Out of 235 million wage reports the Social Security Administration (SSA) receives each year it is unable to credit more than 9 million reports to the workers who earned them because it is unable to match the names and Social Security numbers reported on those reports. SSA notifies all of those workers that it was unable to credit them with the reported wages. In some instances, SSA then mails out so-called "no-match" letters to employers that explain how to clear the no-match. SSA does this because a worker whose wages cannot be matched to a correct social security number may lose at least a portion of his or her retirement and disability benefits. Despite the threat of lost benefits, experience tells us that many of these workers do not correct the mismatch.

Sufficient 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. However, under current law sufficient access to such information is not provided. This is simply wrong, and Congress needs to change the law.

III. Improved Documentation

In the President's May 15, 2006 address to the nation on comprehensive immigration reform, he acknowledged that businesses often cannot verify the legal status of their employees because of the widespread problem of 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

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biometric technology, such as digital fingerprints, 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 planning to require 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 EEVS. As I 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 will electronically verify in a matter of seconds – and only a fraudulent card would fail to verify. Identity fraud could be prevented once we are able to incorporate a biometrics check such as displaying the photograph from the database of card information, into the employment eligibility verification.

IV. Additional Authorities

In addition, as stated above, the Administration is seeking substantial increases in the penalties to be paid by employers who violate the law. We'd like to see those larger base fines multiply for recidivist employers, and those who engage in gross violations of the law.

Employers should be required to retain copies of the documents presented by their workers for the employment verification process and they should be required to retain all documents relating to their attempts to verify or clear up any doubts about an employee's work authorization, including no-match letters, for the same period as the statute of limitations for document fraud and other crimes for which these documents would be evidence.

Ending this form of fraud won't end all fraud, of course. In 1986, the authors of the original employment verification process did not predict the massive document fraud that we see today. And we cannot be expected to predict right now every new fraud that will develop to foil this new process. Therefore, we need a system that is tough and flexible enough to follow the fraud wherever it goes. That was another mistake from the past that haunts us still. While most employers want to follow the law and do what's right for the country, these strictures have turned what were once "safe harbors" into "loopholes" for those who wish to violate the law with impunity.

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V. Conclusion

We thank both the House and the Senate for recognizing the need for change in this area. Both immigration reform bills contain changes to the worksite enforcement sections of the Immigration and Nationality Act. The Senate also included provisions on Social Security information sharing. Both bills include a mandatory employment verification system.

As the President has stated, "working out the differences between the House and Senate bills will require effort and compromise on both sides. Yet the difficulty of the task is no excuse for avoiding it." We at the Department of Homeland Security look forward to working with you in tackling this difficult task.

Thank you and I look forward to answering your questions.

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REMARKS TO SENATE JUDICIARY COMMITTEEE
Subcommittee on Immigration, Border Security, and Citizenship

June 19, 2006

My name is Linda Dodd-Major. I am a business immigration attorney practicing in Washington, DC, in which capacity I provide compliance services and advice to employers nationwide in many industries, including those that have historically attracted unauthorized alien workers. Of equal significance to this proceeding, I am also a former employee of the Immigration and Naturalization Service, where I was hired in early 1995 to develop outreach to the business and educational communities regarding any and all issues under INS jurisdiction that impacted and were impacted by INS. As both a citizen/taxpayer and a professional in the area of practice implicated by the issues before you, I take a personal interest in sound immigration policy.

Although immigration law had been historically viewed simplistically as focusing on alien individuals -- U.S. immigration jurisdiction over and opportunities for individual foreign persons (I intentionally refrain from using the term *immigrant* to refer to any alien who has not been granted approval to remain in the United States permanently and to work without restriction) -- it had emerged with globalization in the mid-90's to become a major area of interest, opportunity, and concern for businesses and international entities.

When I joined INS, I was assigned quite naturally to a group of persons who had comprised the *Employer and Labor Relations (ELR)* function established post-IRCA to provide outreach and compliance assistance to employers regarding the Form I-9. By 1995, that function had long since languished in obscurity within the agency and had lost all the field personnel who had been essential to "hands-on" outreach. It had barely any budget and hung on by a thread.

Under my leadership, we transformed the former ELR into the *Office of Business Liaison (OBL)* that remains in operation today. OBL staff developed education and outreach products and services for employers and attorneys, as well as accurate assistance with business immigration questions and issues. In my role as head of OBL, I traveled throughout the United States and interacted with employers and trade associations in all business sectors. Their frustrations with employment eligibility verification *per se*, as well as with the Form I-9 process, predominated those discussions.

To understand the full spectrum of issues associated with the process, I made it my business to experience as many of them as possible. Working with investigation units assigned to worksite in Phoenix and L.A., for example, I traveled along as an observer of enforcement actions much as media reporters today travel

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"embedded" in U.S. military operations in the Middle East. Like those reporters, my objective was to be able to better explain the process to employers and to gain their understanding and support.

In the course of those experiences, as I have witnessed in my private practice since the beginning of 2003, I saw that sanctions in the form of fines and penalties for I-9 violations were about the least-feared consequences of undocumented employment. IRCA-based fines and penalties, particularly in light of decreasing compliance enforcement, had come to be viewed as business risks. If and when imposed, penalties were considered one of the many costs of doing business. This was **not,** in the cases of the vast majority of these employers, because they favored undocumented employment or because they disrespect the rule of law. More likely, their attitude resulted from one or more of the following factors that must be examined in the course of reforming employment eligibility verification (presented in random order):

1. Business Consequences

Post-IRCA and in the early 90's, employers were able to rely on local INS field offices to help them with document review and employment eligibility determinations. Following the consent agreement in *Salinas* v. *Pena,* however, field offices were prohibited in a memo from Deputy INS Commissioner Chris Sale from providing name-number match or document review services. Nevertheless, raids (called "surveys") continued and employers discovered **real business consequences**, many if not most of which were **totally beyond their control.**

In the course of a worksite enforcement action at a meatpacking plant, for example, illegal aliens (and often legal aliens who retained fear of immigration authorities) fled disruptively through all available means of egress, abandoning premises and materials hurriedly and often leaving them ruined. Some, if not many of such companies lost 30-50% (or more) of workers **whose I-9 forms were in perfect order.** Although they were not fined or found criminally liable, affected employers lost business as a result of these actions, had to spend weeks or months recruiting new workers at a reported cost of $1500 or more apiece, and were unable to meet contract deadlines. In the late 90's, their frustration turned to anger as they saw their companies featured in media reports of the events as employers of undocumented workers. *The public had no idea from the coverage that many of employers were victims themselves of an ineffective and unfair process.*

2. Failure of Enforcement

Employers who discovered unauthorized workers applying for or terminated from jobs, even if associated with other infractions, were dismayed to contact local INS enforcement offices only to find out that nothing would be done. The employers not only interpreted this as unfair, holding them to an impossible standard of screening workers while letting the workers roam free to pursue illegal employment elsewhere (such as with competitors who could use or exploit those workers to undermine them), but to signify that the U.S. Government was not serious about its immigration rules.

An enforcement model that focuses on employers subject to a flawed and inherently uncontrollable process -- but holds individuals harmless who exploit the process deficiencies -- is ineffective, unworkable, and unworthy of perpetuating unless Congress is satisfied that limited purposes served by the current process are satisfactory (keeping most visitors, unauthorized dependents, and employment-specific nonimmigrants out of unrestricted employment). If Congress is genuinely trying to control employment of intransigent EWIs (INS term for those who entered without inspection), overstays, and other economic migrants, enforcement must be meaningful. In my personal opinion, integrity of the

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process would be greatly enhanced by applying meaningful consequences to both employers and employees who intentionally violate the law.

3. Employee Attestation

Although it seems that review and confirmation of documents is the crux of employment eligibility verification, in fact, IRCA provided for another very significant and important step. The debate about verification typically focuses on ***employers' responsibilities***, but IRCA held ***employees*** equally accountable. Specifically, Section 2 of the Form I-9 is the responsibility of employers. Employers are also responsible for ensuring that employees complete Section 1 of the form, but the import of employee attestation has somehow become lost in the process.

Since "the meat" of the I-9 process is widely believed to focus on documents – and certainly the recently issued electronic I-9 regs support this by rendering the employee accountability for Section 1 information virtually meaningless ("click to accept") – the deterrent value of holding an employee accountable for the truth and accuracy of his/her attestation of current employment authorization is widely overlooked. Typically, employers and employees consider Section 1 to be merely an administrative step in the process (gender, address, etc.). Accordingly, it is widely unattended to and omissions in Section 1 (which by law undermine or nullify the attestations) are overlooked or dismissed as unimportant.

If Congress were to *increase* the accountability of employees for their attestations of identity and/or status – even disqualifying undocumented aliens from future immigration benefits based on erroneous information -- it would almost surely result in greater deterrence. For this to be fair, of course, two things must happen. First, employees must have a source of accessible information about their obligations and the consequences of non-compliance. This information is important enough for them to know, to understand, and to be accountable for – just as they are for taxation rules that are far more complex. Second, I-9 and benefits databases must be coordinated or I-9 data must be ready confirmable via timely, accurate, and coordinated databases.

4. Self-employment

The fact that I-9 forms need not be completed for independent contractors has fostered a widely-held belief that employment of undocumented workers is prohibited only if there is an employer-employee relationship between the provider of services and the payor. In fact, this is not true. However, it has provided a loophole for a huge amount of undocumented employment that effectively bypasses the I-9 process and can be expected to continue to do so. Keep in mind that undocumented self-employed individuals compete with U.S. persons (including companies) and can significantly undercut their opportunities, income, and competitive positions.

Self-employment of undocumented aliens is a very significant point in this debate for two reasons. First, many undocumented aliens are known to earn income in industries such as cleaning, landscaping, construction, and child care where they operate as independent contractors. Many hold themselves out as entrepreneurs, competing with their U.S. citizen and authorized alien counterparts. Second, many undocumented aliens work for staffing entities that provide services to companies in need of various skilled and unskilled services. The user companies, on whose premises the individuals actually work -- who are the ones to suffer greatest business consequences in the event of enforcement actions -- not only do not see the workers' I-9s, but are often prohibited from doing so for privacy reasons. If workers are removed from their premises, they are typically perceived to be responsible.

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Although penalties for knowing use of the services of independent contractors who are not authorized to work were included in IRCA (see 8 CFR 274a.5), this is neither widely known nor widely understood. Although employer accountability in nationally reported media cases like the Wal-Mart scandal of two years or so ago was based on this provision of law, it has been widely misrepresented. The bottom line is that to have a meaningful employment eligibility verification regime, self-employment of unauthorized aliens needs to be more squarely addressed on its significant merits.

4. Discrimination

The concept of *discrimination* figures prominently in this discussion and is frequently raised as a reason not to implement or to minimize employment eligibility verification standards. To discuss discrimination meaningfully, it is important to understand the meaning of the term. Disparate impact does not necessarily constitute discrimination unless the elements of the process are so flawed that unfairness to an identifiable group ***that is protected by law*** is predictable. The United States has much experience with discrimination. We take it very seriously, as we should. However, when we use the term in the verification debate, we should do so in context.

From abundant experience, I can truthfully say that **not once** (except in the cases of certain ethnic employers who exploit employees of their own nationality) -- in any conversation I have ever had with **any** employer -- have I received even a hint of – much less a motive for – discrimination against ***any*** legal worker. Employers who need workers, in fact, have every motive ***not to discriminate.*** Many have bemoaned the fact that workers whom they have had to dismiss for lack of eligibility had performed exceptionally and demonstrated commendable work ethics.

In the early days of IRCA, as discussed in some GAO reports, it is true that some employers – often in an overzealous and well-meaning but ignorant attempt to do comply with the law – refused documents of some lawful workers, prescreened workers for employment, or committed other practices that have come to be known collectively as *document abuse.* As a result, public outreach and education on the anti-discrimination aspects of IRCA were expanded. In many cases, once the ELR function waned, employers were educated about anti-discrimination in the absence of substantive I-9 training that should have played a meaningful role in education about compliance. The clear message to employers from such training sessions was to (1) **accept *any* documents that *could be* genuine, (2) not try to be "*document experts*"** (the default cliché) **and (3) pay little if any attention to discrepancies in name and/or identity.** To do so, they were routinely told, was to risk committing actionable discriminatory practices. Meanwhile, they were assured that minimal scrutiny would fully comply with the law and not risk I-9 penalties. As the minimalist attitude persisted -- exacerbated by employers' unfamiliarity with the documents themselves -- the American workforce became as permeable as the U.S. border.

In closing this particular subject, I urge you to keep in mind that IRCA prohibited discrimination based on intent. Although even well-meaning document abuse may have had disproportionate impact on aliens in certain ethnic groups, I know of no substantiation for a finding that the motive in any case was to discriminate. The disproportionate result on Hispanic nationals, in reality, stemmed not from an intent to discriminate against them, but from one or more of the following: (1) most newly legalized aliens who needed newly issued and renewed documents as evidence of work authorization were Hispanic, (2) Hispanic aliens often had hyphenated surnames that were likely to be confused in INS/SSA records or in the I-9 process, and (3) the public perceived through statistics reported by the media that Hispanic persons predominate among undocumented aliens in the United States.

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5. Documentary Problems

For reasons fleshed out more fully in separate comments about operational deficiencies in the process that I believe are important for legislators to be aware of if the theory of employment eligibility verification is to be transformed into meaningful practice, employers had an awful time trying to understand simple but obscure document review standards such as ***appears genuine*** or ***relates to the individual***, as well as the meaning behind unexplained and sometimes illegible endorsements and annotations that appear on List A and C work authorization documents.

Confusion about document expiration dates, not to mention automatic extensions of work authorization and acceptability (or not) of unexpired documents, still pervades all industries, sizes, and locations of employers. The fact that both the Form I-9 and *Handbook for Employers* were outdated almost upon publication, that neither has been updated in 15 years nor reflects current law, and that document reduction mandated by IIRAIRA was never implemented, all exacerbate compliance failure. Many compliance-minded employers simply throw up their hands in despair or become resentful. Intentional abusers, meanwhile, often slide inconspicuously by.

6. Electronic Verification

The success of the Basic Pilot, the surviving version of various verification initiatives authorized by IRCA and piloted by INS, has at least one fatal flaw. Furthermore, in my opinion, it triggered or exacerbated a dangerous transition in document fraud from use of *fake* (counterfeit) documents to use of *false* (not belonging to the individual presenting them) documents to "beat the system." Lastly, since the Basic Pilot has been by and large a volunteer program, it is dangerous to use its performance as a predictor of success on a mandatory nationwide scale.

In labor shortage areas, employers have certainly not been motivated to enroll in the Basic Pilot if subscribing to the higher verification standard would not only deprive them of potential workers who could survive the paper I-9 process, but might put them at a competitive disadvantage if those workers were to move on to work for their competitors and leave them with vacant positions. To avoid problems of competitive advantage or disadvantage, accordingly, meaningful verification should apply to all employers or be left, as is, as an option for employers such as the new option for electronic administration of the process.

The *basic* problem with the *basic* pilot -- *even if it were competition-neutral and if (1) an exit-entry system could be perfected, (2) a consolidated database could be made both timely and accurate, and (3) electronic verification could be operationalized for all U.S. employers rather than a sample of 6000 volunteers* -- is that although it connects the dots between a name and a number, *it does not and* ***can not*** connect that name and number to the individual who presents them.

