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LACK OF WORKSITE ENFORCEMENT AND EMPLOYER SANCTIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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LACK OF WORKSITE ENFORCEMENT AND EMPLOYER SANCTIONS

TUESDAY, JUNE 21, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:25 p.m., in Room 2141, Rayburn House Office Building, the Honorable John N. Hostettler, Chairman of the Subcommittee, presiding.

Mr. HOSTETTLER. The Subcommittee will come to order.

In March this Subcommittee held hearings on the lack of immigration enforcement resources, which has led to much discussion on Capitol Hill regarding the need to boost the number of Border Patrol agents, and Immigration and Customs Enforcement, or ICE, investigators.

It now appears that Congress will include in its final budget for 2006 the majority of Border Patrol agents and ICE agents authorized in the Intelligence Reform and Terrorism Prevention Act of 2004, but does not include the full number of agents authorized.

Increasing the number of agents in the field, however, will only be helpful in bringing illegal immigration under control if the agents are allowed to be fully committed to immigration enforcement and not solely to other enforcement duties.

In May, the Subcommittee held hearings on how immigration enforcement has suffered as a result of both ICE and CBP having multiple missions, and ICE lacking a written mission strategy.

Even if multiple missions were not distracting the critical national security work of these agencies of the Department of Homeland Security, this Subcommittee must ask whether the internal immigration enforcement that has been conducted since ICE's creation has been effective.

There is no doubt that physical control of the borders by Border Patrol will play a critical role in bringing law and order over illegal immigration; however, this alone cannot be sufficient because almost half of illegal aliens arrived here legally and simply found jobs and never went back.

The "black market" in cheap illegal labor must be attacked for the safety of the American workers and the Nation as a whole.

As this chart indicates, thousands of employers are sending in duplicate Social Security numbers multiple times for different workers, perhaps hiding the identity or criminal history of illegal aliens working next to you.

The "jobs magnet" that has motivated so many aliens to enter the country and work illegally has—as we learned in last month's hearing on American workers—impacted most heavily on those low-income and unskilled Americans that are the most vulnerable in the economy.

The Congressional Budget Office published these figures in November.

Moreover, the terrorist and criminal "needles" in the worksite haystack cannot be detected without the overall deterrent effect that broad and aggressive worksite enforcement would achieve.

In other words, ICE must reduce the size of the haystack if ICE is to find the really bad apples. So far, ICE appears to be reactive to events rather than proactive in pursuing a strategic plan.

In fact, as this most important chart of the hearing indicates, ICE has pursued almost no worksite enforcement at all, ever since its creation.

As I hope you will see and understand, there has been a dramatic decline in the work-years, work-hours devoted by legacy Immigration & Naturalization Service, and by ICE agents toward worksite enforcement—enforcing the 1986 law providing that employers could not employ illegal aliens and had to verify the documents of all new employees.

Save a few "Critical Infrastructure" worksites, ICE has conducted almost no worksite enforcement. Of the critical infrastructure facilities investigated, no employer has been fined when illegal aliens have been found at the worksite.

In total, only three Notice of Intent to Fine, or NIFs, have been issued by ICE in FY 2004, following the long trend that this following chart indicates.

In total, worksite enforcement amounts to less than 5 percent of all of ICE's investigation activities. ICE today is doing less worksite enforcement than even the Clinton Administration did, and that is quite a dubious distinction.

Today we will learn why Congress acted in 1986 to create employer sanctions and why they have never been adequately enforced.

Mr. HOSTETTLER. And at this time I yield to the gentlelady from Texas, the Ranking Member, for an opening statement.

Ms. JACKSON LEE. I thank the distinguished Chairman, and I thank the witnesses.

I'm going to be forthright this afternoon and indicate that I've had a number of thoughts about workforce, worksite enforcement. And as someone who has repeatedly offered the comments that immigration does not equate to terrorism, and have a full recognition that really what we're facing in the United States is an onslaught of people who have come for opportunity.

The system that we have structured begs and creates this pool of illegal immigration because we have not fixed the system of legal immigration. And frankly, I think it's important in this instance, particularly talking about employment, employers, worksites, to note that the origins of our immigration cycle, at least that of the 1800's, late 1800's and early 1900's, were people seeking opportunity, economic opportunity, and those who fled persecution.

