IMMIGRANT EMPLOYMENT VERIFICATION AND SMALL BUSINESS

HEARING

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SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT & GOVERNMENT PROGRAMS

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TUESDAY, JUNE 27, 2006

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT AND GOVERNMENT PROGRAMS
COMMITTEE ON SMALL BUSINESS
Washington, DC

The Subcommittee met, pursuant to call, at 2:30 p.m., in Room 2360 Rayburn House Office Building, Hon. Marilyn Musgrave [Chairman of the Subcommittee] presiding.

Present: Representatives Musgrave, Lipinski, Udall, Davis.

Also Present: Representative Akin.

Chairman MUSGRAVE. I think I will go ahead and call the meeting to order, out of respect to Congressman Calvert's time, and the witnesses. Mr. Lipinski is on his way, so he will join us shortly.

I call this meeting to order. I thank you all for being here, especially those of you that have traveled great distances to provide the Committee with testimony.

While I've been traveling around my district, and I hear this from most Congressmen, the problem of illegal immigration is constantly one of the top concerns. Individuals, community leaders, law enforcement leaders, healthcare providers, educators, all recognize the effects that illegal immigration has on our country, and they talk to us about passing laws to promote America's tradition of waffle immigration.

The increasing number of immigrants crossing our borders illegally is a burden to our economy and a threat to our national security. The official census data predicts there are 8.7 million individuals living here illegally. However, some unofficial estimates predicted closer to 12 million. There are also approximately 500,000 illegal aliens that enter the United States every year.

Because this is a pressing issue, the House of Representatives passed H.R. 4437, the Border Protection, Anti-Terrorism and Illegal Immigration Control Act, prior to the recess of Congress in December of '05. In May of 2006, the Senate also passed a significant immigration reform bill, S.2611, the Comprehensive Immigration Reform Act of 2006. Both bills make numerous significant changes to our immigration law and border security efforts.

H.R. 4437 also aims to crack down on alien smugglers and the alien gang members who terrorize our communities. In the addition, the bill would direct the Secretary of Homeland Security to devise a plan to provide systematic surveillance coverage, and

within one year introduce a plan for border security, including risk assessment of ports of entry. This plan would include a description of border security roles of federal, state, regional, local and tribal authorities in ways to ensure such security efforts would not impede commerce.

The focus of the hearing today, however, will be on the expansion of the Basic Pilot program for employee verification that is contained in both bills. The Immigration Reform and Control Act of 1986 made it unlawful for employers to knowingly hire or employ aliens not eligible to work, and required employers to check the identity and work eligibility documents of new employees.

This Act was designed to end the "job-magnet" that draws the vast majority of illegal aliens to the United States. Unfortunately, the easy availability of counterfeit documents has made a mockery of that legislation that was passed in 1986. Fake documents are produced by the millions, and they can be bought very cheaply.

Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress responded to the deficiencies of the 1986 Act by establishing three employment eligibility verification pilot programs for volunteer employers in selected areas. This is known as the Basic Pilot program.

Since November of 1997, the Social Security Administration and the Systemic Alien Verification for Entitlements program have been conducting the Basic Pilot program in the states of California, Florida, Illinois, Nebraska, New York and Texas. The program was made available to all employers in all states starting in December of 2004. The Basic Pilot involves verification checks of the SSA and the now Department of Homeland Security databases of all newly-hired employees, regardless of citizenship.

The Basic Pilot is currently a voluntary program, and is free to employers who volunteer to participate. It is now used by over 4,000 employers and at least 15,000 work sites nationwide.

The recently passed House and Senate legislation both change the name of the Basic Pilot program to the Employment Eligibility Verification System, and would require all businesses to use it when making new hires. The legislation also increases fines for companies failing to comply with the new law.

While the House bill prescribes lower penalties for small and medium-sized businesses, the Senate bill does not, nor does the Senate bill have an exemption or fines for a "good faith effort" to comply.

Our purpose here today is not to compare and contrast the merits of either bill. All too often when these gigantic reform-minded pieces of legislation are formulated, small businesses are just an after thought. While the House did take small and medium-sized businesses into consideration when they constructed the legislation, there are many questions we need to ask to ensure that this bill, should it become law, will not unjustly overburden America's small businesses.

We need to answer questions such as, will making participation mandatory increase the paperwork burden for small businesses? How accurate will it be, and how can we ensure the number of false positives and negatives will be extremely minimal? How long will it take to certify someone, and will the Department of Home-

land Security be ready for it if it happens, and what do we need to do in Congress to make sure they are?

I'm eager to hear today's testimony, and I would like to sincerely thank Representative Calvert from California for coming to testify before the Committee today. I know you are very busy, and when you need to leave we will appreciate your time that you've spent with us today.

Now, I'd like to recognize the Ranking Member, Mr. Lipinski, for an opening statement.

[Chairman Musgrave's opening statement may be found in the appendix.]

Mr. LIPINSKI. Thank you, Madam Chairman.

There's no question that immigration is a serious issue for Americans, it has a significant impact on our economy. It's estimated there are at least 7.2 million people who are working illegal in the U.S., which is about 5 percent of the U.S. labor force.

While this has been an issue for quite some time, the House recently passed a bill to address this problem. The bottom line is this, our borders simply are not as secure as they should be. More than 500,000 individuals enter our country illegally every year. We need to know who is coming into our country, and prevent unauthorized people from entering.

I believe strongly that if a nation does not control its borders, it is not fully protected. Border security legislation is absolutely necessary.

But, before I go any further, I want to make it clear that I believe that most who come into our country illegally, and are here working illegally, are in this country illegally, are here to work and to make a better life for themselves and for their families. But, although this is the case, this does not mean that we can just ignore the situation. For the sake of our national and economic security, we can't allow the current situation to continue.

H.R. 4437, the Border Protection, Anti-Terrorism and Illegal Immigration Control Act of 2006 attempts to address immigration problems by enhancing border security, or requiring employers to verify the employment eligibility of its workers. It is a critical step, but it's important that we carefully examine all proposals and try to mitigate any unintended consequences for small businesses.

Under Title VII of H.R. 4437, a new employee verification system will be created that will make sure that employees are legal and have proper documentation to work in the United States.

During roundtables that I have had with small business owners in my district, there's one clear message that they keep giving me regarding employee verification. It's this, whatever you do, make sure that when I follow the law my competitors are also following the law, so I can compete on a level playing field.

This new system is designed to accomplish this goal, but as we consider the impact of new regulations on our entrepreneurs, we must remember that the cost of regulation compliance is already 60 percent higher for small businesses than their big business counterparts. We need to make sure that any new regulations do not add an unnecessary burden for small businesses. Some additional burden will, unfortunately, be necessary. We need to do all we can to minimize it.

In addition, small business owners need to know and understand what the rules are regarding their work force. If small business owners are not provided with a full understanding of the verification system, it can lead to significant confusion. Well-intentioned entrepreneurs may inadvertently fail to comply, resulting in fines and possibly criminal liability. We must do all we can so that those who are breaking the law know it, and know that they will be punished.

Small businesses are the most important engines of our economy. We must always be extremely careful when establishing new regulations. We also have responsibility to secure and protect our borders, and make sure that Americans are given the opportunity to work.

I look forward to hearing the testimony from our witnesses today about how we can best meet all of these goals.

Thank you.

Chairman MUSGRAVE. Thank you, Mr. Lipinski, and now we will hear from our first panel, starting out with Congressman Calvert, and then we'll hear from Robert Divine. Thank you.

STATEMENT OF THE HONORABLE KEN CALVERT (CA-44), U.S. HOUSE OF REPRESENTATIVES

Mr. CALVERT. Thank you, Chairman Musgrave, Ranking Member Lipinski, and certainly Members of the Committee. Thank you for inviting me to speak today on employment verification.

I'm very pleased that the Small Business Committee is taking a look at this program, because I strongly believe that businesses need to use the program in order to retain and regain confidence in their work force.

Before coming to Congress, I was a small business restaurant owner in California. Like all employers, I required my employees to present documents authenticating their identify and employment eligibility as far of the I-9 Immigration policy. There's a form process that you are aware of.

Since I've never been an expert on documents, I had no way of knowing whether the documents presented were authentic or fraudulent, so when I was elected to Congress I wrote legislation to create the Basic Pilot program with the intention of giving employers a reliable tool to verify their employees' eligibility to work.

In the 109th Congress, I introduced H.R. 19, which would make the Basic Pilot program mandatory, and phase in over time by the size of the employer. The bill became the backbone of Title VII of H.R. 4437, and Title III of the Senate Bill, S.2611.

For a decade, the Basic Pilot program has been tested, improved and expanded. The program began as a telephone system, then became a modem-based system, with software installed on each user's computers. Today, the program is an internet-based, and as easy to use as buying a book off amazon.com. I can attest how easy the program is, since I'm one of the first members of Congress to sign up and use the program in my Congressional Office.

I appreciate the opportunity to clear up some misconceptions about the program, and highlight several key facts.

The Basic Pilot program, and its possible successor, the Employment Eligibility Verification System, as outlined in both the House

and Senate passed versions of the Immigration Reform bills, works to ensure a legal work force by verifying information used in the I-9 form. This program does not target people, but rather confirms the voracity of the information on documents people present. It is important to remember that the program does not discriminate against people, but instead gives employers confidence that the work force is legal and free to work.

It's been noted that the Basic Pilot cannot detect identity theft, yet I believe it can if the new program is used properly. Immigration Customs enforcements must be able to monitor the program's data to look for suspicious patterns, just as credit card companies can flag suspicious activity, the Basic Pilot program can be used to detect possible identity theft by flagging a name and a Social Security number that is being used over, and over, and over again.

Concerns over identity theft have led many to conclude that we need a national identification card. I disagree. By monitoring the data and flagging suspicious activity, a mandatory program can combat identity theft without a new ID card. It is true that no program will ever be perfect, but the concerns about identity theft and program or document fraud can be adequately addressed through a thorough and thoughtful mandatory system, as reflected in the House passed Immigration Reform Bill.

Some of the individuals testifying today may question the accuracy, ease of use, speed, or cost of the program, and may ask whether the program can be expanded for all employers quickly enough. According to the 2005 GAO Report, the U.S. Citizenship and Immigration Services has reduced their data entry backlog from nine months to approximately ten to 12 days, significantly improving the speed and accuracy of the program.

Additional reports found that 98.5 percent of all queries receive an immediate response, and the program is 98.6 percent accurate.

Striving for 100 percent accuracy is necessary, but we should not make the perfect the enemy of the good. The accuracy rate is already very good, and it will improve as the system is implemented. Inaccurate results indicate there is a discrepancy between the information presented by the employees and the data on record.

Notification of a discrepancy is an opportunity for the employee to correct the record. Adequate time is mandated to allow an employee to clear up discrepancies. No one is dismissed because of an initial negative.

I might add here that all employees with mismatched data will receive a chance to correct the record, because employers cannot use the system to pre-screen employees. They can only use the program after they hire a new employee, which is another safeguard against discrimination. If an employee is wrongfully terminated, currently existing remedies remain available to them.

Think of this as a similar to use of a credit report, which are vital to our financial system, yet may contain errors. We do not demand 100 percent perfection in the credit report system in order to find it useful, because we understand that credit reports are viable tools and that errors can be corrected.

The Basic Pilot program is a good tool, and the accuracy of the information will continue to improve as individuals have a chance to correct the record. The Basic Pilot program has experienced in-

credible success since it was launched ten years ago, and that success is even more incredible when you consider that Congress has not appropriated funds specifically for the Basic Pilot program, instead requiring the Department of Homeland Security to use funds from its discretionary accounts.

Yet, the lack of funding is changing. For the first time, the House appropriated $114 million for FY07 to expand and improve the Basic Pilot program to ensure it is ready to handle a huge spike in demand. There are right now about 10,000 employers using the program today, up from 2,300 in 2004, and more employers are signing up each and every day.

Based on the program's superior performance at this point, it is clear that the program will be adequately prepared to quickly and accurately handle queries from every employer in this Nation.

I believe the U.S. Government needs to better enforce their immigration laws, including employer sanctions and work site enforcement. If we are going to hold employers responsible for following the law, we must give them a tool which they can use in good faith. The Basic Pilot program is a tool that all employers should use.

A vital component of immigration reform is to make sure everyone who works in the United States is doing so legally, by turning off the "job-magnet." Making the Basic Pilot program mandatory is an essential component of our national policy that de-incentivizes illegal employment in the United States, and without it all other efforts to enforce immigration laws, in my opinion, will fall short.

Thank you for allowing me an opportunity to speak with you today, and I'll be happy to answer any questions when the time comes.

Chairman MUSGRAVE. Congressman Calvert, would you be able to answer questions after Mr. Divine speaks? Can you stay that long?

Mr. CALVERT. Sure.

Chairman MUSGRAVE. Okay, thank you so much.

[Congressman Calvert's testimony may be found in the appendix.]

Chairman MUSGRAVE. Now we'll hear from Mr. Robert Divine, Acting Deputy Director of U.S. Citizenship and Immigration Services. Thank you for appearing before the Committee.

STATEMENT OF ROBERT DIVINE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. DIVINE. Thank you, Madam Chairman.

Chairman, Ranking Member Lipinski, Members of the Subcommittee, my name is Robert Divine. I'm Acting Deputy Director of U.S. Citizenship and Immigration Services. I'm honored to have this opportunity to talk with the Subcommittee about the basic Employment Verification Pilot, which we call the Basic Pilot, which confirms information for participating employers concerning the work eligibility of their newly-hired workers.

I'll also describe the agency's plans to improve and expand the Basic Pilot, and to implement a nationwide mandatory Employment Eligibility Verification System.

I appreciate your interest in the program, I appreciate Congressman Calvert's involvement in creating it.

Chairman MUSGRAVE. Could you move the mic just a little closer, we are having a little bit of a hard time hearing.

Mr. DIVINE. There we go.

Chairman MUSGRAVE. Okay, thank you.

Mr. DIVINE. Let me put it in my mouth and it will work.

And, we look forward to seeing the participation in the program of every one of the Committee and Subcommittee's Members' offices.

The Employment Verification System, as we conceive it, is a critical step in improving work site enforcement, and it directly supports the President's goal of achieving comprehensive immigration reform.

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

Today, an illegal immigrant with a fake ID and a Social Security card can find work almost anywhere in the country without difficulty. It is the prospect of jobs that leads people to risk their lives, crossing hundreds of 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 System and Employers Sanctions Program as part of the President's call for a comprehensive immigration reform.

Quick history, Congress established the Basic Pilot as part of the IIRIRA law in 1996, creating a program for verifying employment eligibility, at no charge to the employer, of both U.S. citizens and noncitizens. The Basic Pilot program began in 1997 as a voluntary program for employers in the five states with the largest immigrant populations, and in 1999, Nebraska was added. It was twice extended, most recently in 2003, valid and effective until 2008, and at that time it was also made available to participating employers in all 50 states, not just those five original. A small percentage of employers participate, but the program is growing by about 200 employers a month, as Congressman Calvert stated, about 9,300 Memorandums of Agreement with employers who are verifying over a million new hires per year at more than 34,000 work sites.

Madam Chairman, I understand you have said, that "Small businesses are the backbone of Colorado's economy," and, of course, that's true for the Nation as well. Most of our participating employers have 500 or fewer employees. In Colorado, there are 207 participating employers, including the U.S. Olympic Committee, Alsco Laundry Service and the New World Restaurant Group, as examples. Ranking Member Lipinski, in Illinois, there are 407 participating employers, including Staffmark Employment Agency, Judson College, and St. Joseph's Medical Center, and we welcome your support in reaching out to enroll even more employers into the program.

Now, here's how the program works. After hiring a new employee, an employer submits a query including the employee's name, date of birth, Social Security account number (SSN) and whether the person claims to be a U.S. citizen or a noncitizen, and if a noncitizen they provide either the Alien number of some other DHS number to give a tie in to a system about their status. And, through the system the employer receives an initial verification within seconds, electronically. The system first electronically sends the information to the Social Security Administration's Numident database, and if the new hire claims to a citizen, then that's the end of it. It stops with the Social Security Administration's confirmation in the database.

If the new-hires SSN, name and date of birth to the Social Security Administration (SSA) 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 the Social Security database cannot immediately verify electronically, then that system sends an SSA tentative non-confirmation to the employer, and then the employer must notify the employee of the tentative non-confirmation and give the employee an opportunity to contest that filing, a very important part of the procedure as the Congressman has mentioned.

In the case of a noncitizen, after the Social Security Administration has—after its system has verified, and only if it verifies, then the system will go forward to the DHA Basic Pilot database, and seek to verify electronically. And, if the system cannot electronically verify the status of the noncitizen as lawfully able to work in the United States, then an Immigration Status Verifier, a human being in U.S. Citizenship and Immigration Services, will personally research the case, usually providing a response within one business day, I think in 90 percent of the cases that's the turnaround time, either verifying work authorization or issuing a DHS tentative non-confirmation. If the employer receives a tentative non-confirmation, the employer must notify the employee of that finding and give the employee an opportunity to contest that finding.

When USCIS receives a response to that, USCIS normally resolves the case within three business days, issuing either a verification or a DHS final non-confirmation. So, whether it's to the Social Security Administration initially or to USCIS for a noncitizen who verified with Social Security if there is a non-confirmation, if the system can't confirm then the employee is given a chance to contest and cure the problem, and correct the database.

As you know, the House and the Senate have both passed significant immigration legislation this session, including an agreement on the idea of a mandatory electronic Employment Eligibility Verification Program for all 7 million U.S. employers. Although the proposals differ in some significant ways, both bills would require an expansion of the electronic Employer Verification System Program that is, basically, an expansion of the Basic Pilot to all employers.

Therefore, USCIS is already planning for the expansion of the program, planning. The President's Fiscal Year '07 budget requests $110 million to expand and improve the Basic Pilot, so that it can

be used for all employers, including components for outreach, systems monitoring and compliance.

So, let me briefly outline what those improvements and expansions that we are planning. First, ensuring that all employment-authorized aliens have secure biometric cards with an enumerator, and phasing out the production of locally-produced cards that are too vulnerable to counterfeiting, and that are not tied reliably to the verification system. The idea is to reduce manual secondary checks, which slow down everybody in the system and cost the system money and time.

Second, we are working on tapping into our card databases for verification. That means, a worker who has a card, a permanent resident card, or an employment card, would present that card for verification and would be required to do so, and when doing so would be—that card and its data would be validated against the database from which the card was made. In other words, it's a one-to-one match directly against the information that it arose from, and it should be instantaneous. That would again reduce the number of manual secondary checks.