We already know that undocumented aliens easily survive the Basic Pilot if they use a name and number of an authorized person (often a U.S.-born child). The problem is that ***identity***, once established, may not so easily be shed. The slippery slope of ***identity fraud***, which constitutes ***identity theft*** when the identity is assumed without the knowledge or consent of the rightful owner, is a dangerous enough path without being compounded by national implementation of a flawed system.

Of course, the verification system ***could work*** if combined with few, counterfeit-resistant, and tamper-proof documents, but ***such documents do not exist*** for most U.S. workers and are not even issued to all

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work authorized aliens. Mandating documents that would meet this standard for verification purposes would mean either that U.S. citizens would have to get passports or that development and issuance of the ever-unpopular ***National ID card*** would have to be mandated by Congress. An alternative, of course, would be biometric identification of each new employee at the point of hire. This would bypass the document problem, but it boggles the mind to contemplate biometric devices at every point of hire, transmission of complex digital data from tens of thousands of points of hire to a centralized Government database, or a Government database and system sophisticated enough to provide quick and reliable turnaround of huge numbers of eligibility determinations.

7. **Intergovernmental Cooperation and Consistency**

Immigration law is a very, very tricky practice area. The public does not realize that implementation of U.S. laws covering aliens was not restricted to INS and is not comprehensively under authority of the Department of Homeland Security. Rather, laws governing restrictions upon and benefits to aliens fall under a complex regulatory scheme of intersecting, overlapping, and interdependent federal jurisdictions that include the Department of Labor, Department of State, Social Security Administration, Internal Revenue Service, Treasury Department (OFAC), Commerce Department (deemed export), and Defense Department (economic sanctions).

For better or worse, while businesses and individuals are both responsible for compliance with laws administered by these agencies, the public information functions of the agencies are of very poor quality and reliability. Furthermore, even in situations where information under exclusive control of one agency is clear, information that impacts or is impacted by information under exclusive control of another agency is not. The public confronts these laws not according to compartmentalized jurisdictional dividing lines, but as a seamless mass of inseparable issues for which they cannot identify the beginning, the end, or the responsible governmental entity. The employment eligibility verification process –whether done by an employer or through the SAVE system -- is a critical element within that web.

Since it is the intersection of these laws, in cases where they are interdependent, where the public has most problems, it must be a priority for those who administer the laws to address those problems interjurisdictionally. Since enforcement, under even the best scenario, can only do a fraction of the job, voluntary compliance must be encouraged to do the rest.

Thank you for your attention to these observations as you proceed to debate this critically important issue.

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Statement of Martin H. Gerry
Deputy Commissioner
Office of Disability and Income Support Programs
Social Security Administration
Before the
Senate Judiciary Committee
Subcommittee on Immigration, Border Security and Citizenship
June 19, 2006

Chairman Cornyn, Senator Kennedy, and members of the Subcommittee:

Thank you for the opportunity to appear before you today to discuss how the Social Security Administration's (SSA) work in issuing Social Security numbers (SSNs) and processing wage reports supports the Department of Homeland Security's immigration law enforcement activities.

Maintaining accurate records is of utmost importance to SSA. Earnings posted to a worker's SSN are used to determine both eligibility for Social Security benefits and the amount of those benefits. The SSN is also used to track payment of those benefits. We are keenly aware of our responsibilities to ensure that we issue SSNs and cards only to those persons who are eligible to receive them. Today, I will discuss some of the steps SSA takes to meet these responsibilities.

The Social Security Number

As you know, the SSN for many years functioned only as a way for SSA to keep track of the earnings of workers in employment covered by Social Security. There was no statutory authority for other uses of SSNs until 1972; since then, the use of SSNs as an identifier by government and the private sector has proliferated to the point that it has become integral to most government functions as well as to private business transactions ranging from banking to video rental. For example, possession of a valid SSN did not become a condition for receiving government assistance until 1977. SSNs were not required for dependents on tax returns until 1986.

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Until the 1970s, SSNs were assigned and cards were issued based solely on information provided by the applicant. But as the uses of the SSN have expanded over the past 35 years, the need to establish and then continually strengthen the associated documentation requirements have become increasingly important. In fact, the documentation requirements today are significantly more stringent than they were just 5 years ago.

The SSN card was never intended and does not serve as a personal identification document—that is, possession of the card does not establish that the person presenting it is actually the person whose name and SSN appear on the card. The card does not contain information that would allow it to be used independently as proof of identity.

Since SSA uses the SSN as an administrative tool to facilitate the proper crediting of wages, our focus has been on ensuring our ability to determine whether an SSN matches the name of the individual to which it was assigned. We have great confidence in our ability to correctly post wages to the correct record when they are reported correctly. After all, those activities have been central to our business processes for the past 75 years.

Our ability to determine the identity of the person to whom a number has been assigned, whether that individual was entitled to an SSN, and whether the individual was authorized to work in the U.S. at the time the SSN was issued, has been improved with the development of SSA's more stringent verification processes and requirements.

Strengthen the Enumeration Process

I would like to highlight some actions that SSA has taken over the years to strengthen the enumeration process.

As I noted earlier, at the inception of the program, all SSNs were assigned and cards issued based solely on information provided by the applicant. Evidence of identity was not required.

Over time, as the use of the number has been expanded for other purposes, SSA has recognized that changes were necessary to protect the integrity of the card and enumeration process.

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Beginning in November 1971, persons age 55 and over applying for an SSN for the first time were required to submit evidence of identity. As of April 1974, non-citizens were required to submit documentary evidence of age, identity and immigration status. This made it more difficult to obtain a card on the basis of a false identity. SSA was also concerned that individuals who had been assigned SSNs for purposes other than work might use the card to obtain unauthorized employment. Therefore, in July 1974, we began to annotate our records to show when a non-citizen had been issued an SSN for nonwork purposes. Four years later, the integrity of the SSN was further improved, when we began requiring all SSN applicants, not just non-citizens, to provide evidence of age, identity and United States citizenship or non-citizen status. In October 2003, SSA significantly tightened the rules concerning issuance of nonwork SSNs.

We have also developed new processes for issuing SSNs to newborns and immigrants with permanent work authorization.

Enumeration at Birth Process (EAB)

Because of increased demand for SSNs for children at earlier ages due to tax and banking requirements, SSA developed and began to use the EAB process in 1987. SSA recognized that all the information needed to process an SSN application for a newborn was gathered by hospital employees at the child's birth and verified with the respective bureaus of vital statistics. Nearly three-quarters of all requests for an original SSN are now completed through this process.

'Enumeration at Birth' is available in the fifty states, the District of Columbia, and Puerto Rico, and allows parents to indicate on the birth certificate form whether they want an SSN assigned to their newborn child. When a parent requests an SSN for a child through EAB, the State vital statistics office receives the request with the birth registration data from the hospital and then forwards this information to SSA. As a result of these procedures, the parent is not required to file a separate application for an SSN for the child. Based on the information the State forwards to SSA, we assign an SSN and issue a card for the child.

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It is important to note that EAB is a voluntary program on the part of the hospitals and the States and other jurisdictions. No law requires State or hospital participation. The program is administered under the provisions of a contract between each state and SSA that includes safeguards to ensure that the process is not vulnerable to fraud. SSA reimburses the states for participation on a per item basis (currently $2.04 for each birth record). EAB is a far more secure way to enumerate newborns. In addition, the program provides significant savings to the Federal government and a convenient service option for the public.

Enumeration at Entry (EAE)

To reduce fraud and improve government efficiency, SSA inaugurated our Enumeration-at-Entry process in October 2002. Under this process, SSA has entered into agreements with DHS and the Department of State (DOS) for those agencies to assist SSA in enumerating immigrants. To assist SSA, DOS collects enumeration data as part of the immigration process. When the immigrant enters the United States, DHS notifies SSA and the card is issued.

Other Improvements

Within the past several years, to improve the security of our enumeration process, SSA has instituted numerous safeguards to prevent a person from fraudulently obtaining an SSN. These include:

- SSA verifies the immigration status of an individual with DHS before assigning an SSN to a non-citizen.
- Because the majority of individuals born in the U.S have been assigned an SSN by the time they reached age 12, SSA requires a mandatory in-office interview with all SSN applicants age 12 or older.
- As a result of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law (P.L.)108-458, SSA restricts the issuance of replacement SSN cards to no more than three per year and no more than ten per lifetime;

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- As a result of the same law, SSA has established improved verification standards for documents submitted in support of an application for an SSN and requires independent verification of birth records of individuals of all ages applying for an original SSN card (other than those enumerated at birth).

The Social Security Card

Just as the SSN was created for administrative reasons, the Social Security card was designed to give individuals a record of their SSNs. The demand for counterfeit cards has grown with the increased uses of the SSN.

Consequently, Congress and the Executive Branch have worked together over the years to increase the security features included in the card, as the following discussion illustrates. Let me say at this point though, that while some security features have been made public, other features are forensic in nature and must be kept confidential in order to protect the security of the card. I am sure you will understand the caution which must be exercised in discussing the security features of the card in a public forum. Beginning in 1983, the Social Security Act required that SSN cards be made of banknote paper, and to the maximum extent practicable be a card that cannot be counterfeited. SSA worked with the Bureau of Engraving and Printing, the Government Printing Office, the Secret Service, and the Federal Bureau of Investigation to design a card that met these requirements.

Recent Improvements to the Card

The immigration and welfare reform legislation passed in 1996 required us to both conduct a study and to develop a report on different methods for improving the Social Security card process, including prototypes of new cards. This report, "Options for Enhancing the Social Security Card," was issued in 1997.

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You have asked us for information on the cost of replacing social security cards. We know from the 1997 effort that the main costs associated with replacing the current SSN card are those associated with reinterviewing individuals and reverifying documents, while the additional costs of the card itself—even one with additional security features--are minimal. I will address these cost issues more in a moment.

The IRTPA required the Commissioner of Social Security, in consultation with the Secretary of Homeland Security, to form an interagency task force to establish requirements for improving the security of Social Security cards and numbers. Because current law requires the card to be printed on banknote paper, the taskforce was limited to consideration of improvements to this type of card. The taskforce included representation from SSA, DHS and the Federal Bureau of Investigation, Department of State and the Government Printing Office. The taskforce has completed its work, and the Commissioner has developed an implementation plan to produce an SSN card that is less vulnerable to counterfeiting, tampering, alteration and theft.

Cost of Cards

You asked me to address today the issues associated with replacing current Social Security cards with a new type of card and the costs in terms of dollars and work years, as well as timeframes for this transition. Although the Administration is not seeking to replace all Social Security cards, in response to your question, in determining the cost of replacing Social Security cards for a significant portion of the population, it is important to note that, as I indicated earlier, producing the physical card, even the most elaborate card, would be the least expensive part of the process.

The most important factor affecting the total cost is the requirement to verify the identity of the person applying for the card and, in the case of non-citizens, determining the immigration status and work

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authorization. Other factors must be taken into account as well. For example, the cost of peripheral equipment that might be needed in SSA field offices to work with the new cards and the cost to SSA to notify number holders who might need to obtain a new SSN card would have an impact on total outlays.

Currently, most original SSNs (and cards) for United States born individuals are issued through the EAB process in which parents apply for their child's SSN at the hospital as part of the birth registration. The vast majority of *replacement* SSN cards, and a relatively small number of *original* SSN cards for U.S. born individuals, are issued by SSA field offices where evidence is reviewed and verified. The majority of original SSN cards issued through SSA field offices are for individuals who recently arrived in the United States and whose immigration status permits assignment of an SSN.

Last year, we estimated that a card with enhanced security features would cost approximately $25.00 per card, not including the start-up investments associated with the purchase of equipment needed to produce and issue this type of card. According to estimates made last year, reissuance of all new cards for the 240 million cardholders over age 14 would be approximately $9.5 billion. Since that estimate, we know that the cost of issuing SSN cards has increased by approximately $3.00 per card due to new requirements for additional verification of evidence, so we anticipate an increase in the total cost estimate when we update our figures to reflect current dollar costs.

Currently, staff of the agency devotes approximately 3,300 work years of effort are devoted to the SSN card issuance process. Last year's estimate indicates that we would need an additional 67,000 work years to process 240 million new cards. This would require hiring approximately 34,000 new employees if we were required to complete the work within 2 years and 14,000 new employees to complete the work in 5 years. This estimate assumes replacing cards for 240 million individuals; if fewer were replaced, the cost would be lower. An approach that mandated new tamper resistant cards would

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be issued only during the normal course of initial issuance and reissuance would involve relatively modest additional costs. If a phased approach were mandated that limited new cards to only the approximately 30 million people who change jobs at least once during a year and the additional 5 million young people reaching age 14, the cost would be approximately $1.5 billion per year, using last years cost numbers.

As you are aware, the expertise of counterfeiters and the wide availability of state-of-the-art technology make it increasingly difficult to develop and maintain a document that cannot be counterfeited, despite best efforts to guard against such incidents. Therefore, SSA will continue to evaluate new technology as it becomes available to determine if additional features should be included.

Verifying SSNs

On another front, SSA has also worked to develop different tools to assist employers in verifying a worker's SSN. Initially, SSA used a manual process for verifications. This was a highly labor-intensive process that has become increasingly cumbersome as verification became more rigorous and workloads increased.

Over the years, SSA has worked to offer employers alternative methods to verify SSNs. One of those methods is the Employee Verification System (EVS), which has been available to employers for over a decade. EVS is a free, convenient way for employers to verify employee SSNs. It provides employers with several options depending on the number of SSNs to be verified:

- For up to five SSNs, employers can call SSA's toll-free number for employers (1-800-772-6270).
- Employers also have the option to submit a paper listing to the local Social Security office to verify up to 50 names and SSNs.
- In addition, employers may use a simple registration process to verify requests of more than 50 names and SSNs or for any number of requests submitted on magnetic media.

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To further increase the ease and convenience of verifying employee SSNs, SSA developed the Social Security Number Verification Service (SSNVS), which is an internet-based option that permits employer's to quickly verify that the employee-provided information matches with SSA's records. SSA expanded this service to all employers in June 2005. In that year, we processed over 25.7 million verifications for over 12,000 employers through SSNVS, and we estimate that we provided an additional 41 million employer verifications through other verification methods.

Basic Pilot Program

For all queries submitted through the Basic Pilot Program, which is administered by USCIS in DHS, SSA matches the employees name, SSN, and date of birth against the information in SSA's records. SSA confirms whether the information matches or does not match its records and whether a death indicator is present on SSA's records. In addition, if the employee alleges United States citizenship, SSA checks the employee's citizenship status as recorded in SSA's records. For all queries indicating the employee is a non-citizen, DHS uses the employee's submitted alien registration number or admission number to confirm current employment eligibility. In 2005, SSA processed approximately one million queries to the Basic Pilot.

Identity Theft

I have described today the measures we take to ensure the identity of the person to whom we are assigning an SSN or issuing a Social Security card. And I have described the services we offer to employers to assure that the names and SSNs of their employees match the name and SSN combination in our records. But there is no way we can tell employers or Departments of Motor Vehicles, for example, whether a person standing in front of them is the individual to whom the SSN was assigned or the Social Security card was issued. So verifying a name and SSN combination is not, and cannot be, by itself, a protection against identity theft.

