

Testimony of

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June 19, 2006

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To the Senate Committee on the Judiciary
Subcommittee on Immigration, Border Security, and Citizenship
Hearing on Immigration Enforcement at the Workplace:
Learning from the Mistakes of 1986
Monday, June 19, 2006

Overview

Mr. Chairman and Members of the Committee, thank you for the opportunity to address the critical issue of employment verification within the context of comprehensive immigration reform.

The National Council of La Raza (NCLR) - the largest national constituency-based Hispanic civil rights and advocacy organization in the United States - is a private, nonprofit, nonpartisan, tax-exempt organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR is also a convener of the Low Wage Immigrant Worker Coalition, a nationwide coalition of labor unions, civil rights organizations, immigrant rights organizations, and others concerned with the rights of low wage immigrant workers in the U.S.

We believe that the Title III provisions of the Comprehensive Immigration Reform Act of 2006 (S.2611) - the employment verification provisions - are critically important. These provisions reach well beyond immigration reform; they are the one piece of the Senate immigration reform bill that will have an impact on every single American that is ever employed in the U.S. Because of the enormous reach of these provisions, it is critically important that they be designed well and implemented perfectly. If not, millions of U.S. workers could be affected and the implications could be dire - including denial of employment to eligible workers, and severe discrimination on the basis of national origin and citizenship status.

As we enter this discussion, it is important to point out that the notion of worker verification is not new to this debate. There is a long history here, a history that we must learn from if we are to design and implement an immigration reform that accomplishes its principal goal of dramatically reducing undocumented migration, while accomplishing the equally important goal of fair treatment for immigrants and native-born Americans. It should be abundantly clear that NCLR supports this goal; we have been working for many years on developing a policy agenda around comprehensive immigration reform because we believe firmly that the U.S. can and should have an orderly and fair immigration system in which illegal entry is rare, and our laws are enforceable. We applauded the Senate for passing a comprehensive reform last month, even as we expressed reservations about some of its provisions.

It should also be abundantly clear that NCLR has long been concerned about our nation's ability to implement and administer employer sanctions in a way which would be effective without engendering employment discrimination. The results of the 1986 law, from our perspective, represent the worst possible outcome: employer sanctions have clearly been ineffective; nevertheless, there is abundant documentation that the policy has caused discrimination on the basis of nationality and citizenship status. When Congress considered the Immigration Reform and Control Act of 1986, it included a sunset provision designed to allow it to reconsider employer sanctions if a widespread pattern of

employment discrimination were to result; in 1991 the General Accounting Office found exactly that result, and Congress failed to act in any way on this evidence. In short, the goal of immigration control has not been advanced, and the Latino community among many others has faced employment discrimination which is unique in our nation's civil rights history in having been caused entirely by a federal law. By any standard this has been a disastrous outcome.

Given this history, you can imagine the reluctance with which NCLR and our many coalition partners entertained a new debate on immigration reform in which the implementation of employer sanctions was likely to factor. Not only must we contend with a history of employment discrimination, but we also have deep reservations about the government's ability to expand the implementation of employer sanctions by implementing an employment verification system. We have testified before this body in the past that the data on which such a system would rely is notoriously inaccurate, and the agencies which administer it notoriously lax in dealing with database problems. I am sorry to say that there is ample evidence that our concerns are well-founded; there is much reason to be concerned that advancing an employer verification system will jeopardize a substantial portion of the U.S. workforce because data inaccuracies will cast doubt on individual workers' ability to do their jobs lawfully, while others will likely be the victims of "defensive hiring," that is, employment practices which weed out people perceived as immigrants, or whose ethnicity suggests that they might be in the category of workers for whom verification is time-consuming and costly because the databases are fraught with errors.

Despite these serious concerns, we have engaged the policy debate on worker verification issues, and have demonstrated our willingness to devise a system which can allow employers to swiftly verify workers' authorization for employment while simultaneously protecting workers against dismissal or discrimination because of bias, ignorance, or faulty data. We do this because we believe there is wide support for creating an enforceable standard for legal employment in the workplace, and that a reliable, fair system could in fact play an important role among a combination of policies aimed at deterring unauthorized immigration, especially if we expand legal and safe avenues for entry. We have deep concerns about the potential for harm to Hispanic and other Americans, but we are prepared to engage this debate because it is essential for our immigration reforms to be effective. It is equally important for them to be fair and to adequately protect all authorized workers; we cannot support a policy unless it meets both of these standards. While the Grassley, Kennedy, Obama, Baucus substitute Title III amendment contains important worker protections, we need to continue to improve it to ensure that any new electronic employment verification system (EEVS) is fundamentally workable and will not unnecessarily harm U.S. workers.