The third thing is to add more DHS information about the status of temporary workers in the Basic Pilot Verification System. Right now, our system is not pointed to every—to a real-time database about entries that has recently become available, so we need to point to that system and get the information.

We also need to include information about people who have changed or extended their status within the United States, and when we do that we will reduce the number of manual secondary checks that have to be performed. More people will get an instantaneous response.

[Mr. Divine's testimony may be found in the appendix.]

Chairman MUSGRAVE. Okay, I think I'll go ahead and open it up for questions. We want to be very respectful of the time here.

Congressman Calvert, in H.R. 19 there was a tiered implementation program that I thought was very reasonable for small businesses, and it started out with bigger companies the first year, clear down to seven years for the smallest of the small businesses.

Do you have any insight as to why that was not included in the final product? It just seemed to be so reasonable and something that people could appreciate your concern for small businesses and the burden.

Mr. CALVERT. As I mentioned, as an employer myself and recognizing the fact that we have 12 million—up to 12 million people working in the United States today, that you can't just immediately cut that labor off without having some negative effect in the economy.

And so, we tried to work out a legislative fix where we would phase in this program over a period of time, starting with 10,000 employees and more, the Wal-Marts of the world, and 5,000 the next year, 2,500 the year after that, so forth and so on, until we got to zero over seven years time. That would give enough time for the agencies to gear up for a program of some significance.

Fight now, as was mentioned, we have approximately 10,000 employers on the program, that would go to millions when we get to this program as a mandatory system.

Chairman Sensebrenner wanted to move this program sooner rather than later. He has a two-year phase in for all employers in the United States in the final version that came out of the Judiciary Committee and was reported off the floor. The Senate, I'm not quite sure of how they, you know, will phase that in. That would have to be negotiated in the conference report, in fact, there is a conference report.

But, I think that, quite frankly, realistically, I think that a phase in would not be a bad idea, to make sure we give employers enough time in order to do the right thing. I'm not out to punish employers. You know, as an employer, we run into government agencies often, and we want to make sure that we use a carrot approach rather than a stick approach, and get employers to do the right thing, which I think most employers want to do, and not to get into a punitive mode as far as how we get people to initiate this program.

Chairman MUSGRAVE. Thank you very much.

Mr. Lipinski?

Mr. LIPINSKI. Thank you, Madam Chairman.

I want to first thank Representative Calvert for his expert testimony here, not just as a Member of Congress, but also your experience as a small business owner. We very much appreciate that.

I want to focus my questions primarily on Mr. Divine. Representative Calvert, you can jump in here, if you would like. A couple of things that I'm wondering about. It seems that we are really going to have to expand from this pilot program if we are going to be covering everybody, 407 employers in Illinois just seems like a very small number.

You were saying the requests for FY07 from the Administration is $110 million to expand the pilot program. How much is going to be needed, what kind of appropriations are we going to need to be able to make this a system that can cover everybody?

Mr. DIVINE. Well, we are already making the systems changes in terms of the technology, so that, as I said, the employer gets an immediate answer the first time almost every single time, and we reduce the delay for the employer, the cost for the agency to try to run that down.

The rest of it includes outreach to employers who need to participate, assistance, training, and also monitoring and compliance, because as the Congressman mentioned it's not foolproof, and we have to have some compliance capability to monitor trends and detect patterns of abuse.

Mr. LIPINSKI. Do you have any idea how much this is going to cost? We certainly have, up until this point, been cutting back on the amount of money towards, you know, any type of enforcement. Now, turning around to what really needs to be a really huge investment it would seem, to be able to make this work, do you have any idea how much it may cost?

Mr. DIVINE. Well, the President's request for '07 is $110 million, and—

Mr. LIPINSKI. But, down the line, do you have any idea how much more it's going to cost?

Mr. DIVINE. I can't say specifically, because we don't have experience with the system to roll that out to every employer, but, that's the plan.

Mr. LIPINSKI. I'm not trying to—you know, I think that it will be money well spent, I just wanted to try to get some sense of that.

Congressman Calvert?

Mr. CALVERT. Yes, Mr. Lipinski, I would point out, by the way, and just to confirm what the gentleman is saying, that right now the program is at 98.6 percent accuracy rate. It's almost 99 percent. Obviously, if you expand the program very quickly that may affect accuracy, but still I think we can make it very accurate.

Millions of credit card transactions every single day take place in America, with virtually—everyone has a high degree of confidence in using their credit card. I mean, you know, at least, you know, most of us anyway.

But, the cost of this, I think eventually, can be borne by those who are not following the system. You know, there is, for those who knowingly hire people illegally, and I think we ought to give a lot of discretion to the regulators in making sure that we don't fine people immediately, give them every opportunity to follow the law, but the fact is, is that there are people out here, believe it or not, that knowingly hire people that are here illegally. And, in my opinion, they should be fined, and those fines should help offset the cost of running this program. And, I think that that can go a long way to doing that.

In the initial period of time, we really don't know what it's going to cost, until we get this up and operating, but it's really not that complicated a system, though it seems complicated, simplistically we are checking a name against a number.

Mr. LIPINSKI. I certainly agree with you that those who are—who are really violating the law, they should be fined, good place to get the money, we should be serious about enforcement.

I think, Mr. Divine, did you have more information there?

Mr. DIVINE. Hot off the presses, as it were, I'm told by people who will have to get it done, that the $110 million gets all 7 million employers on board by the end of the Fiscal Year '07, and that for '08 the cost would probably go up a little to fully fund the positions that were obtained in '07, and hire about 40 more status verifiers. You know, when you talk about the scale that you expand to for all employers, even though we reduce the percentages the numbers go up, in terms of the work you have to do to run down. That's the best information I've got.

Mr. LIPINSKI. Thank you, I see my time is up. I have another question, but we'll get on to other people asking questions.

Chairman MUSGRAVE. Okay.

While we are talking about the cost of the system, in your written testimony, Mr. Divine, you talked about a fee that would be assessed to pay for the system, and I have a huge problem with someone having to pay a fee to comply with the law. And so, elaborate a little bit on that, if you would, please.

Mr. DIVINE. Well, I guess for USCIS, which is overwhelmingly a fee-funded agency, and if the budget request is granted for this year, it will be one of the only appropriated activities in this agency. And so, I guess there's sort of a theory that we come to things

with that, if the cost of it can be borne by those who are using it, as is in the rest of our business, then that's something to consider. It certainly would reduce the amount of appropriations. It's certainly a policy call for the appropriators to make, but it certainly would ensure the integrity and funding of the process if we had that funding stream.

Mr. CALVERT. I would point out one thing, Ms. Musgrave. The system as it exists today is voluntary, and as was pointed out in the testimony it's been phased in over a period of ten years. And so, employers have to voluntarily involve themselves in the system and pay that fee if they so choose.

If it becomes a mandatory system, in my opinion, there should not be a fee, and that the appropriators should find money, as we have for this year, and I believe that any penalties, and, hopefully, we don't have penalties, hopefully, the employers do the right thing, but those penalties should go toward the agency to help offset their costs.

Chairman MUSGRAVE. Thank you.

Mr. CALVERT. Offset the appropriation.

Chairman MUSGRAVE. Thank you.

Mr. Davis?

Mr. DAVIS. Thank you very much, Madam Chairman, and I thank you and Mr. Lipinski for calling this hearing. Let me thank both of our witnesses.

Representative Calvert, let me begin with you, and ask what exactly is it that you are trying to accomplish with your legislation?

Mr. CALVERT. Well, I'll just give you an example. When I was in the restaurant business, you know, I had many people come in and apply for work, and we would always file the I-9 forms that we were obligated to under the law, under the 1986 Immigration Act, and people would hand me identification.

As required under the law, you have to—we need to xerox two identifications, stick it on the back of the I-9 form, usually a driver's license, or a Green Card, but in every case a Social Security card.

There's no way for me to tell whether that Social Security card was a valid card or not. We are not checking people, we are checking documents, and many people I knew were using invalid Social Security cards.

Well, let me tell you, there is no way that you could tell the difference between an invalid Social Security card and one that is a valid Social Security card. The counterfeit business is pretty good, and the documents that the folks use to get work are very good.

And, as you probably know, Mr. Davis, it's illegal for me as an employer to ask a person's status, an individual status, I can't check an individual under the law, under the Civil Rights Act. The only thing I want to do is check the voracity of the document.

So, this legislation does, it doesn't check people, it checks whether or not the Social Security number that's being used is a valid number, that's all it does, and that's all we are attempting to do, is that people use legal documents when they apply for work, and I think that's important, not just for the employer who wants to hire people who are here legally, but also for national security rea-

sons. People use invalid documents, and so that's what this legislation attempts to do.

Mr. DAVIS. And now, the potential employer knows at least in his or her mind that the document used by the applicant is not matching, as being a legal document.

Mr. CALVERT. Once I determine to hire an individual, I check that number and find out that it's an invalid number, I'll give that—under the law, the employee has some time to try to fix it, if, in fact, the employee says, well, Social Security made a mistake, or whoever, some agency made a mistake.

But, yes, it's just making sure that the Social Security number is a valid number.

Mr. DAVIS. Now, if we should find, and that's not necessarily a part, though, that the employer, then goes ahead and willfully hires an individual, do we seek any kind of additional penalty?

Mr. CALVERT. Well, under existing law, under the law that exists today, that if an employer knowingly hires someone here, someone that's here illegally, they can be fined today. The problem is, is how you prove they hired somebody knowingly illegally.

Right now, before the Basic Pilot program, there was no way you could determine whether or not the documents were valid or not, so you couldn't fine the employer if he filed the I-9 form properly, put the forms on the back of the file, so it was kind of a wink and nod system, quite frankly, since 1986. Everybody did it, everybody knew it, including myself. I'm probably the biggest sinner in Congress. I mean, I hired a lot of people, but there was no way that I could tell whether or not the documents that were being used were valid documents or not, until we had the Basic Pilot program.

Mr. DAVIS. And now, we would know, and so this could actually cut down on illegal immigrants filtering into the job market, which could take away the concerns expressed by people that illegal immigrants are undercutting the labor force because they are not illegal anymore.

Mr. CALVERT. Yes, sir, you are exactly right. I mean, people who are using fraudulent documents to get work will not longer be able to do so, and people who have correct documents will be able to get work, and that would remove the "job-magnet" from people coming from outside of the United States into the United States to obtain employment.

Mr. DAVIS. So, I would then hope that the outcome of that would ultimately be that some individuals who take the harshest views and positions, relative to non-entry of immigrants, that might lighten them up a little bit. They may not be as opposed, because they don't have that factor to say, here's part of our rationale.

Mr. CALVERT. I might point out, my district is 45—was 45 percent Hispanic. Most of the people that are in my congressional district are in favor, most of the Hispanics are in favor of a verification program, because they want—they don't want to be discriminated against, quite frankly, the people that are here legally.

And so, they believe that it's a good system to verify whether or not the documents are correct when people apply for work.

Mr. DAVIS. Well, I want to thank you very much, because it certainly has helped me. I view myself as not being opposed to individuals coming into the country, but I certainly don't have any

problem with finding out who is legal and who is illegal. So, thank you very much.

Mr. LIPINSKI. Thank you, gentlemen.

Chairman MUSGRAVE. Thank you, Mr. Davis.

Maybe, I don't know which one of you wants to answer this, but there is a tension between Immigration and the Department of Justice. You know, the Department of Justice assuring that there's not discrimination in hiring, and Immigration making sure that people are legal. This is the tension that we always come down to. Could you comment on that, please?

Mr. CALVERT. I think the important difference here is, we are not checking people. We are not checking Ken Calvert, or Ms. Musgrave, we are checking documents. We are checking documents to see whether or not they are valid or not. And so, when people use invalid documents to obtain work, unless they can fix that problem by finding proper documents, that they cannot have work. We are not checking individuals, that's the difference here.

So, it's non-discriminatory, because every single person who applies for work, every single one, must use valid documents in order to obtain work. And so, the question you've got to ask yourself, and maybe there are some people in this room, who is in favor of using invalid documents to obtain work? I mean, how can you say I'm for using invalid Social Security cards, or invalid driver's license, or whatever, in this case a Social Security card because we can check the number versus the name.

Chairman MUSGRAVE. Mr. Udall.

Mr. UDALL. Thank you, Madam Chair.

This is a good opportunity, I think, for us, Mr. Calvert, having you here, and having actual experience on this, and I applaud your effort to try to improve the system.

My memory is when we passed that 1986 law, and maybe you can help enlighten me here, early on there was a major effort by the Federal Government to prosecute employers for knowingly hiring illegals. And, it seems like that was dropped very quickly. I mean, and I'm wondering what changed in that period. I mean, the law went into effect, I believe what the consensus that was reached, is that employers were the magnet that were drawing people here, and in order to solve the overall illegal immigration problem you had to deal with the employer part of it.

And then, somehow that was dropped, and now we are trying to get back to it again, but do you remember what I'm talking about and what happened there?

Mr. CALVERT. I remember as an employer. Now, you may want to hear from the agency itself to give their perspective on it, but I'll give you my anecdotal information.

Back in the days when the program first began, Immigration would come in and they would pick up your I-9 forms and they would check those I-9 forms to try to verify whether or not people had status to be working, say, within my restaurant, restaurants. And then, they would notify you of a list of names, and then they may come down and visit your restaurant one day and pick those folks up without any announcement.

Well, employers started yelling and screaming, saying, hey, look, you know, we did the right thing, we filed the I-9 form, we put identification on the back, just like you told us to, and then you come in and, you know, say a farmer in the middle of harvest, or a restaurant guy in the middle of the lunch shift, or a manufacturer in the middle of the day, and you pick up all of our employees, you know, and then we lose a day's work and it puts us, you know, in a bad position.

So, I think there was a lot of pressure on the agencies and they kind of stopped.

Now, the agency might want to give their perspective, but that's my opinion about what happened in those days, and there were huge pressures because companies needed these employees here.

Mr. UDALL. Right.

Mr. CALVERT. I mean, that was the basic response that people were saying, there was no way for the employer to know who they were hiring.

Mr. UDALL. Yes, but, please, thank you, Mr. Calvert, please, go ahead.

Mr. DIVINE. I have to say that for 18 of the 20 years that have ensued in the meantime I was a practicing lawyer, so I can say, similarly to Mr. Calvert, from the private sector point of view I was advising clients about whether to participate in this program when it became available. And, echoing what Congressman Calvert said, one of the primary reasons for a human resources manager to push participation in this program was to avoid that moment when the INS would come in and raid the place and take away half the workers, and make it impossible to make any kind of production. That's the kind of event that gets the human resources manager fired, and that's the kind of event that they would try to plan against.

And, this system allows for an employer to weed out clearly unauthorized workers on the front end, and to do that in lock step with every other employer in the industry, so that there's not a competitive disadvantage from compliance.

And so, it all makes sense.

Mr. UDALL. There's been a lot of discussion about a tamper-proof verification card. I mean, where does that fit in this picture?

Mr. DIVINE. We make tamper-proof cards, we make some that aren't tamper-proof, and we are going to quit making the kind—

Mr. UDALL. Mr. Calvert is smiling, so I'm going to get him to comment on this one.

Mr. DIVINE. Well, tamper resistant, may I say, we make tamper-resistant cards in the form of what we call the "green card" that hasn't been green for a long time, but is the Permanent Resident Card, and we also make a work authorization card. We make two kinds. One is a kind that's issued out of a secure facility that has a lot better features in it, and the other is a kind that's made in local offices that can be counterfeited quite easily. And, we want to quit making that second kind, not only because it's counterfeitable, but because the systems out of which it's made are not tied in well with, and can't be tied in well with, the verification database.

So, we'll have more tamper-resistant cards when we have only those two kinds, and whatever other similar kinds we make for any other program that comes down the pike, but I think I want to make clear, that is not foolproof, and there is no card that can be made that cannot be counterfeited, or at least can't be attempted to be counterfeited, and someone who wants to make a card that has a stolen identity in it, and present that to an employer, may still be able to get away with that, because the data will verify in the system, because it's a real human being. But, we'll get more sophisticated, because we will be detecting patterns of use of those identities and will be able to take action and make investigation with our partner at ICE to sort that out when we detect that pattern.

Mr. CALVERT. I would just point out that this bill, I mean, Basic Pilot Employment Verification, does not get into tamper proof, that's separate. However, I will say that somewhere down the line we may want to look at that, but this legislation doesn't get into national ID or tamper-free identification.

To get into that, you need—the only way to have a surety in the program is to have a biometric identifier on the card itself for each individual, and that gets into a whole different debate, which is not this legislation.

Mr. DIVINE. And, I apologize if I misled you, when I say "we," Department of Homeland Security makes those cards, that doesn't apply to citizens who would not be having a Permanent Resident Card or a work card to present.

Chairman MUSGRAVE. Mr. Lipinski, I'm going to recognize you for your second question.

Mr. LIPINSKI. Appropriate follow up on what we were just talking about, I don't quite understand, if these cards you are talking about, tamper-resistant cards, are going to go to people who—they are not going to go to U.S. citizens, because we are not going down the line of a national ID card, well then, if you are impersonating, if you are coming in and you are saying, I am a citizen, gives false documents, then how does that help, because you are not going to come in and say, well, I—if someone is not really eligible to work, aren't they going to claim that they—probably going to claim that they are a citizen, so then they don't have to, you know, bring you a card that you are talking about?

Mr. DIVINE. That's an excellent question, and it gets to the heart of it, and, again, it's not a foolproof system, and people may very well claim to be citizens, and present documents like that, just as well as they may claim to be a permanent resident with a card that looks like the kinds of cards that we give out, and that contains data of a real human being whose information will match.

But, if you are working and living in Illinois, and the same person—a person who uses the same data as you to validate in Miami, and in Ohio, and in Minnesota, within a short period of time, then our system will be improved to recognize that and to cause action to be taken.

Mr. LIPINSKI. Yes, I agree, that is the key, as Representative Calvert had talked about earlier, so as long as there is that type of tracking to make sure that there isn't duplications like that, and I certainly hope that that can and will be done.

Thank you.

Mr. DIVINE. That's certainly the plan.

Chairman MUSGRAVE. Mr. Davis, did you have another question? Mr. Udall?

Mr. UDALL. No, no more.

Chairman MUSGRAVE. Okay.

I'd like to thank our panel, thank you, Congressman, thank you, Mr. Divine, for your testimony today.

Mr. CALVERT. Thank you.

Chairman MUSGRAVE. I'd like to call up the second panel, please. We are going to have Mr. Jack Shandley on the panel, Senior Vice President of Human Resources at Swift & Company, from Greeley, Colorado; Mr. Mark Krikorian, Executive Director, Center for Immigration Studies, here in Washington, D.C.; Mr. Monte Lake, Partner, McGuiness Norris & Williams, American Nursery and Landscape Association; Mr. Angelo Amador, Director of Immigration Policy, U.S. Chamber of Commerce; Mr. Toby Malara, Government Affairs Counsel, American Staffing Association, from Alexandria, Virginia.