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No-Match Information

In certain instances when a Social Security number does not match that worker's name, SSA notifies employers of this situation through what is commonly called a 'no match' letter. We send these letters to employers who submit more than 10 wage items when more than 0.5 percent of the items in a wage report consist of an SSN and name combination does not match our records. The employer 'no match' letters include a list of up to 500 SSNs submitted by the employer in wage items that SSA could not post to a worker's record. In 2004, we sent approximately 120,000 employer 'no match' letters, which covered 7.3 million mismatched records. For privacy reasons, the letter lists only the SSNs, not the name/SSN combination.
The only source of information that SSA receives about a taxpayer's employer and earnings is from tax return information on the Form W-2. We receive and process this information as an agent for the Internal Revenue Service. Use of and disclosure of tax return information is governed by section 6103 of the Internal Revenue Code. SSA currently has the authority to use this information only for the purpose of determining eligibility for and the amount of social security benefits.

Although, under current law, SSA cannot release no-match data, to DHS, the Administration supports allowing this disclosure in the interests of national security and for law enforcement purposes.

Conclusion

In closing, let me say again that SSA remains committed to maintaining the security of the SSN and the SSN card and ensuring that the American public's hard-earned wages are properly credited to them so that they will be able to receive all of the benefits to which they may be entitled.

Thank you for the opportunity to appear before you, and I will be pleased to answer any questions you may have.

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Statement of Senator Edward M. Kennedy

"Immigration Enforcement in the Workplace: Learning from the Mistakes of 1986"

June 19, 2006

The debate over immigration reform has been a divisive issue in this Congress, but we all agree that the employer sanctions provisions of Immigration Reform and Control Act of 1986 have failed, and that effective worksite enforcement must be part of immigration reform. So I commend Senator Cornyn for calling this hearing on such an important subject, and I thank the witnesses for their testimony today.

This is an important opportunity to consider the 1986 Act and to attempt to resolve our differences over the reform bill recently passed by the Senate.

Some believe that what went wrong in 1986 was that business groups and immigrants' rights groups overly constrained enforcement by requiring employers to evaluate documents based on their apparent legitimacy and by establishing a burden of proof based on an employer's constructive knowledge that an employee is undocumented.

I believe, however, that there were at least five other reasons that were more important factors in the failure of the 1986 Act.

- Worksite enforcement was not a priority for the INS and has not been a priority for the Department of Homeland Security. Spending on worksite enforcement peaked in the late 1980s at about 5 percent of overall INS spending for enforcement and has

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fallen to less than one percent since that time. In 2003, the agency devoted a total of just 90 agent-work-years to worksite enforcement, compared to 2,430 agent work-years devoted to other investigative activity, and more than 10,000 agent work-years devoted to border enforcement.

- Second, the 1986 Act permitted workers to offer more than two dozen different documents to prove eligibility. Even under the best circumstances, employers cannot make reliable judgments about so many different documents.
- Third, undocumented immigrants gamed the system by using borrowed or stolen social security numbers.
- Fourth, the fines for non-compliance remain at the1986 level, and many employers treat such fines as merely a cost of doing business.
- Fifth, and perhaps most importantly, the 1986 Act under-estimated the large employer demand for immigrant labor, and it utterly failed to provide legal alternatives to replace undocumented workers.

The Senate bill addresses, each and every one of these problems:

- It authorizes funding for 11,000 new investigators and requires at least 25% of their time to be devoted to worksite enforcement. That's more than a 3,000 percent increase in worksite enforcement.
- Employees will be required to present one of four ID documents: green cards, employment authorization cards, US passports, or REAL ID drivers' licenses – and each of them will include cutting-edge anti-fraud technology and biometric data.

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- Beginning 18 months after funds are appropriated, all employers will be required to compare employees' identity data against an electronic verification system. Even a rudimentary system will prevent traditional document fraud altogether.
- An electronic verification system will still be vulnerable to identity fraud, and the Senate bill addresses this problem by requiring the Social Security Administration and the IRS to provide The Department of Homeland Security with the name, the taxpayer ID and the employment information of any worker whose employment records show evidence of identity fraud.
- The bill also strengthens the standard for document review and lowers the burden of proof, requiring employers to verify that documents pertain to the individual presenting them, and making employers liable for recklessly disregarding evidence that a worker is undocumented.
- The bill doubles fines for paperwork and substantive violations. It raises the criminal penalties from $3,000 to $25,000, increases jail time for certain violations, and denies government contracts for repeat violators.
- The bill learns from the 1986 Act's biggest mistake by combining robust worksite enforcement with real reforms of the legal visa system, so that employers will have generous access to the legal workers they need.

Our Senate-passes bill is a major improvement over existing law by making it realistic to have effective enforcement of the immigration laws at the worksite.

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One major flaw in the 1986 Act that has been too little discussed is that, for all its other flaws, the Act in fact caused major discrimination against US citizen workers since large numbers of employers refused to hire anyone whose citizenship was in doubt.

- A 1990 GAO study found that 19 percent—almost one out of five—employers engaged in one or more forms of discrimination based on national origin or ethnic background because of the 1986 Act. In GAO's words, these violations "represent 'new' national origin discrimination that would not have occurred without the Act."
- A 2002 study by Douglass Massey and two colleagues found that the real wages of legal immigrants fell 9 cents an hour each year in the 6 years before the Act was passed—and by 27 cents an hour a year in the 6 years after its passage. The study attributed this sharp drop primarily to the practice of defensive hiring under the Act.
- A study in 2001 by Cynthia Bansak and Steven Raphael found that all American Latinos, including US citizens saw their wages decline by six to seven percent as a result of the 1986 Act.

The changes the administration has asked for in the Senate bill will make these problems worse. The administration believes that employers should be held liable if they "should have known" that an employee was undocumented, and that employers should consider "the totality of the circumstances" in making this evaluation. These standards would require employers to make subjective judgments. The "totality of the circumstances" test basically requires employers to adopt different standards for document review based on the color of a job applicant's skin and whether or not they

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speak with a foreign accent. It's difficult to believe that Congress would even consider writing such an incredible invitation to prejudice into law in this day and age.

There's a further fundamental difference of opinion about worksite enforcement. I understand that the Department of Homeland Security, believes the responsibility for preventing undocumented employment lies with employers, not the government. Where there is doubt, employers must be held liable for making incorrect judgments since the government is unable to create a system that provides certainty.

Yet the Department also believes that its electronic verification system will get the right answer 99 percent of the time!

Our consensus worksite enforcement amendment places ultimate responsibility for enforcement on the government, not employers. Our enforcement provisions are focused on ensuring that employers participate in the government system—including reliance on better inter-agency coordination between the IRS, Social Security, and the Department of Homeland Security. It doesn't require employers play Sherlock Holmes with every new employee.

This is exactly the approach that most experts have wanted. Here's what the US Commission on Immigration Reform said about such a system over a decade ago: "to reduce the potential for discrimination and increase the security of the system ... employers should not be required to ascertain immigration status in the process of

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verifying authorization for employment. Their only requirement should be to check the social security number presented by each employee against the registry and record an authorization number to prove that they have done so."

A final significant difference of opinion is over the timing and procedure for creating this system. The original proposal by the Department of Homeland Security called for universal participation in an electronic verification system beginning six years after enactment because that's how long the agency believed it will take to create a reliable system.

That proposal has problems too. Enforcement is urgent, and six years seems unduly long to implement the verification system. On the other hand, the current Basic Pilot program has a mixed record – 10 percent of US citizens and 15 percent of work-authorized non-citizens are initially rejected by the system. Those errors could easily increase as the system is expanded from 2,500 employers and 700,000 queries a year today to six million employers and 60 million queries a year under the new system. Getting it wrong could mean that millions of US citizens would be denied employment opportunities.

In our bipartisan negotiations, we came up with a realistic solution to this dilemma. The bill requires the Department of Homeland Security to push the envelope on creating the system, and it adds reasonable due process protections to make sure citizens and legal immigrants are not wrongly denied employment by a flawed system.

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We face a choice: either we delay implementing a verification system until we know the system is foolproof; or, we implement the system as quickly as possible, but include protections, to make sure that the inevitable errors don't harm our constituents or the economy.

The bill is written so that the most important protections phase out as the system becomes sufficiently accurate.

If any of the witnesses plan to make a case against the bill's worker protections, I hope they will also explain how they would prevent the wrongful rejection of legal workers in a system which is scheduled to start faster than they had planned.

I thank the Chairman again for calling this important hearing, and I look forward to the testimony our witnesses.

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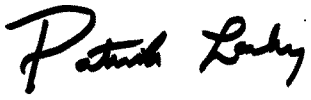

Statement of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
Immigration Subcommittee Hearing
On Immigration Enforcement
June 19, 2006

On May 25, after almost a month of consideration, a bipartisan majority of the Senate passed a comprehensive immigration reform bill, S.2611, also known as the Comprehensive Immigration Reform Act of 2006. Since that time, there has been no progress on enacting the kind of fair, realistic, comprehensive immigration reform that the Senate and President Bush have been seeking. It is comprehensive in that it includes a pathway to earned citizenship, a temporary worker program, stronger interior enforcement and greater border enforcement. After more than five years of inaction by this Administration and the Republican Congress, the Senate showed the way toward significant action and progress on an issue of fundamental importance to the Nation and to all Americans.

Today, a front page story in *The Washington Times* notes that some commentators associated with the President's party have urged the Administration and the Republican Congress to back down. I hope that the President does not give in, as we saw him do last year when he withdrew his nomination of Harriet Miers in the face of conservative criticism and before even a hearing on her nomination could be held. The hopes and aspirations of millions who have demonstrated their commitment to this country's ideals through hard work and the peaceful petitioning of the Government have been raised by the Senate's debate and action in passing this comprehensive bill. This hard-won progress should not be undercut and destroyed by partisan politics and mean-spiritedness.

I have quoted the President's thoughtful words from the immigration debate during which he said: "We cannot build a unified country by inciting people to anger, or playing on anyone's fears, or exploiting the issue of immigration for political gain. We must always remember that real lives will be affected by our debates and decisions, and that every human being has dignity and value . . . ." With passage of the comprehensive Senate bill, the challenge was to the President to demonstrate leadership by making these views part of our national policy. I hope the answer to that challenge is not his abandoning the bipartisan effort toward comprehensive immigration reform.

Regrettably, the indication from the Senate Republican leadership is not support for the Senate-passed bill that they trumpeted as a triumph as recently as last month, but its abandonment. By way of contrast, the Democratic Leader asked the Senate to proceed to a House-Senate conference on the recently-passed immigration bill. Unfortunately, Senate Republicans objected to the Democratic Leader's request that we proceed by the usual practice of taking the House-passed bill and inserting the language passed by the Senate so that we can proceed to a House-Senate conference. Instead of spending time pandering to a faction of the Republicans' political base, I hope that the President will work with us to make progress on our bipartisan immigration initiative. Republican and Democratic senators have said that we will need the President's help to make

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comprehensive immigration reform a reality. Aside from a few choreographed events, the President has been AWOL on the issue. He has not been effective in urging comprehensive immigration reform from the recalcitrant Republican House leadership or helping us in the Senate overcome threats of procedural objections to proceeding to conference.

Today's hearing is about interior enforcement. Both *The New York Times* and *The Washington Post* have front page stories today on the lack of enforcement during this Administration. The number of employers prosecuted for unlawfully employing immigrants had until quite recently been miniscule. Law enforcement against those businesses that exploit immigrant labor has been virtually nonexistent during this Administration. Workplace enforcement must include more than just arresting those who are working illegally: there must also be accountability for unscrupulous employers who take unfair advantage of those who desperately want to work to improve their lives. I hope this hearing serves its purpose of fleshing out the record of the mistakes and lack of enforcement during the last five years, to make all the clearer the need for action on comprehensive immigration reform legislation.

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Statement of Cecilia Muñoz
Vice President, Office of Research, Advocacy, and Legislation
National Council of La Raza

To the Senate Committee on the Judiciary
Subcommittee on Immigration, Border Security, and Citizenship
Hearing on Immigration Enforcement at the Workplace:
Learning from the Mistakes of 1986
Monday, June 19, 2006

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Overview

Mr. Chairman and Members of the Committee, thank you for the opportunity to address the critical issue of employment verification within the context of comprehensive immigration reform.

The National Council of La Raza (NCLR) – the largest national constituency-based Hispanic civil rights and advocacy organization in the United States – is a private, nonprofit, nonpartisan, tax-exempt organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR 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.

We believe that the Title III provisions of the Comprehensive Immigration Reform Act of 2006 (S.2611) – the employment verification provisions – are critically important. These provisions reach well beyond immigration reform; they are the one piece of the Senate immigration reform bill that will have an impact on every single American that is ever employed in the U.S. Because of the enormous reach of these provisions, it is critically important that they be designed well and implemented perfectly. If not, millions of U.S. workers could be affected and the implications could be dire – including denial of employment to eligible workers, and severe discrimination on the basis of national origin and citizenship status.

As we enter this discussion, it is important to point out that the notion of worker verification is not new to this debate. There is a long history here, a history that we must learn from if we are to design and implement an immigration reform that accomplishes its principal goal of dramatically reducing undocumented migration, while accomplishing the equally important goal of fair treatment for immigrants and native-born Americans. It should be abundantly clear that NCLR supports this goal; we have been working for many years on developing a policy agenda around comprehensive immigration reform because we believe firmly that the U.S. can and should have an orderly and fair immigration system in which illegal entry is rare, and our laws are enforceable. We applauded the Senate for passing a comprehensive reform last month, even as we expressed reservations about some of its provisions.

It should also be abundantly clear that NCLR has long been concerned about our nation's ability to implement and administer employer sanctions in a way which would be effective without engendering employment discrimination. The results of the 1986 law, from our perspective, represent the worst possible outcome: employer sanctions have clearly been ineffective; nevertheless, there is abundant documentation that the policy has caused discrimination on the basis of nationality and citizenship status. When Congress considered the Immigration Reform and Control Act of 1986, it included a sunset provision designed to allow it to reconsider employer sanctions if a widespread pattern of employment discrimination were to result; in 1991 the General Accounting Office found

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exactly that result, and Congress failed to act in any way on this evidence. In short, the goal of immigration control has not been advanced, and the Latino community among many others has faced employment discrimination which is unique in our nation's civil rights history in having been caused entirely by a federal law. By any standard this has been a disastrous outcome.

Given this history, you can imagine the reluctance with which NCLR and our many coalition partners entertained a new debate on immigration reform in which the implementation of employer sanctions was likely to factor. Not only must we contend with a history of employment discrimination, but we also have deep reservations about the government's ability to expand the implementation of employer sanctions by implementing an employment verification system. We have testified before this body in the past that the data on which such a system would rely is notoriously inaccurate, and the agencies which administer it notoriously lax in dealing with database problems. I am sorry to say that there is ample evidence that our concerns are well-founded; there is much reason to be concerned that advancing an employer verification system will jeopardize a substantial portion of the U.S. workforce because data inaccuracies will cast doubt on individual workers' ability to do their jobs lawfully, while others will likely be the victims of "defensive hiring," that is, employment practices which weed out people perceived as immigrants, or whose ethnicity suggests that they might be in the category of workers for whom verification is time-consuming and costly because the databases are fraught with errors.

Despite these serious concerns, we have engaged the policy debate on worker verification issues, and have demonstrated our willingness to devise a system which can allow employers to swiftly verify workers' authorization for employment while simultaneously protecting workers against dismissal or discrimination because of bias, ignorance, or faulty data. We do this because we believe there is wide support for creating an enforceable standard for legal employment in the workplace, and that a reliable, fair system could in fact play an important role among a combination of policies aimed at deterring unauthorized immigration, especially if we expand legal and safe avenues for entry. We have deep concerns about the potential for harm to Hispanic and other Americans, but we are prepared to engage this debate because it is essential for our immigration reforms to be effective. It is equally important for them to be fair and to adequately protect all authorized workers; we cannot support a policy unless it meets both of these standards. While the Grassley, Kennedy, Obama, Baucus substitute Title III amendment contains important worker protections, we need to continue to improve it to ensure that any new electronic employment verification system (EEVS) is fundamentally workable and will not unnecessarily harm U.S. workers.