And so I've had sort of the thought that this hearing will be very important to the focus that I will give to legislation that I am considering, whether or not in fact worksite enforcement in a harsh way actually hurts Americans, actually hurts employers, and does little to stem the tide of illegal immigration.

The Immigration Reform and Control Act of 1986 established Federal sanctions for employing undocumented immigrants. The objective of these sanctions is to eliminate the United States as a job magnet that draws undocumented immigrants to the United States and keeps them here.

IRCA also established legalization programs for some immigrants who had been residing illegally in the United States prior to 1982 and for others who had worked in the United States agriculture for at least 1 year. Approximately 3 million obtained lawful status under these programs. Fines for first-time violations started at $250 per unauthorized employee, and increased to as much as 10,000 per employee for third and subsequent violations. Employers engaging in a pattern and practice of employing unauthorized workers are subject to fines of as much as 3,000 per employee and incarceration for up to 6 months.

IRCA has established a universal employment verification system. Violations of the verification requirements may result in penalties ranging from $100 to 1,000 per employee. Employers are required to attest that they have examined documentation that appears to be genuine and that establishes the employee's identity and authorization to work in the United States.

The former Immigration & Naturalization Service, Department of Homeland Security have not made employer sanctions a priority. We can see the evidence of it. We can read and hear about headlines of stories of illegal immigrants now in security areas or areas that should be having the necessity of security clearances. Only 417 Notices of Intent to Fine were issued in 1999, 178 in 2000, 100 in 2001, 53 in 2002, 162 in 2003, and only 3 in 2004. Maybe we're getting better.

The employer sanction system has had some unintended consequences. According to Jennifer Gordon in her book, "Suburban Sweatshops," many employers take a minimalist approach to complying with the law until the workers make a demand the employers want to resist. It may be a simple request for a bathroom break or for overtime wages. More often it is a union-organizing campaign. If he has not filled out I-9 forms, he decides to comply with the law, forcing all the workers to provide legal papers on the spot, which means immediate termination. If he has I-9 forms filed already, he begins to pay new attention to them, calling the Social Security Administration to check on the validity of numbers.

Ms. Gordon concludes that employer sanctions have become the perfect cloak under which to carry out an effective campaign of intimidation, sending the clear message that immigrant workers who organize are not the kind of immigrant workers to get jobs, but it also gives you a rotating door, but it does not provide an opportunity for hiring new American workers or documented workers, it only throws out the last bunch and adds a new bunch that will be quiet, asks no questions, and subject themselves to low-based wages. It is not easy to stop this kind of abuse.

The National Labor Relations Act provides that it is an unfair labor practice to fire workers on the basis of union activity. The normal remedy for such an offense is to require the employer to rehire the fired workers and make them whole, which may include back pay. In *Hoffman Plastic Compounds v. National Labor Relations Board,* however, the U.S. Supreme Court ruled that Federal immigration policies prohibit awarding undocumented workers back pay under the provisions of the National Labor Relations Act.

This decision has made it possible for employers to fire undocumented workers for union activities with impunity, and some employers also have used this decision as a justification for denying undocumented the protections of the Fair Labor Standards Act. At that level of work, make it very clear that I don't believe that that employer then goes out and recruits large numbers of American workers.

The AFL-CIO advocates strong penalties against employers who use workers' immigration status to suppress their rights and labor protections, thereby also denying fair compensation to documented American workers as well. And I agree that this is a problem. It is unfair to the foreign workers and it has the indirect effect of harming workers who are lawful permanent residents or citizens of the United States. Unscrupulous workers will not hire American workers if they can force undocumented employees to work for lower wages than the American workers would require.

So a solution, Mr. Chairman, is partly this hearing, and being informed, and hearing from a diverse groups of witnesses, which I appreciate, who are before us.

But I think the other solution is to move quickly to the overall comprehensive immigration reform that this Nation is begging to have, and I look forward to the Save America Comprehensive Immigration Act of 2005 that I've authored, that has seen—that has received a number of very favorable reviews from experts dealing with immigration law, to have a hearing so that we can have one piece of it be heard, and that is the earned access to legalization, the ability to get in line, to stand in line and to seek legalization so that we can have workers that are on equal plane with American workers, and begin to build jobs and create jobs as opposed to an approach that may not create jobs.

I thank you, Mr. Chairman, and with that, I yield back my time.

