Testimony of Marc R. Rosenblum
Robert Dupuy Professor of Pan-American Studies and Associate Professor of Political Science, University of New Orleans
Fellow, Migration Policy Institute

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Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

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Madam Chairwoman and Distinguished Members of the Subcommittee:

My name is Marc Rosenblum, and I am the Robert Dupuy Professor of Pan-American Studies and Associate Professor of Political Science at the University of New Orleans as well as a Fellow at the Migration Policy Institute. It's an honor to be here with you today and I appreciate the opportunity to talk to you about the challenges of employment verification and worksite enforcement.

In my comments today, I will begin by identifying three basic limitations in our current worksite enforcement regime which undermine efforts to prevent undocumented employment. These obstacles to effective enforcement are well known, and I will therefore focus much of my attention on three additional problems which have received less attention. First, even as the current system fails reliably to prevent undocumented employment, it also denies authorization to some US citizens and other legal workers. These so-called "false negatives" result in substantial lost employment opportunities for US workers. Second, for a variety of reasons, false negatives disproportionately affect persons born outside the United States, including foreign-born US citizens, so that worksite enforcement unintentionally promotes employment discrimination. Third, ambiguities in the worksite enforcement system, and asymmetries between labor and immigration law create incentives for unscrupulous employers to intentionally seek out unauthorized workers in order to take advantage of their vulnerability at the worksite. While undocumented immigrants are the immediate victims of these practices, the downward pressure on wages and standards which results affects all US workers.

As Congress prepares to consider comprehensive immigration reform, I believe you confront a fundamental tension in this area: steps to limit undocumented employment—strengthening verification and enforcement procedures—tend almost inevitably to increase the risks of false negatives, employment discrimination, and worker exploitation. Setting aside politics, it's technically difficult to design a system which screens out those who should be screened out

without causing collateral damage to legal workers and to conscientious employers. This tension may best be resolved by providing employers and employees with clear and effective verification procedures so that straightforward compliance prevents the overwhelming majority of undocumented employment. Once such a verification system exists, enforcement efforts and penalty structures must be substantially increased to create a real deterrent to undocumented employment, with a special focus on going after "bad apple" employers.

Most importantly, we now have two decades of unambiguous evidence about the harmful unintended labor market consequences of worksite enforcement. Yet even as Congress has been made aware of these adverse effects, flawed enforcement practices have not only been permitted to continue, but they have been expanded in direct opposition to the conclusions of key reports on this subject. As Congress prepares once again to strengthen worksite enforcement—as it should—I urge you to learn from these studies and simultaneously to take steps to prevent the predictable increase in false negatives, discrimination, and exploitation which are sure to result.

Background: Overview of Current System

The 1986 Immigration Reform and Control Act (IRCA) made it illegal for employers to "knowingly employ" undocumented immigrants.[1] The primary mechanism for preventing the employment of undocumented immigrants within the United States is the so-called I-9 document review process. Under this system, employees and employers are jointly required to complete a federal I-9 form for each newly hire employee. The I-9 form requires an employee to provide his or her identity information, including Social Security number and Alien identification number if applicable, and to attest under penalty of perjury to his or her legal residency status (citizen, lawful permanent resident, or employment-authorized immigrant). Federal law also requires employers to review one or more documents proving the identity and work-eligibility of the new employee, to make a record of the document reviewed on the I-9 form, and to attest under penalty of perjury that the documents appear genuine and to relate to the named employee. Employers must retain completed I-9 forms for three years after the date of hire or one year after the date employment ends, whichever is later.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which included provisions to establish three separate pilots programs to address weaknesses in the I-9 system by allowing employers to verify job applicants' status through phone or internet connections to the INS and SSA eligibility databases.[2] Two of the three pilots have since been discontinued, but the so-called Basic Pilot remains in operation and was expanded from its original six states to become a nationwide voluntary program in 2004. As of June 2006, approximately 8,600 employers were registered to use the Basic Pilot program out of about 6 million employer firms nationwide (.1% of all employers), though only 4,300 employers were active users of the program (.05% of all employers).[3]

Under the Basic Pilot system, participating employers still fill out the I-9 form as above, and then also submit employees' identification data (name, Social Security number, date of birth, Alien

[1] Pub L. No. 99-603, 100 Stat. 3359.
[2] Pub.L. 104-208, Div. C, 110 Stat. 3009-546
[3] General Accounting Office 2006a. Recent comments by USCIS personnel indicate a total of 15,000 registered users.

identification number if applicable) via a secure website for verification of the employee's work eligibility status. Electronic verification proceeds in four steps. First, all employees' data is automatically checked against the Social Security Administration's primary database, the Numident file. If an employee's data match information in the Numident database and SSA's records reflect that the person is a U.S. citizen, the Basic Pilot issues an immediate confirmation that the employee is work-authorized. Second, if the data are not automatically confirmed by the SSA, the website returns a tentative non-confirmation (TNC). US citizens may appeal the TNC by personally visiting a SSA field office to resolve the problem. If the employee fails to appeal a TNC and resolve the data mismatch, a final non-confirmation is issued and employment must be terminated.