Concerns with Current Employment Verification Systems

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Employment verification is not an easy solution or a magic bullet to our broken immigration system, though a well-designed and effective system could play an important role in a multi-part strategy to control unauthorized migration. However, our experience thus far demonstrates that the nation is very far from being able to implement such a system in the short term. As Congress moves forward with comprehensive immigration reform with an expanded EEVS system as one element, it is critical that it be designed and implemented in a manner that ensures accuracy of data, privacy of information, protection from misuse, minimal opportunities for discrimination, and maximum opportunities to address system errors.

A. Employment Discrimination under Employer Sanctions

It is well documented that one result of employer sanctions and worker verification has been increased discrimination against persons who look or sound "foreign" or have a "foreign" surname. Some employers demand that certain workers show additional or "better" documents beyond what is required in the law; often asking for immigration documents from U.S. citizens whom they perceive to be immigrants. Other employers implement unlawful "citizen only" policies. A Congressionally-mandated GAO report found a widespread pattern of discrimination resulting solely from employer sanctions, reporting substantial discrimination on the basis of foreign accent or appearance, as well as discriminated by preferring certain authorized workers over others. These results were confirmed by nearly a dozen studies conducted locally during the 1990s by local human rights commissions and other organizations which also found significant discrimination resulting from the implementation of employer sanctions.

Additionally, there is evidence that some employers have knowingly hired unauthorized workers and used verification or reverification of employment eligibility as a means to retaliate against workers who complain about labor conditions thereby severely restricting workers' ability to organize or improve labor conditions. Other employers incorrectly reverify all only those workers they perceive to be "foreign," further discriminating against and intimidating immigrant and ethnic-appearing workers.

While Congress added anti-discrimination provisions to the 1986 law and created an office in the Justice Department to address discrimination claims, these efforts appear to have had modest impact on curbing discrimination resulting from IRCA. Even if such efforts were abundantly effective; it is not acceptable to allow discrimination to result from a federal law while creating mechanisms to address it after the fact. Any new laws or policies dealing with employer sanctions and worksite verification must anticipate potential discriminatory results and include vigorous measures to prevent them.

B. Data and Discrimination Problems with the Basic Pilot

In 1996 through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress created electronic employment eligibility pilot programs to allow employers direct access to government databases to verify workers' employment authorization. Currently 8,600 employers use the Basic Pilot. Participation in the Basic

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Pilot Program is voluntary, 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 in the pilot program. Employers who choose to participate must enter into a written memorandum of understanding with the DHS and, where applicable, the SSA. Violation of the terms of the MOU is grounds for immediate termination of participation in the pilot as well as appropriate legal action.

Employers who participate in the Basic Pilot program must first complete I-9 forms for all employees. The employer then verifies employment eligibility with SSA and DHS. If employment is verified, no further action is needed. If the employer's information does not match the SSA or DHS records, the employer must give the employee written notice of the fact, called a "tentative nonconfirmation notice," and the employee has eight working days to resolve the discrepancy with the SSA and/or DHS.

After nearly a decade of experience with the Basic Pilot Program, it is clear that it has significant flaws which must be addressed if Congress is to pursue the creation of a universal mandatory electronic verification system. 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.

In 2002 a Basic Pilot evaluation was conducted for the Department of Justice by the Institute for Survey Research at Temple University and Westat. 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." This conclusion is based on many problems with the current Basic Pilot Program, most notably that the program was seriously hindered by inaccuracies and outdated information in DHS immigration databases. For example, a sizeable number of workers who were found not to have work authorization *were in fact work authorized,* but for a variety of reasons either the INS or SSA did not have up-to-date information. The rates of tentative nonconfirmations remain significantly higher for noncitizen workers than for citizen workers because the immigration databases are less reliable than the SSA database. Furthermore, the evaluators found that when employers contacted the INS/DHS and SSA in an attempt to clarify data, these agencies were often not accessible; 39% of employers reported that SSA never or sometimes returned their calls promptly and 43% reported a similar experience with the INS. The evaluators also discovered that employers engaged in prohibited practices. For example, 45% of employees surveyed who contested a tentative non-confirmation were subject to pay cuts, delayed job training, and other restrictions on working, and 73% of employees who should have been informed of work authorization problems were not.

Any U.S. worker can fall victim to inaccurate or outdated SSA data. Individuals who fail to report a change of name or change of address, or whose change of address information is not properly or swiftly entered into the database can be denied employment as the result of a nonconfirmation. Furthermore databases at the INS and its DHS successor are

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notoriously inaccurate; numerous GAO studies have highlighted vast problems with the quality of this data, and the timeliness with which it is updated.

The evaluators also found that additional problems were the result of employers not complying with the federally-mandated memorandum of understanding they were required to sign as a condition of participating in the Basic Pilot. These participating 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 determinations, which penalizes workers while they and the INS work to resolve database errors; and the failure to inform workers of their rights under the program. No program can function unless those utilizing the program comply with the required procedures.

As a result of these ongoing problems, the report concluded that:

> The evaluation uncovered sufficient problems in the design and implementation of the current program to preclude recommending that it be significantly expanded. Some of these problems could become insurmountable if the program were to be expanded dramatically in scope. The question remains whether the program can be modified in a way that will permit it to maintain or enhance its current benefits while overcoming its weaknesses.

Employment Verification in the Context of Comprehensive Immigration Reform

Now, in the context of comprehensive immigration reform, both the House and the Senate have passed bills creating universal mandatory electronic employment verification systems modeled after the Basic Pilot Program and utilizing the same databases. Given the flaws in the current program and the fact that the government-sanctioned evaluators found unequivocally that the program should not be expanded, we firmly believe that any expansion of the current program without addressing its fundamental flaws would be extremely ill-advised and would result in continued negative consequences for immigrant and U.S. workers alike.

The Grassley, Kennedy, Obama, Baucus amendment constitutes a vast improvement over the original provisions of S. 2611 and is an enormous improvement over the Border Protection, Antiterrorism, and Illegal Immigration Reform and Control Act of 2005 (H.R. 4437) which passed the House of Representatives in December 2005. NCLR commends Senators Grassley, Kennedy, Obama, and Baucus for the thoughtfulness of their work on this amendment.

The current Title III includes several significant provisions that must be maintained as this process moves forward. Specifically:

Antidiscrimination protections including:

- Amending the section of the Immigration and Nationality Act (INA) relating to unfair immigration-related employment practices to explicitly apply to

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employment decisions related to the new electronic employment verification system.

- Expanding the categories of immigrants who can file an immigration-related unfair employment practices complaint under the INA;
- Increasing fines for violations of the INA's antidiscrimination provisions;
- Prohibiting employers from using the electronic employment verification system to discriminate against workers; and
- Providing $40 million in funding for the Office of the Special Counsel for Immigration-Related Unfair Employment Practices to educate employers and employees about antidiscrimination policies.

Due process protections including:

- Requiring employers to provide employees with information in writing (in a language other than English if necessary) about their right to contest a response from the EEVS, and the procedures for doing so;
- Creating a "default confirmation" when DHS cannot issue a final notice of employment eligibility within 30 days of the initial inquiry. The default confirmation will remain in place until the GAO can certify that EEVS is able to issue a final confirmation of work eligibility to individuals who are eligible for employment within 30 days of the initial inquiry at least 99% of the time;
- Allowing individuals to view their own records and contact the appropriate agency to correct any errors through an expedited process; and
- Creating 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. Unfortunately, attorneys' fees and costs were not included in the final amendment and should be added to a final bill.

Privacy protections including:

- Requiring minimization of the data to be both collected and stored, and creating penalties for collecting or maintaining data not authorized in the statute;
- Placing limits on the use of data, and making it a felony to use the EEVS data to commit identity fraud, unlawfully obtain employment, or for any other purpose not authorized in the statute; and
- Requiring the GAO to assess the privacy and security of the EEVS, and its effects on identity fraud or the misuse of personal data.

All of these provisions are critically important, but I would like to highlight two of them which NCLR finds particularly groundbreaking and important.

- Default confirmation. This provision is incredibly important in the case that the government databases are unable to reach a final decision within the 30 day timeframe. This default confirmation remains in place until the confirmation rates are at acceptable levels. Without this provision, millions of authorized workers could potentially be denied employment because of a mistake by the government. This default confirmation, along with the secondary verification and the ability to correct one's own records, provides an important protection for workers.

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However, the default confirmation does not address the underlying problem that the number of tentative nonconfirmations is much higher for noncitizens than for citizen workers, and we know that employers have taken adverse actions against workers when a tentative nonconfirmation is given. Every effort to significantly and quickly reduce this disparity must be taken.

- Administrative and judicial review. NCLR believes it is critical for workers to have the ability to seek compensation from the government in the case that an error occurs. Attorneys' fees and costs must be included in a final bill. The Federal Tort Claims Act alone is not sufficient to address workers who are denied work due to erroneous government data.

Additional Areas that Must be Addressed

The most significant weaknesses of the current Basic Pilot Program include its lack of resources, database inaccuracies, and employer misuse of the system to discriminate against workers. In order for the Senate bill to improve upon the existing Basic Pilot Program, it must include the following:

- Phase-in: 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.

- Data accuracy: Every effort must be made to ensure that the data accessed by employers is accurate and continuously updated. Errors in the data will result in the denial of employment for potentially millions of U.S. citizens and foreign-born workers in the U.S. Innocent mistakes, such as the misspelling of "unusual" names, transposing given names and surnames, and the like, inevitably have a disproportionate impact on ethnic minorities.

- Documentation: The bill requires that work authorized immigrants present only an employment authorization document (EAD) issued by the government. This can only work if the DHS has the ability to issue EADs that are affordable and efficiently re-issued upon expiration. If not, millions of work authorized legal immigrants will be unable to provide the required document. U.S. citizens would have to provide either a U.S. passport or a driver's license or state-issued ID that complies with the REAL ID Act. This is problematic because many U.S. citizens do not hold passports, and the REAL ID Act has not been implemented and no state is currently in compliance with the REAL ID. Even once REAL ID is implemented, many individuals – including US citizens – will have trouble meeting the requirements to obtain a driver's license. It is important that the number of documents that may be used to prove identity and work authorization

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be increased to ensure that every work authorized individual has the ability to comply.

It is also critical that an EEVS not result in a single work authorization document for all workers, such as a new, tamper- and forgery-resistant Social Security Card. The existence of such a card would be a de facto national ID card, result in discrimination, and would increase the probability of identity theft and other breaches of privacy. In the current law enforcement context, the failure to carry an ID card would likely provide a pretext to disproportionately search, detain, or arrest Latinos and other ethnic minorities who would also be subject to new levels of government discrimination and harassment. In the private sector, minorities would likely be the targets of identity checks by banks, landlords, health care workers, and others. For these reasons, NCLR strongly opposed the mandatory use of a single document for EEVS purposes.

- Enforcement of labor laws: The notion that a mandatory EEVS program is the panacea that will deter employers from hiring undocumented workers is at best deeply flawed when there is no political will for meaningful enforcement of stronger labor and employment laws. The lessons learned over the last 20 years with the current employer sanctions system that have resulted in widespread labor law abuses demonstrate that focusing on labor law enforcement is a critical and indispensable component of any true comprehensive immigration reform legislation.

- Resources: Sufficient resources will be necessary to implement and maintain the new EEVS. The GAO recently reported that the best estimates are that enacting any nationwide, employer-implemented, employee-eligibility verification system will cost at least $11.7 billion per year. The GAO cited a study by the Temple University Institute for Survey Research and stated 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. Currently, the cost for simply sending a request through the existing Basic Pilot Verification System costs the government $0.28 per query, and currently, 10% of the employment-eligibility checks run through the Basic Pilot require manual re-verification, and the government spends an estimated $6 to resolve each query that required review by immigration status verifiers at the Department of Homeland Security. Without resources to upgrade and maintain the databases and to hire and train personnel, the huge new expansion of EEVS cannot take place.

- Comprehensive immigration reform: Perhaps most importantly, serious employment verification can only happen within the context of comprehensive immigration reform. With approximately 12 million undocumented immigrants in the U.S., and approximately nine million of them in the workforce, entire sectors of our economy are dependent on undocumented labor. Millions of employers would be devastated by a sudden increase in employment verification

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if it is not done within the context of legalizing the existing workforce and creating legal channels for future workers to enter the U.S. Enforcement alone is not an answer.

Conclusion

NCLR recognizes that worksite verification has become an essential element of the immigration debate, and is prepared to play a constructive role in the policy debate around creating such a system if it can be effective in curtailing unauthorized migration and unlikely to harm immigrant or native-born workers. But we also believe that it would be both morally and substantively disastrous to put in a worksite verification system in place without addressing serious flaws which have been identified after years of experience. It is clear that large numbers of individuals – including U.S. citizens and legal permanent residents – could face denied or delayed employment due to errors in the data or misuse of the system. It would be unacceptable for the outcome of such a policy to cost any authorized workers their livelihoods and incomes. Congress cannot claim to be unaware of the dangers of advancing such a system, and it must not act without addressing them thoroughly. NCLR looks forward to working with the Senate to ensure that as comprehensive immigration moves forward, the EEVS provisions are handled with the utmost care and are designed and implemented in a way that protects all U.S. workers.

Thank you again for the opportunity to testify on these important matters. I look forward to your questions.

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STATEMENT

OF

JULIE L. MYERS
ASSISTANT SECRETARY
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
U.S. DEPARTMENT OF HOMELAND SECURITY

REGARDING A HEARING ON

"IMMIGRATION ENFORCEMENT AT THE WORKPLACE:
LEARNING FROM THE MISTAKES OF 1986"

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY and
CITIZENSHIP

Monday, June 19, 2006 @ 2:00 pm
226 Senate Dirksen Building

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CHAIRMAN CORNYN 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 has begun to change the culture of illegal employment across the country by pursuing the most egregious businesses engaged in the employment of illegal workers. ICE is educating the private sector to institute best hiring practices and garnering their support in identifying systemic vulnerabilities that may be exploited to undermine immigration and border controls. Strategically, 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.

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LESSONS FROM THE 1986 IRCA

ICE has a wealth of historical experience 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 historical review of worksite enforcement under IRCA.

To varying degrees and during specific time periods, the former INS focused on worksite violations by devoting a large percentage of their investigative resources to enforce the administrative employer sanctions provisions of IRCA. Conducting 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. Issuing monetary fines that were routinely mitigated or ignored had little to no deterrent effect. Not only were the results far from effective, 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 incentive 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 complied 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 even maintain a copy of the documents that they reviewed. The apparent validity of a single document and the lack

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of any available evidence regarding the document routinely prevented the government from proving that the employer knew the employee was illegal. The law should reasonably require the employer to review and retain relevant documents and information obtained during the verification process, as well as during the subsequent employment of a worker. It should not allow unscrupulous employers to be "willfully blind" to derogatory information or facts indicative of unauthorized status.

Another detrimental result of the documentation compliance standard established under IRCA was explosive growth in an increasingly profitable false document industry that caters to undocumented workers who purchase the documents necessary to gain employment.