Mr. HOSTETTLER. The gentlelady's time has expired.

At this time, I will introduce members of our panel. Richard Stana is the Director of Homeland Security and Justice Issues at the Government Accountability Office. During his 29-year career with GAO he has directed reviews on a wide variety of complex military and domestic issues in headquarters, the field and overseas offices.

Most recently, he has directed GAO's work relating to law enforcement, drug control, immigration, customs, corrections, court administration and election systems.

Mr. Stana earned a Master's degree in Business Administration with a concentration in Financial Management from Kent State University. He is also a graduate of Cornell University's Johnson School of Management Program on Strategic Decision Making, and

Harvard University's JFK School of Government Program on Leadership and Performance.

Since September 1996, Terence Jeffrey has served as Editor of *Human Events*—the National Conservative Weekly. In 1991, Mr. Jeffrey became the Research Director of Pat Buchanan's Republican presidential primary campaign, and served as campaign manager for Buchanan's second Republican presidential primary campaign.

Mr. Jeffrey started his writing career in 1987 when he became an editorial writer for *The Washington Times.* Prior to that he taught high school, studied Arabic at the American University in Cairo, and studied at Georgetown University. Mr. Jeffrey graduated from Princeton University with a bachelor's degree in English literature.

Carl Hampe is currently a partner at Baker & McKenzie, focusing on immigration and legislative matters. From 1992 to 1993, Mr. Hampe was Deputy Assistant Attorney General in the Office of Legislative Affairs, U.S. Department of Justice, where he was responsible for all legislation in Congress which affected the Immigration & Naturalization Service or the Executive Office for Immigration Review. In addition, Mr. Hampe represented the U.S. in appellate immigration litigation.

Prior to that he served as Counsel and Minority Counsel to the Senate Subcommittee on Immigration and Refugee Affairs of the Committee on the Judiciary.

Mr. Hampe earned his B.A. with honors from Stanford University and graduated *magna cum laude* from the Georgetown University Law Center.

Jennifer Gordon is Associate Professor of Law at Fordham Law School in New York City. In 1992, she founded the Workplace Project in New York, a nationally recognized grass roots workers center that advocates for just treatment on the job. Ms. Gordon has worked as a consultant to the AFL-CIO, the Campaign for Human Development of the Catholic Church, and the Ford Foundation, among others.

She is also author of the book *"Suburban Sweatshops: The Fight For Immigrant Rights,"* that we heard about earlier. And she has received numerous awards for her work, including being selected as one of the *National Law Journal's* 40 leading lawyers under the age of 40, and being named "Outstanding Public Interest Advocate of the Year" by the National Association for Public Interest Law.

Ms. Gordon earned her B.A. from the Radcliffe Institute at Harvard University and her J.D. from Harvard Law School.

At this time, according to Committee procedure, I would ask the witnesses to stand and raise your right hand.

[Witnesses sworn.]

Mr. HOSTETTLER. Thank you. You may be seated.

Let the record reflect that the witnesses responded in the affirmative.

Mr. Stana, you are recognized for 5 minutes, and all members of the panel will have 5 minutes for your opening statement. Mr. Stana.

TESTIMONY OF RICHARD M. STANA, DIRECTOR, HOMELAND SECURITY AND JUSTICE ISSUES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. STANA. Chairman Hostettler, Congresswoman Jackson Lee and Members of the Subcommittee, I appreciate the opportunity to participate in this hearing today on worksite enforcement and employer sanctions efforts.

As we and others have reported in the past, the opportunity for employment is a key magnet attracting illegal aliens to the United States. In 1986, Congress passed the Immigration Reform and Control Act, or IRCA, which made it illegal to knowingly hire unauthorized workers. IRCA established an employment verification process for employers to verify all newly hired employees' work eligibility, and a sanctions program for fining employers who did not comply with the act.

As the U.S. Commission on Immigration Reform reported, immigration contributes to the U.S. national economy by providing workers for certain labor-intensive industries. Yet, immigration, especially illegal immigration, can have adverse consequences by helping to depress wages for low-skilled workers. The Commission concluded that deterring illegal immigration requires a more reliable employment verification process and a more robust worksite enforcement program.