I'm going to ask you all when you speak to get the microphones as close as you can, it's kind of difficult to hear, and, Mr. Shandley, we'll start with you. Welcome to Committee.

STATEMENT OF JACK SHANDLEY, SWIFT & COMPANY

Mr. SHANDLEY. The penalty for sitting on the end, I guess.

Chairman MUSGRAVE. You get to go first, yes.

Mr. SHANDLEY. Thank you, Chairman Musgrave, Congressman, members of the Committee, and other esteemed guests good afternoon. My name is Jack Shandley, and I am Swift & Company, as Senior Vice President of Human Resources. Thank you for inviting me to testify today.

I will begin with some background information on Swift. Swift is the third largest processor of both fresh beef and pork in the United States. Our annual sales are close to $10 billion, and we employ 15,000 people domestically and 20,000 worldwide. We operate nine domestic processing plants in eight states.

Today's meat processing industry is nothing like it was 10 years ago, much less 100 years ago. Our production facilities are safe, clean, and pay wages and provide benefits that enable our people to achieve the American dream.

Swift's production wages are at or above average rates in the communities within which we operate. We offer affordable healthcare benefits to employees who have been with us for at least six months, and approximately 80 percent of our qualified employees participate in our healthcare plans.

Our production employee turnover rate is lower than industry figures for leisure and hospitality, construction, and retail trade. All but one of our domestic plants are unionized.

Our safety rates, as measured by lost time injury incidence, are comparable to all manufacturing businesses in the U.S. Our Greeley beef facility recently completed 5.4 million operating hours without a lost time injury!

Simply put, this isn't the meat processing industry you hear and read about in the media.

Regarding immigration reform, the ongoing highly charged debate highlights the importance of this issue to the American public. Similar to a large percentage of the electorate, Swift & Company supports the development of common sense, balanced and comprehensive immigration reform legislation that: 1.

Recognizes the U.S. economy's current and future needs for workers to support growth; 2.

Protects employers that act in good faith to comply with all legal hiring requirements; and 3.

Contains border security and guest-worker provisions.

Today's hearing clearly touches on my second point with respect to the role of employers in the current immigration debate. While Swift is clearly not a 'small business" by definition, we do have a wealth of experience in the area of employee identity verification that is relevant to today's hearing.

Under the current U.S. law, employers assume responsibility for verifying the identity and employment eligibility of newly hired employees. As part of the hiring process, we are required to complete and retain individual I-9 forms. When completing the I-9 form, a total of 29 distinct documents may be used by the employee to properly establish his or her identity. It is important to note that we as employers are limited in our ability to verify the identity of a new employee: we can't ask for a specific identification document; we can't ask for additional forms of identification; and we can't refuse to accept any single eligible identification document.

Two federal departments enforce the verification and non-discrimination provisions of existing immigration legislation: the Department of Homeland Security's Immigration and Customs Enforcement branch is charged with enforcing verification provisions, and the Department of Justice's Office of Special Counsel enforces anti-discrimination provisions.

This enforcement structure creates significant policy tension between the need for employers to accurately determine workers' eligibility versus the need to address privacy and non-discrimination concerns.

In 2002 we experienced this policy tension first hand when the Office of Special Counsel cited Swift for $2.5 million for allegedly acting too aggressively when verifying the work authorization status of new hires. To repeat, our company found itself in hot water for allegedly pushing too hard to ensure employees possessed the status they claimed! After two years of close cooperation with Federal officials we ultimately settled the case with no admission of guilt for approximately $200,000.

Since 1999 Swift has voluntarily participated in the government's Basic Pilot Program to supplement our efforts to properly verify the identity of all new hires. This program, along with increased employer sophistication in processing identity documents, was reasonably effective in helping to eliminate the use of counterfeit paperwork.

However, over time weaknesses in the Basic Pilot weaknesses came to light. As currently structured, the Basic Pilot Program cannot detect duplicate active records in its database. The same Social Security number could be in use at another employer, and potentially multiple employers, across the country.

The underground market responded by replacing counterfeit documents with genuine identification documents obtained under fraudulent terms—for example, state identification cards obtained with valid copies of birth certificates. As an employer, we must accept such cards on face value. Yet valid birth certificates can be resold to another undocumented worker for reuse in obtaining yet another official state identification card.

As you can see, employers have no foolproof way to determine if a new hire is presenting valid identification documents created under fraudulent circumstances. Furthermore, attempts to use additional means to determine employee eligibility place employers in jeopardy with law enforcement agencies. From our point of view, employers like ourselves who are trying to abide by the law are not the problem in the immigration reform debate—the current immigration system is the problem.

In light of these problems we have three recommendations for Congress on how to improve the current system:

First, create enhancements to federally-endorsed programs that aid employers in their efforts to determine the work eligibility of new hires. This could be achieved in a variety of ways, from improving the Basic Pilot Program to creating a tamper-proof, biometric national identification card. It is unfair to blame employers for the failings of the system and it is unreasonable to assume we can identify fraudulently obtained documents. Give us a comprehensive, workable solution and we will execute against it.Second, reconcile the policy tension that exists for employers when managing the boundaries between employee verification and non-discrimination. Remove the burden of enforcement on both sides of the issue by granting safe harbor to employers that participate in federal worker identification programs.

Finally, continue the practice of voluntary participation in federal worker identification programs. We have chosen to participate in the Basic Pilot program because the large number of applicants we process makes it cost-effective for us to do so. Small business owners in America may not benefit from the increased costs and delays associated with mandatory participation in a verification program. Give business owners a fair choice: risk breaking the law and suffer stiff penalties, or participate in a federal identification program and gain protection from liability.

Thank you for inviting me to speak today and for your ongoing efforts to implement common sense, balanced and comprehensive immigration reform legislation.

Thank you.

Chairman MUSGRAVE. Thank you for your testimony, Mr. Shandley.

[Mr. Shandley's testimony may be found in the appendix.]

Chairman MUSGRAVE. Now we'll hear from Mr. Amador. Welcome.

STATEMENT OF ANGELO AMADOR, U.S. CHAMBER OF COMMERCE, ESSENTIAL WORKER IMMIGRATION COALITION

Mr. AMADOR. Thank you.

Chairman Musgrave, and, Ranking Member Lipinski, I'm Angelo Amador, Director of Immigration Policy at the U.S. Chamber of Commerce.

Chairman MUSGRAVE. A little closer, please.

Mr. AMADOR. More than 96 percent of our over 3 million members are small businesses with 100 or fewer employees, 70 percent of which have ten or fewer employees. I am also testifying on behalf of the Essential Worker Immigration Coalition, which is the business coalition working on comprehensive immigration reform.

I would like to start by clarifying that the Chamber does support a new employment verification system, but like President Bush we support such a program within the context of comprehensive immigration reform. It has to be emphasized that the overall system must be fast, accurate and reliable on the practical real-work conditions.

As to the competing versions now in the Senate and the House Immigration Bills, the Chamber prefers the Senate version with some important exceptions, since both versions, as stated earlier, relied on the same databases used in the Basic Pilot, the discussion shall start there.

It is worth noting that on under both the House and the Senate versions these electronic programs will retain proper work requirements to verify the identity of workers, so it is not like the credit card, as a lot of people have the misconception that you can just run through the system.

Meanwhile, the Basic Pilot program's underlying databases continue to be a problem. The records are not quickly updated, there are often errors, particularly, with name changes due to marriage, or compound names which are common among Latinos.

The most comprehensive independent study on the Basic Pilot program found that 20 percent of properly work authorized individuals are told initially that they are not authorized to work.

Congress needs to ensure that any new system minimizes errors and contains the mechanism in which errors can be quickly rectified. Even an extremely low error rate of 1 percent would translate into the improper disqualification of about 1.4 million potential workers, including U.S. citizens.

As to expenses, the GAO estimated that a mandatory Basic Pilot program will cost about $11.7 billion per year, with employers bearing most of the cost. In addition to infrastructure and training, a great deal of staff time will probably be spent verifying and reverifying worker Eligibility, resolving data errors, and dealing with wrongful denials of eligibility.

However, employers should not also be burdened with 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.

There are five key components to create a workable employment eligibility system within the context of comprehensive reform.

First, the system should have a default confirmation, non-confirmation procedure when the government is unable to reach a final decision within a reasonable time frame. Keeping employees in a tentative non-confirmation limbo is unfair to everyone. Forbidding employers from filing tentatively non-confirmed employees, but then using this data to investigate employers is unacceptable.

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 extremely important.

To reduce the lag time to a more reasonable time frame, the time allowed for the government to reply should be reduced and employers should be allowed to submit the initial inquiry about two weeks before the first day of employment.

These changes will let the employer have a final determination within two weeks of an employee's first day at work, as opposed to two months.

Second, there should be a reasonable approach to the contractor/subcontractor relationship and protections for unintentional violations. Perhaps, the most important language found in the House version was a result of an amendment by Congressman Westmoreland of this Committee. The language provides an exemption from liability for initial good faith violations, which you mentioned at the beginning of the hearing, and a safe harbor for general contractors who have subcontractors that hire unauthorized workers without their knowledge.

Third, the new system should be facing or tiered to guarantee proper implementation at every level. GAO continues to call attention to the weaknesses in the Basic Pilot program, including delays in updating immigration records, false negatives, and program software that is not user friendly. The system should be expanded to the next phase only when identified problems have been resolved.

Recently, GAO reiterated its conclusion that as of now the Basic Pilot is not ready for the kind of implementation called for in H.R. 4437.

Fourth, it needs an investigative system without artificially creative incentive in favor of automatic fines and frivolous litigation. We oppose the so-called employer compliance fund found in the Senate version, which creates an incentive for litigation, because under this scheme the fines and fees supplement the agency's budget. Instead, in addition to civil fines and criminal penalties being commensurate to the violation, the system should allow for the issuance of warnings and/or reasonable time for employers to correct administrative errors without automatically being subject to an enforcement action.

Fifth, there should be accountability structures for all involved including our government. The possible harm to employers, United States citizens and legal immigrants due to a flawed system should not be taken lightly. The Senate version holds the government accountable through the creation of a review process that allows employers and employees opportunity to contest findings. Workers could seek compensation for lost wages due to agency error, and an employee fined by the government due to an unfounded allegation could recover some attorneys fees and costs that they prevail in their appeal.

Finally, employers will be at the forefront of all compliance issues and should, therefore, be consulted into shaping up a new system, to ensure that it's workable, reliable and easy to use.

Thank you.

Chairman MUSGRAVE. Thank you for your testimony.

[Mr. Amador's testimony may be found in the appendix.]

Chairman MUSGRAVE. Mr. Krikorian.

STATEMENT OF MARK KRIKORIAN, CENTER FOR IMMIGRATION STUDIES

Mr. KRIKORIAN. Thank you, Madam Chairman and Mr. Lipinski.

I'm the Executive Director of the Center for Immigration Studies. We are a think tank here in town that examines immigration and, incidentally, also a small business. I appreciate the chance to testify today.

I wanted to ask three questions about employment, a mandatory Employment Verification System. Would it be practical to do? Would it be burdensome for business, and would it be good or bad for business?

The first point is, would it be practical? I think the answer is clearly yes, with adequate resources and adequate political support, both from Congress and from the Executive Branch, there is no reason that this shouldn't—we shouldn't be able to implement a workable verification system.

Now, there were something like 56 million hiring decisions last year made in the United States, average of 200,000 plus each business day. Now, that sounds like a lot, but when you put it in context it really isn't that big. Customers of iTunes download five times that many songs every day. Wal-Mart checks out 50 times that many customers every day, and VISA processes 500 times that many credit card transactions each day.

Now, obviously, there are going to have to be improvements in the system, and some of the witnesses already referred to those. The capacity will have to be increased. The speed of entering in new information into DHS databases will have to be increased. Most importantly, there's going to have to be monitoring of the patterns of use, so that multiple uses of the same legitimate numbers are exposed. But, those are things that DHS is already working on and are achievable objectives.

Secondly, is it likely to be burdensome for business? As a small businessman, I appreciate the multitude of government mandates that are placed on small business. As I was writing this testimony, I went into our break room and I looked on the wall of all the disclaimers that we're required to post on the wall, and there were references to the Civil Rights Act, the Occupational Safety and Health Act, the Family and Medical Leave Act, the Employee Polygraph Protection Act, the Drug Free Workplace Act, the Youth Employment Act, Uniform Services Employment and Re-employment Rights Act, among others.

Even George McGovern, when he became a small business man, wrote that legislators and government regulators need to more carefully consider the economic and management burdens that we have been imposing on U.S. business. I couldn't agree more, and that's why it's a good thing that such a program would not, in fact, place disproportionate burdens on business.

The National Federation of Independent Business, the authoritative voice of small business here in Washington, polled its members and found overwhelmingly they were concerned about illegal

immigration, they wanted increased penalties against crooked employers, and that a centralized verification system like this would minimize whatever extra burdens that verification might place on them. And, this isn't just theoretical, because my own small business actually participates in the verification program, and we have for more than a year, and it represents no extra burden really for us at all.

A growing number of businesses agree, voluntarily flocking to the program over the past three years the number of participants has quadrupled, including most notably in the news Dunkin Donuts and Baskin Robbins now require all of their franchisees to participate.

And, if and when Congress does make verification mandatory for all employers, what we are going to see is creation of a market for entrepreneurs to actually make whatever burden does exist be even less and simplify it more, especially for small business that doesn't have the infrastructure in place, the H.R. departments, to do it on their own. DHS has already provided for this, they have designated agents, they call them, or at least an opportunity for companies to step forward as designated agents to make it their job to do the Basic Pilot process for others.

The first one that—there's already a firm that's been approved as a designated agent, not only for doing Basic Pilot, but for paperless I-9 forms as well. It's called Form I-9 Compliance in southern California, and other firms will follow in their wake. And, they not only provide a paperless web-based I-9 form that checks with Basic Pilot, but includes extra services that entrepreneurs are going to think of that government employees may not have thought of, for instance, periodic reminders of upcoming expiration date for a temporary alien worker. And, in a sense, what these firms do is what Turbo Tax does for tax filing, they offer a user friendly, a more user friendly interface, eliminate paper, reduce errors, and file electronically.

The third and final point is, is this good for business? And, you might say that, well, this isn't all that big a burden, it's root canal, but the root canal doesn't hurt too much. Actually, it's quite the opposite. A verification program is good for businesses. I can see why business, small business in particular, would be alarmed about all of this talk of penalizing employers as part of enforcing immigration laws, but, in fact, the verification system is not intended to penalize employers, but to empower employers, so that they know who they are hiring. It takes the guess work out of establishing a legal work force, so they build their work force on concrete, not on sand, a work force that doesn't run away when there's an immigration raid, won't be arrested when the inevitable immigration, broad national immigration crackdown does come.

In fact, I would submit that public companies that are not participating or exploring participation in the Basic Pilot are neglecting their fiduciary responsibility to shareholders by imprudent labor practices that jeopardize the stability of their labor force. And, even privately-held companies, which is what most small businesses are, while not answerable to shareholders, nonetheless, have a moral responsibility to their employees, their customers, their creditors, to conduct due diligence in their hiring decisions.

And, let me just, my last point, to point out that Congressman Lipinski's point of it being mandatory, so that there's a level playing field for all business, is essential. I remember hearing about a landscaper in southern California who enrolled in the program, he was a patriotic employer, wanted to do the right thing, but was undercut by competitors not in the program. So, making it mandatory for all employers is, in fact, a pro business measure.

Chairman MUSGRAVE. Thank you for your testimony.

[Mr. Krikorian's testimony may be found in the appendix.]

Chairman MUSGRAVE. Mr. Malara, we'll go to you now, welcome to Committee.

STATEMENT OF TOBY MALARA, AMERICAN STAFFING ASSOCIATION

Mr. MALARA. Thank you, Madam Chairman Musgrave, Ranking Member Lipinski. My name is Toby Malara, and I'm the Government Affairs Counsel for the American Staffing Association, and we appreciate the opportunity to offer comments on the Employment Verification System provisions contained in H.R. 4437.

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

The staffing industry employs almost 3 million employees a day ad more than 12 million each year. Staffing firms recruit and hire their employees and assign them to businesses to assist in special work situations. Employees work in virtually every skill level and job category, including industrial labor, office support, engineering, IT, legal accounting and healthcare.

Most of ASA's members earn less than $12.5 million in annual revenue and thus qualify as small businesses under SBA guidelines. Like all staffing firms, they have unusually large numbers of employees relative to revenue due to their workers' short tenure. For example, it's not uncommon for a staffing firm with annual revenue of $10 million to employee more than 1,000 employees each year. As you can see, any new employment verification system will have a great impact on our members.

ASA also represents hundreds of firms that recruit and refer individuals for hire by others. Unlike temporary and contract staffing firms, traditional placement and executive recruiters do not hire the individuals seeking employment and, therefore, as we note later, such firms currently are not subject to employment verifications, nor should they be.

While there are a number of points that we raise in our written testimony, I would like to touch on two major points today.

Under current law, staffing firms and other employers have the option of verifying employment eligibility upon either the offer of employment or at the time work actually commences. For example, a person will walk into a staffing firm to apply for a job. They'll go through an interview process, and the staffing firm will determine if they are qualified for work assignments. At that point, the person has been made an offer of employment for the purpose of

I-9 verification process, even though a specific job assignment is not immediately available.

When an assignment does come up that the person is qualified for, the staffing firm will call and notify the employee, who will then go directly to the client's work site. Many employees never return to the staffing firm's office.

Because these assignments must be filled on short notice, it would be difficult, if not impossible, for employees to return to the staffing firm's office to complete the attestation and document examination process prior to going on assignment.

Moreover, getting to the staffing firm's office would be a significant hardship for employees who live far away from that office or who rely on public transportation.

Staffing firms and other similarly situated employers have the option of completing the attestation and document examination phase of the verification process at the time that they are offered employment. They should continue to have the same flexibility in using any new electronic employment verification system enacted by Congress.

Also under current law, the obligation to verify employment eligibility generally applies only to employers, not to those who merely recruit or refer individuals for employment by others. There is a minor exception for those who recruit agricultural or farm workers.

Traditional placement agencies and executive search firms help match candidates looking for jobs with our clients, who are perspective employers. Once a candidate is hired for a job, they become the employee of the client, and the client assumes the obligation of verifying their employment eligibility.