A NEW APPROACH TO WORKSITE ENFORCEMENT

Based on these lessons, ICE's current worksite enforcement strategy is no longer a piecemeal case-specific effort; instead, it 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. Thus, under the new ICE paradigm, worksite enforcement incorporates a vast multitude of investigations and crimes as illustrated below. Using this approach ICE worksite

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investigations now support felony charges and not just the traditional misdemeanor worksite violations under section 274A of the Immigration and Nationality Act. Let me give you some examples to explain what I mean.

Worksite enforcement includes critical infrastructure protection. Since 9/11, ICE has prioritized critical infrastructure. Just five days ago, an ICE investigation apprehended 55 illegal aliens working at a construction site at Dulles International Airport. Effective homeland security requires verifying the identity of not just the passengers that board the planes, but also the employees that work at the airports.

Worksite enforcement combats alien smuggling. In the last few months, we have made arrests at employment agencies that served as a conduit between the criminal organizations that smuggle illegal aliens into this country and the employers that willfully employ them.

Worksite enforcement also combats human trafficking. As the result of worksite enforcement actions, ICE has dismantled forced labor and prostitution rings, be it Peruvian aliens in New York or Chinese aliens in Maryland. The common thread is 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.

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Worksite enforcement involves financial crimes, commercial fraud, export violations, and trafficking in counterfeit goods. ICE enforcement efforts leverage our legacy authorities to fully investigate these 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.

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

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. On April 19, 2006, ICE agents executed 9 federal arrest warrants, 11 search warrants, and 41 consent searches at IFCO Systems (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

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and officers from 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 a financial gain, as well as document fraud (8 U.S.C. Section 1324 & 18 U.S.C. Sections 1546 and 371, respectively).

Another recent example of our worksite efforts occurred on May 9, 2006, when 85 unauthorized workers employed by Robert Pratt and other sub-contractors for Fischer Homes, Inc., were arrested as part of another 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. (8 U.S.C. Sections 1324 & 1326). 80 of the 84 illegal workers encountered were detained and 12 have already been removed from the United States.

What impact will this have? Criminally charging employers who hire undocumented aliens will create the kind of deterrence that was previously absent in enforcement efforts. 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 illegals and to pay them substandard wages.

To be clear, the magnet of employment is fueling illegal immigration, but the vast majority of employers do their best to comply with the law. ICE has provided training and tools on our website to help employers avoid violations.

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However, just as a chain is only as strong as its weakest link, the employment process cannot permit the widespread use and acceptance of fraudulent identification documents. Accordingly, in April 2006, Deputy Attorney General Paul McNulty and I 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 entities such as 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 DBF Task Forces identify, investigate and remove organizations that supply identity documents that enable illegal aliens, terrorists or criminals to integrate into our society undetected and obtain employment or other immigration benefits.

NEW TOOLS

ICE has made substantial improvements in the way we investigate and enforce worksites. Yet, we must do more and our experiences can inform your efforts to make that possible. DHS supports several of the additional tools contained in the immigration reform bill passed by the Senate, and we look forward to working with Congress as it considers comprehensive immigration reform, including proposals to enhance worksite enforcement.

NO-MATCH

There are millions of employers in the United States. Contained within the Social Security databases are statistics that show the employers with the greatest raw number,

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and greatest percentage, of employees who have presented social security numbers that do not match official social security roles; this is known as "No-Match" data. We believe the availability of this data to DHS would greatly enhance worksite enforcement. Access to this data will allow ICE agents to quickly identify and remove unauthorized workers and identify employers who appear to rely on illegal workers as part of their business practices. In addition, access to this data will provide another tool to locate and remove fugitive aliens who have absconded from final orders of deportation. From a national security standpoint, access to SSA no-match data is essential to ICE's efforts to identify criminal employers and vulnerabilities in critical infrastructure industries and sectors throughout the country. This represents one legislative fix that would go far toward ensuring that our workplace laws are upheld.

Additionally, provisions in current legislative proposals regarding document retention by employers, including evidence of actions taken by employers to resolve employment eligibility issues (e.g., SSA no-match letters), are crucial to worksite enforcement criminal prosecutions. Asking employers to retain documents for at least as long as the statute of limitations for these crimes is simply common sense. ICE has provided additional training and tools on our website to help employers avoid violations.

PROPOSED MODEL OF FINES AND PENALTIES

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

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business. Only with a strong compliance program, combined with issuance of meaningful penalties, will the United States have an effective worksite enforcement program.

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.

In conclusion, I would like to thank the Subcommittee for its analysis and review of how to prevent the problems of 1986 from occurring again. As I have outlined in my testimony, ICE has made great strides in our worksite enforcement program and our efforts are part of a comprehensive strategy that focuses on several different layers of the problem simultaneously; including smuggling, document and benefit fraud, and illegal employment.

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.

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 three objectives:

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strengthening border security, ensuring a comprehensive interior enforcement strategy that includes worksite enforcement, and establishing a temporary worker program. Achieving these objectives will dramatically protect our infrastructure, 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. We look forward to working with this Subcommittee in our efforts to secure our national interests. I hope my remarks today have been helpful and informative. I thank you for inviting me and I will be glad to answer any questions you may have at this time.

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United States Government Accountability Office

GAO

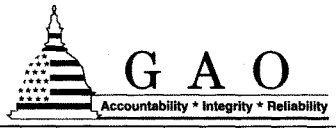
Testimony
Before the Subcommittee on Immigration, Border Security, and Citizenship, Committee on the Judiciary, U.S. Senate

For Release on Delivery
Expected at 2:00 p.m. EDT
Monday, June 19, 2006

IMMIGRATION ENFORCEMENT

Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts

Statement of Richard M. Stana, Director
Homeland Security and Justice



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Highlights

Highlights of GAO-06-895T, a testimony before the Subcommittee on Immigration, Border Security, and Citizenship, Committee on the Judiciary, U.S. Senate

Why GAO Did This Study

The opportunity for employment is one of the most important magnets attracting illegal immigrants to the United States. The Immigration Reform and Control Act (IRCA) of 1986 established an employment eligibility verification process and a sanctions program for fining employers for noncompliance. Few modifications have been made to the verification process and sanctions program since 1986, and immigration experts state that a more reliable verification process and a strengthened worksite enforcement capacity are needed to help deter illegal immigration. This testimony is based on GAO's August 2005 report on the employment verification process and worksite enforcement efforts. In this testimony, GAO provides observations on (1) the current employment verification process and (2) U.S. Immigration and Customs Enforcement's (ICE) priorities and resources for the worksite enforcement program and the challenges it faces in implementing that program.

What GAO Recommends

We recommended that the Department of Homeland Security (DHS) set time frames for completing its review of the Form I-9 and that U.S. Citizenship and Immigration Services in DHS assess the costs and feasibility of addressing Basic Pilot Program weaknesses. DHS agreed with these recommendations and is taking steps to assess the pilot program's weaknesses.

www.gao.gov/cgi-bin/getrpt?GAO-06-895T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Richard M. Stana at (202) 512-8777 or stanar@gao.gov.

June 19, 2006

IMMIGRATION ENFORCEMENT

Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts

What GAO Found

The current employment verification (Form I-9) process is based on employers' review of documents presented by new employees to prove their identity and work eligibility. On the Form I-9, employers 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, document fraud (use of counterfeit documents) and identity fraud (fraudulent use of valid documents or information belonging to others) have undermined the employment verification process by making it difficult for employers who want to comply with the process to ensure they hire only authorized workers and easier for unscrupulous employers to knowingly hire unauthorized workers with little fear of sanction. In addition, the large number and variety of documents acceptable for proving work eligibility has hindered employer verification efforts. In 1998, the former Immigration and Naturalization Service (INS), now part of DHS, proposed revising the Form I-9 process, particularly to reduce the number of acceptable work eligibility documents, but DHS has not yet finalized the proposal. The Basic Pilot Program, a voluntary program through which participating employers electronically verify employees' work eligibility, shows promise to enhance the current employment verification process, help reduce document fraud, and assist ICE in better targeting its worksite enforcement efforts. Yet, several weaknesses in the pilot program's implementation, such as its inability to detect identity fraud and DHS delays in entering data into its databases, could adversely affect increased use of the pilot program, if not addressed.

The worksite enforcement program has been a relatively low priority under both INS and ICE. Consistent with the DHS mission to combat terrorism, after September 11, 2001, INS and then ICE focused worksite enforcement efforts mainly on detecting and removing unauthorized workers from critical infrastructure sites. Since fiscal year 1999, the numbers of employer notices of intent to fine and administrative worksite arrests have generally declined. According to ICE, this decline is due to various factors, such as the prevalence of document fraud that makes it difficult to prove employer violations. ICE officials told us that the agency has previously experienced difficulties in proving employer violations and setting and collecting fine amounts that meaningfully deter employers from knowingly hiring unauthorized workers. In April 2006, ICE announced a new interior enforcement strategy to target employers who knowingly hire unauthorized workers by bringing criminal charges against them, and ICE has reported increases in the number of criminal arrests and indictments since fiscal year 2004. However, it is too early to tell what effect, if any, this new strategy will have on enhancing worksite enforcement efforts and identifying unauthorized workers and their employers.

United States Government Accountability Office

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Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to be here today to participate in this hearing on immigration enforcement at the workplace. As we and others have reported in the past, the opportunity for employment is one of the most important magnets attracting unauthorized immigrants to the United States. To help address this magnet, in 1986 Congress passed the Immigration Reform and Control Act (IRCA),[1] which made it illegal for individuals and entities to knowingly hire, continue to employ, or recruit or refer for a fee unauthorized workers. The act established a two-pronged approach for helping to limit the employment of unauthorized workers: (1) an employment verification process through which employers verify all newly hired employees' work eligibility and (2) a sanctions program for fining employers who do not comply with the act. Efforts to enforce these sanctions are referred to as worksite enforcement and are conducted by U.S. Immigration and Customs Enforcement (ICE).

As the U.S. Commission on Immigration Reform reported, immigration contributes to the U.S. national economy by providing workers for certain labor-intensive industries and contributing to the economic revitalization of some communities.[2] Yet, the commission also noted that immigration, particularly illegal immigration, can have adverse consequences by helping to depress wages for low-skilled workers and creating net fiscal costs for state and local governments. Following the passage of IRCA, the U.S. Commission on Immigration Reform and various immigration experts have concluded that deterring illegal immigration requires, among other things, strategies that focus on disrupting the ability of illegal immigrants to gain employment through a more reliable employment eligibility verification process and a more robust worksite enforcement capacity. In particular, the commission report and other studies have found that the single most important step that could be taken to reduce unlawful migration is the development of a more effective system for verifying work authorization. In the nearly 20 years since passage of IRCA, the employment eligibility verification process and worksite enforcement program have remained largely unchanged. Moreover, in previous work, we reported that employers of unauthorized aliens faced little likelihood that the

[1]Pub. L. No. 99-603, 8 U.S.C. 1324a et seq.

[2]U.S. Commission on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy* (Washington, D.C: September 1997).

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Immigration and Naturalization Service (INS)[3] would investigate, fine, or criminally prosecute them, a circumstance that provides little disincentive for employers who want to circumvent the law.[4] The legislative proposals currently under consideration would revise the current employment verification process and the employer sanctions program.

My testimony today is based on our August 2005 report to Congress on the employment verification process and ICE's worksite enforcement program.[5] Specifically, I will discuss our observations on (1) the current employment verification process and (2) ICE's priorities and resources for the worksite enforcement program and the challenges it has faced in implementing that program.

To address these objectives, we reviewed federal laws and information obtained from ICE, U.S. Citizenship and Immigration Services (USCIS), and Social Security Administration (SSA) officials in headquarters and selected field locations. We examined regulations, guidance, past GAO reports, and other studies on the employment verification process and the worksite enforcement program. We also analyzed the results and examined the methodology of an independent evaluation of the Basic Pilot Program, an automated system through which employers electronically check employees' work eligibility information against information in Department of Homeland Security (DHS) and SSA databases, conducted by the Institute for Survey Research at Temple University and Westat in June 2004.[6] Furthermore, we analyzed data on employer use of the Basic Pilot Program and on worksite enforcement and assessed the data reliability by reviewing them for accuracy and completeness, interviewing agency officials knowledgeable about the data, and examining documentation on how the data are entered, categorized, and verified in

[3]In March 2003, INS was merged into the Department of Homeland Security, and its immigration functions were divided between U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection. U.S. Immigration and Customs Enforcement is responsible for managing and implementing the worksite enforcement program.

[4]GAO, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist*, GAO/GGD-99-33 (Washington, D.C.: Apr. 2, 1999).

[5]GAO, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813 (Washington, D.C.: Aug. 31, 2005).

[6]Institute for Survey Research and Westat, *Findings of the Basic Pilot Program Evaluation* (Washington, D.C.: June 2004).

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the databases. We determined that the independent evaluation and these data were sufficiently reliable for the purposes of our review. We conducted the work reflected in this statement from September 2004 through July 2005 in accordance with generally accepted government auditing standards.

Summary

The employment verification process is primarily based on employers' review of work eligibility documents presented by new employees, but various weaknesses, such as the process' vulnerability to fraud, have undermined this process. Employers 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, document fraud (use of counterfeit documents) and identity fraud (fraudulent use of valid documents or information belonging to others) have made it difficult for employers who want to comply with the employment verification process to ensure that they hire only authorized workers and have made it easier for unscrupulous employers to knowingly hire unauthorized workers with little fear of sanction. In addition, the large number and variety of documents acceptable for proving work eligibility have hindered employers' verification efforts. In 1998, the former INS proposed revising the verification process and reducing the number of acceptable work eligibility documents; that proposal was never acted upon. DHS, however, at the direction of Congress, introduced the Basic Pilot Program, an automated system for employers to electronically check employees' work eligibility information with information in DHS and SSA databases, that may enhance this process. This program shows promise to help reduce document fraud and assist ICE in better targeting its worksite enforcement efforts. Yet, a number of weaknesses in the pilot program's implementation, including its inability to detect identity fraud and DHS delays in entering data into its databases, could adversely affect increased use of the pilot program, if not addressed. In addition, USCIS officials told us the current Basic Pilot Program may not be able to complete timely verifications if the number of employers using the program significantly increased. About 8,600 employers have registered to use the Basic Pilot Program, and a smaller number of these employers are active users.

Under both INS and ICE, worksite enforcement has been a relatively low priority. Consistent with the DHS mission to combat terrorism, after September 11, 2001, INS and then ICE focused worksite enforcement resources mainly on identifying and removing unauthorized workers from critical infrastructure sites, such as airports and nuclear power plants, to help address vulnerabilities at those sites. In fiscal year 1999, INS devoted

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about 240 full-time equivalents (or about 9 percent of its total investigative agent work-years) to worksite enforcement, while in fiscal year 2003 it devoted about 90 full-time equivalents[7] (or about 4 percent of total agent work-years). Furthermore, between fiscal years 1999 and 2003 the number of notices of intent to fine issued to employers for knowingly hiring unauthorized workers or improperly completing employment verification forms and the number of administrative worksite arrests generally declined. ICE has attributed this decline to various factors, including the widespread use of counterfeit documents that make it difficult for ICE agents to prove that employers knowingly hired unauthorized workers. In addition, INS and ICE have faced difficulties in setting and collecting fine amounts from employers and in detaining unauthorized workers arrested at worksites. In April 2006 ICE announced a new interior enforcement strategy as part of the Secure Border Initiative. Under this strategy, ICE plans to target employers who knowingly employ unauthorized workers by bringing criminal charges against them. While ICE has taken some steps to address difficulties it has faced in implementing worksite enforcement efforts and has announced a new interior enforcement strategy, it is too early to tell what effect, if any, these steps will have on identifying the millions of unauthorized workers and the employers who hired them.

