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SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP
SENATE COMMITTEE ON THE JUDICIARY
ON
"IMMIGRATION ENFORCEMENT AT THE WORKPLACE: LEARNING FROM THE MISTAKES OF 1986"
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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 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 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,
• 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.

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, 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 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 us 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.

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.