Currently, there's language in the House bill that would make it unlawful to hire or to recruit or refer for employment an individual without complying with the employment verification requirements. We are concerned that this broad reference to those who recruit and refer could again be construed improperly as expanding the verification requirement to all recruiters.

While there is other language in the House bill that appears to limit the reference to recruiting and referring to labor service agencies that operate day labor hiring halls, we urge that the bill be amended to make that unequivocally clear to avoid any misinterpretation.

We do not think that employers should have to pay a fee for using the system, or that employers should have to reverify their entire work force, unless there are extraordinary circumstances, such as significant past immigration violations. These issues are discussed in greater detail in our written statement.

The American Staffing Association strongly supports Congress' efforts to develop a new Employment Verification System that is effective, efficient, accurate and reliable, and we look forward to working with members of Congress and others to bring such a system to fruition.

Thank you very much.

[Mr. Malara's testimony may be found in the appendix.]

Chairman MUSGRAVE. Thank you for your testimony.

Mr. Lake, welcome to Committee.

STATEMENT OF MONTE LAKE, MCGUINESS, NORRIS & WILLIAMS, LLP

Mr. LAKE. Thank you, Madam Chair and Ranking Member Lipinski. I appreciate the opportunity to testify on behalf of the Agriculture Coalition for Immigration Reform, including the American Nursery and Landscape Association and National Council of Agricultural Employers.

The coalition includes over 150 state, regional and national agricultural organizations, representing thousands of small farming, ranching and nursery businesses. It was formed six years ago for the purpose of promoting comprehensive immigration reform as it relates to agricultural employers.

My name is Monte Lake. I'm a Partner in the labor and employment law firm of McGuiness Norris & Williams in Washington, D.C., and I have represented many small businesses engaged in agricultural and horticultural operations throughout the U.S., in their efforts to comply with the requirements of federal immigration and employment law over the past 20 years since IRCA was enacted.

I appreciate the opportunity to address the issue of employment verification. American agriculture will support electronic verification of employment eligibility, as long as the process is simple, manageable, and provides clear-cut compliance responsibilities.

It is also imperative that Congress pass comprehensive reform that ensures American agriculture an adequate supply of legal workers to replace those that likely will be screened out by an electronic verification system.

My comments on H.R. 4437, the House passed bill, are made in the light of the failures of the legal compliance morass that currently surrounds the Verification of work authorization that's been addressed by some of the witnesses before me. Employers should not face discrimination charges as a result of trying to hire legal workers, but that's been the history.

Small employers want clarity, simplicity and a rational system that facilitates legal compliance, and now is the time to get it right after 20 years.

I ask that my written statement be submitted into the record, and I'll be glad to answer questions after the presentation of these brief oral remarks.

A new verification system should achieve, at a minimum, seven goals.

One, it must screen out undocumented workers and provide employers certainty that they have a legal work force, that their training costs will not be wasted, and their businesses later disrupted by revelations that certain workers are illegal.

Two, it must reduce the number of employment documents. The current menu of 29 different documents to establish legality is confusing and leads to discrimination charges. ACIR supports the establishment of a single Social Security type card for purposes of employment verification, similar to the approach of H.R. 98 introduced by Representative Drier. It would simplify the hiring process, and help eliminate the problem of discrimination that is a problem under current law. It's simplicity that we seek.

Three, the new verification system should be implemented over time, and should not be applied retroactively. Placing too many de-

mands, too soon, has the potential to overwhelm the system creating compliance challenges and defeating its purpose. The approach taken in H.R. 19, introduced by Representative Calvert, who we heard here today, and commented on by the Chairman, is a reasonable one that anticipates the problem and would phase in perspective verification over a number of years. The largest employers would be subject to the system first, and the smallest employers several years later.

Four, because of the inherent tension that's been referenced between verification and discrimination under the law, the new law should set forth clearly any new duties and rights related to discriminatory practices based on national origin and citizenship status. H.R. 4437 merely directs the Secretary of Homeland Security to evaluate the problems related to this issue, but doesn't provide employers and workers any guidelines.

Five, agricultural businesses often hire farm labor contractors, which they consider to be the employers of the workers they provide. Contractors have an obligation to verify the status of the workers they supply. The law should make clear that the agricultural business does not have a duplicate verification obligation and can rely upon the verification of the contractor.

Six, the penalties for verification paperwork violations should be reasonable. Inadvertent mistakes, often repeated through the hiring process, could incur fines between $1,000 and $25,000 per violation, per piece of paper, under the bill. Small employers that span from family to hundreds of seasonal workers each year, face hundreds of thousands of dollars in fines under the provisions. We believe that Congress should revisit this issue and provide a more reasonable approach.

And finally, seven, the legislation also must provide a viable means for agricultural employers to obtain legal workers. An effective verification system would screen out a majority of the agricultural work force. The U.S. agricultural work force has become increasingly populated by foreign workers who lack work authorization, as reported by the last report of the United States Department of Labor.

In anticipation of this problem, American agriculture came to Congress ten years ago, when IIRIRA was considered, and expressed support for electronic verification, as long as it was accompanied by substantial reform of the H.288 Agricultural Guest Worker Program. Because of the difficulties in using that program, less than 2 percent of the seasonal agricultural work force are brought in through it.

An employer enforcement only, or enforcement first approach to immigration reform, that does not include a reform worker program, will be disastrous for American agriculture. Not only will field production jobs be lost, but for every field job the three to four jobs in cities and suburban areas that provide processing, packaging, chemicals, farm equipment, transportation, and ports also will be lost.

We hope that America is not willing to export its labor-intensive agriculture and rely upon foreign imports.

Thank you very much for the opportunity to testify.

[Mr. Lake's testimony may be found in the appendix.]

Chairman MUSGRAVE. Thank you for your testimony. We may be called for votes right away, so we'll quickly move through questions.

Mr. Shandley, I was amazed when I heard you talking about the incident in 2002, and the original fine was cited at $2.5 million because allegedly you had been too aggressive in seeking proper verification for new hires, and I'm trying to—it's kind of the darned if you do and darned if you don't situation.

Could you elaborate a little bit on that experience, and I assume a great deal of frustration that you were going through with that?

Mr. SHANDLEY. Thank you, Chairman Musgrave.

In elaboration, one of the things Swift & Company does, both as a domestic employer as well as a global employer, is we do want to have a very strong working relationship with all agencies, and comply with the laws.

In the situation at hand, it basically was the tension that was alluded to earlier, where circumstances at one of our facilities, where they had documentation, they suspected that they had passed the Basic Pilot program, they suspected that there may be some problems with it, they tried to look into it further, and ultimately got us in hot water through the Office of Special Counsel.

And, I will sit there and say that at the end of the day the working relationship between the INS then, or ICE now, and the Office of Special Counsel, succeeded in working through the issues, and the ultimate fine was really just—it was really a cost avoidance of further litigation, not an admission by any means. But, it does spell out the simple fact that we can hire—we'll hire people using legal documents that were obtained fraudulently, and that becomes, you know, part of the issue that an employer faces. Our staffs are not trained to be detectives at that level.

Chairman MUSGRAVE. Well, Mr. Divine had said that if many people were using the same documentation, you know, in a number of states, I believe it was his example that it would be caught. And, I noticed in your testimony that you see, however, any kind of duplicate use of valid documents as a real problem. Is that the case?

Mr. SHANDLEY. Yes, basically, we have a lot of experience with the Basic Pilot program, but it does have its flaws as we've heard today.

The biggest flaw really is the person could take a legitimate birth certificate, go to an office and get a legitimate Social Security card, and that legitimate Social Security card then goes to a state to get a state ID with a picture on it. At that point on, that Social Security card and the state ID, by law, we are required to accept, even though it was fraudulently obtained.

The other issue that comes up is really the fact that has already been mentioned, is unless you individually look at your Social Security statement at the end of the year, and look at where the income flow is coming from, you don't know how many times or how many employers that same Social Security number is being used.

The Basic Pilot is very good, and it's very quick in its turnaround, and it's the right start and the right step, but it doesn't go into the active Social Security numbers, and so those active Social Security numbers, as it stands today, could be used elsewhere and fraudulently. And so, that's the issue that we have.

Chairman. MUSGRAVE. Thank you.

Mr. Lipinski?

Mr. LIPINSKI. Well, let me first go through and just quickly ask each one of you whether or not you think that the pilot program can be expanded and can be used to cover everybody, just very quickly, just say yes or no, and then we'll get into more details.

Mr. Shandley?

Mr. SHANDLEY. The answer is yes, but I'd like to expand on that, if I had an opportunity.

Mr. AMADOR. It could be expanded, but in phases, if all the problems are fixed. If not, it will be expanded but it will be flawed.

Mr. KRIKORIAN. Yes.

Mr. MALARA. Yes.

Mr. LAKE. I think it has to be expanded over time. It's being used by 9,000 employers as I understand now, and we are looking at 7 million, and we need to phase it in gradually.

Mr. LAKE. Mr. Shandley, you seem to have the most concerns about it. What are you most concerned about? We just talked about the fact that, you know, on our first panel we talked about you can pull out multiple times a Social Security number is being used, you can flag that, pull that out, find the problem. You said that can't be done right now. So, what do you sort of boil it down to? Very quickly, what do you think are the most important changes that need to be made?

Mr. SHANDLEY. Let me qualify, Your Honor, it absolutely can be and should be expanded, and I believe it should be expanded immediately, sooner rather than later.

We've taken it upon ourselves, as a major employer, with, you know, our payroll is over a half a billion dollars, and if you simply use the force multipliers that's a lot of economic impact in the regions that we operate.

We've taken it upon ourselves to force our subcontractors, and I use the word force figuratively, or push our subcontractors to use the Basic Pilot program. By law, they are not required to do that. And yet, it's our effort, as a private employer, to try to get the Basic Pilot used in a broader fashion, so that's my point of clarification. I believe it can be, and should be, accelerated, enhanced. It's a procedural issue, it's a process issue, it's a database issue, like we talked about earlier today.

Mr. LIPINSKI. Mr. Amador, would you want to add?

Mr. AMADOR. Yes, I would like to add that it's important to mention that in both bills, and all through immigration law, as the fees increase for enforcement there's also fee increases in fines and broader investigations for civil rights violations.

So, we are looking for a way, you know, and we are looking for fast answers as well. You know, when you have people on the tentative non-confirmation, and we read in the paper of a member being sued by an employee because they fired him, the moment they got a tentative non-confirmation the reaction from the employer is, I don't want anything to do with this, I want to fire the individual. And, we want to be able to get a fast and reliable response so the employer can either hire and keep the individual, or fire the individual.

And, right now, on the Basic Pilot, this tentative non-confirmation that can go on forever doesn't give you that security.

Mr. LIPINSKI. Did you say there's a 25 percent false negative?

Mr. AMADOR. 20 percent of the first initial response is a tentative non-confirmation, that end up being later on confirmed as work authorized. And, we understand that the numbers have gone down, but we haven't seen any new official data come out from DHS saying what the new number is.

Mr. LIPINSKI. And, what needs to be done to change that?

Mr. AMADOR. Well, the databases have to be improved, but the mechanisms and the procedures, as Calvert said, shouldn't be just penalties and penalties, there should be incentives there, and there should be some form of default confirmations.

You know, the employer at some point needs to feel confident that they use the system, they did everything they were told to do, and then they can rely that, you know, they are not going to come and do an investigation based on the tentative non-confirmation of employees they are by law not allowed to fire.

So, there are many things that we recommend could be done to improve it, but one thing that we must point out again is that we are talking within the context of a comprehensive immigration reform. One of the things Congressman Calvert testified to was that there would be a cost to the economy to get out these workers from the economy right away, and I would expand and say, not just if you take them right away, if you take them out of our economy period.

Mr. LIPINSKI. Mr. Lake, how long do you think it's going to take?

Mr. LAKE. I think hearing Congressman Calvert, who has a lot of experience with this, and put a lot of time into it, a seven-year period phased in, with largest employers first, makes sense. We've gotten 20 years in trying to adopt this, ten years since IIRIRA started the pilot. Let's do it right. The problem if we don't do it right is that small employers can't get responses from the system, and they have the ongoing duty to try to follow up each day to get into the system, and meanwhile they are making new hires, and the problem is compounding. You are going to have system break down of its own weight, and it's going to breed disrespect, and we are trying to make it work right.

So, I think start with the largest employers, and I represent them, who want computer-based systems, who want to copy the documents electronically, who want to have electronic signatures, they are equipped to do it, and ready to do it, start with the big ones first, and gradually phase in.

If there's a capacity to do it more quickly, as the experience demonstrates, Congress can come back and, perhaps, accelerate it.

Mr. LIPINSKI. Thank you.

Chairman MUSGRAVE. Mr. Akin?

Mr. AKIN. Thank you, Madam Chairman, especially allowing a guest in to your hearing.

Chairman MUSGRAVE. Happy to have you.

Mr. AKIN. When we voted on the Comprehensive Immigration Bill the end of last year, as a guy that used to work in business, and used to work for IBM, my understanding of what we were talking about, and maybe I'm wrong, was something that's pretty

straightforward for an employer. You simply call up, they have a prospective employee sitting there, they call up and they say, what's your Social Security number, they check it and find out what his name is and his birthday is, and see if they all match.

If they do, they can hire him. If they don't, they say, we're sorry, we've got some sort of a problem, you need to go talk to some government office.

I was thinking of something that would be very simple, an immediate test, and second of all, that's foolproof for many lawsuits, either from the government in terms of fines, or from anybody else who says you are threatening somebody's rights, because every single employee, just do the same process.

That was my concept of what they were talking about. Is that your concept of what's going on, or are you talking about something where you hire somebody and later on try and figure out whether they are legal or not?

Mr. AMADOR. If I may add, the House bill is written within the context of current law, so all of the other penalties still apply. They actually increased the penalties for civil rights violations, but they all fall within the INA.

Mr. AKIN. What I'm talking about, could you ever have a civil right violation for doing that, what I just said?

Mr. LAKE. I think, Congressman, the issue is this, as Mr. Divine from the Administration, who is implementing the system, talked about, you have citizens who are putting forth a Social Security card, and that's more straightforward, and I think it's the simplicity that you talk about.

But, some of the discrimination lawsuits we've seen involve alien cards, which are also a part of the system, and which goes through the Department of Homeland Security's database. And, as we heard from some of the witnesses previously, a lot of these cards either have temporary status, they are expired as a matter of law, but the person may not have a new document, and the government doesn't get in the updates on the status as readily as they do, for example, on Social Security cards.

And so, if an employer believes that a person is an alien and has an expired card, and terminates them, when, in fact, they are still legal, but it hasn't gotten into the database, that's when you are looking at problems that arise that raise the problem of discrimination.

So, it's a matter of the government having time to get the capacity up on the alien side, as well as the Social Security side, to make the system work, and that's why we hope that it's done right so that people aren't discriminated against unfairly, and that employers don't make mistakes that get them into that position.

Mr. AKIN. And, you are saying that's going to take seven years to get that up and going properly, is your guess?

Mr. LAKE. I'm just relying upon the study of Congressman Calvert, who has looked at this issue, put a lot of time into it, was a small employer, and I think that's a reasonable approach.

Mr. AKIN. And, this system would apply to any American that wants to get a job, right? It makes it hard to say you are discriminating, because anybody that you are going to hire you are basically doing the same check on that.

Mr. LAKE. It applies to any American citizen, as well as any alien, whoever it is, anybody's warm body walks up, we are not discriminating against anybody. You just basically check everyone.

Mr. AKIN. Okay. Well, I've heard similar estimates that that database is hard to—it's a lot harder to bring it up and make it work than what it would appear that it should be simple on the surface, it's not so simple.

Okay, well, I think that answers you questions.

Chairman MUSGRAVE. Thank you.

Mr. Lipinski, did you have another question?

Mr. LIPINSKI. No, I have no further questions.

Chairman MUSGRAVE. I want to thank the panel for your very good testimony. You've given us good information today, and thank you for appearing before the Committee.

This meeting is adjourned.

[Whereupon, the Subcommittee was adjourned at 4:17 p.m.]

Opening Statement
Marilyn Musgrave, Chairman
Subcommittee on Workforce, Empowerment, & Government Programs
Immigrant Employment Verification and Small Business

- Good Morning, this hearing of the Subcommittee on Workforce, Empowerment and Government Programs will come to order.
- Thank you all for being here this morning as we examine the impact of various immigration reform proposals on small business.
- I would like to especially thank those of you who traveled great distances to provide our committee with testimony.

- While traveling around my congressional district, the problems of illegal immigration are consistently among the top concerns communicated to me.
- Individuals, community leaders, law enforcement officials, and business leaders all recognize the adverse affects and want Congress to pass laws to promote America's tradition of lawful immigration.
- The increasing number of immigrants crossing our borders illegally is a burden to our economy and a threat to our national security.
- Official census data predicts there are 8.7 million individuals living here illegally; however, some unofficial estimates predict closer to 10-12 million.
- There are also approximately 500,000 illegal aliens that enter the United States every year.
- Because this is a pressing issue, the House of Representatives passed H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act, prior to adjourning the first session of this Congress, in December 2005.
- In May 2006 the Senate also passed a significant immigration reform bill, S.2611, the Comprehensive Immigration Reform Act of 2006.

- Both bills make numerous significant changes to our immigration law and border security efforts.

- H.R. 4437 also aims to crack down on alien smugglers and the alien gang members who terrorize our communities.

- In addition, the bill would direct the Secretary of Homeland Security to devise a plan to provide systematic surveillance coverage and, within one year, introduce a plan for border security including risk assessment of ports of entry.

- This plan would include a description of border security roles of federal, state, regional, local and tribal authorities and ways to ensure such security efforts would not impede commerce.

- The focus of the hearing today, however, will be on the expansion of the Basic Pilot Program for employee verification that is contained in both bills.

- The Immigration Reform and Control Act of 1986 (IRCA) made it unlawful for employers to knowingly hire or employ aliens not eligible to work and required employers to check the identity and work eligibility documents of all new employees.

- This act was designed to end the "job magnet" that draws the vast majority of illegal aliens to the United States.

- Unfortunately, the easy availability of counterfeit documents has made a mockery of the 1986 legislation.

- Fake documents are produced by the millions and can be obtained cheaply.

- Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress responded to the deficiencies of the 1986 Act by establishing three employment eligibility verification pilot programs for volunteer employers in selected areas. This is known as the Basic Pilot Program.

- Since November 1997, the Social Security Administration (SSA) and the Systematic Alien Verification for Entitlements (SAVE) Program have been conducting the Basic Pilot Program in the States of California, Florida, Illinois, Nebraska, New York and Texas.

- The program was made available to employers in all states starting December 20, 2004.

- The Basic Pilot involves verification checks of the SSA and the now Department of Homeland Security databases of all newly hired employees, regardless of citizenship.