In our August 2005 report, we recommended that DHS establish specific time frames for completing its review of the Form I-9 process to help strengthen the current employment verification process. We also recommended that USCIS include an assessment of the feasibility and costs of addressing the Basic Pilot Program's weaknesses in its evaluation of the program. DHS agreed with our recommendations and plans to include information on addressing the pilot program's weaknesses in the evaluation.

Background

IRCA provided for sanctions against employers who do not follow the employment verification (Form I-9) process. Employers who fail to properly complete, retain, or present for inspection a Form I-9 may face civil or administrative fines ranging from $110 to $1,100 for each employee for whom the form was not properly completed, retained, or presented. Employers who knowingly hire or continue to employ unauthorized aliens may be fined from $275 to $11,000 for each employee, depending on whether the violation is a first or subsequent offense. Employers who

[7]One full-time equivalent is equal to one work-year or 2,080 non-overtime hours.

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engage in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens are subject to criminal penalties consisting of fines up to $3,000 per unauthorized employee and up to 6 months imprisonment for the entire pattern or practice.

Basic Pilot Program Employment Verification Process

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[8] of 1996 required INS and SSA to operate three voluntary pilot programs to test electronic means for employers to verify an employee's eligibility to work, one of which was the Basic Pilot Program.[9] The Basic Pilot Program was designed to test whether pilot verification procedures could improve the existing employment verification process by reducing (1) false claims of U.S. citizenship and document fraud; (2) discrimination against employees; (3) violations of civil liberties and privacy; and (4) the burden on employers to verify employees' work eligibility.

The Basic Pilot Program provides participating employers with an electronic method to verify their employees' work eligibility. Employers may participate voluntarily in the Basic Pilot Program, but are still required to complete Forms I-9[10] for all newly hired employees in accordance with IRCA. After completing the forms, these employers query the pilot program's automated system by entering employee information provided on the forms, such as name and social security number, into the pilot Web site within 3 days of the employees' hire date. The pilot program then electronically matches that information against information in SSA and, if necessary, DHS databases to determine whether the employee is eligible to work, as shown in figure 1. The Basic Pilot Program electronically notifies employers whether their employees' work authorization was confirmed. Those queries that the DHS automated check cannot confirm are referred to DHS immigration status verifiers

[8] 8 U.S.C. 1324a(b). IIRIRA was enacted within a larger piece of legislation, the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208.

[9] The other two pilot programs mandated by IIRIRA—the Citizen Attestation Verification Pilot Program and the Machine-Readable Document Pilot Program—were discontinued in 2003 due to technical difficulties and unintended consequences identified in evaluations of the programs. See Institute for Survey Research and Westat, *Findings of the Citizen Attestation Verification Pilot Program Evaluation* (Washington, D.C.: April 2003) and Institute for Survey Research and Westat, *Findings of the Machine-Readable Document Pilot Program Evaluation* (Washington, D.C.: May 2003).

[10] The Form I-9 is completed by employers in verifying the work eligibility of all newly hired employees.

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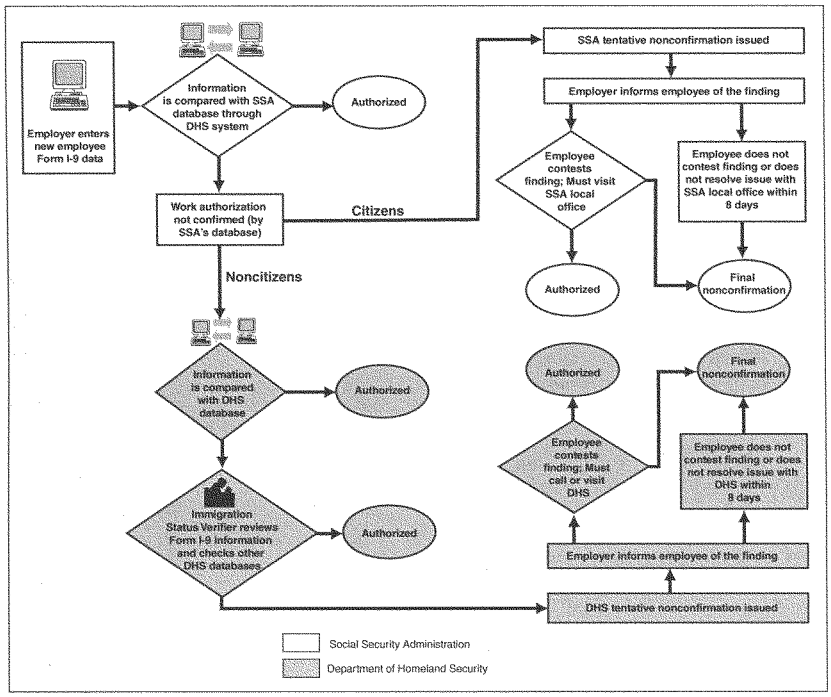
who check employee information against information in other DHS databases.

Figure 1: Basic Pilot Program Verification Process



Source: GAO analysis based on USCIS information.

In cases when the pilot system cannot confirm an employee's work

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authorization status either through the automatic check or the check by an immigration status verifier, the system issues the employer a tentative nonconfirmation of the employee's work authorization status. In this case, the employers must notify the affected employees of the finding, and the employees have the right to contest their tentative nonconfirmations by contacting SSA or USCIS to resolve any inaccuracies in their records within 8 days. During this time, employers may not take any adverse actions against those employees, such as limiting their work assignments or pay. Employers are required to either immediately terminate the employment, or notify DHS of the continued employment, of workers who do not successfully contest the tentative nonconfirmation and those who the pilot program finds are not work-authorized.

Various Weaknesses Have Undermined the Employment Verification Process, but Opportunities Exist to Enhance It

Current Employment Verification Process Is Based on Employers' Review of Documents

In 1986, IRCA established the employment verification process based on employers' review of documents presented by employees to prove identity and work eligibility. On the Form I-9, employees must attest that they are U.S. citizens, lawfully admitted permanent residents, or aliens authorized to work in the United States. Employers must then certify that they have reviewed the documents presented by their employees to establish identity and work eligibility and that the documents appear genuine and relate to the individual presenting them. In making their certifications, employers are expected to judge whether the documents presented are obviously counterfeit or fraudulent. Employers are deemed in compliance with IRCA if they have followed the Form I-9 process, including when an unauthorized alien presents fraudulent documents that appear genuine.

Form I-9 Process Is Vulnerable to Document and Identity Fraud

Since passage of IRCA in 1986, document and identity fraud have made it difficult for employers who want to comply with the employment verification process to ensure they hire only authorized workers. In its 1997 report to Congress, the Commission on Immigration Reform noted that the widespread availability of false documents made it easy for

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unauthorized aliens to obtain jobs in the United States. In past work, we reported that large numbers of unauthorized aliens have used false documents or fraudulently used valid documents belonging to others to acquire employment, including at critical infrastructure sites like airports and nuclear power plants.[11] In addition, although studies have shown that the majority of employers comply with IRCA and try to hire only authorized workers, some employers knowingly hire unauthorized workers, often to exploit the workers' low cost labor. For example, the Commission on Immigration Reform reported that employers who knowingly hired illegal aliens often avoided sanctions by going through the motions of compliance while accepting false documents. Likewise, in 1999 we concluded that those employers who do want to comply with IRCA can intentionally hire unauthorized workers under the guise of having complied with the employment verification requirements by claiming that unauthorized workers presented false documents to obtain employment.[12]

The Number and Variety of Acceptable Documents Hinders Employer Verification Efforts

The large number and variety of documents that are acceptable for proving work eligibility have complicated employer verification efforts under IRCA. Following the passage of IRCA in 1986, employees could present 29 different documents to establish their identity and/or work eligibility. In a 1997 interim rule, INS reduced the number of acceptable work eligibility documents from 29 to 27.[13] The interim rule implemented changes to the list of acceptable work eligibility documents mandated by IIRIRA and was intended to serve as a temporary measure until INS issued final regulations on modifications to the Form I-9. In 1998, INS proposed a further reduction in the number of acceptable work eligibility documents to 14, but did not finalize the proposed rule.

Since the passage of IRCA, various studies have addressed the need to reduce the number of acceptable work eligibility documents to make the employment verification process simpler and more secure. For example, we previously reported that the multiplicity of work eligibility documents contributed to (1) employer uncertainty about how to comply with the

[11]GAO/GGD-99-33, and GAO, *Overstay Tracking: A Key Component of Homeland Security and a Layered Defense*, GAO-04-82 (Washington, D.C.: May 21, 2004).

[12]GAO/GGD-99-33.

[13]Eight of these documents establish both identity and employment eligibility (e.g., U.S. passport or permanent resident card); 12 documents establish identity only (e.g., driver's license); and 7 documents establish employment eligibility only (e.g., social security card).

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employment verification requirements and (2) discrimination against authorized workers.[14] In 1998, INS noted that, when IRCA was first passed, a long inclusive list of acceptable work eligibility documents was allowed for the Form I-9 to help ensure that all persons who were eligible to work could easily meet the requirements, but as early as 1990, there had been evidence that some employers found the list confusing.

According to DHS officials, the department is assessing possible revisions to the Form I-9 process, including reducing the number of acceptable work eligibility documents, but has not established a target time frame for completing this assessment and issuing regulations on Form I-9 changes. DHS released an updated version of the Form I-9 in May 2005 that changed references from INS to DHS but did not modify the list of acceptable work eligibility documents on the Form I-9 to reflect changes made to the list by the 1997 interim rule. Moreover, DHS recently issued interim regulations on the use of electronic Forms I-9, which provide guidance to employers on electronically signing and storing Forms I-9.[15]

The Basic Pilot Program Shows Promise to Enhance Employment Verification, but Current Weaknesses Could Undermine Increased Use

Various immigration experts have noted that the most important step that could be taken to reduce illegal immigration is the development of a more effective system for verifying work authorization. In particular, the Commission on Immigration Reform concluded that the most promising option for verifying work authorization was a computerized registry based on employers' electronic verification of an employee's social security number with records on work authorization for aliens. The Basic Pilot Program, which is currently available on a voluntary basis to all employers in the United States, operates in a similar way to the computerized registry recommended by the commission, and shows promise to enhance employment verification and worksite enforcement efforts. Only a small portion—about 8,600 as of June 2006—of the approximately 5.6 million

[14]GAO, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, GAO/GGD-90-62 (Washington, D.C.: Mar. 29, 1990).

[15]In October 2004, Congress authorized the electronic Form I-9 to be implemented by the end of April 2005. See Pub. L. No. 108-390.

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employer firms nationwide have registered to use the pilot program, and about 4,300 employers are active users.[16]

The Basic Pilot Program enhances the ability of participating employers to reliably verify their employees' work eligibility and assists participating employers with identification of false documents used to obtain employment by comparing employees' Form I-9 information with information in SSA and DHS databases. If newly hired employees present counterfeit documents, the pilot program would not confirm the employees' work eligibility because their employees' Form I-9 information, such as the false name or social security number, would not match SSA and DHS database information when queried through the Basic Pilot Program.

Although ICE has no direct role in monitoring employer use of the Basic Pilot Program and does not have direct access to program information, which is maintained by USCIS, ICE officials told us that program data could indicate cases in which employers do not follow program requirements and therefore would help the agency better target its worksite enforcement efforts toward those employers. For example, the Basic Pilot Program's confirmation of numerous queries of the same social security number could indicate that a social security number is being used fraudulently or that an unscrupulous employer is knowingly hiring unauthorized workers by accepting the same social security number for multiple employees. ICE officials noted that, in a few cases, they have requested and received pilot program data from USCIS on specific employers who participate in the program and are under ICE investigation. However, USCIS officials told us that they have concerns about providing ICE broader access to Basic Pilot Program information because it could create a disincentive for employers to participate in the program, as employers may believe that they are more likely to be targeted for a worksite enforcement investigation as a result of program participation. According to ICE officials, mandatory employer participation in the Basic

[16]The approximately 8,600 employers who registered to use the Basic Pilot Program do not reflect the number of worksites or individual business establishments using the program. The about 5.6 million firms in the United States was the number of firms in 2002, which is the most current data available. Under the Basic Pilot Program, one employer may have multiple worksites that use the pilot program. For example, a hotel chain could have multiple individual hotels using the Basic Pilot Program, but the hotel chain would represent one employer using the pilot program. A firm is a business organization consisting of one or more domestic establishments in the same state and industry that were specified under common ownership or control.

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Pilot Program would eliminate the concern about sharing data and could help ICE better target its worksite enforcement efforts on employers who try to evade using the program. Moreover, these officials told us that mandatory use of an automated system like the pilot program, could limit the ability of employers who knowingly hired unauthorized workers to claim that the workers presented false documents to obtain employment, which could assist ICE agents in proving employer violations of IRCA.

Although the Basic Pilot Program may enhance the employment verification process and a mandatory program could assist ICE in targeting its worksite enforcement efforts, weaknesses exist in the current program. For example, the current Basic Pilot Program cannot help employers detect identity fraud. If an unauthorized worker presents valid documentation that belongs to another person authorized to work, the Basic Pilot Program would likely find the worker to be work-authorized. Similarly, if an employee presents counterfeit documentation that contains valid information and appears authentic, the pilot program may verify the employee as work-authorized. DHS officials told us that the department is currently considering possible ways to enhance the Basic Pilot Program to help it detect cases of identity fraud, for example, by providing a digitized photograph associated with employment authorization information presented by an employee.

Delays in the entry of information on arrivals and employment authorization into DHS databases can lengthen the pilot program verification process for some secondary verifications. Although the majority of pilot program queries entered by employers are confirmed via the automated SSA and DHS verification checks, about 15 percent of queries authorized by DHS required secondary verifications by immigration status verifiers in fiscal year 2004.[17] According to USCIS, cases referred for secondary verification are typically resolved within 24 hours, but a small number of cases take longer, sometimes up to 2 weeks, due to, among other things, delays in entry of data on employees who received employment authorization documents generated by a computer and

[17]In fiscal year 2004, only about 8 percent of total Basic Pilot Program queries were referred to DHS for verification. Of these queries referred to DHS for verification, about 85 percent were confirmed via the DHS automated verification check.

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camera that are not directly linked to DHS databases.[18] Secondary verifications lengthen the time needed to complete the employment verification process and could harm employees because employers might reduce those employees' pay or restrict training or work assignments, which are prohibited under pilot program requirements, while waiting for verification of their work eligibility.[19] DHS has taken steps to increase the timeliness and accuracy of information entered into databases used as part of the Basic Pilot Program and reports, for example, that data on new immigrants are now typically available for verification within 10 to 12 days of an immigrant's arrival in the United States while, previously, the information was not available for up to 6 to 9 months after arrival.[20]

Furthermore, employer noncompliance with Basic Pilot Program requirements may adversely affect employees queried through the program. The Temple University Institute for Survey Research and Westat evaluation of the Basic Pilot Program concluded that the majority of employers surveyed appeared to be in compliance with Basic Pilot Program procedures. However the evaluation and our review found evidence of some noncompliance with these procedures, such as those that prohibit screening job applicants or limiting of employees' work assignments or pay while contesting tentative nonconfirmations. The Basic Pilot Program provides a variety of reports that may help USCIS determine whether employers follow program requirements, but USCIS officials told us 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.