Concerns with Current Employment Verification Systems

Employment verification is not an easy solution or a magic bullet to our broken immigration system, though a well-designed and effective system could play an important role in a multi-part strategy to control unauthorized migration. However, our experience thus far demonstrates that the nation is very far from being able to implement such a system in the short term. As Congress moves forward with comprehensive immigration reform with an expanded EEVS system as one element, it is critical that it be designed and implemented in a manner that ensures accuracy of data, privacy of information, protection from misuse, minimal opportunities for discrimination, and maximum opportunities to address system errors.

A. Employment Discrimination under Employer Sanctions

It is well documented that one result of employer sanctions and worker verification has been increased discrimination against persons who look or sound "foreign" or have a "foreign" surname. Some employers demand that certain workers show additional or "better" documents beyond what is required in the law; often asking for immigration documents from U.S. citizens whom they perceive to be immigrants. Other employers implement unlawful "citizen only" policies. A Congressionally-mandated GAO report found a widespread pattern of discrimination resulting solely from employer sanctions, reporting substantial discrimination on the basis of foreign accent or appearance, as well as discriminated by preferring certain authorized workers over others. These results were confirmed by nearly a dozen studies conducted locally during the 1990s by local human rights commissions and other organizations which also found significant discrimination resulting from the implementation of employer sanctions.

Additionally, there is evidence that some employers have knowingly hired unauthorized workers and used verification or reverification of employment eligibility as a means to retaliate against workers who complain about labor conditions thereby severely restricting workers' ability to organize or improve labor conditions. Other employers incorrectly reverify all only those workers they perceive to be "foreign," further discriminating against and intimidating immigrant and ethnic-appearing workers.

While Congress added anti-discrimination provisions to the 1986 law and created an office in the Justice Department to address discrimination claims, these efforts appear to have had modest impact on curbing discrimination resulting from IRCA. Even if such efforts were abundantly effective; it is not acceptable to allow discrimination to result from a federal law while creating mechanisms to address it after the fact. Any new laws or policies dealing with employer sanctions and worksite verification must anticipate potential discriminatory results and include vigorous measures to prevent them.

B. Data and Discrimination Problems with the Basic Pilot

In 1996 through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress created electronic employment eligibility pilot programs to allow employers direct access to government databases to verify workers' employment authorization. Currently 8,600 employers use the Basic Pilot. Participation in the Basic Pilot Program is voluntary, although certain employers who have been found to unlawfully hire unauthorized workers or who have discriminated against workers on the basis of national origin or citizenship status may be required to participate in the pilot program. Employers who choose to participate must enter into a written memorandum of understanding with the DHS and, where applicable, the SSA. Violation of the terms of the MOU is grounds for immediate termination of participation in the pilot as well as appropriate legal action.

Employers who participate in the Basic Pilot program must first complete I-9 forms for all employees. The employer then verifies employment eligibility with SSA and DHS. If employment is verified, no further action is needed. If the employer's information does not match the SSA or DHS records, the employer must give the employee written notice of the fact, called a "tentative nonconfirmation notice," and the employee has eight working days to resolve the discrepancy with the SSA and/or DHS.

After nearly a decade of experience with the Basic Pilot Program, it is clear that it has significant flaws which must be addressed if Congress is to pursue the creation of a universal mandatory electronic verification system. The creation of such a system without addressing the fundamental flaws in the current program is unadvisable and will result in severe negative consequences for immigrant and U.S. workers on a much larger scale than they currently experience.

In 2002 a Basic Pilot evaluation was conducted for the Department of Justice by the Institute for Survey Research at Temple University and Westat. The evaluation report identified several critical problems with the pilot program and concluded that it "is not ready for larger-scale implementation at this time." This conclusion is based on many problems with the current Basic Pilot Program, most notably that the program was seriously hindered by inaccuracies and outdated information in DHS immigration databases. For example, a sizeable number of workers who were found not to have work authorization were in fact work authorized, but for a variety of reasons either the INS or SSA did not have up-to-date information. The rates of tentative nonconfirmations remain significantly higher for noncitizen workers than for citizen workers because the immigration databases are less reliable than the SSA database. Furthermore, the evaluators found that when employers contacted the INS/DHS and SSA in an attempt to clarify data, these agencies were often not accessible; 39% of employers reported that SSA never or sometimes returned their calls promptly and 43% reported a similar experience with the INS. The evaluators also discovered that employers engaged in prohibited practices. For example, 45% of employees surveyed who contested a tentative nonconfirmation were subject to pay cuts, delayed job training, and other restrictions on working, and 73% of employees who should have been informed of work authorization problems were not.

Any U.S. worker can fall victim to inaccurate or outdated SSA data. Individuals who fail to report a change of name or change of address, or whose change of address information is not properly or swiftly entered into the database can be denied employment as the result of a nonconfirmation. Furthermore databases at the INS and its DHS successor are notoriously inaccurate; numerous GAO studies have highlighted vast problems with the quality of this data, and the timeliness with which it is updated.