- The Basic Pilot is currently a voluntary program and is free to employers who volunteer to participate. It is used by over 4,000 employers and at nearly 15,000 worksites nationwide.

- The recently passed House and Senate legislation both change the name of the Basic Pilot Program to the Employment Eligibility Verification System and would require all businesses to use it when making new hires.

- The legislation also increases fines for companies failing to comply with the new law.

- While the House bill prescribes lower penalties for small and medium sized businesses, the Senate bill does not, nor does the Senate bill have an exemption of fines for a "good faith effort" to comply.

- Our purpose here today is not to compare and contrast the merits of either bill, however.

- All too often when these gigantic, reform-minded pieces of legislation are formulated, small businesses are often an afterthought.

- While the House did take small and medium sized businesses into consideration when constructing their legislation, there are many questions we need to ask to ensure that this bill, should it become law, will not unjustly overburden America's small business community.

- We need to answer questions such as, "Will making participation mandatory increase the paperwork burden for small businesses?"; "How accurate will it be and how can we ensure the number of false positives and negatives will be extremely minimal"; "How long will it take to certify someone?"; and, "Will the Department of Homeland security be ready for it if it happens and what do we in Congress need to do to make sure they are?"

- I am eager to hear today's testimony and before I yield to our Ranking Member, Mr. Lipinski, I would also like to sincerely thank Representative Calvert from California for taking time out of what I am sure is his very busy schedule to be with us today.

- Mr. Lipinski?

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Written Statement of Rep. Nydia M. Velázquez
Small Business Sub Committee on Workforce, Empowerment and Government Programs Hearing
on Immigrant Employment Verification and Small Business

June 27, 2006

Thank you, Chairwoman Musgrave.

As we all know, immigrant workers play a vital role in the U.S. economy. This country has a long history of being dependent on the hard work of our nation's immigrants – and it holds just as true today. In fact, immigrants have played a pivotal role in every major surge that has ever taken place in our nation.

That is why small businesses rely so heavily on the immigrant workforce. As the drivers of the U.S. economy, small firms depend on a reliable, strong workforce to keep their businesses running. Yet, one of their main challenges can be finding and retaining a full workforce. Historically, even during times of slow economic growth, entrepreneurs often struggle to fill their employment needs.

The reality is that employment gaps do exist in this country. Cultural barriers have created a situation where people focus on careers that require a college education. Because of this, good paying, low-skilled jobs are simply not attracting the same level of interest that they did nearly a decade ago.

Immigrant workers help to fulfill this exact void – enabling a significant number of small businesses to expand and continue their day to day operations. Studies have actually shown that immigrant workers have higher workforce participation and lower employment rates.

These workers fill a crucial gap – they hold down the jobs that keep our small businesses, and the economy, strong. Their presence can be felt in professions from construction and healthcare, to the service industry, agriculture and technology.

However, it has become very clear that the current immigration system in this country is broken. The result of this dysfunctional system is clear – a growing undocumented workforce and a temporary worker program that does not even start to solve the problem.

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The bottom line is that the current system does nothing to match willing employees with employers in need. If we are to truly address the issue of immigration in this country, while meeting the needs of small businesses and our economy, we need to have a good balance here.

I was very disappointed to see that H.R. 4437 passed the House just a few months ago. This bill is not good for our nation's immigrants, nor does it address this issue for small businesses.

If anything, it actually worsens the problem – particularly Title VII. There is a great deal of concern over this provision and the additional regulatory burdens it will impose on this nation's small businesses.

That is why it is so important that we are discussing this issue today – to truly examine what type of impact provisions such as Title VII will have on our immigration system, our small businesses and most importantly the nation's economy. Holding hearings like this will allow us to go on record discussing what these provisions mean for our nation's small businesses.

I look forward to today's discussion and hearing the testimony of the witnesses.

Thank you.

Statement by Representative Ken Calvert
House Small Business Committee
Subcommittee on Workforce, Empowerment, and Government Programs
June 27, 2006

Chairman Musgrave, Ranking Member Lipinski, and Members of the Committee, thank you for inviting me to speak today on employment verification.

I am very pleased that the Small Business Committee is taking a look at this program because I strongly believe that businesses need to use the program in order to regain confidence in their workforce.

Before coming to Congress, I was a small business restaurant owner in California. Like all employers, I required my employees to present documents authenticating their identity and employment eligibility as part of the I-9 Immigration Form process. Since I have never been an expert on documents, I had no way of knowing whether the documents presented were authentic or fraudulent. So when I was elected to Congress, I helped write legislation to create the Basic Pilot Program with the intention of giving employers a reliable tool to verify their employees' eligibility to work. In the 109th Congress, I introduced H.R. 19 which would make the Basic Pilot program mandatory, and phased-in over time by size of employer. This bill became the backbone of Title VII of H.R. 4437 and Title III of S. 2611.

For a decade, the Basic Pilot Program has been tested, improved, and expanded. The program began as a telephone system, then became a modem-based system with software installed on each users' computers. Today, the program is internet-based and is as easy to use as buying a book off Amazon.com. I can attest to how easy the program is since I am one of the first Members of Congress to sign up to use the program in my Congressional office.

I appreciate the opportunity to clear up some misconceptions about the program and highlight several key facts.

The Basic Pilot Program, and its possible successor the Employment Eligibility Verification System as outlined in both the House- and Senate-passed versions of immigration reform bills, works to ensure a legal workforce by verifying information in I-9 Form. This program does not target people, but rather confirms the veracity of the information on the documents people present. It is important to remember that the program does not discriminate against people, but instead gives employers confidence that their workforce is legal and free to work.

It has been noted that the Basic Pilot can not detect identify theft, yet I believe it can if the new program is used properly. Immigration Customs Enforcement must be able to monitor the program's data to look for suspicious patterns. Just as credit card companies

can "flag" suspicious activity, the Basic Pilot program could be used to detect possible identity theft by flagging a name and SSN that is being used over and over again. Concerns over identity theft have lead many to conclude that we need a national identification card. I disagree. By monitoring the data and flagging suspicious activity, a mandatory program can combat identity theft without a new ID card. It is true that no program will ever be perfect, but the concerns about identity theft and document fraud can be adequately addressed through a thoughtful mandatory system as reflected in the House-passed immigration reform bill.

Some of the individuals testifying today may question the accuracy, ease of use, speed, or cost of the program and may ask whether the program can be expanded for all employers quickly enough. According to the 2005 GAO report, the U.S. Citizenship and Immigration Services has reduced their data entry backlog from 9 months to approximately 10-12 days, significantly improving the speed and accuracy of the program. The same report found that 98.5% of all queries receive an immediate response and the program is 98.6% accurate.

Striving for 100% accuracy is necessary, but we should not make the perfect the enemy of the good. The accuracy rate is already very good and it will improve as the system is implemented. Inaccurate results indicate that there is a discrepancy between the information presented by the employees and the data on record. Notification of a discrepancy is an opportunity for the employee to correct the record. Adequate time is mandated to allow an employee to clear up discrepancies. No one is dismissed because of an initial negative.

I might add here that all employees with mismatched data will receive a chance to correct the record because employers cannot use the system to pre-screen employees. They can only use the program after they hire a new employee, which is another safeguard against discrimination. If an employee is wrongfully terminated, currently existing remedies remain available to them.

Think of this as similar to the use of credit reports, which are vital to our financial system yet may contain errors. We do not demand 100% perfection in the credit report system in order to find it useful because we understand that credit reports are valuable tools and that errors can be corrected. The Basic Pilot is a good tool and the accuracy of the information will continue to improve as individuals have a chance to correct the record.

The Basic Pilot has experienced incredible success since it was launched 10 years ago, and that success is even more incredible when you consider that Congress has not appropriated funds specifically for the Basic Pilot, instead requiring the Department of Homeland Security to use funds from its discretionary account.

Yet the lack of funding is changing. For the first time, the House has appropriated $114 million for FY07 to expand and improve the Basic Pilot to ensure it is ready to handle a huge spike in demand. There are almost 10,000 employers using the program today, up from 2,300 in 2004 and more employers are signing up everyday. Based on the

program's superior performance to this point, it is clear that the program will be adequately prepared to quickly and accurately handle queries from every employer in the nation.

I believe the U.S. government needs to better enforce our immigration laws, including employer sanctions and worksite enforcement. If we are to hold employers responsible for following the law, we must give them a tool which they can use in good faith. The Basic Pilot is the tool all employers should use.

A vital component of immigration reform is to make sure everyone who works in the U.S. is doing so legally by turning off the "job-magnet." Making the Basic Pilot program mandatory is an essential component of our national policy that de-incentivizes illegal employment in the U.S., and without it, all other efforts to enforce immigration laws will fall short.

Thank you again for allowing me an opportunity to speak to you today.

U.S. Citizenship and Immigration Services

STATEMENT

OF

ROBERT DIVINE
ACTING DEPUTY DIRECTOR
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
U.S. DEPARTMENT OF HOMELAND SECURITY

REGARDING A HEARING ON

"Immigrant Employment Verification and Small Business"

BEFORE THE

SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT, AND GOVERNMENT PROGRAMS
HOUSE COMMITTEE ON SMALL BUSINESS

June 27, 2006
2:30 PM
2360 Rayburn House Office Building

Madam Chairman, Ranking Member Lipinski, and Members of the Subcommittee:

I. Introduction

My name is Robert Divine and I am the Acting Deputy Director of U.S. Citizenship and Immigration Services (USCIS). I am honored to have this opportunity to talk with the Subcommittee about the Basic Employment Verification Pilot (Basic Pilot) which provides information to participating employers about the work eligibility of their newly-hired workers. I also will describe the agency's plans to improve and expand the Basic Pilot in preparation for a nationwide mandatory Employment Eligibility Verification System (EEVS).

EEVS is a critical step to improving worksite enforcement and directly supports the President's goal of achieving comprehensive immigration reform. In his speech to the U.S. Chamber of Commerce on June 1, President Bush endorsed the Basic Pilot as "a quick and practical way to verify social security numbers" that "gives employers confidence that their workers are legal, improves the accuracy of wage and tax reporting, and helps ensure that those who obey our laws are not undercut by illegal workers."

Clearly, if we are 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 Colorado and Illinois and Georgia, not just along the southwest border. Today, an illegal immigrant with a fake ID and Social Security card can find work almost anywhere in the country without difficulty. It's the prospect of jobs that leads people to risk their lives crossing a hundred miles of desert or to spend years in the shadows, afraid to call the authorities when victimized by criminals or exploited by their boss.

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

There is much we can do in advance of the enactment of comprehensive immigration reform. Here's what we are working on at USCIS, not only to improve the Basic Pilot but also to transform the entire way that we process applications for immigration benefits:

- Ensuring all aliens have secure biometric cards with an enumerator (A#) and phasing out production of locally produced cards that are too vulnerable to counterfeiting and that do not tie into a database for verification.

- Tapping into our card databases for verification—which will decrease the number of Basic Pilot queries that require a manual, secondary check to resolve them.

- Adding more DHS information about the status of nonimmigrants into the Basic Pilot verification system, which also will decrease the number of queries needing manual checking.

- Moving to eliminate our data entry errors by pushing for electronic intake of applications and more robust and timely sharing of information.

- Linking verification and employer sponsorship accounts (which will be a new feature of our transformed case processing system).

- Creating monitoring and compliance units that will search Basic Pilot and EEVS data for patterns to detect identification fraud and employer abuse.

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

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

II. The Current Basic Pilot Program and EEVS

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

Congress established the Basic Pilot as part of IIRIRA in 1996, creating a program for verifying employment eligibility, at no charge to the employer, of both U.S. citizens and noncitizens. The Basic Pilot program began in 1997 as a voluntary program for employers in the five states with the largest immigrant populations -- California, Florida, Illinois, New York and Texas. In 1999, based on the needs of the meat-packing industry as identified through a cooperative program called Operation Vanguard, Nebraska was added to the list. The program was originally set to sunset in 2001, but Congress has twice extended it, most recently in 2003 extending its duration to 2008 and also ordering that it be made available in all 50 States. However, the program remains only voluntary, with very limited exceptions. A small percentage of U.S. employers participate, although the program is growing by about 200 employers a month to a current 9,300 MOUs between USCIS and employers. These employers are verifying over a million new hires per year at more than 34,000 work sites.

Madam Chairman, you have said, "Small businesses are the backbone of Colorado's economy." And what is true for Colorado is true for the rest of the Nation as well. We seek in operating the Basic Pilot program to encourage the voluntary participation of small businesses, and to be responsive to their needs and concerns. Most (87%) of our participating employers have 500 or fewer employees. Madam Chairman, in your state of Colorado, there are 207 participating employers, including the U.S. Olympic Committee, Alsco Laundry Service and the New World Restaurant Group. The types of industries in the Basic Pilot in Colorado include administrative and support services, construction, and hotels and motels. And Ranking Member Lipinski, in Illinois, there are 407 participating employers, including Staffmark Employment Agency, Judson College, and St. Joseph Medical Center representing employment agencies, educational institutions, and medical facilities. We would welcome your support in reaching out to enroll even more employers into the program. Interested employers can register by going to our Basic Pilot Employer Registration Site at: https://www.vis-dhs.com/employerregistration.

How the Basic Pilot Works

After hiring a new employee, an employer submits a query including the employee's name, date of birth, Social Security account number (SSN) and whether the person claims to be a U.S. citizen or work authorized noncitizen (for noncitizens, A# or other DHS issued # is also submitted) through the system and receives an initial verification response within seconds. The system first electronically sends the new-hire's SSN, name and date of birth to the Social Security Administration (SSA) to match that data, and SSA will confirm citizenship status (if the employee claimed to be a U.S. citizen) based on data in the Social Security Administration's Numident database. If a new hire claims to be a U.S. citizen, that person's information is verified only through SSA's database. In a small percentage of cases (12%), a query cannot be immediately verified electronically, so the system issues an SSA tentative non-confirmation to the employer. The employer must notify the employee of the tentative non-confirmation and give him or 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.

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

verification of the employee's work authorization status or a DHS Final Nonconfirmation.

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

USCIS is already planning for the expansion of the program. The President's FY07 budget request includes $110 million to expand and improve the Basic Pilot so that it can be used for all employers as the new Employment Eligibility Verification System (EEVS), including components for outreach, systems monitoring, and compliance. USCIS currently is exploring ways to improve the completeness of the immigration data in the Basic Pilot database, including adding information about nonimmigrants who have extended or changed status and real-time arrival information from U.S. Customs and Border Protection. In addition, USCIS is currently enhancing the Basic Pilot system to allow an employer to query by the new hire's card number, when that worker has a secure I-551 ("green card") or secure Employment Authorization Document. This enhancement will significantly improve the speed at which USCIS will be able to verify the employment eligibility of many 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, resulting in 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. As currently envisioned, EEVS will include robust processes for monitoring and compliance that will help detect and deter the use of fraudulent documents, imposter fraud, and incorrect usage of the system by employers (intentionally and unintentionally). USCIS will forward enforcement leads to ICE Worksite Enforcement in accordance with referral procedures developed with ICE. The monitoring unit will scrutinize individual employers' use of the system and conduct trend analysis to detect potential fraud. Findings that are not likely to lead to enforcement action (e.g., user has not completed training) will be referred to USCIS compliance officers for follow-up. Findings concerning potential fraud (e.g., SSNs being run multiple times in improbable patterns, employers not indicating what action they took after receiving a final nonconfirmation) will be referred to ICE Worksite Enforcement investigators.

However, it should be emphasized that no electronic verification system is foolproof or can fully 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, monitoring and compliance functions, along with a fraud referral process for potential ICE Worksite Enforcement cases can substantially help deter and detect the use of fraud by both employers and employees as we work to strengthen the Administration's overall interior enforcement strategy.

It is essential that DHS have the authority to use information arising from the EEVS system to enforce our Nation's laws, including deterring and prosecuting fraud, and identifying and removing criminal aliens and other threats to public safety or national security. It is also important that the system contain security and other protections to guard personal information from inappropriate disclosure or use, and discourage the misuse of the system for the purpose of illegal discrimination or other improper use adversely impacting the civil rights of U.S. citizens or work-authorized noncitizens.

Planning for EEVS

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

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

III. Improved Documentation

In the President's May 15, 2006 address to the nation on comprehensive immigration reform, he indicated that businesses often cannot verify the legal status of their employees because of 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 biometric technology…to make it tamper-proof. A tamper-proof card would help us enforce the law, and leave employers with no excuse for violating it."

Many foreign workers already possess a secure, biometric card evidencing their immigration status as either an immigrant (an I-551 card, commonly known as a "green card") or a work-authorized nonimmigrant (an Employment Authorization Document or EAD). Some nonimmigrants currently have non-secure EADs, but USCIS is planning to

eliminate the issuance of these cards in favor of secure cards. In addition, USCIS is 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 matched with a name and DOB will electronically verify in a matter of seconds – and only a fraudulent card would fail to verify.

IV. Conclusion

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

Thank you and I look forward to answering your questions.

Swift & Company®

TESTIMONY BY

JACK SHANDLEY
SENIOR VICE PRESIDENT, HUMAN RESOURCES
SWIFT & COMPANY
GREELEY, COLORADO

"IMMIGRANT EMPLOYMENT VERIFICATION AND SMALL BUSINESS"

BEFORE

THE HOUSE SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT, AND GOVERNMENT PROGRAMS OF THE COMMITTEE ON SMALL BUSINESS UNITED STATES CONGRESS

ON

JUNE 27, 2006

Chairman Musgrave, Congressman Lipinski, members of the Committee, and other esteemed guests – good afternoon. My name is Jack Shandley, and I am Swift & Company's Senior Vice President of Human Resources. Thank you for inviting me to testify today.

I will begin with some background information on Swift.

Swift is the third largest processor of both fresh beef and pork in the U.S. Our annual sales are close to $10 billion, and we employ 15,000 people domestically and 20,000 worldwide. We operate nine domestic processing plants in eight states.

Today's meat processing industry is nothing like it was 10 years ago, much less 100 years ago. Our production facilities are safe, clean, and pay wages and provide benefits that enable our people to achieve the American dream.

Swift's production wages are at *or above* average rates in the communities within which we operate. We offer affordable healthcare benefits to employees who have been with us at least six months, and approximately 80% of our qualified employees participate in our healthcare plans.

Our production employee turnover rate is *lower* than industry figures for leisure and hospitality, construction, and retail trade. All but one of our domestic plants are unionized.

Our safety rates, as measured by lost time injury incidence, are comparable to all manufacturing businesses in the U.S. Our Greeley beef facility recently completed 5.4 million operating hours without a lost time injury!

Simply put, this isn't the meat processing industry you hear and read about in the media.