My prepared statement is drawn from our ongoing work for this Subcommittee to assess the employment verification process and ICE's worksite enforcement program. I'd like to briefly summarize it now and discuss the current employment verification process and ICE's priorities and resources for worksite enforcement.

The employment verification process is primarily based on employers' review of work authorization documents presented by new employees, but various weaknesses, such as its vulnerability to fraud, have undermined this process. Employers certify that they have reviewed documents presented by their employees and that the documents appear genuine and relate to the individual presenting the documents. However, the availability and use of counterfeit documents and the fraudulent use of documents that are valid and belong to others, have made it difficult for employers who want to comply with the employment verification process to ensure that they hire only authorized workers.

It also makes it easier for employers who don't want to comply, to knowingly hire unauthorized workers without fear of sanction. This further is complicated by the fact that employees can present 27 different documents to establish their identity and/or work eligibility. In 1998, INS proposed revising the verification process and reducing the number of acceptable work eligibility documents to 14, but that proposal was never acted upon.

To bolster the verification process, DHS, at the direction of Congress, introduced the Basic Pilot Program, a voluntary, automated system for employers to electronically check employees' work eligibility information against information in DHS and Social Security Administration databases. In fiscal year 2004, about 2,300 employers actively used the Basic Pilot Program. This program shows promise to help identify the use of counterfeit documents and assist ICE in better targeting its worksite enforcement efforts. Yet a

number of weaknesses exist in the pilot program, including its inability to detect the fraudulent use of valid documents, and DHS delays in entering information into its databases. In addition, CIS officials told us the current Basic Pilot Program would not be able to complete timely verifications with existing resources if the number of employers using the program significantly increased.

Turning to worksite enforcement, this has been a low priority under both INS and ICE. In fiscal year 1999, INS devoted about 240 FTEs, or about 9 percent of its total agent work-years, to address the employment of millions of unauthorized workers. In fiscal year 2003, it devoted about 90 FTE's or about 4 percent of total agent work-years. That many people would not fill the chairs behind me in this hearing room. Furthermore, the number of Notices of Intent to Fine issued to employers for knowingly hired unauthorized workers or improperly completing employment verification forms dropped from 417 in fiscal year 1999 to 3 in fiscal year 2004.

Some of this reduced activity in worksite enforcement can be attributed to a shift in agency priorities. Since 9/11, ICE focused worksite enforcement resources almost exclusively on identifying and removing unauthorized workers from critical infrastructure sites, such as airports and nuclear power plants. Other issues have also hampered worksite enforcement issues. In particular, the availability and use of counterfeit documents has made it difficult for ICE agents to prove that employers knowingly hired unauthorized workers. Further, employers who knowingly hire or continue to employ unauthorized aliens may be fined from $275 to $11,000 for each employee. Fine amounts are often negotiated down in value during discussions between ICE attorneys and employers to a point so low that employers might view it as a cost of doing business rather than as an effective deterrent. And collecting fines from employers is difficult in many cases because employers go out of business or declare bankruptcy.

In closing, we plan to further develop these and other program management issues and report to you on the final results of our work later this summer. This concludes my oral statement. I'd be happy to address any questions that Members of the Subcommittee may have.

[The prepared statement of Mr. Stana follows:]

United States Government Accountability Office

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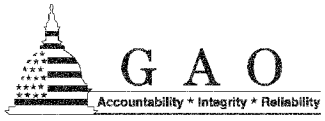
Testimony Before the Subcommittee on Immigration, Border Security, and Claims, Committee on the Judiciary, House of Representatives

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IMMIGRATION ENFORCEMENT

Preliminary Observations on Employment Verification and Worksite Enforcement Efforts

Statement of Richard M. Stana, Director,
Homeland Security and Justice



GAO-05-822T

June 21, 2005

IMMIGRATION ENFORCEMENT

Preliminary Observations on Employment Verification and Worksite Enforcement Efforts

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Highlights

Highlights of GAO-05-822T, testimony before the Subcommittee on Immigration, Border Security, and Claims, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

The opportunity for employment is one of the most important magnets attracting illegal aliens to the United States. The Immigration Reform and Control Act (IRCA) of 1986 established an employment eligibility verification process and a sanctions program for fining employers for noncompliance. Few modifications have been made to the verification process and sanctions program since 1986, and immigration experts state that a more reliable verification process and a strengthened worksite enforcement capacity are needed to help deter illegal immigration. In this testimony, GAO provides preliminary observations from its ongoing assessment of (1) the current employment verification process and (2) U.S. Immigration and Customs Enforcement's (ICE) priorities and resources for the worksite enforcement program and the challenges it faces in implementing that program.

www.gao.gov/cgi-bin/getrpt?GAO-05-822T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Richard M. Stana at (202) 512-8777 or stanar@gao.gov.