The evaluators also found that additional problems were the result of employers not complying with the federally-

mandated memorandum of understanding they were required to sign as a condition of participating in the Basic Pilot. These participating employers engaged in prohibited employment practices, including pre-employment screening, which denies the worker not only a job but also the opportunity to contest database inaccuracies; taking adverse employment action based on tentative determinations, which penalizes workers while they and the INS work to resolve database errors; and the failure to inform workers of their rights under the program. No program can function unless those utilizing the program comply with the required procedures.

As a result of these ongoing problems, the report concluded that:

The evaluation uncovered sufficient problems in the design and implementation of the current program to preclude recommending that it be significantly expanded. Some of these problems could become insurmountable if the program were to be expanded dramatically in scope. The question remains whether the program can be modified in a way that will permit it to maintain or enhance its current benefits while overcoming its weaknesses.

Employment Verification in the Context of Comprehensive Immigration Reform

Now, in the context of comprehensive immigration reform, both the House and the Senate have passed bills creating universal mandatory electronic employment verification systems modeled after the Basic Pilot Program and utilizing the same databases. Given the flaws in the current program and the fact that the government-sanctioned evaluators found unequivocally that the program should not be expanded, we firmly believe that any expansion of the current program without addressing its fundamental flaws would be extremely ill-advised and would result in continued negative consequences for immigrant and U.S. workers alike.

The Grassley, Kennedy, Obama, Baucus amendment constitutes a vast improvement over the original provisions of S. 2611 and is an enormous improvement over the Border Protection, Antiterrorism, and Illegal Immigration Reform and Control Act of 2005 (H.R. 4437) which passed the House of Representatives in December 2005. NCLR commends Senators Grassley, Kennedy, Obama, and Baucus for the thoughtfulness of their work on this amendment.

The current Title III includes several significant provisions that must be maintained as this process moves forward. Specifically:

Antidiscrimination protections including:

- ? Amending the section of the Immigration and Nationality Act (INA) relating to unfair immigration-related employment practices to explicitly apply to employment decisions related to the new electronic employment verification system.
- ? Expanding the categories of immigrants who can file an immigration-related unfair employment practices complaint under the INA;
- ? Increasing fines for violations of the INA's antidiscrimination provisions;
- ? Prohibiting employers from using the electronic employment verification system to discriminate against workers; and
- ? Providing \$40 million in funding for the Office of the Special Counsel for Immigration-Related Unfair Employment Practices to educate employers and employees about antidiscrimination policies.

Due process protections including:

- ? Requiring employers to provide employees with information in writing (in a language other than English if necessary) about their right to contest a response from the EEVS, and the procedures for doing so;
- ? Creating a "default confirmation" when DHS cannot issue a final notice of employment eligibility within 30 days of the initial inquiry. The default confirmation will remain in place until the GAO can certify that EEVS is able to issue a final confirmation of work eligibility to individuals who are eligible for employment within 30 days of the initial inquiry at least 99% of the time;
- ? Allowing individuals to view their own records and contact the appropriate agency to correct any errors through an expedited process; and
- ? Creating an administrative and judicial review process where individuals can contest findings by DHS, and seek

compensation for the wages lost where there is an agency error. Unfortunately, attorneys' fees and costs were not included in the final amendment and should be added to a final bill.

Privacy protections including:

- ? Requiring minimization of the data to be both collected and stored, and creating penalties for collecting or maintaining data not authorized in the statute;
- ? Placing limits on the use of data, and making it a felony to use the EEVS data to commit identity fraud, unlawfully obtain employment, or for any other purpose not authorized in the statute; and
- ? Requiring the GAO to assess the privacy and security of the EEVS, and its effects on identity fraud or the misuse of personal data.

All of these provisions are critically important, but I would like to highlight two of them which NCLR finds particularly groundbreaking and important.

? Default confirmation. This provision is incredibly important in the case that the government databases are unable to reach a final decision within the 30 day timeframe. This default confirmation remains in place until the confirmation rates are at acceptable levels. Without this provision, millions of authorized workers could potentially be denied employment because of a mistake by the government. This default confirmation, along with the secondary verification and the ability to correct one's own records, provides an important protection for workers. However, the default confirmation does not address the underlying problem that the number of tentative nonconfirmations is much higher for noncitizens than for citizen workers, and we know that employers have taken adverse actions against workers when a tentative nonconfirmation is given. Every effort to significantly and quickly reduce this disparity must be taken.

? Administrative and judicial review. NCLR believes it is critical for workers to have the ability to seek compensation from the government in the case that an error occurs. Attorneys' fees and costs must be included in a final bill. The Federal Tort Claims Act alone is not sufficient to address workers who are denied work due to erroneous government data.

