



**Testimony of**

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**Oversight Hearing on the**  
**Shortfalls of the 1986 Immigration Reform Legislation**

**Before the**  
**Subcommittee on Immigration, Citizenship, Refugees, Border Security, and**  
**International Law**  
**Committee on the Judiciary**  
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Madam Chairwoman and Distinguished Members of the Subcommittee:

My name is Muzaffar Chishti, and I am Director of the Migration Policy Institute's office at New York University School of Law. Thank you for inviting me to testify before your committee on the "shortfalls of the 1986 immigration reform legislation."

## **Introduction**

As Congress tries to grapple with today's immigration policy challenges, the lessons learned from the Immigration Reform and Control Act of 1986 (IRCA)<sup>1</sup> provide an extremely useful backdrop.

IRCA was an important milestone in our nation's immigration law and policy. It was the first major attempt by Congress to address the problems of unauthorized migration. Its passage was several years in the making. The recommendations of a high-profile congressionally appointed Select Commission on Immigration and Refugee Policy (SCIRP) provided the broad parameters for the legislation. Though various versions of IRCA were passed by the Senate in 1982, 1983, and 1985, legislation materialized only in 1986. Even in 1986, the legislation only won final approval in the closing days of the congressional session.

IRCA was clearly a product of a number of political compromises, which diluted its effectiveness. Thus, though IRCA deserves its rightful place as a historic piece of legislation, it suffered from a number of drawbacks in its design and implementation. Many of those shortfalls have contributed to the present dilemma in our immigration policy.

IRCA sought to counter illegal immigration through a "three-legged stool" of increased border security, sanctions for employers who hired unauthorized workers, and a legalization program for unauthorized immigrants living in the country for certain number of years. The program aimed to "wipe the slate clean" on the illegal immigration problem. However, 21 years after the law's passage, the population of unauthorized immigrants in the United States has grown three-fold from an estimated 4 million in 1986 to an estimated 12 million today. The country has poured ever-increasing dollars into border enforcement, but roughly 400,000 unauthorized immigrants cross our border undetected each year. And evidence suggests that many employers continue to hire unauthorized immigrants either unknowingly, or willfully, with impunity.

In this testimony, I will focus on three areas related to the design and implementation of IRCA. In the first part, I will highlight the failure of the law to provide for the future economic and labor market needs of the country. In the second part, I will examine the critical drawbacks of the employer sanctions component of the law. And in the third part, I will outline the lessons — both positive and negative — that can be drawn from the legalization program of the law.

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<sup>1</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-639, 100 Stat. 3359 (IRCA).

## I. IRCA's Failure to Provide for Future Labor Needs

The major failure of IRCA, ultimately, was its narrow focus. By dealing almost exclusively with issues related to unauthorized immigration, it failed to anticipate or make provisions for the continuing demand for workers in the United States, especially in the low-skill labor market. Without a plan for managing the labor market needs, and the supply of foreign workers to fill those needs, the “three-legged” solution to illegal migration collapsed under the weight of economic and demographic forces.

### *Low-Skill Immigrants in Strong Demand, and Supply*

According to the best available estimates, the unauthorized immigrant population dropped to 2.5 million by 1989 following the IRCA legalization, but then grew by an average of 360,000 a year until 1996, and by roughly over 500,000 a year since then.<sup>2</sup> Illegal immigration was and is primarily a response to laws of supply and demand — workers filling workforce openings — that have proven more powerful than immigration enforcement. Two-thirds of today's total unauthorized population is working, accounting for slightly less than five percent of the labor force nationwide. Almost three out of five unauthorized women and 94 percent of unauthorized men are in the labor force.<sup>3</sup> The unauthorized population is overrepresented in a growing number of occupations. Unauthorized workers make up 24 percent of workers in farming occupations, 17 percent in cleaning services, 14 percent in construction, and 12 percent in food preparation.<sup>4</sup>

The country has depended heavily on immigrant workers, both legal and illegal, for labor force growth in recent decades. About 50 percent of the growth in the U.S. labor force between 1990 and 2000 was due to new immigrants, a share that increased to 60 percent between 2000 and 2004.<sup>5</sup> The United States has also depended on immigrant workers to maintain a balance of skill levels in the workforce. As the educational level of native-born workers has steadily increased, this has left fewer native-born workers available for low-skilled jobs.<sup>6</sup> While about one-quarter of the foreign born in the United States have a bachelor's degree or more, one-third have not completed high school, and have thus become a vital labor pool for the hundreds of thousands of essential jobs that require relatively few skills.<sup>7</sup>

The country's dependence on foreign labor over the past few decades will be eclipsed by the importance of foreign labor in our country's future. A large increase in native-born 25- to 54-year-old workers, particularly women and baby boomers, came into the workforce during the last 35 years. This age group accounted for the majority of labor force growth between 1980 and

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<sup>2</sup> Jeffrey S. Passel, “The Size and Characteristics of the Unauthorized Migrant Population in the U.S.” (Washington, D.C.: Pew Hispanic Center, 2006).

<sup>3</sup> Ibid.

<sup>4</sup> While unauthorized workers make up only less than 5 percent of the total U.S. workforce, they make up a significantly greater share of the workforce in a growing number of occupations. Ibid.

<sup>5</sup> Andrew Sum, et al., “New Foreign Immigrants and the Labor Market in the U.S.” (Boston, MA: Center for Labor Market Studies, Northeastern University, January 2005).