Third, for non-citizens, the SSA verification or tentative non-confirmation is followed by a secondary analysis by the US Citizenship and Immigration Service (USCIS), where identity and immigration status data from the I-9 are checked against the USCIS' Customer Processing System (CPS) database. If the CPS confirms the individual's work authorization, a confirmation is issued. If not, the case is automatically referred to an immigration status verifier (ISV), who manually checks the data against additional DHS databases before issuing a confirmation (if the individual's status can be verified) or a second TNC. Fourth, the job applicant then has an opportunity to appeal the second TNC, a process which typically requires the employee to contact the ISV by telephone. If the employee is able to provide missing information necessary to resolve ambiguities in the record, a confirmation of work authorization is issued. If database ambiguities cannot be resolved, or if the individual fails to contest the TNC, a final non-confirmation is issued and employment must be terminated.[4]

Regardless of whether employers verify employees' work authorization through the paper-based I-9 system or the Basic Pilot EVS, the ability of these procedures to prevent undocumented employment ultimately depends on oversight and enforcement by the Immigration and Customs Enforcement (ICE) Office of Investigations, within the Department of Homeland Security. Historically, investigations of immigration employment violations have been rare, and have focused on individual businesses on the basis of leads provided by private citizens, the Department of Labor, and other local, state, and federal law enforcement agencies. A secondary strategy has been to target larger groups of firms on the basis of their industrial and regional characteristics. A small number of firms were randomly selected for inspection during the late-80s and 1990s, but random targeting was discontinued in 1998 due to its inefficiency. Once a firm is targeted, the primary investigatory tool has been the audit of I-9 forms and other personnel records. Audits may be followed by on-site inspections. Where investigators find evidence of non-compliance (slightly less than half the time), penalties may range from a formal warning to a "paperwork" fine (for unintentional non-compliance), to a "substantive" fine (for intentional non-compliance), to the initiation of criminal charges (for engaging in a repeated pattern or practice of violations).[5]

[4] See Jernegan 2005 for a more detailed treatment of the history and mechanics of the Basic Pilot program.
[5] See Rosenblum 2005 for a more detailed discussion of existing enforcement practices.

Why the Current System Fails to Prevent Undocumented Employment

It is widely recognized that the status quo verification and worksite enforcement system fails to prevent undocumented employment, leaving in place the so-called "jobs magnet" that motivates much undocumented migration to the United States.[6] These failures are the result of "false positives" (i.e., cases in which undocumented immigrants are incorrectly identified as work-authorized) in the existing document-based and electronic verification systems and of inadequate enforcement efforts and modest penalty structures which make the expected cost of non-compliance an acceptable business expense for many non-compliant employers.

1. Verification of Status

For the overwhelming majority of employers, status verification is governed by the I-9 process: employees must present one or two identity and eligibility documents and attest to their work eligibility; and employers must attest to having verified that the documents reasonably appear on their face to be genuine. This document-based process is an ineffective screening mechanism for two reasons:

- Document fraud. Employees may present fraudulent documents ("fake ID's") to complete the I-9 form. Fake ID's are readily available in all American cities as well as most countries of origin, and employers lack expertise to distinguish between legitimate and fraudulent documents.
- Identity Fraud. Employees may present borrowed or stolen *genuine* documents, or may fraudulently obtain genuine documents containing the identity and eligibility data pertaining to some other work-authorized individual. In these cases, an employer may correctly judge the document(s) to be genuine, but fail to recognize that the document does not pertain to the individual presenting it.

Any document-based system is vulnerable to these two types of fraud, but these weaknesses are exacerbated in the US case by regulatory complexity and lax document security standards. First, the I-9 rules allow job applicants to present one or two documents from a list of 29 alternatives, many of which in turn are plural categories (e.g., state and territory driver's licenses, tribal identity documents) so that the actual number of acceptable documents is larger still. Even the most conscientious employers find it difficult to familiarize themselves with the full range of permissible documents. Second, many acceptable identity and eligibility documents are paper-based and/or lack anti-fraud security features, making them vulnerable to counterfeiting. Third, birth certificates and other "breeder documents" are particularly diverse and lacking in security features, creating ample opportunities for sophisticated individuals to fraudulently obtain genuine identity documents.

The Basic Pilot electronic eligibility verification system improves upon the I-9 process by guarding against the most basic type of document fraud. In particular, any functional EVS will detect crude fake ID's because the data on the fraudulent document does not match records in the EVS database. Fabricated identity and eligibility data submitted to the Basic Pilot will result in a non-confirmation of the employee's status. *Yet the ability of the Basic Pilot or any EVS reliably*

[6] See e.g., Commission on Immigration Reform 1997; Cornelius et al. 2004; General Accounting Office 2006a; Massey et al. 2002.

to detect unauthorized workers is limited by the vulnerability of the system to identity fraud: an unauthorized worker presenting borrowed or stolen identity data pertaining to a work-authorized individual will be confirmed by the Basic Pilot. Thus, in the absence of a system for decisively linking identity cards to their bearers—a process which typically requires biometric data collection at the point of document presentation—even a universal electronic eligibility verification system would fail reliably to detect unauthorized workers and would require additional measures to guard against identity theft.

2. Oversight and Enforcement

Weaknesses in the I-9 and Basic Pilot program ensure that even conscientious employers cannot reliably determine the work authorization status of their employees for the reasons discussed above, and they create opportunities for willful non-compliance on the part of indifferent or unscrupulous employers. Weak oversight and enforcement measures make it difficult to obtain convictions or enact penalties, and exacerbate non-compliance by the latter two categories of employers.