Regarding immigration reform, the ongoing highly charged debate highlights the importance of this issue to the American public. Similar to a large percentage of the electorate, Swift & Company supports the development of common sense, balanced and comprehensive immigration reform legislation that:

1. Recognizes the U.S. economy's current and future needs for workers to support growth;
2. Protects employers that act in good faith to comply with all legal hiring requirements; and
3. Contains border security and guest-worker provisions.

Today's hearing clearly touches on my second point with respect to the role of employers in the current immigration debate. While Swift is clearly not a 'small business' by definition, we do have a wealth of experience in the area of employee identity verification that is relevant to today's hearing.

Under the current U.S. law, employers assume responsibility for verifying the identity and employment eligibility of newly hired employees. As part of the hiring process, we are required to complete and retain individual I-9 forms. When completing the I-9 form, a total of 29 distinct documents may be used by the employee to properly establish his or her identity. It is important to note that we as employers are limited in our ability to verify the identity of a new employee: we can't ask for a specific identification document; we can't ask for additional forms of identification; and we can't refuse to accept any single eligible identification document.

Two federal departments enforce the verification and non-discrimination provisions of existing immigration legislation: the Department of Homeland Security's Immigration and Customs Enforcement branch is charged with enforcing verification provisions, and the Department of Justice's Office of Special Counsel enforces antidiscrimination provisions.

This enforcement structure creates significant policy tension between the need for employers to accurately determine workers' eligibility versus the need to address privacy and non-discrimination concerns.

In 2002 we experienced this policy tension first hand when the Office of Special Counsel cited Swift for $2.5 million for allegedly acting too aggressively when verifying the work authorization status of new hires. To repeat, our company found itself in hot water for allegedly pushing too hard to ensure employees possessed the status they claimed! After two years of close cooperation with Federal officials we ultimately settled the case with no admission of guilt for approximately $200,000.

Since 1999 Swift has voluntarily participated in the government's Basic Pilot Program to supplement our efforts to properly verify the identity of all new hires. This program, along with increased employer sophistication in processing identity documents, was reasonably effective in helping to eliminate the use of counterfeit paperwork.

However, over time weaknesses in the Basic Pilot weaknesses came to light. As currently structured, the Basic Pilot Program cannot detect duplicate active records in its database. The same social security number could be in use at another employer, and potentially multiple employers, across the country.

The underground market responded by replacing counterfeit documents with genuine identification documents obtained under fraudulent terms – for example, state identification cards obtained with valid copies of birth certificates. As an employer, we must accept such cards on face value. Yet valid birth certificates can be resold to another undocumented worker for reuse in obtaining yet another official state identification card.

As you can see, employers have no foolproof way to determine if a new hire is presenting valid identification documents created under fraudulent circumstances. Furthermore, attempts to use additional means to determine employee eligibility place employers in jeopardy with law enforcement agencies. From our point of view, employers like

ourselves who are trying to abide by the law are not the problem in the immigration reform debate – the current immigration system is the problem.

In light of these problems we have three recommendations for Congress on how to improve the current system:

First, create enhancements to federally-endorsed programs that aid employers in their efforts to determine the work eligibility of new hires. This could be achieved in a variety of ways, from improving the Basic Pilot Program to creating a tamper-proof, biometric national identification card. It is unfair to blame employers for the failings of the system and it is unreasonable to assume we can identify fraudulently obtained documents. Give us a comprehensive, workable solution and we will execute against it.

Second, reconcile the policy tension that exists for employers when managing the boundaries between employee verification and non-discrimination. Remove the burden of enforcement on both sides of the issue by granting safe harbor to employers that participate in federal worker identification programs.

Finally, continue the practice of voluntary participation in federal worker identification programs. We have chosen to participate in the Basic Pilot program because the large number of applicants we process makes it cost-effective for us to do so. Small business owners in America may not benefit from the increased costs and delays associated with mandatory participation in a verification program. Give business owners a fair choice: risk breaking the law and suffer stiff penalties, or participate in a federal identification program and gain protection from liability.

Thank you for inviting me to speak today and for your ongoing efforts to implement common sense, balanced and comprehensive immigration reform legislation.

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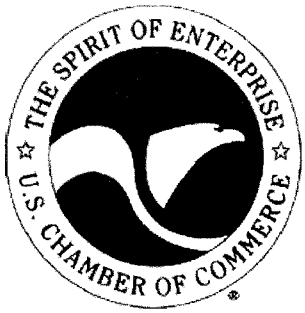

Statement of the U.S. Chamber of Commerce

ON: IMMIGRANT EMPLOYMENT VERIFICATION AND SMALL BUSINESS

TO: HOUSE SUBCOMMITTEE ON WORKFORCE, EMPOWERMENT, AND GOVERNMENT PROGRAMS OF THE COMMITTEE ON SMALL BUSINESS

BY: ANGELO I. AMADOR

DATE: JUNE 27, 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.

Statement on

Immigrant Employment Verification and Small Business

Before the

House Subcommittee on Workforce, Empowerment, and Government Programs of the Committee on Small Business

By

Angelo I. Amador

Director of Immigration Policy

U.S. Chamber of Commerce

June 27, 2006

Chairman Musgrave, members of the Committee, I am Angelo I. Amador, Director of Immigration Policy at the United States Chamber of Commerce and it is an honor and a privilege to testify before 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. The prevalence of false documents makes it difficult for an employer to know who is authorized to work and who is not. Employers need a fast, accurate, and reliable way to ensure that the workers they hire are indeed authorized to work.

There are currently two differing versions of electronic employment verification procedures in the House and Senate bills, one found in Title VII of the House-passed Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) and the other found in Title III of the Senate-passed Comprehensive Immigration Reform Act of 2006 (S.

2611). Both proposals seek to establish a new way of verifying the employment eligibility of the American workforce. The House version relies on the current I-9 system for identity verification while modifying and expanding the current voluntary "Basic Pilot Program" and imposes it on all employers. The Senate version modifies the current I-9 system and builds on the principles of the Basic Pilot, but takes a much different approach overall. The 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 testimony, 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 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

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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.
[6] Daniel J. Pilla, How to Fire the IRS, at 68-69, 1994.

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-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

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[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.*
[17] *Id.*
[18] *Id.*

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]

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

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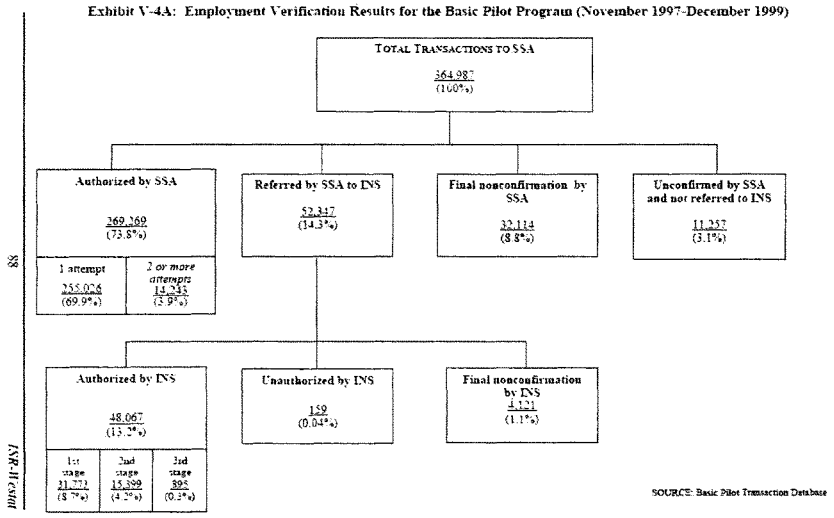
[19] Jernegan, Eligible to Work? Experiments in Verifying Work Authorization, at 3.
[20] Tyler Moran, National Immigration Law Center, Written Statement to the U.S. Senate Committee on the Judiciary on Employment Verification Systems in Comprehensive Immigration Reform, at 2, October 18, 2005.
[21] F. 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.*
[24] Institute for Survey Research at Temple University (ISR) and Westat, Findings of the Basic Pilot Program Evaluation, at 81-82, June 2002.

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)



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

[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.

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."

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

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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.*

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, 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.

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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.

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.

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 also rely on the same databases used by the Basic Pilot Program and, thus, will have similar challenges.

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

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 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

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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.

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 I look forward to your questions.

Immigrant Employment Verification and Small Business

Statement of Mark Krikorian
Executive Director
Center for Immigration Studies

Before the U.S. House of Representative Small Business Committee
Subcommittee on Workforce, Empowerment and Government Programs
Tuesday, June 27, 2006

The key to controlling illegal immigration is to change the incentive structure that illegal aliens face. The most important part of this is to make it as difficult as possible for an illegal alien to find a job, since easy access to employment is the main incentive for illegal immigration.

More than half a century ago, in 1951, the President's Commission on Migratory Labor recommended that employers be prohibited from hiring illegal aliens, a prohibition we now refer to in shorthand as "employer sanctions.". But instead of prohibiting the hiring of illegal aliens, Congress inserted the "Texas Proviso" into the 1952 immigration law, which specifically *permitted* the employment of illegals.

The Select Commission on Immigration Reform in 1979 again called for employer sanctions, and after seven years of legislative wrangling, Congress passed and the president signed the Immigration Reform and Control Act of 1986. It repealed the Texas Proviso and established a system for employers to verify the legal status of new

hires, centered on the I-9 form, and instituted various civil and criminal penalties for violators.

Unfortunately, opponents of the law ensured its failure by basing verification solely on paper documents and by preventing the requirement that pilot programs be developed to test how best to verify immigrants' claims to be eligible to work.

The result was eminently predictable. Even legitimate employers had no way of determining the legal status of new hires because of an explosion in false documents – and paper documents were all that employers had to gone on. And those employers who looked too closely at possibly false documents could – and were – investigated by the Justice Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices. The situation with employer sanctions was similar to the old Soviet joke: the illegals pretend to be authorized to work and the employers pretend to believe them. And the INS pretended to enforce the law.

Because of this, illegal immigrants had no trouble finding work, and as word got back to Mexico and to immigrant-sending communities around the world that the United States was not serious about enforcing its laws, illegal immigration soared, now amounting to some 12 million people, with around 800,000 more illegal aliens settling here each year.

In 1991, President George H.W. Bush authorized a small telephone-based pilot program with nine participating companies to see how verification of employment eligibility might work. Then, in 1995, the Clinton administration launched a larger experiment with about 1,000 volunteer employers nationwide. That same year, Congress acted on the recommendations of Barbara Jordan's Commission on Immigration Reform and required three pilots to be launched, and the largest of which continues today and is referred to as the Basic Pilot, a mainly internet-based system with almost 9,000 companies participating.

A consensus appears to have developed that mandatory verification is needed; both the House and Senate immigration bills call for the development of such a system, along the lines of the existing Basic Pilot. There are some significant differences between the two bills – the Senate bill, for instance, is likely to stretch out the implementation of the new system longer than the House bill, its penalties for noncompliance are weaker, and it does not provide for the verification of existing workers.

But more important is the very concept of mandatory, universal verification of new hires' eligibility to work – Is it practical? Is it burdensome? Is it good or bad for small business?

Practical. Because there were 56 million hiring decisions made in the United States last year, a nationwide, mandatory verification system would be a large undertaking, much more extensive than the current voluntary pilot program. But putting it in context shows that there is no reason to think implementing it would be unachievable, or even that difficult, so long as there are adequate resources and political support. There are about 260 business days in a year, so there are an average of 215,000 hires made each day. But customers download nearly 1.3 million songs each day from i-Tunes; Wal-Mart conducts more than 10 million transactions per day at its 3,700 stores in the United States; and Visa processes more than 100 million transactions each day.

Of course, improvements will have to be made in the system. In 2004, according to the GAO, there were 657,000 queries run through the Basic Pilot, about one percent of the total number of hires nationwide; while the system is currently operating at only 2 percent of capacity, it will obviously have to be expanded to handle the increased traffic. Furthermore, the Department of Homeland Security needs to continue to speed up the process of data entry on aliens newly authorized to work. Also, DHS needs to further automate the work currently done manually by immigration status verifiers on the relatively small number of cases that are not handled by the automated system. In other words, in 2004, there were 657,000 queries made through the system; about 596,000 (91 percent) resulted in employment authorization, 90 percent of them by the Social Security

Administration. Of the 10 percent referred to DHS for verification (because the employees with problems were non-citizens), 85 percent were authorized by automated means but the remaining 15 percent (i.e., about 1 percent of the total number of authorizations) had to be checked manually in other databases by DHS staff. Though it would certainly be possible to hire an adequate number of status verifiers to continue this practice, it would make sense (for a variety of reasons) to better integrate DHS's databases to streamline this process.

Furthermore, although the system reduces fraud by verifying the information presented by an employee, it is still possible for the same legitimate Social Security number and name to be used fraudulently by multiple workers in different sites. This is why any full-scale verification system needs to include criteria for flagging potential identity theft; in other words, if the same Social Security number is used more than a certain number of times within a certain time period, and in a wide variety of locations, those facts need to be brought to the attention of employers, for re-verification, and to enforcement personnel, for investigation.

Not Burdensome. This is all very interesting, but of immediate concern to business is whether a verification system would represent an additional burden that makes it harder to do their jobs. Small business, in particular, lacks the infrastructure to deal with the proliferating mandates coming from all levels of government. As a small businessman myself, I appreciate the multitude of regulations small business faces; just looking at posters on the wall in my Center's work room, I see references to the Civil Rights Act, the Occupational Safety and Health Act, the Family and Medical Leave Act, the Employee Polygraph Protection Act, the Drug-Free Workplace Act, the Youth Employment Act, the Older Americans Act, and the Uniformed Services Employment and Reemployment Rights Act – among others. As even George McGovern learned, "legislators and government regulators must more carefully consider the economic and management burdens we have been imposing on U.S. business."

Which is why it's a good thing that mandatory employment-eligibility verification would not be especially burdensome to employers. The information that is to be verified all has to be collected anyway as part of the normal hiring process. The only way employers would no longer have to collect a news hire's name, date of birth, and Social Security number is if Congress abolished the Social Security system and income tax withholding – which I don't see on the horizon. That being the case, verifying (at no cost to the business) the information that employees have to provide anyway is hardly a new mandate.

A survey in April of members of the national Federation of Independent Business, the association of small businesses in our country, found that more than 90 percent of the small-business owners surveyed believed illegal immigration is a problem, 70 percent ranking it as a "very serious" or "serious" problem. Furthermore, 78 percent of the small-business owners surveyed supported increased penalties for employers who knowingly hire illegal aliens. And while respondents thought that verifying the ID of new hires might represent a moderate burden, that burden would be reduced by a centralized verification system like the Basic Pilot.

Nor is this simply theoretical; my own small (very small) business participates in the Basic Pilot, and it represents no extra burden at all. A growing number of businesses seem to agree, as is clear from the rapid growth in participation; from 2,300 employers in 2003, there are now nearly 9,000 participating employers. And further rapid growth is likely; starting this month, Dunkin' Donuts began requiring all 5,000 of its franchisees to enroll in the Basic Pilot.

If there had been vigorous worksite enforcement of the immigration laws in recent years, you might be able to argue this growth in participation wasn't really voluntary; in other words, businesses caught employing illegals being told by immigration authorities to enroll in the system, or, at the very least, businesses enrolling out of fear of possible enforcement. But, of course, worksite enforcement of immigration laws has been all but abandoned until recently; in 1998, 1,023 employers were issued notices of intent to fine

by the INS, a number which fell to three (3) in 2004. And most of that collapse in enforcement came before 9/11, and so had nothing to do with a new focus on terrorism. Given the complete lack of enforcement, businesses would not be flocking to this program if it represented a significant impediment to their operations.

Were Congress to make verification mandatory for all businesses, it would also create a market opportunity for entrepreneurs to further simplify the process and integrate it into a firm's operations. And, in fact, such entrepreneurs are already stepping forward. DHS has approved the first of what are likely to be many "Designated Agents" – companies in the business of conducting the Basic Pilot for other firms. The first such firm, Form I-9 Compliance in Newport Beach, Calif., http://www.formi9.com/, offers a web-based, paperless I-9 form linked to the Basic Pilot, and includes extra services as well, such as reminders of the upcoming expiration of an alien worker's employment authorization. Such services do what TurboTax does for tax filing – eliminate paper, reduce errors, and file (or in this case verify) electronically. And like TurboTax, they are likely to be available at a reasonable cost, especially when economies of scale come into play. I don't know what Form I-9 Compliance charges, but I use an outside payroll service for my small business – and payroll is obviously a much more complex process than one-time verification of legal status – and I pay only about $130 a month.

Good for Business. But it's not just that a verification system would sit lightly on the back of business; it actually makes good business sense to participate. Many small businesses might well be alarmed by all the talk they've been hearing of "penalizing employers" as an immigration-enforcement strategy. While crooked, faithless employers deserve whatever penalties they receive, the point to an employer-verification system is not to penalize employers, but to *empower* them. By taking the guesswork out of hiring a legal workforce, the system that grows out of the Basic Pilot can help firms build a workforce on concrete rather than sand, a workforce that will have no reason to run away if there's an immigration raid, a workforce that won't be arrested when the inevitable – and I believe it is inevitable – crackdown comes.

In fact, I would submit that public companies that are not participating in the Basic Pilot are neglecting their fiduciary responsibility to their shareholders through imprudent labor practices that will jeopardize the stability of their labor force. Privately held businesses, while not answerable to stockholders, nonetheless have a moral responsibility to their employees and customers and creditors to conduct due diligence in hiring.

A legal workforce is a business imperative, and this helps explain the popularity of a site such as www.SmartBusinessPractices.com, which provides information for small businesses interested in the Basic Pilot and offers a listing of participating businesses, organized by city or state or business name. What's more, even companies that are not in the Basic Pilot are voluntarily exerting themselves to ensure that their employees have valid Social Security numbers on a separate track from the Basic Pilot. For instance, AMC Entertainment, the nation's second-largest movie-theater chain with 415 sites and 24,000 employees, uses the Social Security Number Verification System to ensure that it employs only people with valid SSNs. Upon acquiring the Leows theater chain, AMC verified the information of its newly acquired workers, and at one multiplex in suburban Maryland, 11 employees resigned after "after they could not rectify discrepancies that arose during the screening" – i.e., they were illegal aliens.

As beneficial as many firms find it to verify their workers, it is important for Congress to make participation mandatory – not for punitive reasons, but rather to protect legitimate, patriotic businesses. I was told of a landscaper in Orange County who recognized the advantages of hiring only legal workers, and enrolled in the Basic Pilot. He had no trouble finding labor, though he had to offer a dollar an hour more than his competitors – and that was the problem. His competitors, still hiring illegal aliens, were underbidding him on commercial landscaping contracts and he was forced to drop out. Congress has a responsibility to level the playing field and ensure that civic-minded, law-abiding firms eager to participate in the Basic Pilot are not put at a disadvantage for doing so.