What GAO Found

The current employment verification (Form I-9) process is based on employers' review of documents presented by new employees to prove their identity and work eligibility. On the Form I-9, employers certify that they have reviewed documents presented by their employees and that the documents appear genuine and relate to the individual presenting the documents. However, document fraud (use of counterfeit documents) and identity fraud (fraudulent use of valid documents or information belonging to others) have undermined the employment verification process by making it difficult for employers who want to comply with the process to ensure they hire only authorized workers and easier for unscrupulous employers to knowingly hire unauthorized workers. In addition, the number and variety of documents acceptable for proving work eligibility has hindered employer verifications efforts. In 1998, the former Immigration and Naturalization Service (INS), now part of the Department of Homeland Security (DHS), proposed revising the Form I-9 process, particularly to reduce the number of acceptable work eligibility documents, but DHS has not yet finalized the proposal. The Basic Pilot Program, a voluntary program through which participating employers electronically verify employees' work eligibility, shows promise to enhance the current employment verification process, help reduce document fraud, and assist ICE in better targeting its worksite enforcement efforts. Yet, several current weaknesses in the pilot program's implementation, such as its inability to detect identity fraud and DHS delays in entering data into its databases, could adversely affect increased use of the pilot program, if not addressed.

The worksite enforcement program has been a low priority under both INS and ICE. For example, in fiscal year 1999 INS devoted about 9 percent of its total investigative agents' time to worksite enforcement, while in fiscal year 2003 it allocated about 4 percent. ICE officials told us that the agency has experienced difficulties in proving employer violations and setting and collecting fine amounts that meaningfully deter employers from knowingly hiring unauthorized workers. In addition, INS and then ICE shifted its worksite enforcement focus to critical infrastructure protection after September 11, 2001.

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to be here today to participate in this hearing on worksite enforcement and employer sanctions efforts. As we and others have reported in the past, the opportunity for employment is one of the most important magnets attracting illegal aliens to the United States. To help address this magnet, in 1986 Congress passed the Immigration Reform and Control Act (IRCA),[1] which made it illegal for individuals and entities to knowingly hire, continue to employ, or recruit or refer for a fee unauthorized workers. The act established a two-pronged approach for helping to limit the employment of unauthorized workers: (1) an employment verification process through which employers verify all newly hired employees' work eligibility and (2) a sanctions program for fining employers who do not comply with the act. Efforts to enforce these sanctions are referred to as worksite enforcement and are conducted by U.S. Immigration and Customs Enforcement (ICE).

As the U.S. Commission on Immigration Reform reported, immigration contributes to the U.S. national economy by providing workers for certain labor-intensive industries and contributing to the economic revitalization of some communities.[2] Yet, the commission also noted that immigration, particularly illegal immigration, can have adverse consequences by helping to depress wages for low-skilled workers and creating net fiscal costs for state and local governments. Following the passage of IRCA, the U.S. Commission on Immigration Reform and various immigration experts have concluded that deterring illegal immigration requires, among other things, strategies that focus on disrupting the ability of illegal immigrants to gain employment through a more reliable employment eligibility verification process and a more robust worksite enforcement capacity. In particular, the commission report and other studies have found that the single most important step that could be taken to reduce unlawful migration is the development of a more effective system for verifying work authorization. In the nearly 20 years since passage of IRCA, the employment eligibility verification process and worksite enforcement program have remained largely unchanged. Moreover, in previous work, we reported that employers of unauthorized aliens faced little likelihood that the

[1]P.L. 99-603, 8 U.S.C. 1324a et seq.

[2]U.S. Commission on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy* (Washington, D.C: September 1997).

Immigration and Naturalization Service (INS)[3] would investigate, fine, or criminally prosecute them, a circumstance that provides little disincentive for employers who want to circumvent the law.[4]

My testimony today is drawn from our ongoing work for this subcommittee to assess the employment verification process and ICE's worksite enforcement program. Specifically, I will discuss our preliminary observations on (1) the current employment verification process and (2) ICE's priorities and resources for the worksite enforcement program and the challenges it faces in implementing that program.