At the policy enforcement stage, the single greatest barrier to targeting non-compliant employers, prosecuting cases, and implementing sanctions is the fact that no agency, office, or division has made a priority of worksite enforcement. In general, both the INS and ICE have emphasized the apprehension and removal of undocumented immigrants rather than worksite enforcement. After a modest initial investment, attention to worksite enforcement lagged during the 1990s, especially after the initial success of the Border Patrol's "prevention through deterrence" strategy caused Congress to focus overwhelmingly on border enforcement and detentions, rather than interior investigations. The INS' 1999 Interior Enforcement Strategy focused remaining investigations resources on a small number of high-profile cases, a move which highlighted widespread abuses of IRCA provisions, but which also insured that most employers would not be investigated. Institutional commitment to employer sanctions reached a new low after the 2001 terror attacks, as ICE's counter-terrorism mission (as distinct from the INS's migration control mission) shifted the focus of interior enforcement to the nation's critical infrastructure and away from industries which tend to employ undocumented immigrants.[7]

Thus, while spending on border enforcement and detention facilities increased from $800 million to over $4.5 billion between 1986 and 2002, spending on interior enforcement and investigations only increased from $100 million to $500 million.[8] Even these number radically overstate the commitment to worksite enforcement, as just *two percent* of interior investigations targeted worksites in 2003.[9] Out of over 2,500 agent work-years devoted to immigration-related investigations in 2003, only 90 agent work-years were devoted to worksite enforcement nation-wide; and these investigations resulted in a total of just three notices of intent to fine being issued to employers.[10] These numbers received substantial attention from Congress during 2006, and the Bush administration has recently emphasized worksite enforcement, including through a

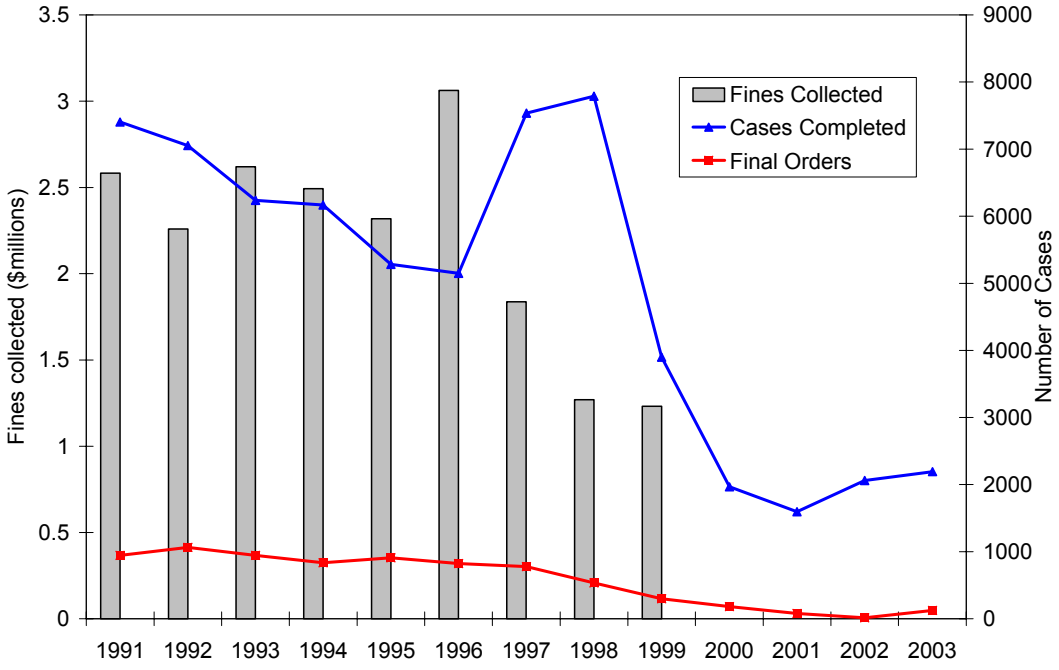
[7] Rosenblum 2005.
[8] Dixon and Gelatt 2005.
[9] Ibid.
[10] General Accounting Office 2006a.

number of high profile worksite raids during the last nine months; but detailed budget and agent work-year data for the current period is not yet available.

Finally, even on the rare occasions that employers are targeted for enforcement, a number of factors make it difficult to obtain convictions or collect penalties for non-compliance. Fundamentally, the flawed verification procedures described above ensure that it is difficult to meet the standard for conviction—that employers *knowingly* employed unauthorized workers. In short, as long as employers have completed an I-9 form for every employee on the payroll—regardless of the quality of documents reviewed—it is difficult for investigators to prove non-compliance. As a result, some employers may protect themselves from prosecution by complying with the letter of the law even while knowingly hiring unauthorized workers. In other cases, employers hire undocumented immigrants as "independent contractors" in order to immunize themselves against document verification requirements; or they contract with fly-by-night subcontractors who assume the liability for verification violations but then go out of business if they become the subject of an immigration investigation. ICE investigators, aware of the difficulty of obtaining convictions under these circumstances, often negotiate modest settlements with employers rather than pursuing civil or criminal penalties.

These limitations are illustrated by figure one. Between 1991 and 2003, fewer than 5,000 employer investigations were completed per year, targeting less than one in a thousand U.S. worksites. While evidence of undocumented employment was found in almost half of these cases, only ten percent led to final orders to fine, and an average of just $2.2 million in fines were collected nation-wide (the bars in figure one; data limited to 1991-1999).