A verification system is an idea whose time has finally come – it is a practical, pro-business measure whose eventual implementation is inevitable. Small business – all business – would do well to get on board now and incorporate these new practices sooner rather than later.

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Statement of the

American Staffing Association

on

Immigrant Employment Verification and Small Business

by

Toby J. Malara
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Before the

United States House of Representatives

Small Business Committee

Subcommittee on Workforce, Empowerment, and Government Programs

June 27, 2006

American Staffing Association

Introduction

The American Staffing Association appreciates the opportunity to offer comments on the employment verification system proposed in H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005. The new system is designed to be more effective, efficient, accurate, and reliable than the current I-9 system. We strongly support those objectives, but several issues need to be addressed to make such a system fair and workable.

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

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

The staffing industry employs almost 3 million employees a day and more than 12 million each year. Staffing firms recruit and hire their employees and assign them to businesses to assist in special work situations such as employee absences, skill shortages, and seasonal workloads, or to

perform special assignments or projects. Employees work in virtually every skill level and job category, including industrial labor, office support, engineering, IT, legal, accounting and health care.

Most of ASA's members earn less than $12.5 million in annual revenue and thus qualify as small businesses under SBA guidelines. But like all staffing firms, they have unusually large numbers of employees relative to revenue due to their workers' short tenure (12.5 weeks on average). For example, a staffing firm with annual revenue of $10 million could employ more than 1,000 employees in a year. Some large national firms employ *hundreds of thousands* of employees in a year. So any new employment eligibility verification system will have a large and disproportionate impact on the staffing industry.

ASA also represents hundreds of firms that recruit and refer individuals for hire by others. Unlike temporary and contract staffing firms, traditional placement agencies and executive recruiters do not hire the individuals seeking employment and, therefore, as we note later, such firms currently are not subject to employment verification requirements. Nor should they be.

In implementing a new employment verification system, Congress should address the following issues that affect staffing firms and recruiters in particular.

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

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

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

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

Employers should have the same flexibility in using the new electronic employment verification system. Section 701 of H.R. 4437 requires the incorporation of reasonable safeguards against using the system in a discriminatory manner, including use of the system "prior to an offer of employment." Accordingly, staffing firms and other employers whose employees do not commence work immediately should have the option of accessing the system at the time the individual is offered employment (e.g., when the individual has successfully completed the application process and been approved for employment) or when work actually commences.

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

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

Section 703 of H.R. 4437 would make it unlawful to hire "*or to recruit or refer for employment*" an individual without complying with the employment verification requirements. We are concerned that this broad reference to those who recruit and refer could again be construed inappropriately as expanding the verification obligations to *all* recruiters. Language in Sections 705 and 708 appears to limit the reference to recruiting and referring in Section 703 to labor services agencies that operate hiring halls or day labor shelters. But to avoid any misinterpretation, we urge that the bill be amended to make that unequivocally clear.

Employers Should Not be Charged a Fee for Using The System

According to a Congressional Budget Office cost estimate report on H.R. 4437, when employers begin using the system for new hires in 2008, 55 million to 60 million employees will need to be verified. The CBO report estimates fully implementing this new system will cost more than $400 million over a 4-year period. While some believe employers should be charged a fee for using this system, we believe that would place an unwarranted burden on businesses. A fee-based system will also have an unfair and disproportionate impact on employers with large numbers of part-time and temporary employees and high employee turnover, such as staffing firms, restaurants, and retail establishments.

Businesses Should Not be Required to Reverify Current Employees

Any new verification system must be fair to all employers. H.R. 4437 states that in 2012 all employers must verify their entire work force through the new system. This requirement is

unnecessary because these employees will have already been verified by their employers through the current I-9 process. It will also cost employers time and money and will discriminate against employers with disproportionately large temporary and part-time work forces and high turnover. Instead of requiring blanket reverification for all employers, Congress should allow the Secretary of Homeland Security to require reverification only if an employer has engaged in material violations of the law.

Conclusion

The American Staffing Association strongly supports Congress's efforts to develop a new employment eligibility verification system that is effective, efficient, accurate, and reliable, and we look forward to working with members of Congress and others to bring such a system to fruition.

AGRICULTURE COALITION FOR IMMIGRATION REFORM

Statement of Monte B. Lake
on behalf of the Agriculture Coalition for Immigration Reform, National Council of Agricultural Employers and American Nursery and Landscape Association

before the

Subcommittee on Workforce, Empowerment and Government Programs of the House Committee on Small Business

June 27, 2006

Madame Chair Musgrave and members of the Subcommittee:

I appreciate the opportunity to testify on behalf of the Agriculture Coalition for Immigration Reform, referred to as ACIR, and its national co-chair organizational leaders, the American Nursery and Landscape Association (ANLA) and National Council of Agricultural Employers (NCAE). ACIR is a coalition of over 150 state, regional and national agricultural organizations and commodity groups, representing thousands of employers and formed six years ago for the purpose of promoting comprehensive immigration reform as it relates to agricultural employers.

ANLA and NCAE were also actively engaged in the legislative and regulatory process that produced the Immigration Reform and Control Act of 1986 and Illegal Immigration Reform and Immigrant Responsibility Act of 1996. A substantial number of the members of ACIR, ANLA and NCAE are small family farming, ranching and nursery businesses that would be directly and seriously affected by the reform legislation currently being considered by Congress. These organizations are uniquely situated to provide meaningful comments and insights into issues concerning immigration policy and how it affects the employment practices of its members' businesses, and the availability of an adequate agricultural labor supply.

My name is Monte B. Lake. I am a partner in the labor and employment law firm of McGuiness Norris & Williams, LLP in Washington, D.C. In addition to serving as employment and immigration law counsel to ACIR, ANLA and NCAE, I have represented a number of small businesses engaged in agricultural and horticultural operations throughout the United States in their efforts to comply with the requirements of federal immigration and employment law over the past 20 years. In addition, I served as counsel to and was actively engaged in the legislative

and regulatory processes surrounding the adoption of the Immigration Reform and Control Act of 1986 (IRCA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

In summary, my testimony here today will focus on the enforcement and employment eligibility verification provisions of Title VII of H.R. 4437, the immigration bill passed by the House of Representatives on December 16, 2005 and their anticipated impact on agricultural employers, a substantial number of which are small family-run businesses. American agriculture over the past 20 years has supported a simple, effective and nondiscriminatory process of determining the employment eligibility of new hires. Today, similar to when IIRIRA was being considered 10 years ago, American agriculture would support electronic verification of employment eligibility, as long as the process is simple, manageable, provides a bright line of compliance responsibilities and is coupled with a viable means of obtaining legal workers when there is an insufficient domestic workforce.

My comments on Title VII of H.R. 4437 are made in the context of the failures of IRCA and IIRIRA and the so-called Social Security mismatch problem that has complicated the already difficult, and confusing employer compliance challenges imposed by these laws. After 20 years of experience with ineffective and frustrating employment eligibility verification laws, it is time for Congress to get it right. "Getting it right" means eliminating fraudulent documents through an effective telephonic and electronic verification system but also implementing a simple and user-friendly system that accommodates the practical day to day realities of the hiring process necessarily used by many employers.

It also is imperative that Congress understand that immigration reform must not be limited to an effective employment eligibility verification system that removes the so-called "job magnet" and increased worksite enforcement. Without comprehensive immigration reform that, in addition to eliminating the job magnet that attracts undocumented workers, also includes substantial reform of the H-2A temporary and seasonal agricultural worker program and a means by which experienced agricultural workers may earn legal status, American labor intensive agriculture and related service sectors including landscape installation and maintenance will face a labor catastrophe. As noted later in my testimony, American labor intensive agriculture is predominantly undocumented—not because farmers and ranchers ignore the law—but because the current law is dysfunctional and provides no viable means of obtaining legal agricultural workers. The continued economic viability of U.S. agriculture and related sectors are at stake. We urge this Committee to support efforts to address the immigration problem in a comprehensive manner.

Lessons from IRCA and IIRIRA

Two essential components of IRCA are employers' obligation to comply with the employment eligibility requirements of the law and face sanctions if they do not, and provisions prohibiting unfair immigration-related employment practices based on citizenship status and national origin. The employer sanctions provisions require employers to provide employees a menu of some 29 different document combinations set forth on the I-9 Form provided by the Department of Homeland Security (DHS) from which applicants can attempt to establish their

identity and work authorization. Employers have an obligation to view the documents offered by applicants and make a judgment as to whether they reasonably appear genuine on their face. Court decisions interpreting the facial genuineness of document standard have found it to be a minimal standard that does not require employers to be forensic document experts.

The experience of the employers we have represented over the past 20 years since IRCA's enactment shows that employers are easily confused by the large number of documents that may evidence work eligibility, with many of the documents being unusual or of limited validity, putting employers in a position of uncertainty as to their legality. The small employers we represent strongly favor a limitation on the number of acceptable employment eligibility documents in order to make compliance simpler and less confusing.

The anti-discrimination provisions of IRCA represent a well-intended attempt to prevent employers from assuming that persons of particular ancestry or ethnic backgrounds are likely to be illegal aliens and thus refrain from hiring them. After the enactment of IRCA, agricultural organizations throughout the U.S. conducted extensive compliance programs for employers, informing them of their obligations under these new laws. Such programs often were conducted with the participation of lawyers from the then Immigration and Naturalization Service (INS) and the Department of Justice's Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). Unfortunately, lawyers from these agencies with very distinct missions often would not agree as to what employer compliance obligations were, given the tension created by one component that encouraged vigilant review of work eligibility documents and another that stressed that employers face discrimination charges if they were too aggressive in evaluating the documents presented during the work authorization process.

The result of these competing provisions of the law was a lack of compliance clarity for the employer community. During the past 20 years we have represented more employers who were charged with discrimination under IRCA for being overly zealous in complying with the employment eligibility requirements, than employers charged with violating the employer sanctions provisions. The specifying of certain documents or requesting more than the minimal amount of documents was treated by OSC as document abuse and a *per se* violation of the antidiscrimination provisions under what it interpreted as a strict liability standard. This resulted in a high level of frustration from well- intended employers caught in the jaws of an IRCA vice that they viewed as inherently contradictory.

In 1996, Congress again turned its attention to immigration reform and attempted to address some of the above-described employer concerns created by IRCA. Under IIRIRA, the so-called document abuse provisions that resulted in numerous discrimination complaints against well-intended employers were modified to clarify that document specification or over-documentation required a showing of discriminatory intent, rather than establishing a strict liability standard. This was a positive development. IIRIRA also amended IRCA to require a reduction in the number of documents acceptable for completion of the I-9 Form. On September 30, 1997, the INS issued an interim rule stating that it intended to implement a new document reduction program and revise the I-9 Form and provide guidance to employers.[1] Until a final rule was issued, employers were informed that they could continue to use the current I-9

[1] 62 Fed. Reg. 51,001 (Sept. 30, 1997).

Form (edition 11/21/91) and documents listed on it as acceptable without being subjected to liability. Today, nearly 10 years later, a final rule and revised I-9 Form still have not been issued.

IIRIRA also established the pilot electronic employment eligibility verification programs. H.R. 4437 would make the basic pilot program mandatory and universal and my testimony later addresses the features of this legislation.

The Social Security Mismatch Problem

For over ten years, agricultural employers, like many others, have received so-called Social Security mismatch letters. These letters are sent by the Social Security Administration (SSA) after employers file the Form W-2 tax and wage information and SSA determines that the names and Social Security numbers (SSN) do not match or that the SSN is invalid. Employers are required to inform employees of the problem and correct any mistakes that resulted in the mismatch. Explanatory materials sent to employers regarding the mismatch problem have stated that the Federal Privacy Act (5 U.S.C. §552a(I)) prohibits the use of the information received from SSA records "for purposes other than that to which it was requested" and that persons who violate this prohibition are subject to fines and imprisonment. The purpose for which the letters are sent is to ensure that SSA wage information is accurately reported to the benefit of the worker.

The employers that we represent have had great concern regarding whether the mismatch letters put them on notice that they may be in violation of the employment authorization provisions of the immigration law, since the Social Security card is one of the most commonly used employment authorization documents. The Privacy Act provisions referenced above suggest that use of the letters for immigration purposes is inappropriate; however, opinion letters issued by INS indicate that under certain circumstances, mismatch letters could provide evidence of constructive knowledge that an employee was in undocumented status in violation of IRCA. Immigration and employment lawyers are not in agreement as to whether mismatch letters impose immigration compliance obligations. There is no doubt, however, that mismatch letters put employers in another untenable position regarding immigration law compliance and add to their anxiety about the legal status of their workers.

On June 14, 2006 DHS issued a proposed rule that states its position that employers that receive SSA mismatch letters may be shown to have constructive knowledge that an employee referred to in the letter is not authorized to work in the U.S. The rule states that an employer that fails to take reasonable steps to follow up on written notice from SSA regarding the validity of an SSN or DHS regarding employment authorization may be liable under immigration law. It also provides a set of procedures that, if followed by the employer, may provide a safe harbor from liability. Under the proposed rule, an employer would have between 14 and 60 days, depending on the circumstances, to verify the legitimacy of an employee's documents, and if an employer could not do so during the required period, it would have to terminate the employee or face potential liability.

While DHS' rule is welcome to the extent that it provides clarity and a bright line for compliance steps, it does not eliminate the potential for the employer to be sued for discrimination. A decision recently issued by the U. S. Court of Appeals for the Tenth Circuit in *Zamora v. Elite Logistics, Inc.,* (No. 04-3205) (10th Cir. June 6, 2006), illustrates the treacherous path employers tread when they engage in post-hiring verification of Social Security cards of employees, once the validity of the card has been called into question. The court in *Zamora* reversed a grant summary judgment for the employer in a Title VII discrimination claim based on race or national origin. The case involved circumstances in which an employer followed up on information it received in auditing its I-9 Forms that the plaintiff, who had satisfied the employment verification requirements when initially hired, had a Social Security number that had been used by another person on three different occasions in another state. The employer's effort to verify the validity of plaintiff's Social Security card and the alleged facts that stemmed therefrom resulted in an allegation of discrimination, which the Court of Appeals held needed to be determined by a trier of fact. As has been the case with IRCA's sanctions and antidiscrimination provisions, the Social Security mismatch problem retains the "damned if you do and damned if you don't" dilemma that employers face.

Does Title VII of H.R. 4437 Correct the Employment Eligibility Verification Problems of IRCA, IIRIRA and the Social Security Mismatch Process or Create New Ones?

The problems associated with IRCA, IIRIRA and Social Security mismatch letters provide a clear set of standards against which to measure the improvements that Title VII of H.R. 4437 seeks to achieve. Employers will measure the merits of any reformed employment eligibility verification system based on the answers to the following questions:

1. Does the legislation screen out unauthorized persons in a manner that simplifies the hiring process with a minimum of administrative burdens for employers?

2. Does the legislation provide employers clear-cut compliance standards, that if complied with, do not put employers at risk of unlawfully discriminating?

3. Does the legislation impose reasonable penalties upon employers that do not comply with its employment eligibility verification provisions?

4. Does the legislation eliminate the existing confusion with regard to Social Security mismatch letters?

5. Does the legislation provide a viable means for employers to obtain legal workers, in addition to containing a telephonic and electronic employment verification system?

1. Does the legislation screen out unauthorized persons in a manner that simplifies the hiring process with a minimum of administrative burdens for employers?

ACIR members support the mandatory and universal employment verification system concept that is incorporated in H.R. 4437 in the context of comprehensive reform. Part of the appeal of its verification approach is that it has the capacity to simplify and bring certainty to the

hiring process and, for the first time, effectively screen out unauthorized workers who have relied upon fraudulent documents in the past.

The Legislation Must Result in A Significant Reduction of Acceptable Employment Authorization Documents, Preferably a Single Social Security-type Document

While Title VII of H.R. 4437 does not directly reduce the number of documents that may be used to establish identity or employment authorization, section 707 mandates that the Commissioner of Social Security, Secretary of DHS and Attorney General evaluate within 9 months of enactment, the viability of establishing a durable plastic Social Security card with an encrypted machine-readable electronic identification strip with a digital photograph for use as a single employment authorization and identity document. The study would include an assessment of the use of such a card to verify employment eligibility through a unified document database.

ACIR supports the establishment of a single card for purposes of employment verification. It would simplify the hiring process and eliminate the confusion that often accompanies the current process. Moreover, it would help eliminate the problem of document abuse (requesting more or different documents than are required) in violation of IRCA's antidiscrimination provisions that we previously have described. H.R. 4437 would be improved if it provided an alternative means of document reduction if the mandated study concludes that technology or administrative challenges preclude the adoption of a new Social Security card to be the exclusive employment authorization document in the near future.

The Option of Telephonic or Computer-based Verification Should be Retained

Many small agricultural and small business employers do not have traditional offices. Their businesses often are located in remote rural areas where internet services may not be readily available. Some do not use computers in their businesses. Thus, it is important that the option of telephonic, as opposed to computer-only verification, be available. The House bill allows and should retain this option.

The Verification Database Should Not be Universally Implemented Prematurely Nor Applied Retroactively In Order to Enable It to Adjust to the Tremendous Demands to Be Imposed Upon It.

ACIR members are concerned about the capacity of a universal and mandatory verification system to handle within a relatively short timeframe the tremendous volume of employer, recruiter and referrer verification requests mandated by the legislation. The timeframes established by H.R. 4407 are ambitious. All employers, recruiters and referrers must use the new verification system to determine the employment eligibility of new hires two years after enactment. Previously hired employees who were hired under the old visual document inspection system must be reverified under the electronic system within 6 years of enactment, unless they are a governmental entity or private employer engaged in business on a military base, nuclear facility, airport or other critical infrastructure, in which case retroactive verification must occur within 3 years after enactment. Entities may voluntarily use the system to reverify employees 2 years after enactment.

Our comments are not intended to criticize the intent of H.R. 4437 to ensure that all entities involved in facilitating employment have responsibility for ensuring that only persons who are work authorized obtain employment. We simply want to ensure that the new employment verification system database is not unnecessarily and prematurely overburdened by the demands placed upon it by recruiters, referrers and employers to the extent that it cannot handle the demand and fails to serve its intended purpose. We believe that a 2 year implementation date for prospective hires and retroactive reverification after 6 years may place unmanageable demands upon the system, resulting, among other things, in employers, recruiters and referrers being unable to obtain verification of employment eligibility within the 3 days of a person's hiring. Small employers are fearful that such a result will impose upon employers extensive verification follow-up that will place unreasonable time demands upon what otherwise was intended to be a simple process.