We developed these preliminary observations by reviewing federal laws and information obtained from ICE, U.S. Citizenship and Immigration Services (CIS), and Social Security Administration (SSA) officials in headquarters and selected field locations. We examined regulations, guidance, past GAO reports, and other studies on the employment verification process and the worksite enforcement program. We also analyzed the results and examined the methodology of an independent evaluation of the Basic Pilot Program, an automated system through which employers electronically check employees' work eligibility information against information in Department of Homeland Security (DHS) and SSA databases, conducted by the Institute for Survey Research at Temple University and Westat in June 2004.[5] Furthermore, we analyzed data on employer use of the Basic Pilot Program and on worksite enforcement and assessed the data reliability by reviewing them for accuracy and completeness, interviewing agency officials knowledgeable about the data, and examining documentation on how the data are entered, categorized, and verified in the databases. We determined that the independent evaluation and these data were sufficiently reliable for the purposes of our review. We conducted the work reflected in this statement from September 2004 through June 2005 in accordance with generally accepted

[3]In March 2003, INS was merged into the Department of Homeland Security, and its immigration functions were divided between U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection. U.S. Immigration and Customs Enforcement is responsible for managing and implementing the worksite enforcement program.

[4]GAO, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist*, GAO/GGD-99-33 (Washington, D.C.: Apr. 2, 1999).

[5]Institute for Survey Research and Westat, *Findings of the Basic Pilot Program Evaluation* (Washington, D.C.: June 2004).

government auditing standards. We plan to complete our analysis and prepare a report for issuance later this summer.

Summary

The employment verification process is primarily based on employers' review of work eligibility documents presented by new employees, but various weaknesses, such as the process' vulnerability to fraud, have undermined this process. Employers certify that they have reviewed documents presented by their employees and that the documents appear genuine and relate to the individual presenting the documents. However, document fraud (use of counterfeit documents) and identity fraud (fraudulent use of valid documents or information belonging to others) have made it difficult for employers who want to comply with the employment verification process to ensure that they hire only authorized workers and have made it easier for unscrupulous employers to knowingly hire unauthorized workers. In addition, the large number and variety of documents acceptable for proving work eligibility have hindered employers' verification efforts. In 1998, the former INS proposed revising the verification process and reducing the number of acceptable work eligibility documents; that proposal was never acted upon. DHS, however, at the direction of Congress, introduced the Basic Pilot Program, an automated system for employers to electronically check employees' work eligibility information with information in DHS and SSA databases, that may enhance this process. This program shows promise to help reduce document fraud and assist ICE in better targeting its worksite enforcement efforts. Yet, a number of current weaknesses in the pilot program's implementation, including its inability to detect identity fraud and DHS delays in entering data into its databases, could adversely affect increased use of the pilot program, if not addressed. In addition, CIS officials told us the current Basic Pilot Program may not be able to complete timely verifications if the number of employers using the program significantly increased. In fiscal year 2004, about 2,300 employers actively used the Basic Pilot Program.

Under both INS and ICE, worksite enforcement has been a low priority. In fiscal year 1999, INS devoted about 240 full-time equivalents[6] (or about 9 percent of its total investigative agent workyears) to worksite enforcement, while in fiscal year 2003 it devoted about 90 full-time equivalents (or about 4 percent of total agent workyears). Furthermore,

[6]One full-time equivalent is equal to one workyear or 2,080 non-overtime hours.

the number of notices of intent to fine issued to employers for knowingly hiring unauthorized workers or improperly completing employment verification forms decreased from 417 in fiscal year 1999 to 3 in fiscal year 2004. According to ICE officials, the agency has experienced difficulties in proving employer violations and in setting and collecting fine amounts that meaningfully deter employers from knowingly hiring unauthorized workers. In addition, after September 11, 2001, INS and then ICE almost exclusively focused worksite enforcement resources on identifying and removing unauthorized workers from critical infrastructure sites, such as airports and nuclear power plants.