Figure One: Employer Sanctions Enforcement Outcomes



Source: INS Statistical Yearbook, various years; Peter Brownell 2005.

In sum, the existing status verification and worksite enforcement fails to provide adequate tools for confirming the work eligibility of employees and fails to provide a meaningful threat of enforcement against substantive non-compliance. As a result, while highly vigilant employers may use existing tools to screen out most unauthorized employees, a larger class of employers may comply with both the letter and the spirit of the law and still unwittingly hire undocumented immigrants. Most troubling, the system makes it safe for "bad apple" employers to comply with the letter of the law even as they seek out undocumented immigrants as a strategy for holding down labor costs.

False Negatives

Document Imprecision in the I-9 and Basic Pilot verification systems is not limited to the problem of false positives discussed above, but may also lead to the opposite problem: "false negatives," or cases in which an employer wrongly concludes (or assumes) a US citizen, permanent resident, or work-authorized non-immigrant lacks work authorization. While false positives undermine immigration control efforts by leaving in place the job magnet, the problem of false negatives represents a very different kind of threat: imprecise verification procedures—especially if combined with credible enforcement and oversight—could require millions of US citizens and legal immigrants to spend substantial time and resources clarifying their status, or could result in their being denied legal employment.

Both the I-9 document-based system and the Basic Pilot electronic eligibility verification system produce false negatives. Despite the due process protections discussed above—i.e., the requirement that employers accept documents that appear on their face to be genuine—the I-9 process is inherently subjective and relies on employer judgment to make determinations about the legitimacy of documents and about whether or not they pertain to their bearers. Risk-averse employers reluctant to expose themselves to possible prosecution will err on the side of caution by refusing to hire people who seem like they *might* be unauthorized to work, a phenomenon known as "defensive hiring." The risk of defensive hiring is exacerbated by the complexity of the I-9 system, as confused employers may subject diverse employees (and documents) to different degrees of scrutiny.

In principle, the Basic Pilot or another electronic eligibility verification system should mitigate this problem by eliminating the need for employers to make judgments about document authenticity. But in practice the Basic Pilot continues to rely on employers as the point of interface between employees, their identity documents, and the electronic verification process; and the system re-creates problems found in a document-based system as a result. Employers continue to make subjective judgments about whether a given document pertains to the individual presenting it, and continue to apply different rules to their employees as a function of these subjective judgments.

In addition to this familiar problem, the Basic Pilot introduces an important new source of false negatives: errors in the SSA and DHS databases and in the electronic verification process. In short, the structure of the Basic Pilot system places the burden of proof of work authorization on job applicants. If the system fails automatically to confirm a job applicant for whatever reason, the applicant must prove that an error has occurred or, by law, be terminated from their place of

employment. It bears emphasis that the logic of this system runs counter to the judicial principle of presumed innocence: *under the Basic Pilot all job applicants are presumed unauthorized until proven otherwise*. The verification process itself produces false negatives for four distinct reasons:

- Data entry error by employers at the point of hire. If an employer enters incorrect information into the Basic Pilot system, searches of the SSA and DHS databases will fail to confirm an employee's work authorization. The burden is on the employee in this case to discover and correct the employer's mistake.
- Delays in database maintenance. Neither the SSA nor the DHS databases are reliably up-to-date. The most common errors in the SSA database pertain to legal name changes, which often take as long as a year or more to be recorded in the SSA database. New US citizens and temporary immigrants also experience delays in being entered into the SSA database. Historically, the most common errors in the DHS databases have resulted from the failure of USCIS and other DHS agencies and field offices to transmit information about status changes to the USCIS CPS database in a timely manner, with delays of several days or even weeks being common. Although recent procedural changes intend to eliminate some of these delays, the effectiveness of the new procedures have not yet been evaluated.
- General database errors. Both the USCIS and SSA databases contain general errors, especially in cases related to complex or unusual names, transliterated names which may be spelled multiple ways, or names with ambiguous word order (e.g., because individuals have multiple last names, hyphenated last names, or because the individual's family name precedes his or her given name in normal usage).
- Immigration status verifier (ISV) error. Where non-citizens' data are not confirmed automatically by the CPS database, the system is vulnerable to human error by the ISV assigned to a particular case. Again, the burden is on the employee to discover and correct the ISV's mistake.

In an era of ATM machines and credit card purchases it is tempting to place a great deal of faith in our ability to manage large databases with a high degree of accuracy, but the SSA and DHS databases remain highly error prone:

- A 2006 analysis of the SSA's NUMIDENT database found that 4.1 percent of cases analyzed contain discrepancies which would lead to incorrect responses in a Basic Pilot query. This error rate would correspond to 17.8 million potential false negatives in a universal electronic eligibility verification system based on the existing data.[11]
- A 2006 analysis of the DHS system for tracking A-files, the primary record for all immigrants in the United States, found that between one and four percent of all records could not be located. Missing A-files were much higher in some regions, including a 20 percent missing record rate in the San Diego field office.[12]
- A 2002 independent analysis of the Basic Pilot program found that 42 percent of employees who received *final non-confirmations* after their cases were referred to the INS for review (a non-random sub-sample of all final non-confirmations) were in fact work-authorized at the time of their referral.[13]

[11] Social Security Administration 2006.
[12] General Accounting Office 2006b.
[13] Institute for Survey Research 2002.