<sup>6</sup> David Ellwood, “How We Got Here,” in *Grow Faster Together. Or Grow Slowly Apart* (Washington, D.C.: The Aspen Institute Domestic Strategy Group, 2002).

<sup>7</sup> B. Lindsay Lowell, Julia Gelatt, and Jeanne Batalova, “Immigrants and Labor Force Trends: The Future, Past, and Present,” Task Force Insight No. 17 (Washington, D.C.: Migration Policy Institute, July 2006).

2000. However, the baby boom generation is now aging into retirement. By 2020, all 78 million baby boomers will be above the age of 55, and the oldest baby boomers will be 74. The number of new native-born workers entering the workforce may be high enough to maintain the size of the U.S. labor force, but with so many baby boomers retiring, they will not be able to contribute to the growth of the labor force. Any increase in the labor force over the next 15 or so years will come from only two sources — baby boomers working into traditional retirement years and immigrants.<sup>8</sup>

Between 2004 and 2014, about 54.7 million jobs will open up, due either to new jobs being created or to workers retiring or leaving the labor force.<sup>9</sup> Of these jobs, over half (58.6 percent) will require only a high school degree or perhaps some vocational training or college.<sup>10</sup> Given that the trend of rising educational attainment among native-born workers is likely only to accelerate, the country will increasingly rely on immigrant workers to fill the low-skill jobs of the future. Immigrants are already overrepresented in many of the, mainly low-skill, occupations projected to create the most new jobs by 2014.<sup>11</sup> And, immigrants are employed at high rates in jobs, such as home-care aides and medical support workers, which will be important in serving tomorrow's aging population.<sup>12</sup>

Not only labor market trends, but also demographic trends suggest a strong need for immigrant labor in coming years. The aging of the baby boom generation will greatly shift the age profile of the population in the United States. By 2030, a full 31 percent of the U.S. population will be age 55 or older. The aging population will raise the elderly dependency ratio — the number of retired dependents relative to economically active workers — leaving a greater number of elderly to be supported by each worker. Immigration alone cannot forestall looming strains on social assistance programs for the elderly, as it would take millions of young immigrants over a long period to change the age structure of the population. However, infusions of young, tax-paying immigrants are an important part of addressing the shortfalls that lie ahead in terms of numbers of high- and low-skilled workers and in social insurance programs.<sup>13</sup>

### *Lack of Legal Channels for Low-Skill Workers*

While the need for low-skill immigrant workers has become increasingly evident, legal channels for their entry are almost nonexistent. The current employment-based immigration selection system makes 5,000 permanent visas available each year for low-skill workers.<sup>14</sup> The temporary

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<sup>8</sup> Ellwood, “How We Got Here” (see n. 6).

<sup>9</sup> Daniel E. Hecker, “Occupational Employment Projections to 2014,” *Monthly Labor Review* 128, No. 11 (November 2005): 70-101.

<sup>10</sup> *Ibid.*

<sup>11</sup> The 15 occupations forecast to create the largest number of new jobs between 2004 and 2014 include 10 requiring only short- or moderate-term on-the-job training, suggesting low-skilled immigrant could contribute to meeting the demand for these types of jobs. According to 2000 Census data, immigrants were already overrepresented in five of these occupations. Daniel E. Hecker, “Occupational Employment Projections to 2014” (see n. 9); Lowell, Gelatt, and Batalova, “Immigrants and Labor Force Trends” (see n. 7).

<sup>12</sup> *Ibid.*

<sup>13</sup> Richard Jackson, “The Global Retirement Crisis” (Washington, D.C.: Center for Strategic and International Studies, April 2002).

<sup>14</sup> Although the Immigration and Nationality Act (INA) provides 10,000 visas for low-skilled workers, this number has been temporarily reduced to 5,000 to make visas available under the Nicaraguan and Central American Relief Act of 1997 (NACARA). The reduction will last as long as is necessary to offset adjustments under the NACARA

workers programs in the current law (like the H-2A and H-2B programs) are designed for seasonal or short-term jobs, not for more permanent jobs.

With very few options for entering legally through employment-based visa categories, intending immigrants could try to enter through the family-based categories. But to be eligible for the family-based visas, they need to have a sponsoring relative. Even if they do have a qualified sponsoring relative, the wait lists for many of these categories are prohibitively long. For example, U.S. citizens trying to sponsor unmarried adult children from abroad have to wait about six years for a visa to free up, while those sponsoring unmarried adult children from Mexico and Philippines have to wait over 15 years. Spouses and minor children of lawful permanent residents have to wait over five years. For U.S. citizens sponsoring siblings from the Philippines, the wait extends to 22 years.<sup>15</sup>

Thus, in the absence of legal channels, immigrants entering our labor market have come to rely on illegal channels.

### *Managing Future Flows through New Legal Channels*

To accommodate the labor needs of our economy and to manage the future flow of workers from abroad, a new category of visas should be created. Many proposals for future flows of immigrants have been offered in the current immigration debate. The one I propose is to create a provisional worker category for jobs that are not seasonal or temporary. Creating a provisional worker category is part of a set of recommendations made recently by the Independent Task Force on Immigration and America's Future, convened by the Migration Policy Institute.<sup>16</sup>

The provisional worker category would bridge the false divide that now exists between certain forms of temporary and permanent immigration, and create an integrated system that organizes immigration around the ways immigrant flows and labor markets work in practice. The provisional visa category would be carefully structured to assure that it does not inherit the mistakes of the Bracero-type work programs of the past. The Bracero-type programs have a troubling legacy of abuse and exploitation. Such programs tie workers to their sponsoring employers, circumscribe the labor rights of foreign workers, and, in turn, undermine the interests of U.S. workers. Such programs also explicitly foreclose the integration of workers in the host society. The experience of those programs should not be repeated.