We have several recommendations that we believe would address these potential problems. To address the verification system's capacity to handle the burdens imposed upon it, we recommend that it be phased in gradually. Larger employers are more equipped to deal with the challenges of the new system and should be subject to it first. Smaller employers, which in many instances are least prepared, should be covered after several years. We believe the approach taken in H.R. 19, introduced by Representative Calvert, is a reasonable one that anticipates this problem and would phase in prospective verification over a number years. Under H.R. 19, the largest employers would be subject to the system one year after enactment and the smallest employers seven years later, with a new group, based on the decreasing number of employees, phased in each year in between. The value of such an approach is that the most sophisticated employers would use the system first and the database system would be allowed to gradually accommodate expanded usage through a seven year phase-in. We also believe that the Calvert bill wisely does not impose a retroactive reverification obligation, implicitly recognizing the challenges such a burden involving millions of additional workers would impose on the system. Retroactive verification is arguably unnecessary anyway given the rate of employment change, especially in industries like agriculture. We recommend that retroactive verification be excluded from the proposed legislation.

2. Does the legislation provide employers clear-cut compliance standards, that if complied with, do not put employers at risk of unlawfully discriminating?

Legislation Should Clarify the Verification Responsibilities of Recruiters, Referrers, Independent Contractors and Entities Using Their Services and Avoid Needless Duplication of Effort

H.R. 4437 mandates verification at many points in the employment process and may require needless duplication. This is potentially problematic because of the sheer volume of

inputs it would require into the verification systems database.[2] The bill does not address directly whether the entity to whom the person is referred after recruitment has the additional obligation to verify the referred worker. This presents a significant practical compliance problem in the agricultural context where agricultural entities pay a farm labor contractor (FLC), as an independent contractor, a fee to provide workers for a limited duration, with the express understanding that the FLC is the employer for all purposes, including employment eligibility verification. As with most independent contractor relationships, there is no bright line as to whether an independent contractor relationship exists, and under joint employer principles set forth under the federal Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act, a grower who believed the FLC was an independent contractor responsible for I-9 completion may nonetheless found to be the joint employer. In an abundance of caution, the grower may feel compelled to reverify the worker, even if the recruiter/referrer FLC already has done so.

H.R. 4437 does not clearly set forth principles that address these complex circumstances. While section 706 of the bill provides a safe harbor for contractors who use subcontractors, the language of this provision appears to be narrowly limited to contractor-subcontractor relationships, rather than entities, such as those in agriculture, that are not contractors but often use contractors, more so than subcontractors. At a minimum, we suggest that this language be clarified to address these circumstances.

As a result of the uncertainty surrounding this issue, in an abundance of caution, many farmers and ranchers likely would reverify the workers recruited and referred to them by an FLC to avoid an alleged violation of the employer sanctions provisions. This will result in at least three problems: 1) farmers and ranchers would undergo additional paperwork and compliance responsibilities already assumed by recruiters and referrers; 2) in doing so, they would undercut their otherwise legitimate claim of not being the employer, exposing them to other unanticipated liability; and 3) the government database would be burdened with duplicative verification requests.

We recommend that the language of any proposal be clarified to address the ambiguity in verification obligations between recruiters and referrers that are contractors and the entities to whom they provide workers. We believe that if the recruiter and referrer can provide documentation that it has satisfied its verification obligations, that the entity for whom the

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[2] In agriculture, many employers rely upon farm labor contractors (FLCs) to supply seasonal workers during peak periods of need. Typically, FLCs will call potential workers, who may be located hundreds of miles away, and recruit them for an agricultural job. The bill requires that an attempt must be made to determine the employment eligibility of the worker within 3 days of this recruitment contact through entering information into the government's database and documenting on an I-9 Form or its equivalent the pertinent information. Because H.R. 4437 still requires the employer and recruiter or referrer to make a visual inspection of the documents provided, determine that the identity of the person presenting the documents is who he/she purports to be, and observe the person sign the document verifying the truthfulness of the information provided, all recruitment necessarily must be face to face. Given the mobility of the agricultural workforce, in which many migrant workers move seasonally throughout the U.S. from crop to crop, this imposes practical challenges that may indirectly disrupt the current farm labor system. At a minimum, the components of the current regulation that allow recruiters and referrers to designate agents to complete the employment procedures on their behalf, including notaries, associations or employer, should be incorporated into any new law. 8 C.F.R. § 274a.2(b)(iv).

workers provide services should not have to duplicate the verification obligation. This would provide compliance clarity and avoid unnecessarily burdening the verification system's database.

In the Event of a System Malfunction, Employers Should Not Be Required to Make Daily Inquiries as to Employment Eligibility

Section 702 of the bill provides special provisions in the event of a system malfunction and would appear to require employers to make daily inquiries of the system until it registers no nonresponses. For many small employers with limited human resource personnel who hire many seasonal workers on a daily basis, this provision would be a real compliance headache. Not only would employers have to verify each day's new hires, but in addition, would have to continue to seek on a daily basis verification of previous hires for whom the employer could not access the system. We suggest that a reasonable timeframe, such as seven to ten business days after the system failed to give a response, be allowed for employers to verify backlogged verification requests. Otherwise, small employers would become overwhelmed by the administrative burdens and face potential unintentional compliance problems.

New Unlawful Discrimination Prohibitions Imposed by the Verification System Should be Set Forth Clearly in the Legislation

As previously discussed in my testimony, a major problem with IRCA was the confusion it created for employers trying to comply with the verification procedures while avoiding discrimination. H.R. 4437 does not amend the non-discrimination provisions of existing law at the same time that it changes the verification procedures. Section 702 of the bill, however, does require in the design and operation of the verification system that the Secretary of Homeland Security provide reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status. While we strongly support a system that is designed to avoid unlawful discrimination, employer obligations in that regard should be expressly stated, rather that implied through an implementation directive to the Secretary. To the extent that H.R. 4437's telephonic and electronic verification system potentially creates new types of discrimination, the bill should amend IRCA's nondiscrimination provisions (8 U.S. C. § 1324b) to provide applicants, employees, and employers a clear statement of any new rights and obligations.

3. Does the legislation impose reasonable penalties upon employers that do not comply with its employment eligibility verification procedures?

Section 706 of H.R. 4437 greatly increases the penalties that would be imposed upon employers that are found to have failed to comply with the verification standards by hiring or continuing to employ undocumented workers. ACIR members are especially concerned about the tremendous increase in penalties for paperwork violations. Employers that fail to properly complete the employment eligibility form, such as the current I-9 Form, would face fines of between $1,000 and $25,000 per form. This compares with fines of between $100 and $1,000 under current law for the same violation. Because the document creation and retention obligations apply to every hire, even small employers that have few year-round employees, but

that may hire hundreds of seasonal employees for a short period, could be crippled and put out of business by this provision.

The fine would apply with respect to every form completely improperly or not retained for the proper period, even if the violation was inadvertent. In our experience with employer compliance under current law, many well-intended employers unintentionally commit minor paper work violations during the completion of the I-9 Form. While H.R. 4437 has small employer mitigation provisions, the size of the paperwork fines, nonetheless, could be beyond the means of small employers to pay and could ultimately force them out of business.

While ACIR certainly believes that employers who violate the law should be punished, it believes that the punishment should be reasonable and fit the crime. Its members believe that the fines that H.R. 4437 imposes for minor paperwork violations are too extreme and would be unnecessarily punitive for small employers.

4. Does the legislation eliminate the existing confusion with regard to Social Security mismatch letters?

We have described the uncertainty and conflicts that exist between various federal statutes that directly or indirectly embrace the Social Security mismatch issue. The newly proposed DHS rule clearly would incorporate the mismatch problem into an employer immigration compliance problem. Enactment of the employment verification procedures of H.R. 4437 would make the proposed rule unnecessary. Because the Social Security card is a central component of the new verification system and presumably fraudulent Social Security numbers will be screened out by the system, employers that hire persons regardless of the nonverification of the card would be subject to employer sanctions. If the verification system works as anticipated, the mismatch issue should be substantially reduced.

Mandatory use of the Social Security Administration's database prior to employment of persons places the issue of a card's validity directly in the employment context. This is a direct and more appropriate way to address the issue than the indirect Social Security mismatch approach that is more directly related to ensuring that tax payments are appropriately credited. This is especially true if the study required by H.R. 4437 results in adoption of a new Social Security card that is the sole employment authorization document, similar to the approach taken in H.R. 98 introduced by Representative Dreier.

We recommend that the Social Security mismatch issue be addressed in the legislation to clarify that employers that receive such letters still have an obligation under the Internal Revenue Code (IRS) to correct any errors in reporting and remain subject to penalties under the IRS Code if they fail to comply. Any additional employer obligations related to the Social Security card as an employment document should be limited to the verification obligations set forth in new legislation. This would have several advantages. It would separate tax and immigration compliance responsibilities, eliminating overlapping obligations and confusion. It also would reduce the chances of discrimination resulting from employer confusion with regard to mismatch letters as described earlier in my testimony in the recent *Zamora* decision.

5. Does the legislation provide a viable means for employers to obtain legal workers, in addition to containing a telephonic and electronic employment verification system?

ACIR supports the concept of mandatory electronic employment verification as long as the criteria we have described are part of it. The most indispensable part of such a system is its linkage to a viable means of obtaining legal workers in the event that the verification system effectively screens out a sizeable portion of those who apply for agricultural jobs. ACIR members, representing a substantial portion American labor intensive agriculture, anticipate that a verification system such as proposed in H.R. 4437, would screen out a majority of the agricultural workforce. Currently, there is no effective way to replace them. Consequently, it is imperative that any mandatory electronic verification system be accompanied by measures that will allow agricultural employers to obtain legal workers.

The U.S. agricultural work force has become increasingly populated by foreign workers who lack proper work authorization. The U.S. Department of Labor's National Agricultural Worker Survey (NAWS) reported in its 1998-99 survey that 52 percent of seasonal agricultural workers working in the U S. self-identified as not authorized to work in the U.S. This was an increase from 37 percent in the previous survey only three years earlier, and from only about 12 percent a decade earlier. More than 70 percent of the new seasonal agricultural labor force entrants in the NAWS survey self identified as not authorized to work. Most experts agree that the statistics based on self identification in the NAWS survey are likely very conservative. Evidence based on DHS audits and verification of Social Security cards by the Social Security Administration often results in 60 to 80 percent or more of workers' documents being determined to be invalid or not pertaining to the person who presented them.

These statistics do not evidence employer disregard for the current employment verification standards, as employers must accept documents offered by applicants that appear genuine on their face. Unfortunately, the ease with which persons may obtain fraudulent documents that appear legitimate fosters this problem. Yet, employers who refuse to accept such documents risk facing discrimination charges.

The only program agriculture has to obtain legal foreign workers was enacted as the H-2 program in the Immigration and Nationality Act of 1952. In 1956 Congress attempted to streamline the program and redesignated it H-2A. Because of the difficulties in using the program, less than two percent of the seasonal agricultural workforce is brought in through the program.

The H-2A program has been used principally on the east coast in fruit, vegetables, and tobacco. The program's structure and requirements evolved from government-to-government treaty programs which preceded it. Over the years the program has become beleaguered with regulations promulgated by the Department of Labor and adverse legal decisions generated by opponents of the program. Both have rendered it unworkable and uneconomic for many agricultural employers who face labor shortages. The program is characterized by government delays in approving grower applications that adversely affect the harvest of perishable crops; a costly non-market based wage rate set annually by the Department of Labor called the adverse effect wage rate; and costly and burdensome litigation. Now that government policy threatens to

eliminate the illegal alien work force, many growers are caught between an unworkable and uneconomical H-2A program and the prospect of insufficient labor to operate their businesses.

Opponents of a viable agricultural worker program suggest there are other ways to address the problem that would result from the removal of the illegal alien agricultural work force than the legal admission of alien agricultural workers. One approach that is suggested is that agricultural employers should be "left to compete in the labor market just like other employers have to do". There are several observations one must make about this "solution". No informed person seriously contends that wages, benefits and working conditions in seasonal agricultural jobs can be raised sufficiently to attract workers away from their permanent nonagricultural jobs in the numbers needed to replace the illegal alien agricultural work force and maintain the economic competitiveness of U.S. producers.

Seasonal farm jobs have attributes which make them inherently uncompetitive with nonfarm work. First and foremost is that they are seasonal. Secondly, many seasonal farm jobs are located in rural areas away from centers of population. Furthermore, to extend the period of employment, workers must work at several such jobs in different areas. That is, they must become migrants. It is highly unlikely that many U.S. workers would be willing to become migrant farm workers at any wage, or that, as a matter of public policy, we would want to encourage them to do so. In fact, the U.S. government has spent billions of dollars over the past several decades attempting to settle domestic workers out of the migratory stream. The success of these efforts is one of the factors that has led to the expansion in illegal alien employment. In addition to seasonality and migrancy, most farm jobs are subject to the vicissitudes of weather, and require physical strength and stamina. Thus it is highly unlikely that a significant domestic worker response would result even from substantial increases in wages and benefits for seasonal farm work.

Nonagricultural employers have some options for responding to domestic labor shortages that agricultural employers do not have. Many nonagricultural employers can "foreign source" the labor intensive components of their product or service without losing the good jobs. Since agricultural production is tied to the land, the labor intensive functions of the agricultural production process cannot be foreign-sourced. We cannot, for example, send the harvesting process or the thinning process overseas. Either the entire product is grown, harvested, transported and in many cases initially processed in the U.S., or all these functions are done somewhere else, even though only one or two steps in the production process may be highly labor intensive. When the product is grown, harvested, transported and processed somewhere else, *all* the jobs associated with these functions are exported, not just the seasonal field jobs. These are the so-called "upstream" and "downstream" jobs that support, and are created by, agricultural production. U.S. Department of Agriculture studies indicate that there are about 3.1 such upstream and downstream jobs for every on-farm job. Most of these upstream and downstream jobs are "good" jobs, *i.e.*, permanent, average or better paying jobs held by citizens and permanent residents. Thus, we would be exporting about three times as many jobs of U.S. citizens and permanent residents as we would farm jobs if we shut off access to alien agricultural workers.

Another suggestion has been that recruitment of welfare recipients and the unemployed could replace the illegal aliens. In the late 1990's growers in the San Joaquin Valley of California tried to augment their labor supply by recruiting welfare recipients and the unemployed. They worked with the California welfare agencies and employment development departments in an effort to recruit the rural unemployed. The extensive efforts of two government agencies and agricultural employers resulted in few former welfare recipients and unemployed persons moving into jobs on farms.. The study found that the preponderance of those on the welfare rolls were single mothers with young children. Many were not physically capable of doing farm work, did not have transportation into the rural areas and were occupied with the care of young children.

The unemployed also make, at best, a marginal contribution to the hired farm work force. Relatively high unemployment rates in some rural agricultural counties are often cited as evidence of an available labor supply or even of a farm worker surplus. First it should be noted that labor markets with a heavy presence of seasonal agriculture will always have higher unemployment rates than labor markets with a higher proportion of year round employment. By the very nature of the fact that farm work is seasonal, many seasonal farm workers spend a portion of the year unemployed. Second, unemployed workers tend to share the same values as employed workers. They prefer permanent employment which is not physically demanding and takes place in an inside environment. They share an aversion to migrancy, and often have transportation and other limitations that restrict their access to jobs. The coexistence of unemployed workers and employers with labor shortages in the same labor markets means only that we have a system that enables workers to exercise choices.

Many welfare recipients and unemployed workers cannot or will not do agricultural work. It is reasonable to expect an alien worker program to have a credible mechanism to assure that domestic workers who are willing and able to do farm work have first access to agricultural jobs, and that aliens do not displace U.S. workers. It is not reasonable to expect or insist that welfare and unemployment rolls fall to zero as a condition for the admission of alien workers.

A third alternative to alien workers often suggested is to replace labor with technology, including mechanization. This argument holds that if agricultural employers were denied access to alien labor they would have an incentive to develop mechanization to replace the alien labor. Alternatively, it is argued that the availability of alien labor retards mechanization and growth in worker productivity.

The argument that availability of alien labor creates a disincentive for mechanization is belied by the history of the past two decades. From 1980 to 2000, the output of labor intensive agricultural commodities has risen dramatically while hired agricultural employment has declined. The only way this could have happened is as a result of significant agricultural labor productivity increases. Yet, this was also the period of perhaps the greatest influx of illegal alien farm workers in our history.

It does not appear that there has been a great deal of increase in agricultural mechanization in fruit and vegetable farming since a spasm of innovation and development in the 1960's and 1970's. Indeed, some of the mechanization developed during that period, specifically

mechanical apple harvesters, have proven to be uneconomical in the long term because of tree damage as well as fruit damage.

But productivity increases can result from many different factors, of which mechanization is only one. Smaller fruit trees, which require less ladder climbing, trellised trees, and changes in the way trees or vines are pruned are also technological developments which improve labor productivity. The switch from boxes and small containers to bulk bins and pallets in the field has significantly improved labor productivity of some harvesting activities. Use of production techniques and crop varieties that increase yields also improves field labor productivity by making harvesting and other operations more efficient. These appear to be the techniques that farmers have used to achieve the large productivity increases obtained in the 1980's and 1990's.

At the same time as labor intensive agriculture faces a shortage of legal workers, it has for the past several years also been experiencing actual shortages of workers. During the past several years there have been shortages in the lettuce and vegetable harvests in border areas in Arizona and California. During the past year and currently, growers in a number of crops on the West Coast are facing shortages of labor. Other states from coast to coast are reporting labor shortages in a number of crops. Actual labor shortages coupled with shortages of legal workers and the prospect of enforcement only legislation as proposed by the House of Representatives in H.R. 4437, represents the "perfect storm" for labor intensive agriculture. Its future is at risk.

American agriculture has devoted the past ten years to seeking access to a workable agricultural worker program through H-2A and other reforms. Through ACIR and other organizations, it has supported workable employment verification systems as a component of such reforms. If, however, Congress now decides to impose an enforcement only or enforcement first approach to immigration reform, with electronic verification as a key element, without addressing the needs of American agriculture for a reformed worker program, the result will be catastrophic. A system that excludes an anticipated 70 percent of the agricultural workforce without also providing a legal means of replacing it represents a formula for the demise of labor intensive agriculture in this country.

ACIR strongly encourages this Subcommittee to consider not only the necessary components of a workable employment verification system, but the concomitant need for legislation to provide agriculture a viable means of retaining its experienced workforce and obtaining a legal workforce in the future.

Thank you very much for the opportunity to share our views.

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