- Overall, thirteen percent of all Basic Pilot queries analyzed for the 2002 study resulted in final non-confirmations after employees failed to appeal a tentative non-confirmation; analysts concluded that a "sizeable number" were false negative responses.[14]

Employer subjectivity and database errors together create an additional source of false negatives when electronic verification results in a tentative non-confirmation (TNC). On paper, employers are required to respond to TNC's by providing an opportunity for the employee in question to provide additional information prior to a final determination; the Basic Pilot relies on employers to provide employees with the tools to do so. Yet the same factors which may cause employers to engage in defensive hiring and to practice differential document verification standards under the I-9 system may also cause employers—in violation of Memorandum of Understanding governing their participation in the Basic Pilot—to engage in "defensive firing" or other adverse employment practices upon receipt of a TNC response, rather than taking the time and trouble to assist employees with their right to appeal such an interim result. Especially where employers have their own doubts about an employee's immigration status, defensive firing represents a cost-savings over the TNC appeal process because employers prefer not to invest in training a new employee in the absence of certainty about the employee's status; moving on to a different job applicant may provide that certainty. Short of terminating an employee following a Basic Pilot TNC, employers may also suspend their training or otherwise place them in provisional status pending a final determination of the employee's status. Previous studies indicate that these practices, though illegal, are widespread:

- Thirty percent of Basic Pilot employers admitted restricting work assignments while employees contest a tentative nonconfirmation.
- Among a sample of employees who contesting tentative nonconfirmations, 45 percent reported one or more of the following adverse actions: were not allowed to continue working while they straightened out their records, had their pay cut, or had their job training delayed.
- Overall, 73 percent of the employees who should have been informed of work authorization problems were not informed. These employees were not aware that they had verification problems and were thus precluded from resolving these problems.
- Thirty-nine percent of employees who did appeal TNC results did not recall receiving printed instructions from their employers as required by law.[15]

What are the consequences of these false negatives? The immediate effect is lost work opportunities for an unknown number of US citizens and work-authorized non-citizens.[16] It is

[14] Ibid. More recent data provided by USCIS suggest that eight percent of all Basic Pilot queries result in tentative non-confirmations at this time; the vast majority of these continue to result in final non-confirmations because employees fail to appeal the findings.

[15] All statistics from Institute for Survey Research 2002.

[16] A second consequence of false negative responses is that employees and federal agencies must spend significant time and resources correcting these errors, though these efforts may be viewed as a necessary investment in fixing the verification system. The burden of correcting errors in US citizen records will be particularly acute for SSA field offices, which have already seen a 40% increase in visitors since passage of the Intelligence Reform and Terrorism Prevention Act (IRTPA). Security requirements associated with the IRTPA have caused the number of people who must make multiple trips to an SSA office in order to obtain a new card or clear up database error to increase from 20% to 33% of all visitors. In many cases, especially in western districts, that extra trip to an SSA field office may involve up to 400 miles of round trip driving.

particularly difficult to estimate the scope of this problem, since in most cases victims of I-9 false negatives may never have an opportunity to apply for a job, and no legal violation occurs. The data also fail to provide an exact estimate of the error rate in the Basic Pilot databases—we do not know what percentage of those who fail to appeal their TNC's are in fact work-authorized—but we do know that most employers fail to notify workers that they have received a TNC response or to provide adequate information for a TNC appeal, as discussed above. For this reason, *it is not safe to assume that an employee who fails to appeal a TNC is unauthorized to work in the United States*; and many legal workers have undoubtedly lost their jobs as a result of false Basic Pilot non-confirmations. These numbers would increase exponentially in a nation-wide Basic Pilot program, including because Basic Pilot expansion would likely lead to increased database errors and erroneous non-confirmations as system capacity is expanded and new ISV's are hired and trained.[17] For these reason, *the 2002 Temple/Westat analysis recommended against requiring additional participation in the Basic Pilot program*. Although results of a 2006 update to this study have not yet been released, several individuals familiar with its contents have said that it concludes that employer non-compliance with Basic Pilot procedures, false TNCs, and erroneous final non-confirmations continue to plague the program. *Members of Congress should demand access to this report prior to finalizing plans regarding expanded participation in the Basic Pilot program.*

Additional Adverse Consequences: Employment Discrimination

Thus, both the I-9 document-based system and the Basic Pilot electronic eligibility verification system result in a significant number of false negatives—cases in which US citizens, legal permanent residents, and work-authorized non-immigrants are incorrectly identified as unauthorized to work. While it bears emphasis that all Americans confront this risk, legal immigrants and citizens of foreign descent, and Latino Americans in particular, are especially vulnerable to false non-confirmation; and poorly-designed verification and worksite enforcement rules are therefore a de facto source of employment discrimination.