According to USCIS officials, due to the growth in other USCIS verification programs, current USCIS staff may not be able to complete timely secondary verifications if the number of employers using the program significantly increased. In particular, these officials said that if a significant number of new employers registered for the program or if the

[18]Information on employment authorization documents generated through this process is electronically sent to USCIS headquarters for entry, but is sometimes lost or not entered into databases in a timely manner. By contrast, employment authorization documents issued at USCIS service centers are produced via computers that are used to update data in USCIS databases, which USCIS officials told us represent the majority of employment authorization documents currently issued by USCIS.

[19]Institute for Survey Research and Westat.

[20]DHS, *Report to Congress on the Basic Pilot Program* (Washington, D.C.: June 2004).

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program were mandatory for all employers, additional staff would be needed to maintain timely secondary verifications. USCIS has approximately 38 Immigration Status Verifiers allocated for completing Basic Pilot Program secondary verifications, and these verifiers reported that they are able to complete the majority of manual verification checks within their target time frame of 24 hours. However, USCIS officials said that the agency has serious concerns about its ability to complete timely verifications if the number of Basic Pilot Program users greatly increased.

Competing Priorities and Implementation Challenges Have Hindered Worksite Enforcement Efforts

Worksite Enforcement Has Been a Relatively Low Priority

Worksite enforcement is one of various immigration enforcement programs that competes for resources and among INS and ICE responsibilities, and worksite enforcement has been a relatively low priority. For example, in the 1999 INS Interior Enforcement Strategy, the strategy to block and remove employers' access to undocumented workers was the fifth of five interior enforcement priorities.[21] In that same year, we reported that, relative to other enforcement programs in INS, worksite enforcement received a small portion of INS's staffing and enforcement budget and that the number of employer investigations INS conducted each year covered only a fraction of the number of employers who may have employed unauthorized aliens.[22]

In keeping with the primary mission of DHS to combat terrorism, after September 11, 2001, INS and then ICE focused investigative resources primarily on national security cases. In particular, INS and then ICE focused available resources for worksite enforcement on identifying and removing unauthorized workers from critical infrastructure sites, such as airports and nuclear power plants, to help reduce vulnerabilities at those sites. We previously reported that, if critical infrastructure-related businesses were to be compromised by terrorists, this would pose a

[21]INS, *Interior Enforcement Strategy* (Washington, D.C.: Jan. 1999).

[22]GAO/GGD-99-33.

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serious threat to domestic security. According to ICE, the agency adopted this focus on critical infrastructure protection because the fact that unauthorized workers can obtain employment at critical infrastructure sites indicates that there are vulnerabilities in those sites' hiring and screening practices, and unauthorized workers employed at those sites are vulnerable to exploitation by terrorists, smugglers, traffickers, and other criminals. ICE has inspected Forms I-9 and employer records at hundreds of critical infrastructure sites, including at about 200 airports as part of Operation Tarmac and at more than 50 nuclear power plants as part of Operation Glow Worm.[23] More recently, ICE announced conducting worksite enforcement operations at other critical infrastructure sites, including at an airport, chemical plants, and a water and power facility.

Since fiscal year 1999, INS and ICE have dedicated a relatively small portion of overall agent resources to the worksite enforcement program. As shown in figure 2, in fiscal year 1999 INS allocated about 240 full-time equivalents to worksite enforcement efforts, while in fiscal year 2003, ICE allocated about 90 full-time equivalents. Between fiscal years 1999 and 2003, the percentage of agent work-years spent on worksite enforcement efforts generally decreased from about 9 percent to about 4 percent.[24]

[23]Operations Tarmac and Glow Worm were ICE initiatives to detect and remove unauthorized workers from airports and nuclear power plants, respectively.

[24]More recent data on investigative agent work-years cannot be shared publicly.

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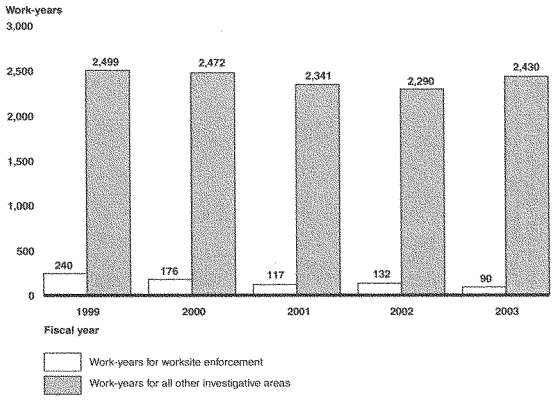
Figure 2: Investigative Agent Work-years Spent on Worksite Enforcement Efforts and Agent Work-years Spent on Other Investigative Areas for Each Fiscal Year from 1999 through 2003



Source: GAO analysis of INS case management data.

Although worksite enforcement has been a low priority relative to other programs, ICE has proposed increasing agent resources for the worksite enforcement program. For example, in its fiscal year 2007 budget submission, ICE requested funding for 206 additional positions for worksite enforcement. Yet, at this point, it is unclear what impact, if any, these additional resources would have on worksite enforcement efforts.

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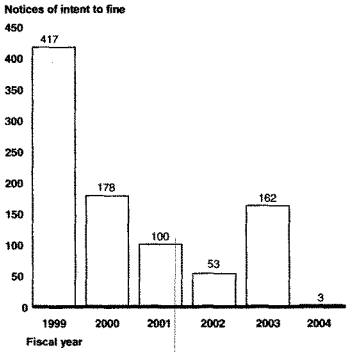
ICE Attributes Decline in Numbers of Employer Fine Notices and Worksite Arrests to Document Fraud and Resource Allocation Decisions

The number of notices of intent to fine issued to employers as well as the number of unauthorized workers arrested at worksites have generally declined.[25] Between fiscal years 1999 and 2004, the number of notices of intent to fine issued to employers for improperly completing Forms I-9 or knowingly hiring unauthorized workers generally decreased from 417 to 3. (See fig. 3.)

Figure 3: Number of Notices of Intent to Fine Issued to Employers for Each Fiscal Year from 1999 through 2004



Source: GAO analysis of INS and ICE case management data.

The number of unauthorized workers arrested during worksite enforcement operations has also declined since fiscal year 1999. As shown in figure 4, the number of worksite arrests for administrative violations of immigration law, such as for violating the terms of a visa, declined by about 84 percent from 2,849 in fiscal year 1999 to 445 in fiscal year 2003.

[25]If warranted as a result of a worksite enforcement operation, ICE may issue a notice of intent to fine to an employer that specifies the amount of the fine ICE is seeking to collect from the employer. This amount may be reduced after negotiations between ICE attorneys and the employer.

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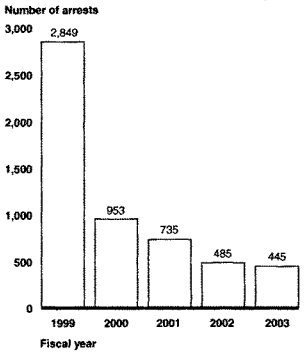
Figure 4: Number of Administrative Worksite Enforcement Arrests for Each Fiscal Year from 1999 through 2003



Source: GAO analysis of INS case management data.

ICE attributes the decline in the number of notices of intent to fine issued to employers and number of administrative worksite arrests to various factors including the widespread availability and use of counterfeit documents and the allocation of resources to other priorities. Various studies have shown that the availability and use of fraudulent documents have made it difficult for ICE agents to prove that employers knowingly hired unauthorized workers. ICE officials also told us that employers who agents suspect of knowingly hiring unauthorized workers can claim that they were unaware that their workers presented false documents at the time of hire, making it difficult for agents to prove that the employer willfully violated IRCA.

In addition, according to ICE, the allocation of INS and ICE resources to other priorities has contributed to the decline in the number of notices of intent to fine and worksite arrests. For example, INS focused its worksite enforcement resources on egregious violators who were linked to other criminal violations, like smuggling, fraud or worksite exploitation, and de-emphasized administrative employer cases and fines. Furthermore, ICE investigative resources were redirected from worksite enforcement activities to criminal alien cases, which consumed more investigative hours by the late 1990s than any other enforcement activity. After

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September 11, 2001, INS and ICE focused investigative resources on national security cases, and in particular, focused worksite enforcement efforts on critical infrastructure protection, which is consistent with DHS's primary mission to combat terrorism. According to ICE, the redirection of resources from other enforcement programs to perform national security-related investigations resulted in fewer resources for traditional program areas like fraud and noncritical infrastructure worksite enforcement. Additionally, some ICE field representatives, as well as immigration experts, noted that the focus on critical infrastructure protection does not address the majority of worksites in industries that have traditionally provided the magnet of jobs attracting illegal aliens to the United States.

As part of the Secure Border Initiative, in April 2006 ICE announced a new interior enforcement strategy to target employers of unauthorized aliens, immigration violators, and criminal networks. Under this strategy, ICE plans to target employers who knowingly employ unauthorized workers by bringing criminal charges against them. ICE has reported increases in the numbers of criminal arrests, indictments, and convictions between fiscal years 2004 and 2005 as a result of these efforts.[26] Between fiscal years 2004 and 2005, ICE reported that the number of criminal arrests increased from 160 to 165. Furthermore, in fiscal year 2005 ICE reported that the number of criminal indictments and convictions were 140 and 127, respectively, and in fiscal year 2004 the number of indictments and convictions were 67 and 46, respectively. In addition, ICE reported arresting 980 individuals on administrative immigration violations in fiscal year 2005 as a result of its worksite enforcement efforts.

[26]Data from fiscal years 2004 and 2005 cannot be compared with data for previous fiscal years because the way INS agents entered data on investigations into the INS case management system differs from the way ICE agents enter such data into the ICE system. Following the creation of ICE in March 2003, the case management system used to enter and maintain information on immigration investigations changed. With the establishment of ICE, agents began using the legacy U.S. Customs Service's case management system, called the Treasury Enforcement Communications System, for entering and maintaining information on investigations, including worksite enforcement operations. Prior to the creation of ICE, the former INS entered and maintained information on investigative activities in the Performance Analysis System, which captured information on immigration investigations differently than the Treasury Enforcement Communications System.

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INS and ICE Have Faced Difficulties in Setting Fine Amounts and in Detaining Unauthorized Workers, but Have Taken Steps to Address Difficulties

INS and ICE have faced difficulties in setting and collecting fine amounts that meaningfully deter employers from knowingly hiring unauthorized workers and in detaining unauthorized workers arrested at worksites. ICE officials told us that because fine amounts are so low, the fines do not provide a meaningful deterrent. These officials also said that when agents could prove that an employer knowingly hired an unauthorized worker and issued a notice of intent to fine, the fine amounts agents recommended were often negotiated down in value during discussion between agency attorneys and employers. The amount of mitigated fines may be, in the opinion of some ICE officials, so low that they believe that employers view the fines as a cost of doing business, making the fines an ineffective deterrent for employers who attempt to circumvent IRCA. According to ICE, the agency mitigates employer fine amounts because doing so may be a more efficient use of government resources than pursuing employers who contest or ignore fines, which could be more costly to the government than the fine amount sought.

An ICE official told us that use of civil settlements and criminal charges instead of pursuit of administrative fines, specifically in regard to noncritical infrastructure employers, could be a more efficient use of investigative resources. In 2005, ICE settled a worksite enforcement case with a large company without going through the administrative fine process. As part of the settlement, the company agreed to pay $11 million and company contractors agreed to pay $4 million in forfeitures—more than an administrative fine amount ever issued against an employer for ICE violations. ICE officials also said that use of civil settlements could help ensure employers' future compliance by including in the settlements a requirement to entire into compliance agreements, such as the Basic Pilot Program. In addition, as part of ICE's new interior enforcement strategy, the agency plans to bring criminal charges against employers who knowingly hire unauthorized workers, rather than using administrative fines to sanction employers. The practice of using civil settlements and criminal charges against employers is in the early stages of implementation; therefore, the extent to which it may help limit the employment of unauthorized workers is not yet known.

The former INS also faced difficulties in collecting fine amounts from employers, but collection efforts have improved. We previously reported that the former INS faced difficulties in collecting fine amounts from employers for a number of reasons, including that employers went out of

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business, moved, or declared bankruptcy.[27] In 1998, INS created the Debt Management Center to centralize the collections process, and the center is now responsible for collecting fines ICE issued against employers for violations of IRCA, among other things. The ICE Debt Management Center has succeeded in collecting the full amount of final fines on most of the invoices issued to employers between fiscal years 1999 and 2004.[28]

In addition, ICE's Office of Detention and Removal has limited detention space, and unauthorized workers detained during worksite enforcement investigations have been a low priority for that space.[29] In 2004, the Under Secretary for Border and Transportation Security sent a memo to the Commissioner of U.S. Customs and Border Protection and the Assistant Secretary for ICE outlining the priorities for the detention of aliens. According to the memo, aliens who are subjects of national security investigations were among those groups of aliens given the highest priority for detention, while those arrested as a result of worksite enforcement investigations were to be given the lowest priority. ICE officials stated that the lack of sufficient detention space has limited the effectiveness of worksite enforcement efforts. For example, they said that if investigative agents arrest unauthorized aliens at worksites, the aliens would likely be released because the Office of Detention and Removal detention centers do not have sufficient space to house the aliens and they may re-enter the workforce, in some cases returning to the worksites from where they were originally arrested. Congress has provided funds to the Office of Detention and Removal for additional bed spaces. Yet, given competing priorities for detention space, the effect, if any, these additional bed spaces will have on ICE's priority given to workers detained as a result of worksite enforcement operations cannot currently be determined.

[27]GAO/GGD-99-33.

[28]The Debt Management Center issues invoices to employers for collecting fine amounts. According to ICE, multiple invoices can be issued for each final order for an employer fine, as a payment plan is typically established for employers as part of the final order for the fine amount.

[29]The Office of Detention and Removal is primarily responsible for identifying and removing criminal aliens from the United States. The office is also responsible for managing ICE's space for detaining aliens.

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Concluding Observations

Efforts to reduce the employment of unauthorized workers in the United States necessitate a strong employment eligibility verification process and a credible worksite enforcement program to ensure that employers meet verification requirements. The current employment verification process has not fundamentally changed since its establishment in 1986, and ongoing weaknesses have undermined its effectiveness. Although DHS and the former INS have been contemplating changes to the Form I-9 since 1997, DHS has not yet issued final regulations on these changes, and it has not yet established a definitive time frame for completing the assessment. We recommended that DHS set a target time frame for completing this assessment and issuing final regulations to strengthen the current employment verification process and make it simpler and more secure. Furthermore, the Basic Pilot Program shows promise for enhancing the employment verification process and reducing document fraud if implemented on a much larger scale. However, current weaknesses in pilot program implementation would have to be fully addressed to help ensure the efficient and effective operation of an expanded or mandatory pilot program, or a similar automated employment verification program, and the cost of additional resources would be a consideration. USCIS is currently evaluating the Basic Pilot Program to include, as we have recommended, information on addressing the program's weaknesses to assist USCIS and Congress in addressing possible future use of the Basic Pilot Program.