Background

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[7] of 1996 required INS and SSA to operate three voluntary pilot programs to test electronic means for employers to verify an employee's eligibility to work, one of which was the Basic Pilot Program.[8] The Basic Pilot Program was designed to test whether pilot verification procedures could improve the existing employment verification process by reducing (1) false claims of U.S. citizenship and document fraud; (2) discrimination against employees; (3) violations of civil liberties and privacy; and (4) the burden on employers to verify employees' work eligibility.

The Basic Pilot Program provides participating employers with an electronic method to verify their employees' work eligibility. Employers may participate voluntarily in the Basic Pilot Program, but are still required to complete Forms I-9[9] for all newly hired employees in accordance with IRCA. After completing the forms, these employers query the pilot program's automated system by entering employee information provided on the forms, such as name and social security number, into the pilot Web site within 3 days of the employees' hire date. The pilot program

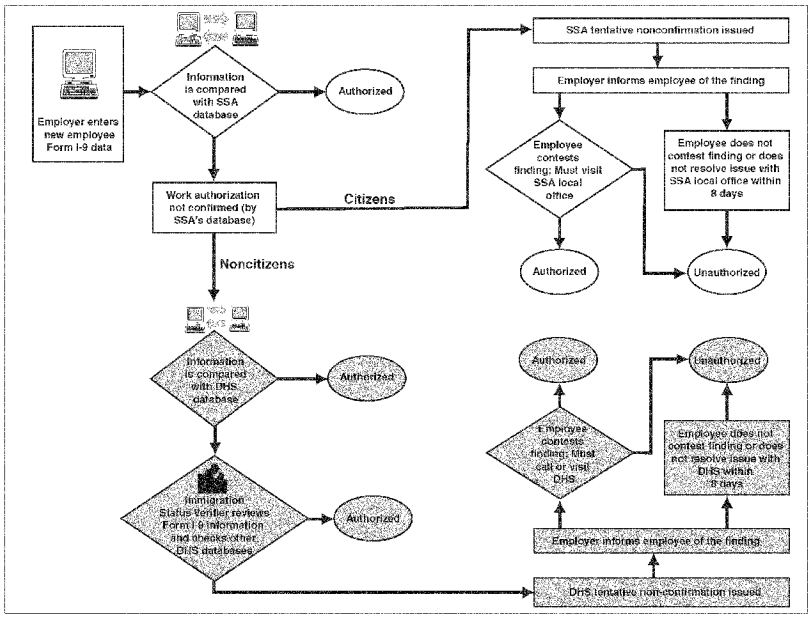
[7]IIRIRA of 1996 was enacted within a larger piece of legislation, the Omnibus Consolidated Appropriations Act, 1997, P. L. 104-208.

[8]The other two pilot programs mandated by IIRIRA—the Citizen Attestation Verification Pilot Program and the Machine-Readable Document Pilot Program—were discontinued in 2003 due to technical difficulties and unintended consequences identified in evaluations of the programs. See Institute for Survey Research and Westat, *Findings of the Citizen Attestation Verification Pilot Program Evaluation* (Washington, D.C.: Apr. 2003) and Institute for Survey Research and Westat, *Findings of the Machine-Readable Document Pilot Program Evaluation* (Washington, D.C.: May 2003).

[9]The Form I-9 is completed by employers in verifying the work eligibility of all newly hired employees.

then electronically matches that information against information in SSA and, if necessary, DHS databases to determine whether the employee is eligible to work, as shown in figure 1. The Basic Pilot Program electronically notifies employers whether their employees' work authorization was confirmed. Those queries that the DHS automated check cannot confirm are referred to DHS immigration status verifiers who check employee information against information in other DHS databases.

Figure 1: Basic Pilot Program Verification Process



Source: GAO analysis based CIS information.

In cases when the pilot system cannot confirm an employee's work authorization status either through the automatic check or the check by an immigration status verifier, the system issues the employer a tentative

nonconfirmation of the employee's work authorization status. In this case, the employers must notify the affected employees of the finding, and the employees have the right to contest their tentative nonconfirmations by contacting SSA or CIS to resolve any inaccuracies in their records within 8 days. During this time, employers may not take any adverse actions against those employees, such as limiting their work assignments or pay. Employers are required to either immediately terminate the employment, or notify DHS of the continued employment, of workers who do not successfully contest the tentative nonconfirmation and those who the pilot program finds are not work-authorized.