As with false negatives in general, employment discrimination related to verification and worksite enforcement is the result of both subjective employer judgment and systemic database errors. In the first case, where risk-averse employers may engage in defensive hiring, many employers use an "information shortcut" by assuming that all Latin Americans or all "foreign-looking" individuals may be undocumented. A 1990 General Accounting Office analysis of employment practices found that this type of defensive hiring was widespread in the immediate aftermath of IRCA's passage, at which time employers were especially concerned about the threat of workplace enforcement:

- Five percent of employers in their study "began a practice, as a result of IRCA, not to hire job applicants whose appearance or accent led them to suspect that they might be unauthorized aliens."[18]

[17] Currently, the Basic Pilot program generates about 70 TNC's per day, which are processed by four independent status verifiers (with 70 additional ISV's responding to TNC's generated by the SAVE program). To increase the number of Basic Pilot by queries a factor of 50 as would be required under a universal system would require the recruitment and training of at least 200 additional ISV's.

[18] General Accounting Office 1990.

- Nine percent of employers said that because of IRCA they "began hiring only persons born in the United States or not hiring persons with temporary work eligibility documents."[19]
- A "matched pair" survey of job applicants found that Anglo job applicants received 52 percent more job offers than Hispanic job applicants with identical records.[20]

Employers who require different employees to submit different types of documents or who subject some documents to more scrutiny than others are likely to employ similar shortcuts.[21] Because employers are uncertain about a job applicant's legal status, many employers assume all Latino workers may be undocumented and hold them to different standards in a variety of ways:

- The 1990 GAO study found that 7.5 percent of employers only required individuals to fill out I-9 forms if the person "had a 'foreign' appearance or accent."[22]
- Overall, the 1990 GAO survey found that 19 percent of all employers in their population engaged in one or more forms of national origin or related discrimination after IRCA's implementation.[23]

A third way in which subjective employer responses to the threat of enforcement produces discriminatory outcomes is in the form of wage discrimination. Many employers hire Hispanic job applicants, but pass the risks of immigration enforcement along to their employees by paying individuals who "look or seem undocumented" lower wages than those paid to similarly-qualified applicants who appear native-born. All US workers see their wages decline through ripple effects from this immigrant-based wage depression.[24] Several studies have specifically documented the post-IRCA discriminatory wage effects of worksite enforcement:

- Latino non-agricultural wages fell by 9.6 relative to Latino agricultural wages during the initial post-IRCA period in which only non-agricultural employers were required to check status.[25]
- Latino wages fell by 6-7 percent relative to non-Latino wages as a result of the introduction of employer sanctions in general.[26]
- The real wages of legal immigrants fell 35 percent between 1980 and 1993. Analysts attribute most of this wage drop to IRCA, as wages fell 9 cents per year prior to IRCA and 27 cents per year after IRCA.[27]
- An analysis of US Census data found that workers of Mexican descent—including US citizens of Mexican descent—saw a "sizeable" decline in their hourly earnings relative to Cuban and Puerto Rican workers and relative to non-Latino white workers following IRCA's passage. This analysis concluded that employer sanctions adversely affected the earnings of Mexican workers.[28]

[19] Ibid.
[20] Ibid.
[21] Christi 1995.
[22] General Accounting Office 1990.
[23] Ibid.
[24] Borjas et al. 1996.
[25] Raphael 2001.
[26] Ibid.
[27] Massey et al. .2002.
[28] Bansak 2005.

In addition to these employer-driven sources of discrimination, the Basic Pilot is an independent source of de facto discrimination because errors in the SSA and DHS databases disproportionately affect immigrants and foreign-born US citizens relative to native born citizens.[29] First, the systemic database errors discussed above (misspellings, reversed name order, etc.) are disproportionately likely to affect foreign-born individuals and individuals with atypical (from a US perspective) names. Second, the SSA database is, for a variety of reasons, more accurate than the USCIS database. One of the most significant advantages to the Social Security database is that numbers are typically issued at birth, and individuals have numerous opportunities to correct errors in their social security file prior to the point at which the Numident database is queried at the point of hire. Third, as noted above, the various DHS databases covering work eligibility are not networked, so that newly legal immigrant workers routinely face delays before their change of status is recorded in the CPS database. Fourth, many naturalized citizens experience delays in establishing records with the Social Security Administration, causing them to be wrongly non-confirmed until their records can be clarified.

For all of these reasons, the Basic Pilot produces significantly more incorrect TNC's and false final non-confirmations for non-citizens and citizens of foreign descent than for native-born US citizens.

- Among legitimately work-authorized job applicants approved by the Basic Pilot, 99.8 percent of US citizens are approved by an electronic screen of SSA data, compared to just 88.6 percent of foreign-born citizens and 48.8 percent of non-citizens. Thus, a majority of work-authorized non-citizens are subject to delays, during which time they are often penalized at the workplace as discussed above.[30]
- Only 82.6 percent of non-citizens approved by the Basic Pilot are confirmed by USCIS through primary electronic checks.[31]
- Overall, over 99 percent of US citizens appear to be automatically approved by the system on a first or second pass, but fewer than 90 percent of work-authorized non-citizens.[32]

Additional Adverse Consequences: Worker Exploitation

Finally, just as "bad apple" employers may exploit weaknesses in the system to knowingly or willingly hire undocumented immigrants, so too may the same employers take advantage of asymmetries in the system to gain leverage over their undocumented employees during bargaining over wages and working conditions. Despite the ambiguities in the I-9 and Basic Pilot processes, savvy employers gain information about their workers' immigration status during the document verification process. Unscrupulous employers may intentionally hire workers they believe to be undocumented—a low-risk strategy in light of the limitations on effective enforcement discussed above—and use this information to threaten employees with immigration