Provisional visas would allow workers of all skill levels to enter the country for up to two periods of three years each. Workers would be sponsored by employers, but workers would have the freedom to change employers after an initial period of employment in the United States. Provisional workers would have the same labor protections as similarly employed U.S. workers,

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program. U.S. Department of State, "Visa Bulletin for July 2006," [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_2943.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_2943.html).

<sup>15</sup> U.S. Department of State, "Visa Bulletin for May 2007," [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_3219.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_3219.html).

<sup>16</sup> Doris Meissner, Deborah W. Meyers, Demetrios G. Papademetriou, and Michael Fix, *America's Future: A New Chapter*, Report of the Independent Task Force on Immigration and America's Future (Washington, D.C.: Migration Policy Institute, September 2006).

including the right to bring action against employers in court. Provisional workers would be able to bring their family members with them.

Provisional visas would allow employers and workers the flexibility to exercise choices before committing to permanent immigration. Workers would have the flexibility of working for a period before returning home, if they choose, or of adjusting to permanent resident status. Permanent residence would be contingent on proof of employment opportunity in an occupation relevant to their education and training, ability to speak English, and passage of security and background checks.

Employers of most provisional workers would be required to participate in a highly regulated labor attestation process or become pre-certified sponsors of provisional workers. The initial penalty for noncompliance with attestation or pre-certification requirements would be to forfeit the ability to hire foreign workers for a designated time period. Employers would pay significant fees, and the revenue generated from them would be used to meet a wide range of immigration capacity-building needs.

The number of provisional visas would initially be set to approximate current flows of such workers who enter both legally and illegally. The numbers would then be adjusted according to recommendations made by a Standing Commission on Immigration and Labor Markets. This Standing Commission would be responsible for making recommendations to Congress every two years for adjusting immigration levels, based on analyses of labor market needs, unemployment patterns, and changing economic and demographic trends.

## **II. The Shortfalls of the Employer Sanctions Provisions of IRCA**

### *Experience with Employer Sanctions*

IRCA was the first legislation ever to sanction employers for hiring unauthorized immigrants. The “employer sanctions” provisions were a critical element of the long-debated IRCA legislation. They came with the compelling dual promise that they would reduce illegal immigration and improve the wages and labor standards of U.S. workers. Twenty years of experience with employer sanctions, however, suggest that the promise has not been met. Thus there is good reason to be skeptical about their effectiveness.

As mentioned earlier, illegal immigration has grown almost three-fold since 1986. It has grown dramatically in the last ten years, with over half a million immigrants added to the unauthorized population every year. Furthermore, wages and working conditions in the low-wage sector of the labor market have shown no signs of improvement. In 2004 for example, 7.8 million of U.S. workers were classified as “working poor,” i.e., earning below the federal poverty level.<sup>17</sup> Government studies have found that 100 percent of poultry industry employers, 60 percent of nursing homes, and between 26 to 65 percent of employers in the garment industry (depending

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<sup>17</sup> U.S. Bureau of Labor Statistics, A Profile of the Working Poor (May 2004)

on the geographical location) were in violation of basic minimum wage and overtime protections.<sup>18</sup>

Not only have employer sanctions failed to fulfill their promise of reducing illegal immigration and improving wages and working conditions, they have also raised some important collateral concerns. Foremost among these concerns is discrimination in the workplace. The congressionally mandated study by the General Accounting Office (GAO) concluded that employer sanctions have resulted in discrimination against “foreign appearing” or “foreign sounding” workers.<sup>19</sup> Concerned about possible penalties, some employers have used national origin and ethnic background as a proxy for unlawful status. Some have implemented “citizens-only” hiring policies. The GAO report found that the “widespread” pattern of discrimination was attributable “solely” to IRCA.<sup>20</sup> This was a strong claim to make, but one for which the GAO found substantial evidence: Nineteen percent of U.S. employers began national origin or citizenship discrimination as a result of the law, with higher numbers in areas with significant Hispanic and Asian populations.<sup>21</sup>

Another collateral concern is the emergence of a growth industry in fraudulent documents. IRCA requires employers to fill out and retain an I-9 form for the workers they hire. On the I-9 form, employers attest that they have examined documents that establish the workers’ identity and eligibility to work lawfully. However, there is no requirement that the employers verify the authenticity of the documents presented. Without verification, employers find it easy to comply with the letter of the law, and unauthorized workers procure the documents they need to be hired. Thus, there is a high degree of compliance on paper alongside rampant use of fraudulent documents. The highly publicized December 2006 raids by the Immigration and Customs Enforcement (ICE) at various plants of the Swift meatpacking company targeting the use of fraudulent documents have brought to attention the prevalence of such documents.<sup>22</sup>

Lastly, some employers have used employer sanctions as an effective tool to retaliate against workers who assert their rights under various labor protection statutes.<sup>23</sup> Some employers choose to verify or re-verify a worker’s status only when the worker asserts rights such as those related to wage, hour, health, and safety standards or to joining a union.<sup>24</sup>

In this regard, a 2002 Supreme Court decision represents an important reversal in the ability of unauthorized workers to pursue claims against their employers. In *Hoffman Plastic Compounds Inc. v. NLRB*, the court held that a worker unlawfully terminated in retaliation for his labor

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<sup>18</sup> U.S. Department of Labor, Employment Standards Administration, “FY 2000 Annual Performance Report Summary,” March 31, 2001; U.S. Department of Labor, Wage and Hour Division, “Nursing Home 2000 Compliance Survey Fact Sheet” (2000); U.S. Department of Labor, Wage and Hour Division, Garment Compliance Surveys for New York City, Los Angeles, and San Francisco, various years.