Additional Areas that Must be Addressed

The most significant weaknesses of the current Basic Pilot Program include its lack of resources, database inaccuracies, and employer misuse of the system to discriminate against workers. In order for the Senate bill to improve upon the existing Basic Pilot Program, it must include the following:

? Phase-in: Any mandatory universal verification system must be implemented incrementally, with vigorous performance evaluations taking place prior to any expansion. Moving forward rapidly without addressing ongoing problems within the system will not help to achieve stated goals and will result in harm to U.S. workers.

? Data accuracy: Every effort must be made to ensure that the data accessed by employers is accurate and continuously updated. Errors in the data will result in the denial of employment for potentially millions of U.S. citizens and foreign-born workers in the U.S. Innocent mistakes, such as the misspelling of "unusual" names, transposing given names and surnames, and the like, inevitably have a disproportionate impact on ethnic minorities.

? Documentation: The bill requires that work authorized immigrants present only an employment authorization document (EAD) issued by the government. This can only work if the DHS has the ability to issue EADs that are affordable and efficiently re-issued upon expiration. If not, millions of work authorized legal immigrants will be unable to provide the required document. U.S. citizens would have to provide either a U.S. passport or a driver's license or state-issued ID that complies with the REAL ID Act. This is problematic because many U.S. citizens do not hold passports, and the REAL ID Act has not been implemented and no state is currently in compliance with the REAL ID. Even once REAL ID is implemented, many individuals - including US citizens - will have trouble meeting the requirements to obtain a driver's license. It is important that the number of documents that may be used to prove identity and work authorization be increased to ensure that every work authorized individual has the ability to comply.

It is also critical that an EEVS not result in a single work authorization document for all workers, such as a new, tamper- and forgery-resistant Social Security Card. The existence of such a card would be a de facto national ID card, result in discrimination, and would increase the probability of identity theft and other breaches of privacy. In the current law enforcement context, the failure to carry an ID card would likely provide a pretext to disproportionately search, detain, or arrest Latinos and other ethnic minorities who would also be subject to new levels of government discrimination and harassment. In the private sector, minorities would likely be the targets of identity checks by banks, landlords, health care workers, and others. For these reasons, NCLR strongly opposed the mandatory use of a single document for EEVS purposes.

? Enforcement of labor laws: The notion that a mandatory EEVS program is the panacea that will deter employers from hiring undocumented workers is at best deeply flawed when there is no political will for meaningful enforcement of stronger labor and employment laws. The lessons learned over the last 20 years with the current employer sanctions system that have resulted in widespread labor law abuses demonstrate that focusing on labor law enforcement is a critical and indispensable component of any true comprehensive immigration reform legislation.

? Resources: Sufficient resources will be necessary to implement and maintain the new EEVS. The GAO recently reported that the best estimates are that enacting any nationwide, employer-implemented, employee-eligibility verification system will cost at least \$11.7 billion per year. The GAO cited a study by the Temple University Institute for Survey Research and stated 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. Currently, the cost for simply sending a request through the existing Basic Pilot Verification System costs the government \$0.28 per query, and currently, 10% of the employment-eligibility checks run through the Basic Pilot require manual re-verification, and the government spends an estimated \$6 to resolve each query that required review by immigration status verifiers at the Department of Homeland Security. Without resources to upgrade and maintain the databases and to hire and train personnel, the huge new expansion of EEVS cannot take place.

? Comprehensive immigration reform: Perhaps most importantly, serious employment verification can only happen within the context of comprehensive immigration reform. With approximately 12 million undocumented immigrants in the U.S., and approximately nine million of them in the workforce, entire sectors of our economy are dependent on undocumented labor. Millions of employers would be devastated by a sudden increase in employment verification if it is not done within the context of legalizing the existing workforce and creating legal channels for future workers to enter the U.S. Enforcement alone is not an answer.

Conclusion

NCLR recognizes that worksite verification has become an essential element of the immigration debate, and is prepared to play a constructive role in the policy debate around creating such a system if it can be effective in curtailing unauthorized migration and unlikely to harm immigrant or native-born workers. But we also believe that it would be both morally and substantively disastrous to put in a worksite verification system in place without addressing serious flaws which have been identified after years of experience. It is clear that large numbers of individuals - including U.S. citizens and legal permanent residents - could face denied or delayed employment due to errors in the data or misuse of the system. It would be unacceptable for the outcome of such a policy to cost any authorized workers their livelihoods and incomes. Congress cannot claim to be unaware of the dangers of advancing such a system, and it must not act without addressing them thoroughly. NCLR looks forward to working with the Senate to ensure that as comprehensive immigration moves forward, the EEVS provisions are handled with the utmost care and are designed and implemented in a way that protects all U.S. workers.

Thank you again for the opportunity to testify on these important matters. I look forward to your questions.