[29] Designers of the Basic Pilot system hoped that the program would reduce discrimination by taking the guesswork out of the document review process. While a plurality of employers self-reported being more willing to hire immigrants since enrolling in the program, the Temple/Westat study's analysis of actual hiring patterns found no evidence that use of the Basic Pilot changed employers hiring patterns.
[30] USCIS 2004.
[31] Ibid.
[32] Ibid.

enforcement in response to complaints about unfair wages or working conditions or union activism. Ironically, the Basic Pilot (or any employer-based EVS) may exacerbate this problem by providing these employers more certainty about workers' undocumented status, especially where employers pre-screen job applicants, a practice illegal under the Basic Pilot Memorandum of Understanding but widespread nonetheless.[33] Employers also benefit from ambiguities in the I-9 process, claiming that employee documents appeared genuine but then "discovering" their undocumented status when a worker files a labor claim.

The Supreme Court's 2002 *Hoffman Plastics Compounds v. NLRB* decision gave employers an additional reason to adopt such a strategy: under this ruling employers convicted of violating wage and standards laws are not required to compensate undocumented workers for back pay, the only monetary remedy available under the National Labor Relations Act (NLRA). Thus, unscrupulous employers who intend to violate wage and standards laws have a positive incentive to seek out undocumented immigrants, in effect taking out insurance against the possibility of future wage and standards convictions by reserving the option to "deport their problem" later.[34]

By its nature, this type of exploitation is often difficult to document, but evidence suggests it is widespread:

- While the passage of IRCA had no measurable impact on the ability of undocumented immigrants to obtain employment in the United States, the imposition of employer sanctions made it "much more likely" that undocumented immigrants would earn below the US minimum wage, contrary to the pre-IRCA finding.[35]
- A recent study of immigrant workers in post-Katrina New Orleans found that thirty-four percent of undocumented workers reported receiving less money than they expected to be paid, compared to 16 percent for documented workers. Twenty-eight percent of undocumented workers said they had problems obtaining payment, compared to 13 percent of documented workers. The average hourly wage among documented workers is $16.50 compared to $10.00 for undocumented workers. Twenty percent of undocumented workers received time-and-a-half for overtime hours, compared to 74 percent of documented workers.[36]
- Undocumented Latin-American men and women experience statistically significant wage penalties—22% and 36%, respectively—after controlling for length of U.S. work experience, education, English proficiency, and occupation. Undocumented immigrants report working in unsafe conditions at considerably higher rates relative to immigrants with legal status. Moreover, immigrants without legal status also report alleged wage and hour violations at considerably higher rates relative to documented workers.[37]

[33] Among a sample of individuals who received Basic Pilot TNC responses and were surveyed as part of the Temple/Westat study, 28 percent never received job offers from the employer submitting the query, indicating that these applicants were pre-screened (Institute for Survey Research 2002).
[34] Note that current law prohibiting citizenship status discrimination (enforced by OSC) does not prohibit discrimination with respect to terms and conditions of employment. Thus, for example, it may be legal for employers to pay US citizens less than aliens (to dissuade citizens from being employed, leading to more exploitable workforce).
[35] Donato et al. 1992; Massey et al. 2002.
[36] Fletcher et al. 2006.
[37] Mehta et al. 2002.

- A number of federal court cases have upheld employees Fair Labor Standards Act claims against employers who have exploited immigration law to engaged in retaliatory action against employees involved in union activism.[38]

Recommendations

Developing a fair and effective system of status verification and worksite enforcement requires Congress to strike a difficult balance because steps to limit undocumented employment—strengthening verification and enforcement procedures—tend almost inevitably to increase the risks of false negatives, discrimination, and exploitation. *In general the solution is to limit subjective employer discretion by providing employers and employees with clear rules and unambiguous answers during the eligibility verification stage*. Most employers are willing to play by the rules, and their straightforward compliance with the law under these circumstances will prevent the overwhelming majority of undocumented employment. A minority of employers will still attempt to game the system in an effort to hold down wages and working conditions. Thus, even with an effective verification system is in place, stronger enforcement efforts and more punitive penalties for non-compliance are necessary to compel reluctant employers to comply with the law. *Finally, we can predict with a high degree of certainty that an increased threat of enforcement will also lead to defensive hiring, discrimination, and exploitation, so these efforts to prevent undocumented immigration must be accompanied by concrete counter-measures to prevent these unintended consequences*.

Changes at each stage of the verification and enforcement processes would enhance efforts to prevent undocumented employment while guarding against false negatives and other unintended consequences:

<u>Document review process</u>

1) Limit the number of acceptable I-9 documents and insure that all I-9 documents include strong anti-fraud measures. While it is not possible to produce fraud-proof identity cards, requiring that all I-9 documents include basic state-of-the-art security measures like holograms and multi-colored ink will raise the cost of document fraud and make it easier for conscientious employers to identify fake ID's. Restricting acceptable documents to a handful of categories—passports, green cards, DHS-issued employment authorization documents, and state-issued driver's licenses and non-driver identity cards—would further assist employers in making this determination.
2) Regulations governing document verification requirements must make allowances for the difficulties many US citizens, permanent residents, and work-authorized nonimmigrants will encounter in obtaining secure documents—a process which may be prolonged by security requirements related to birth certificates and other original documents. Thus, issuing agencies must be required to issue temporary identification certificates where permanent cards are delayed, and employers must be required to accept temporary cards as interim proof of work eligibility in such circumstances. In addition, citizens should not be penalized for living in states which have reject REAL ID licensing requirements; any secure state-issued license or identity card should be acceptable.