Even with a strengthened employment verification process, a credible worksite enforcement program would be needed because no verification system is foolproof and not all employers may want to comply with IRCA. ICE's focus of its enforcement resources on critical infrastructure protection since September 11, 2001, is consistent with the DHS mission to combat terrorism by detecting and mitigating vulnerabilities to terrorist attacks at critical infrastructure sites which, if exploited, could pose serious threats to domestic security. This focus on critical infrastructure protection, though, generally has not addressed noncritical infrastructure employers' noncompliance with IRCA. As a result, employers, particularly those not located at or near critical infrastructure sites, who attempted to circumvent IRCA have faced less of a likelihood that ICE would investigate them for failing to comply with the current employment verification process or for knowingly hiring unauthorized workers. ICE is taking some steps to address difficulties it has faced in its worksite enforcement efforts, but it is too early to tell whether these steps will improve the effectiveness of the worksite enforcement program and help ICE identify the millions of unauthorized workers and the employers who hired them.

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This concludes my prepared statement. I would be pleased to answer any questions you and the Subcommittee Members may have.

GAO Contact and Staff Acknowledgments

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Other key contributors to this statement were Frances Cook, Michelle Cooper, Orlando Copeland, Michele Fejfar, Rebecca Gambler, Kathryn Godfrey, Eden C. Savino, and Robert E. White.

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U.S. Senate Committee on the Judiciary
Subcommittee on Immigration, Border Security and Citizenship

"Immigration Enforcement at the Workplace:
Learning from the Mistakes of 1986"

Washington, D.C.
June 19, 2006

INTRODUCTION

Chairman Cornyn and Ranking Member Kennedy, thank you for the opportunity to return to your committee to discuss how to develop an effective system to enforce our immigration laws related to illegal employment of unauthorized workers and how such a program plays a critical part of a broader effort to secure our borders. I am currently a principal at the consulting firm Mehlman Vogel Castagnetti, Inc., an Adjunct Fellow at the Center for Strategic and International Studies, and a member of the Independent Task Force on Immigration Reform and America's Future which is chaired by former Senator Spencer Abraham and former Congressman Lee Hamilton and managed by the Migration Policy Institute.[1]

As you know, following confirmation by the Senate in 2003, I served as Assistant Secretary for Border and Transportation Security Policy and Planning until my resignation from the Department of Homeland Security (DHS) in March of 2005. In this capacity, I was responsible for policy development within the Border and Transportation Security (BTS) Directorate, reporting to Under Secretary Asa Hutchinson and Secretary Tom Ridge. BTS coordinated policy development and operational activities in the fields of immigration and visas, transportation security, law enforcement, and cargo security which largely were carried out in the field by BTS agencies – U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and the Transportation Security Administration. BTS' functions have been subsumed and enhanced under the new DHS structure, including the new DHS Policy Directorate headed by Assistant Secretary Baker which has spearheaded the attempt to gain control of our immigration systems.

You may remember that shortly after leaving DHS a year ago, I appeared before this Subcommittee to discuss immigration enforcement. It is a credit to Chairman Cornyn, Ranking Member Kennedy and many of your colleagues in the House and Senate who have devoted countless hours in the past year to developing bold legislative solutions to

[1] Mehlman Vogel Castagnetti represents several clients with a variety of interests related to immigration matters and CSIS does not take policy positions; thus, this testimony is submitted in my personal capacity and not on behalf of any third party.

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fix our troubled immigration laws. Before turning to the specifics of enforcement at the workplace, I would urge the Congress to seize the moment and pass a comprehensive approach to immigration reform this year. While I recognize the difficult politics inherent in this issue, each day that we struggle under the current legal regime only makes the task more difficult. The issues that you have attempted to resolve this Congress cannot be solved by time or appropriations for enforcement alone. Next year the number of illegal workers will be greater, the disconnect between our economic needs and our laws wider, the politics more inflamed, and the solutions even harder to implement. Now is the time to act and to act in a way that learns from our prior mistakes, not just respond to understandable public anger.

Late last year, the House passed a sweeping enforcement bill, H.R. 4437. Last month, the Senate passed S. 2611 which added to the enforcement provisions wide ranging sections to create a temporary worker program and provide legal status to millions of aliens who have been in country for several years who can pass a background check, maintain employment, pay any back taxes and a fine, and meet other criteria. The Senate bill is not perfect, but the general approach is the correct one. Trying to enact an "enforcement-only" or "enforcement-first" approach is doomed to fail. Only by addressing all of the elements of a sensible immigration plan in one piece of legislation can any of the elements be expected to succeed.

Earlier this year, an informal coalition of former high-ranking officials in DHS and its component agencies with immigration responsibilities signed an open letter to interested parties which argued that the best way to secure our borders was this comprehensive approach to border security. The Coalition for Immigration Security stated in part:

> "But enforcement alone will not do the job of securing our borders. Enforcement at the border will only be successful in the long-term if it is coupled with a more sensible approach to the 10-12 million illegal aliens in the country today and the many more who will attempt to migrate into the United States for economic reasons. Accordingly, we support the creation of a robust employment verification system and a temporary worker program in the context of an overall reform of our border security and immigration laws.
>
> With each year that passes, our country's shifting demographics mean we face a larger and larger shortage of workers, especially at the low-skilled end of the economy. Entire segments of the economy in a growing number of urban and rural areas depend on large illegal populations. Existing law allows only a small fraction of these workers even to attempt to enter the United States legally, even though our unemployment rate has fallen below 5 percent.
>
> Thus, each week our labor market entices thousands of individuals, most from Mexico but many from numerous other countries, to sneak across our border, or to refuse to leave when a temporary visa expires. These numbers add up: DHS apprehends over 1 million migrants illegally entering the United States each year, but perhaps as many as 500,000 get through our defenses every year and add to

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our already staggering illegal immigrant population. As believers in the free market and the laws of supply and demand, we believe border enforcement will fail so long as we refuse to allow these willing workers a chance to work legally for a willing employer.

Most such migrants are gainfully employed here, pay taxes, and many have started families and developed roots in our society. And an attempt to locate and deport these 10 to 12 million people is sure to fail and would be extraordinarily divisive to our country.

But others seeking to cross our borders illegally do present a threat – including potential terrorists and criminals. The current flow of illegal immigrants and people overstaying their visas has made it extremely difficult for our border and interior enforcement agencies to be able to focus on the terrorists, organized criminals, and violent felons who use the cloak of anonymity that the current chaotic situation offers.

An appropriately designed temporary worker program should relieve this pressure on the border. We need to accept the reality that our strong economy will continue to draw impoverished job seekers, some of whom will inevitably find a way to enter the country to fill jobs that are available. A successful temporary worker program should bring these economic migrants through lawful channels. Instead of crossing the Rio Grande or trekking through the deserts, these economic migrants would be interviewed, undergo background checks, be given tamper-proof identity cards, and only then be allowed in our country. And the Border Patrol would be able to focus on the real threats coming across our border. This will only happen, however, if Congress passes a comprehensive reform of our border security and immigration laws.

Moreover, current law neither deters employers who are willing to flout the law by hiring illegal workers, nor rewards employers who are trying to obey the law. Bogus documents abound, and there is currently no comprehensive and mandatory mechanism for employers to check the legality of a worker's status. An effective temporary worker program would include a universal employment verification system based on the issuance of secure, biometrically-based employment eligibility documents and an "insta-check" system for employers to confirm eligibility. We recognize the cost of such programs but believe the cost of the current morass is much greater.

Lastly, individuals who have maintained employment in the United States for many years without evidence of ties to criminal or terrorist behavior should be granted the opportunity to make in essence a plea bargain with law enforcement. By paying a stiff fine and undergoing a robust security check, these individuals can make amends for their mistake without crippling our economy and social structures by being part of a mass deportation. Each day that we fail to bring these people out of the shadows is another day of amnesty by default."

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A full copy of the coalition's letter is attached to this testimony.

In particular, there appears to be an overwhelming consensus now that our country urgently needs a robust program to allow temporary workers to enter the country to fill jobs that cannot be filled by American citizens. We have existing systems in place to conduct security reviews and issue biometrically-enhanced travel documents to current temporary workers that should suffice as an interim measure for the new temporary worker program while the new electronic employer verification system (EEVS) is deployed. Allowing this flow of workers to begin only a year and a half after funds have been allocated to the EEVS, as a provision of S.2611 would require, means we would be adding another 18 months worth of workers being attracted and employed illegally rather than channeling that flow through legal means.

As Congress has been in the legislative phase, I am pleased to see the aggressive approach DHS is taking to put in place a strategic plan to restore integrity to our immigration systems. As some of the political and funding impediments that hindered the efforts of immigration enforcement during my tenure have been overcome, Secretary Chertoff, Assistant Secretary Myers, Commissioner Basham, Chief Aguilar, Assistant Secretary Baker, and Assistant Secretary Beardsworth are to be commended for their Secure Border Initiative which is sweeping in scope and thoughtful in approach. Each of the major elements of SBI needs significant funding and long-term policy commitment to play a part in reversing decades of poorly-designed immigration policy, including:

SBInet: DHS wisely has turned to the ingenuity of the private sector to develop the best mix of technological solutions to enforcement between the ports of entry, with a procurement award expected this fall. Now is the time to take the best current generation technology -- whether it be sensors, cameras, video recognition software, airborne surveillance, biometrics, identification and booking systems, vehicular deterrents, or similar products – and deploy the most effective series of assets that can support the operations of the Border Patrol in the wide variety of physical settings they operate.

Enhanced Detention and Removal: While not as sexy as interdiction assets mentioned above, the ability of ICE to process, hold, and return as many illegal aliens as possible has long been the weakest part of enforcement regime. Bedspace shortages and litigation challenges led to policies like "catch-and-release" and issuance of so-called "run" letters to individuals in deportation proceedings. DHS has made progress in a number of areas in this realm, including the overdue use of expedited removal along the border, the streamlining of deportation proceedings, negotiations with recalcitrant countries to accept deportees, and modest increases in bedspace. However, until there is a credible system that will hold the overwhelming majority of illegal aliens when they are identified by federal, state, or local law enforcement, it will be difficult to claim victory. The bedspace crisis will become especially acute as the other enforcement assets such as the Border Patrol, ICE Investigations, and states working under federal enforcement agreements, become much more effective in providing "customers" to ICE Detention and Removal.

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Turning to employment enforcement issues, it is difficult to imagine a system that could be worse than the current one. While many people point the 1986 immigration law as the cause for this failure, that statute created only part of the current mix of law, enforcement policy, and employer behavior that is notorious now for the following factors:

- Prospective employees are allowed to "prove" their ability to work by producing a number of identification documents which are illegally obtained, easily forged, or used multiple times. In essence we have tried building an enforcement regime on quicksand;
- Prospective employers who would like to obey existing laws have been provided with no tools to ascertain anything but the worse frauds since the documents they review are unreliable and there has been no reliable system to confirm employment eligibility;
- Prospective employers who either are willing to break the law or make no effort to comply have essentially been given a green light due to a lack of enforcement resources and the fact that INS and then DHS announced that enforcement activity was to be concentrated on employers in a handful of industries with national security connections;
- Despite the fact that the Social Security Administration has developed an elaborate system of employee identification to facilitate payment of retirement benefits and investigation of tax compliance, that system essentially has been of little use to immigration enforcement authorities;
- In an era when government requires employers and employees to submit information concerning nearly every aspect of their activities to various agencies; amazingly the only wide-scale program that allows the government to assist employers with eligibility determinations – the so-called Basic Pilot system – is voluntary.

As we sit here today, credit card companies have developed a system that allows secure payments at millions of locations around the world in a matter of seconds, not to mention any computer terminal. Banks have deployed a worldwide network of ATM machines that hand out cash in a matter of seconds. As mentioned above, the Social Security Administration and Internal Revenue Service obtain and analyze enough information about each of us to ensure that the government knows down the last dollar how much we owe in taxes and receive in retirement and other benefits. But there is no system to provide an answer to the following question: Is the person applying for a job an American citizen or a foreign guest eligible to work? This failure is question of will, not of ability.

The American people rightfully are concerned about the current state of affairs, but they are also willing to accept the reality that we cannot expect the EEVS to be fool-proof and universally-applied from day one. Employee verification is not missile defense – some measure of error is to expected and tolerated so long as it does not deny U.S. citizens the opportunity to work. Thus, as Congress continues drafting legislation to create the EEVS, I make the following recommendations:

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- Phased-in approach: The EEVS should be applied to employers in phases, starting with the most sensitive employers such as aviation, chemical or other critical infrastructure, as S.2611 requires;
- Employee rights: Especially during the initial phases of EEVS, enforcement activities should err on the side of employees claiming to the legitimate U.S. citizens before requiring termination. As the system improves and legacy workers transition into new documents and jobs, what we ask of employees and employers should be increased but as the system is turned on, we cannot expect perfection. Allowing some initial flexibility may also minimize the need to require DHS, and by extension taxpayers, to pay for damages in cases where people were in appropriately denied work authorization. Eventually over 50 million workers may be subject annually to the EVS and nothing will cause the worthy goal of EEVS to collapse faster than horror stories of American workers being denied employment because of faulty government databases;
- REAL ID implementation: Unless and until a new system of biometrically-enhanced identification documents is deployed, the EEVS likely will be heavily dependent on U.S. citizens obtaining and presenting REAL ID compliant driver's licenses. Thus DHS must keep the process of issuing implementing regulations for REAL ID on track and Congress must help states with the massive cost of REAL ID compliance;
- Biometrics: Basing EEVS on non-biometric identifiers such as Social Security Numbers and immigration control numbers may be the best short-term fix, but the next phase of EEVS must be biometrically-based to derive the enforcement and facilitation benefits that only biometric databases can deliver. In essence, we need a database of legitimate worker identification akin to the US-VISIT database of foreign travelers which has been extremely effective in finding criminals and imposters and clearing those with biographic information similar to wanted individuals. This type of system would be especially helpful in deterring potential discrimination against non-citizens eligible to work and those who "look" like illegal aliens;
- Private sector involvement: U.S. Citizenship and Immigration Services (CIS) has made commendable progress in speeding up the backlog of service applications and including additional security checks on applicants. However, the Herculean task of building EEVS and tying it to Social Security and enrolling tens of millions of prospective employees including millions of temporary workers is a job where we will need the best and brightest private sector solutions. Much like US-VISIT and SBI, the private sector should be challenged to propose and implement innovative solutions to each aspect of EEVS under the supervision of DHS and its component agencies;
- Fees: Asking U.S. employers to spend corporate funds to comply with government mandates is a reasonable request, as we have done in areas such as environmental, tax, and accounting compliance. Imposing a flat tax for the privilege of hiring a domestic worker to fund the government side of the EEVS is not reasonable or consistent with our history of encouraging a robust domestic economy. Building the EEVS is a core governmental responsibility which should come partially from fees on foreign workers seeking entry into the country and partially from general taxpayer revenues.

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Building an effective EEVS is the lynchpin to the entire effort to secure our borders. It will require significant funding, oversight, cooperation with the private sector, and explanation to the public.

As I testified last year, we should be attempting to build an immigration system based on the principals of "deter and reward": Those who are seeking to enter our country to work must be faced with a reality that crossing our borders illegally or attempting to work without proper certifications will be detected and punished with long-term consequences for violations. In contrast, those that follow the rules on applying for work, passing a security check, and crossing the border legally should be rewarded with employment, retirement and travel privileges. By the end of this decade, we should be able to look back in amazement to an era when illegal employment was tolerated and our immigration enforcement efforts fodder for late night comedians.

I congratulate the Committee and Subcommittee for its thoughtful work on these most difficult issues. I thank you for the opportunity to appear before you today and look forward to your questions.

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