Testimony of

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

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

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

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

To understand the full spectrum of issues associated with the process, I made it my business to experience as many of them as possible. Working with investigation units assigned to worksite in Phoenix and L.A., for example, I traveled along as an observer of enforcement actions much as media reporters today travel "embedded" in military operations in the Middle East. Like those reporters, my objective was to be able to better explain the process to employers and to gain their understanding and support.

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

1. Business Consequences

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

In the course of a worksite enforcement action at a meatpacking plant, for example, illegal aliens (and often legal

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

2. Failure of Enforcement

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

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

3. Employee Attestation

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

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

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

4. Self-employment

The fact that I-9 forms need not be completed for independent contractors has fostered a widely-held belief that employment of undocumented workers is prohibited only if there is an employer-employee relationship between the provider of services and the payor. In fact, as we experts know, this is not true. However, it has provided a loophole for a huge amount of undocumented employment that effectively bypasses the I-9 process and can be expected to continue to do so. Remember that self-employed individuals also compete with U.S. workers and can significantly undercut their opportunities, income, and working conditions just as undocumented employees can affect lawfully authorized employees.

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

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

5. Discrimination

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

From abundant experience, I can truthfully say that not once (except in the cases of certain ethnic employers who exploit employees of their own nationality) in any conversation I have ever had with any employer have I received even a hint of - much less a motive for - discrimination against any legal worker. Employers who need workers, in fact, have every motive not to discriminate. Furthermore, they are generally very pleased with the performance of Hispanic workers widely considered to be targets of discrimination and regularly compliment their work ethics.

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

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

6. Documentary Problems

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

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

7. Electronic Verification

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

Except for those employers mandated to join the pilot, participation has been voluntary. In labor shortage areas, employers have certainly not been motivated to enroll if subscribing to the higher verification standard would not only

deprive them of potential workers who could survive the paper I-9 process, but might put them at a competitive disadvantage if those workers were to move on to work for their competitors and leave them with vacant positions. To avoid problems of competitive advantage or disadvantage, meaningful verification should apply to all employers or be left, as is, as an option for employers such as the new option for electronic administration of the process.

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

We already know that undocumented aliens easily survive the Basic Pilot if they use a name and number of an authorized person (often a U.S.-born child). Although many have done this innocently enough in order to exploit a loophole in the system for survival purposes, identity, once established, may not so easily be shed. The slippery slope of identity fraud, which constitutes identity theft when the identity is assumed without the knowledge or consent of the rightful owner, is a dangerous enough path without being exacerbated by national implementation of a flawed system.

Of course, the verification system could work if combined with few, counterfeit-resistant, and tamper-proof documents, but such documents do not exist for most U.S. workers and are not even issued to all aliens who are authorized to work. Mandating documents that would meet this standard for verification purposes would mean either that U.S. citizens would have to get passports or that development and issuance of the ever-unpopular National ID card would have to be mandated by Congress. An alternative, of course, would be biometric identification of each new employee at the point of hire. This would bypass the document problem, but it boggles the mind to contemplate biometric devices at every point of hire, transmission of complex digital data from tens of thousands of points of hire to a centralized Government database, or a Government database and system sophisticated enough to provide quick and reliable turnaround of eligibility determinations.

7. Intergovernmental Cooperation and Consistency

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

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

Since it is the intersection of these laws, in cases where they are interdependent, where the public has most problems, it must be a priority for those who administer the laws to address those problems interjurisdictionally if they are serious about compliance.

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