<sup>19</sup> U.S. General Accounting Office, Report to the Congress, “Immigration Reform: Employer Sanctions and the Question of Discrimination” GAO/GGD-90-62 (March 1990), <http://archive.gao.gov/d24t8/140974.pdf>.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Julia Preston, “U.S. Raids 6 Meat Plants in ID Case,” *The New York Times*, December 13, 2006.

<sup>23</sup> Muzaffar Chishti, “Employer Sanctions Against Immigrant Workers,” *WorkingUSA, The Journal of Labor and Society*, March-April 2000.

<sup>24</sup> Ibid.

organizing activities is not eligible for back pay under the National Labor Relations Act, if the worker is unauthorized.<sup>25</sup> The Supreme Court ruled that the employer sanctions provisions of the immigration law prevail over a conflicting labor protection statute like the National Labor Relations Act. Thus, certain labor protections — historically guaranteed to all workers in the United States — may not apply to unauthorized workers because of the employer sanctions provisions of ICRA. Although the *Hoffman Plastic* case related to the eligibility for back pay, the decision has been cited to justify denial of other worker benefits such as workers' compensation.<sup>26</sup> If it was not already the case pre-*Hoffman Plastic*, certainly post-*Hoffman Plastic*, employers have a new, perverse incentive to hire unauthorized workers.

The ineffectiveness (and low priority to the federal government) of employer sanctions is also reflected in federal spending patterns. Immigration enforcement spending in general has increased five-fold since 1986, from \$1 billion to almost \$5 billion.<sup>27</sup> However, less than 10 percent of that has flowed to employer enforcement activity.<sup>28</sup> An average of 6,600 worksite enforcement cases per year were completed by the Immigration and Naturalization Service (INS) between 1991 and 1998, or less than 10 percent of the interior enforcement activity.<sup>29</sup> Between 2000 and 2003, the number of cases the INS and the Immigration and Customs Enforcement (ICE) completed fell to fewer than 2,200 annually, or less than 3 percent of the enforcement activity.<sup>30</sup> Only three notices of intent to fine were issued against employers in fiscal year 2004.<sup>31</sup> For noncompliant employers, the cost savings from employing illegal labor can outweigh the possible cost of sanctions. Fines range from \$100 to \$1,000 per unauthorized immigrant for paperwork errors, and from \$250 to \$10,000 for substantive violations. The range has not changed since 1986.<sup>32</sup>

In sum, the employer sanctions policy has been notoriously ineffective. It has yielded few benefits and extracted significant costs. It has been ineffective in reducing unauthorized immigration, but has helped encourage widespread use of fraudulent documents, and has undermined some important rules of the workplace.

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<sup>25</sup> *Hoffman Plastic Compounds Inc. v NLRB*, 535 U.S. 137 (2002).

<sup>26</sup> Anne Marie O'Donovan, "Workers' Compensation for Immigrants after Hoffman Plastics," *N.Y.U. Review of Law and Social Change* (2005).

<sup>27</sup> David Dixon and Julia Gelatt, "Immigration Enforcement Spending since IRCA," Task Force Fact Sheet No. 10 (Washington, D.C.: Migration Policy Institute, November 2005), [http://www.migrationpolicy.org/pubs/FactSheet\\_Spending.pdf](http://www.migrationpolicy.org/pubs/FactSheet_Spending.pdf).

<sup>28</sup> U.S. Department of Justice, *Statistical Yearbook of the Immigration and Naturalization Service*, 1991-1998. (Washington, D.C.: Department of Justice, Immigration and Naturalization Service, 1993-2000).

<sup>29</sup> *Ibid.*

<sup>30</sup> U.S. Department of Homeland Security, *Yearbook of Immigration Statistics: 2004* (Washington, D.C.: Department of Homeland Security, Office of Immigration Statistics, 2006).

<sup>31</sup> U.S. General Accounting Office, "Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts" GAO-05-813 (August 2005).

<sup>32</sup> Marc R. Rosenblum, "Immigration Enforcement at the Worksite: Making it Work," Task Force Policy Brief No. 6 (Washington, D.C.: Migration Policy Institute, November 2005), <http://www.migrationpolicy.org/ITFIAF/PolicyBrief-6-Rosenblum.pdf>.