[38] E.g., *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.,* No. C98-2701 SC (N.D.Cal. Oct. 26, 1998); *Singh v. Jutla, et al.,* 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

3) Document review requirements must not require employers to make subjective judgments, which are a burden on conscientious employers and a weapon in the hands of "bad apples." Thus, even though a document-based system will leave in place some risk of document and identity fraud, standards for document verification should continue to require employers simply to confirm that documents reasonably appear on their faces to be genuine and to pertain to the individuals bearing them. Employers should also be required to make a photocopy of the card to document compliance. Employers who comply in good faith with these requirements should be granted a safe harbor from prosecution; such safe harbors minimize the burden on conscientious employers and the risk of defensive hiring.

Expansion of the Basic Pilot or a similar electronic eligibility verification

1) An electronic eligibility verification system eventually should be expanded to cover all employers; but full implementation of the system should be linked to third-party certification that database error rates are less than one percent. Such linkage could be accomplished through a phased implementation with each successive level of participation requiring such a certification, as would be required under the STRIVE Act; or by requiring that the EVS return default confirmations in ambiguous cases until these standards are met, as would have been required under the Senate's Comprehensive Immigration Reform Act of 2006. An advantage to the default confirmation procedure found in S.2611 is that it would protect against wrongful non-confirmations while still allowing USCIS to begin enrolling a larger set of employers in the Basic Pilot program on an expedited basis, building a database for the purpose of future enforcement and increasing employers' and employees' level of comfort with electronic verification requirements.
2) A broader EVS must be accompanied by strong due process protections to guard against remaining false negatives, including opportunities for employees to be notified directly of TNC's and to correct erroneous records, and opportunities to appeal final non-confirmations and receive compensation for lost wages in cases of system or employer errors.
3) Provisions now found in the Basic Pilot Memorandum of Understanding to prevent employer abuse or misuse of EVS screening must be codified as part of EVS law. These changes should be accompanied by employer education about, and enforcement of these and other regulations proscribing unfair immigration-related employment practices (pre-screening of employees, adverse employment practices in response to a TNC, etc.). Penalties for non-compliance with these EVS procedures and other unfair immigration-related employment practices should be increased.
4) An EVS must include a mechanism to detect identity fraud. In the long run this could be accomplished by incorporating biometric data into the verification process, including, for example, by requiring some employers to collect biometric data (e.g., a finger print scan or digital photograph) as part of the verification process. Such a biometric component will require substantial new infrastructure, and will never cover all worksites. Thus, in the short-run, the only realistic strategy for detecting identity fraud is through an analysis of verification patterns to detect cases in which the same names and identification numbers appear "too often." Once participation in an EVS is widespread, the data analysis necessary for detecting identity fraud will not require information sharing between DHS and SSA/IRS as has been proposed in recent House and Senate legislation, though an initial period of limited data sharing will enhance counter-identity fraud measures prior to the time that a significant EVS participation record exists.

5) In the absence of a biometric system for linking cards to their owners, an unintended consequence of increased employer participation in an EVS is likely to be a rise identity theft, a crime already affecting nine million Americans in 2006, at an estimated cost of $56.6 billion.[39] Given existing problems with federal database security,[40] expanded participation in an EVS must also be accompanied by strong measures to protect private data and to prohibit the use of EVS data for purposes other than worksite enforcement.

Oversight and enforcement

1) Substantially increase penalties for non-compliance with verification procedures, targeting "bad apple" employers in particular. Improved verification procedures will allow conscientious employees to comply more effectively with worksite immigration laws, but intentionally non-compliant employers will continue to hire undocumented immigrants unless they are confronted with a realistic risk of detection and punishment.
2) Subcontractors should be held liable for verifying the immigration status of their employees, allowing primary employers to safely delegate these responsibilities in most cases. However, where subcontractors are found to violate immigration law and are cannot be brought to account, responsibility for fines and potential criminal penalties should transfer to the primary employer. While this practice will, in the short run, diminish the efficiency of subcontracting relationships in some industries, such a policy will create a market demand for subcontractor firms providing documented workers.
3) The current system is overwhelmingly focused on detecting and deporting undocumented immigrants, largely to the exclusion of any effort to hold unscrupulous employers accountable. Special units should be dedicated to enforcement against non-compliant employers (rather than undocumented workers), and should target for enforcement a minimum number of worksites—perhaps five percent per year—based on a mix of random and risk-based selection criteria. Placing these special units in the Department of Labor, rather than DHS, and providing undocumented immigrants with whistle-blower protection in cases of labor law violations, would encourage workers to report on employers who hire undocumented immigrants for the purpose of depressing wages and working standards.
4) Employers who fail to comply with fair and reasonable verification requirements should be subject to far higher penalties than currently exist. Intentional employment of undocumented immigrants for the purpose of depressing wages and working conditions should be discouraged by imposing criminal penalties against employers found to be employing undocumented immigrants while also violating related labor laws. Congress should pass legislation overturning or limiting the *Hoffman Plastics* decision so that employers can be held financially liable for labor law violations related to undocumented immigrants.

[39] Privacy Rights Clearinghouse 2007.
[40] See General Accounting Office 2007.

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