### *Experience with the Verification System*

The proponents of employer sanctions have, with some merit, argued that a major reason for the failure of sanctions is the plethora of documents that workers can use to establish their eligibility to work, and the ease with which such documents can be fraudulently obtained. In response, Congress created an electronic employment eligibility pilot program as part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>33</sup> The program, known as the Basic Pilot, allows employers to directly access Social Security and immigration databases and verify the employment eligibility of a worker. If the eligibility of the worker is not verified, the employer receives a secondary verification response, and the worker is given eight days to verify his/her eligibility with the Social Security Administration (SSA) or Citizenship and Immigration Services (USCIS). If the agencies are unable to verify the worker's employment eligibility, the employer must terminate the worker.

In 1997, the Basic Pilot started operating in five states, and in 2003, Congress extended it to all 50 states.<sup>34</sup> The pilot program is primarily voluntary, although some employers found to have violated immigration laws may be required to participate in the program. Somewhat over 15,000 employers have registered to use the pilot program, though not all participating employers actively use the system.<sup>35</sup>

As part of a congressionally mandated study, the Institute of Survey Research at Temple University and Westat evaluated the Basic Pilot. Their 2002 evaluation report found critical problems with the program, mostly related to database inaccuracies and misuse of the system by participating employers.<sup>36</sup>

The evaluators found that the Basic Pilot generates a high level of "tentative non-confirmation" notices, i.e., notices that fail to verify an authorized worker's eligibility to work.<sup>37</sup> Although both the SSA and USCIS databases suffer from inaccuracies, the USCIS database is less reliable because it fails to efficiently update the information on immigrants' status. Thus, non-citizens are more likely to be affected by data inaccuracies than citizens. Twenty percent of non-citizens and 13 percent of citizens are not verified for employment at the initial stage.<sup>38</sup> They can only be verified if they contact the SSA or USCIS offices to resolve discrepancies in their information, which needs to be done manually by the agencies.<sup>39</sup> Ninety percent of tentatively non-confirmed

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<sup>33</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009.

<sup>34</sup> Basic Pilot Program Extension and Expansion Act of 2003. Pub. L. No. 108-156, 117 Stat. 1944-1946.

<sup>35</sup> Emilio T. Gonzalez, Director, U.S. Citizenship and Immigration Services (USCIS), Testimony before the House Subcommittee on Homeland Security, Hearing on Immigration Reform and the Temporary Worker Program, 110th Cong., 1st sess., March 27, 2007; Information obtained from the Office of Policy and Strategy, U.S. Citizenship and Immigration Services, July 21, 2006.

<sup>36</sup> Temple University Institute for Survey Research and Westat, "Findings of the Basic Pilot Program Evaluation" (June 2002). See also, National Immigration Law Center, "DHS Basic Pilot Program," Basic Information Brief (Washington, D.C.: NILC, October, 2006).

<sup>37</sup> Ibid.

<sup>38</sup> Kevin Jernegan, "Eligible to Work? Experiments in Verifying Work Authorization," Task Force Insight No. 8 (Washington, D.C.: Migration Policy Institute, November 2005).

<sup>39</sup> Ibid.

applicants fail to pursue their cases for a variety of reasons.<sup>40</sup> However, the 2002 evaluation studies found that less than one-tenth of 1 percent of all submissions were ultimately determined to be from persons unauthorized for employment, though it is unclear how many of those who failed to contest their tentative nonconfirmation findings may have also been unauthorized for employment.<sup>41</sup>

More recent examinations of the Basic Pilot continue to suggest that the data inaccuracies remain unresolved. The Department of Homeland Security (DHS) and GAO issued reports in 2004 and 2005, respectively, which identified the Basic Pilot program's unacceptably high tentative nonconfirmation rates for non-citizens.<sup>42</sup>

In addition to the issue of data accuracy, evaluation of the Basic Pilot has also identified a disturbing trend of unlawful practices engaged in by a number of participating employers. For instance, some employers screen applicants for their employment eligibility before making an offer of employment.<sup>43</sup> Such practices not only deny the worker a job, but also the opportunity to contest database inaccuracies.

Because of the serious problems that they identified in the Basic Pilot, the independent evaluators concluded that that the pilot was "not ready for a larger scale implementation."<sup>44</sup> The GAO in 2005 also cautioned against the expansion of the program.<sup>45</sup>

Despite these notes of caution, recent immigration reform bills that passed the House and the Senate in the 109th Congress would mandate the use of the Basic Pilot for all employers. The House bill, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437), required employers to use an expanded Basic Pilot system to verify the work eligibility of all new hires within two years of the bill's enactment, and to verify the eligibility of all workers within six years.<sup>46</sup> The Senate bill, the Comprehensive Immigration Reform Act of 2006 (S. 2611), required electronic verification of new hires within 18 months after an appropriation of \$400 million to upgrade the Basic Pilot database.<sup>47</sup>

A massive expansion of the verification system that mandates all U.S. employers to participate is a major undertaking. As noted above, the current Basic Pilot has only 15,000 participating employers — less than half of 1 percent of all U.S. employers. A universal verification system will need to include more than 8 million employers and 144 million workers, and process more than 50 million hiring decisions each year.<sup>48</sup> To achieve this will require a qualitatively different commitment on the part of the government, employers, and representatives of workers.

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> U.S. Citizenship and Immigration Services, "Report to the Congress on the Basic Pilot Program" (June 2004); GAO, "Weaknesses Hinder Employment Verification" (see n. 31).

<sup>43</sup> Temple University Institute for Survey Research and Westat, "Findings of the Basic Pilot Program Evaluation" (see n. 36).

<sup>44</sup> Ibid.

<sup>45</sup> Ibid; GAO, "Weaknesses Hinder Employment Verification" (see n. 31).

<sup>46</sup> Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437), Title VII.

<sup>47</sup> The Comprehensive Immigration Reform Act of 2006 (S. 2611), Title III.

<sup>48</sup> Meissner et al. *Immigration and America's Future* (see n. 16).

## *Outline of a Workable Verification System*

Despite the problems associated with employer sanctions enforcement and the Basic Pilot, the time for an electronic employment verification system has arrived. The bills passed by both the House and the Senate last year reflect the reality that such a system currently has strong political support. The organized business community now supports a verification system that offers employers predictability and access to a legal workforce, and the ability to hire individuals whose status can be verified in a simple, reliable way.<sup>49</sup> Changes in technology have made more people accustomed to accessing information electronically for many day-to-day chores. Finally, illegal immigration has increased at such an alarming rate that new measures need to be tested. Hiring unauthorized workers has become the new norm and an acceptable business practice today. In the absence of viable alternatives, key constituencies are now prepared to work with government agencies and Congress to build in appropriate safeguards instead of opposing verification measures altogether.<sup>50</sup>

While the current immigration debate has acknowledged the need for a new employer verification system, the bills that passed the House and the Senate last year do not provide an adequate framework for a successful system. The following key elements must be met for a universal, mandatory verification system to be effective.

Improvements to Verification Databases: Legislation that does not address and correct the flaws identified in the Basic Pilot program will fail. The first task needed is to dramatically improve the accuracy and completeness of the databases used to verify worker eligibility. The USCIS immigration database needs special attention. It should reflect changes in a person's immigration status without delay. The system should allow individuals to access and correct recorded information such as the spelling of their names, changes in their married names, or the word order of uncommon foreign names. In addition, it would be helpful to integrate all visa issuance and admission databases with the existing databases in the Basic Pilot to achieve a more complete database.

Sufficient and sustained resources must be afforded to USCIS and SSA to upgrade their databases and improve the linkages among them. In particular, the Verification Division in the Citizenship and Immigration Services, charged with overseeing the verification program from the USCIS end, must be fully staffed.

Worker Protection Provisions: The statute and the implementing regulations should include worker protection provisions to prevent the abuses identified in the Basic Pilot program. For example, there should be meaningful penalties against employers who violate the security and privacy of workers or discriminate against them on the basis of race, national origin, or citizenship. Similarly, employers who submit an applicant's name for verification prior to an

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<sup>49</sup> Angelo I. Amador, U.S. Chamber of Commerce, Testimony before the House Subcommittee on Workforce, Empowerment, and Government Programs, Hearing on Immigrant Employment Verification and Small Business, 109th Cong., 2nd sess., June 27, 2006.

<sup>50</sup> See, for example Cecilia Munoz, Vice President, National Council of La Raza, before 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, 109th Cong., 2nd sess., June 19, 2006; Amador, Testimony (see n. 49).

offer of employment, submit a worker's name to the verification system in response to a union organizing campaign, or terminate a worker on the basis of unresolved nonconfirmations should be penalized. An administrative and judicial review process should be established by which a worker can appeal an adverse finding of eligibility.

Stakeholder Engagement: DHS should create a new Workplace Enforcement Advisory Board to respond to the political and policy challenges that accompany a universal electronic verification system. The advisory body should be comprised of representatives of the key constituencies whose cooperation, expertise, and support are vital for the system to succeed. It should include representatives from executive branch agencies; state governments; business, labor, and immigrant communities; as well as civil liberties, security, and privacy interests. Given the history of workplace enforcement and the reach of a universal, mandatory verification system, the new initiative will require the active engagement and long-term commitment of these important constituencies.

Secure Documents: In addition to confirming that job applicants are eligible to work, an effective verification system must also assure that individuals have valid, secure identification documents that tie the cardholder to the information on the card. It is time to develop a secure, biometric, machine-readable Social Security card that allows citizens to easily establish both their identity and eligibility to work<sup>51</sup>

A Realistic Timeline: Addressing the flaws of the Basic Pilot program and extending it to the full universe of U.S. employers will require an extraordinary amount of preparation. It is unrealistic to implement a program in the timelines prescribed in the bills passed by the last Congress and mentioned earlier. A rush to appear "tough" on workplace enforcement will harm innocent workers, disrupt hiring practices and productivity, encourage noncompliance, and further undermine the legitimacy of immigration enforcement.

The new verification program should be phased-in over a period of at least three years. In the first year, resources and staffing should be directed at improving the databases to be used in the program. Staff should be trained for implementing the program, including its evaluation and oversight. In addition, the Workplace Enforcement Advisory Board should be created.

In the second year, regulations should be issued to protect workers against employer and government agency abuses identified earlier. An aggressive outreach and education program regarding these rules and their enforcement should be launched. Upgrades of the databases and their coordination should continue.

In the third year, groups of employers should be designated for participation in a pilot akin to the Basic Pilot. The size and scope of the groups initially designated for mandatory participation should be decided by the Secretary of Homeland Security, in consultation with the Workplace Enforcement Advisory Board. The program should start with industries of particular sensitivity to terrorism concerns, such as chemical plants and transportation facilities. It should then be

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<sup>51</sup> For estimates of the cost of creating such a new card, see U.S. Government Accountability Office, "Social Security Administration: Improved Agency Coordination Needed for Social Security Card Enhancement Efforts," GAO-06-303 (March 2006), <http://www.gao.gov/new.items/d06303.pdf>.

extended to a larger group of employers based on an analysis of the system's error rates in the upgraded databases and the effectiveness of the privacy and worker protection provisions in the re-designed system. Wider (and eventually universal) participation should be phased-in gradually only upon the determination by the Secretary of DHS and the Advisory Board that mandatory participation has not imposed undue burdens on employers or authorized workers or led to serious violations of worker protections.

Employer Compliance with the System: However well designed the electronic verification system, its ultimate success requires a sustained and labor-intensive commitment to enforcement. An electronic verification system will be a useful tool to employers who are committed to hiring only authorized workers. It is ineffective against employers who actively seek unauthorized workers because they are exploitable. Such employers will simply hire these workers "off the books," without accessing the verification system. This would be particularly true in the informal sector of the labor market. The only way to discipline such employers is by physically inspecting the workplaces, and inspecting them on a sustained basis. Such strict and intensive enforcement requires significantly more manpower than has been committed in the past.

Restoring Labor Protections: The exploitative practices of habitual employers of unauthorized workers also need attention. Congress should clarify, by statute, that employers cannot use the immigration status of a worker as a defense against liability for violations of any labor and employment laws. In the absence of such a clear statement from Congress, the Supreme Court's decision in *Hoffman Plastic* provides employers an incentive to hire unauthorized workers.

Comprehensive Immigration Reform: Finally, a mandatory employment verification system will be successful only if it is a part of a comprehensive immigration reform package. The critical elements of the reform package must be a broad legalization program for the current pool of unauthorized workers, and a new expanded employment-based immigration stream that allows workers in the future to migrate to the United States through legal channels. These two measures will significantly decrease the number of unauthorized workers in the U.S. labor market, and are thus a necessary foundation for a successful immigration enforcement effort at the workplace.

### **III. Lessons from the IRCA Legalization Program**

My views on the 1986 legalization program are significantly informed by the experience I had in the implementation of that program. In 1986, I directed the immigration project of the International Ladies' Garment Workers' Union, a predecessor union of UNITE-HERE. In that capacity, I oversaw the union's program to legalize the status of its unauthorized immigrant members. I also worked with the legacy Immigration and Naturalization Service (INS) and national immigrant defense organizations on various aspects of the legalization program more broadly.

The legalization program, in hindsight, was the most successful element of the IRCA legislation. It remains the largest legalization program conducted in history. Over 2.7 million people were legalized under its provisions. Over three-fourths of those who were eligible did apply for legalization, and close to 90 percent of them were approved. The special unit of the INS that implemented the program rose to the occasion, and made an extra effort to ensure the program

was successful. The agency showed its softer side. Many newly minted legalization offices became known as islands of civility, good cheer, and openness in a bureaucracy that had a reputation for being hostile to immigrants. Adjudication of applicants, especially in the general legalization program, was done in a fair and generous manner. A special unit was established to consider appeals from denials of applications. Collaborative efforts with community-based organizations were initiated for outreach and implementation of the program.

Despite the success of the 1986 legalization program, important lessons from that experience are relevant for any future legalization program. They are outlined here.

1. For any legalization to be successful, it must be as inclusive as possible, and invite as little fraud as possible. The law should not disqualify large sections of the unauthorized population, or create different tiers of eligibility for benefits. Such provisions create obvious incentive for fraud. The Special Agricultural Worker (SAW) legalization program in IRCA experienced significant fraud, because unauthorized immigrants who were ineligible under the general legalization program attempted to qualify for the more liberal SAW program.
2. The lessons of IRCA suggest that the legalization process should be simple, with an eligibility date as close to the date of enactment as possible. It should be a two-step process. The first step would involve registration of eligible applicants for grant of temporary legal status and work authorization, accompanied by a background security check and payment of a fine for unlawful presence in the United States. In subsequent years, registered immigrants would be required to demonstrate a knowledge of English, steady employment, payment of taxes, and good moral character in order to earn lawful permanent residence and, ultimately, citizenship. Those applying for legal status should be permitted to travel to and from the United States. Some proportion is likely to decide to return permanently to their countries of origin.
3. Immediate family members of qualifying applicants should receive derivative benefits, if these would-be family members would not themselves qualify. IRCA, for example, disqualified those who arrived in the United States after January 1, 1982. Thus, at the time of its implementation in 1987, there were many who had lived in the country for up to five years, but did not qualify for legalization. These included a large number of immediate family members of those who did qualify. This policy left a number of families in a mixed lawful–unlawful status. INS, through the “family fairness” program eventually granted “indefinite voluntary departure” to many such family members, allowing them to stay and work lawfully in the United States. Congress, through the Immigration Act of 1990, created the “family unity” program and extended the “semi-legal” status of these family members until they would receive permanent residence through the normal family preference categories.<sup>52</sup> Thus, when the legalized population became permanent residents, they petitioned for their immediate relatives who were already in the United States in the “semi-legal” status. This led to the current multi-year

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<sup>52</sup> Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

backlogs in the family second-preference category. This experience can only be avoided by granting derivative status to family members of those who qualify for legalization.

4. The regulations implementing the legalization provisions should be inclusive, clear, and unambiguous. That was generally true for the regulations implementing the IRCA legalization program. Indeed, in the rule-making process, the INS was initially quite receptive to the comments received from the advocates of immigrants. Later, there were divergent — and sometimes unfairly strict — interpretations of provisions like “continuous residence,” “known to the government,” or “brief, casual, and innocent departure,” that resulted in prolonged litigation.
5. The role of the community-based organizations that are in direct contact with immigrants is critical for a successful legalization program. That role should be recognized in the statute. In IRCA, Congress allowed for the designation of Qualified Designated Entities (QDEs) to be a buffer between INS and the legalization applicants. Coordination between the INS and the QDEs was quite successful. QDEs included not-for-profit organizations serving immigrants, church groups, and unions. They provided public education and outreach on the legalization program, encouraged those eligible to apply, assisted in the application process, provided expert legal representation in complex cases, and engaged in regular coordination with INS. A program similar to the QDE system should be repeated in a future legalization program. The IRCA experience, however, also demonstrated that regulating and monitoring such agencies is critical. Some QDEs proved to be “legalization entrepreneurs” who exploited the vulnerable applicants. In a future legalization program, organizations designated to assist applicants should either be accredited with the Board of Immigration Appeals or have an established track record of providing social services.

These designated organizations and other immigrant defense groups should be adequately funded, especially to conduct an effective outreach and public education program. Outreach in the 1986 legalization was not particularly successful. It was initiated too late in the application process, and not uniformly targeted. A sustained, widespread and multi-media outreach program is important to encourage eligible applicants to apply.

6. A separate, dedicated unit at the DHS should be established to implement the program. Creating such a unit at the INS during the IRCA program was a success. Having a specially trained and separate team of adjudicators is important. Equally important is the choice of the person to head the unit implementing the program. It should be someone who is committed to its success and who can communicate that mission to the staff. A large new legalization program will require dedicated expertise, focused attention, and an institutional culture that truly embraces the program.
7. Implementing a future legalization program will require serious commitment of funding. IRCA provides some important lessons in this regard. In 1986 there were no funds appropriated for the general legalization program. It was to be self-funded through the application fees. But there were very significant start-up costs to the program. INS paid for these by borrowing against its normal budget. Although the application fees

ultimately generated more revenue than was needed to administer the program, fewer applications were received than expected early in the program. This led the INS to scale down its legalization staff midway, only to be overwhelmed by a surge of applications at the end of the application period. In order to avoid such a situation in a future legalization program, Congress should appropriate funds for legalization that could later be repaid from application fee receipts.

8. States and localities should be adequately compensated for the costs of integrating the legalized population. It is critical to win the support of key states for a legalization program. IRCA created a \$4 billion State Legalization Impact Assistance Grant (SLIAG) to help defray anticipated costs that states would incur in terms of health care, public assistance, and English/civics classes for the legalized immigrants. But cumbersome federal reporting requirements led to significant delays for state reimbursement. This was further exacerbated by the fact that reimbursement was contingent on documentation of the number of applicants served. Since there was a surge of legalization applicants toward the end of the application period, it delayed the stream of money for the states. As a result, available funds were appropriated by Congress for other uses, which penalized states waiting to be reimbursed for expenditures.<sup>53</sup>

In a future legalization program, the aid program should provide states with more flexibility to find solutions that fit their different needs, populations, and funding mechanisms than was the case with IRCA. Based on lessons learned from SLIAG and the contrasting 1996 welfare reform block grant model, it is more effective to cover the costs arising from a new legalization program through a block grant, rather than a reimbursement scheme.<sup>54</sup> A block grant encourages states to be innovative and allows them to target urgent needs. Such flexibility would have to be accompanied by clear guidelines for accountability against which states would plan expenditures and measure results.

## Conclusion

IRCA was a bold attempt at dealing with a set of complex problems confronting the country in the 1980s. It had a profound impact on the lives of millions of Americans, both immigrant and native-born, and fundamentally altered the role of immigration law in the workplace. The country today faces a much larger scale of problems, but in many ways they are similar to the ones we confronted in 1986. We are therefore fortunate to have the experience of IRCA behind us to offer us guideposts for crafting a new immigration law. The lessons of 1986 — both positive and negative — should be well heeded in order to avoid the repetition of past mistakes or the creation of unintended consequences that past experience could have predicted.

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<sup>53</sup> Deborah L. Garvey, “Designing an Impact Aid Program for Immigrant Settlement,” in *Securing the Future: U.S. Immigrant Integration Policy*, ed. Michael Fix (Washington, D.C.: Migration Policy Institute, 2007).

<sup>54</sup> Under SLIAG, state and local governments were reimbursed — after the fact — for documented expenditures on services for the unauthorized immigrants who obtained legal status under IRCA’s legalization program. Under The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) Public Law 104-193, states are provided with block grants, and can allocate the funds as needed.

The stakes are high — failure to reform our current immigration policy can only bring the country to an even greater state of crisis and further polarize public opinion. However, the current political atmosphere, in which a bipartisan success story is sorely needed, offers a unique opportunity to thoughtfully address the immigration challenges of today. Legislation that this Congress passes would have impacts even greater than those of IRCA, with strong implications for America's future.

I applaud this subcommittee for its enthusiasm in tackling such deeply-entrenched issues and would be happy to answer your questions about my experience with the 1986 law as you begin the process of shaping legislation.

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*Julia Gelatt of the Migration Policy Institute assisted with the preparation of this testimony.*