Various Weaknesses Have Undermined the Employment Verification Process, but Opportunities Exist to Enhance It

Current Employment Verification Process Is Based on Employers' Review of Documents

In 1986, IRCA established the employment verification process based on employers' review of documents presented by employees to prove identity and work eligibility. On the Form I-9, employees must attest that they are U.S. citizens, lawfully admitted permanent residents, or aliens authorized to work in the United States. Employers must then certify that they have reviewed the documents presented by their employees to establish identity and work eligibility and that the documents appear genuine and relate to the individual presenting them. In making their certifications, employers are expected to judge whether the documents presented are obviously counterfeit or fraudulent. Employers are deemed in compliance with IRCA if they have followed the Form I-9 process, including when an unauthorized alien presents fraudulent documents that appear genuine.

Form I-9 Process Is Vulnerable to Document and Identity Fraud

Since passage of IRCA in 1986, document and identity fraud have made it difficult for employers who want to comply with the employment verification process to ensure they hire only authorized workers. In its 1997 report to Congress, the Commission on Immigration Reform noted that the widespread availability of false documents made it easy for unauthorized aliens to obtain jobs in the United States. In past work, we

reported that large numbers of unauthorized aliens have used false documents or fraudulently used valid documents belonging to others to acquire employment, including at critical infrastructure sites like airports and nuclear power plants.[10] In addition, although studies have shown that the majority of employers comply with IRCA and try to hire only authorized workers, some employers knowingly hire unauthorized workers, often to exploit the workers' low cost labor. For example, the Commission on Immigration Reform reported that employers who knowingly hired illegal aliens often avoided sanctions by going through the motions of compliance while accepting false documents.

The Number and Variety of Acceptable Documents Hinders Employer Verification Efforts

The number and variety of documents that are acceptable for proving work eligibility have complicated employer verification efforts under IRCA. Following the passage of IRCA in 1986, employees could present 29 different documents to establish their identity and/or work eligibility. In a 1997 interim rule, INS reduced the number of acceptable work eligibility documents from 29 to 27.[11] The interim rule implemented changes to the list of acceptable work eligibility documents mandated by IIRIRA and was intended to serve as a temporary measure until INS issued final rules on modifications to the Form I-9. Since the passage of IRCA, we and others have reported on the need to reduce the number of acceptable work eligibility documents to make the employment verification process simpler and more secure.[12] In 1998, INS proposed a further reduction in the number of acceptable work eligibility documents to 14, but the proposed rule has not been finalized. According to DHS officials, the department is currently assessing possible revisions to the Form I-9 process, including reducing the number of acceptable work eligibility documents, but has not established a target time frame for completing this assessment and issuing regulations on Form I-9 changes.

[10]GAO/GGD-86-33, and GAO, *Overstay Tracking: A Key Component of Homeland Security and a Layered Defense*, GAO-04-82 (Washington, D.C.: May 21, 2004).

[11]Eight of these documents establish both identity and employment eligibility (e.g., U.S. passport or permanent resident card), 12 documents establish identity only (e.g., driver's license), and 7 documents establish employment eligibility only (e.g., social security card).

[12]See GAO/GGD-98-33, and U.S. Senate, Committee on the Judiciary, Subcommittee on Immigration and Refugee Affairs, *Options for an Improved Employment Verification System* (Washington, D.C.: Sept. 23, 1992).

The Basic Pilot Program Shows Promise to Enhance Employment Verification, but Challenges Exist to Increased Use

Various immigration experts have noted that the most important step that could be taken to reduce illegal immigration is the development of a more effective system for verifying work authorization. In particular, the Commission on Immigration Reform concluded that the most promising option for verifying work authorization was a computerized registry based on employers' electronic verification of an employee's social security number with records on work authorization for aliens. The Basic Pilot Program, which is currently available on a voluntary basis to all employers in the United States, operates in a similar way to the computerized registry recommended by the commission, and shows promise to enhance employment verification and worksite enforcement efforts. Only a small portion—about 2,300 in fiscal year 2004—of the approximately 5.6 million employer firms nationwide actively used the pilot program.[15]

The Basic Pilot Program enhances the ability of participating employers to reliably verify their employees' work eligibility and assists participating employers with identification of false documents used to obtain employment by comparing employees' Form I-9 information with information in SSA and DHS databases. If newly hired employees present counterfeit documents, the pilot program would not confirm the employees' work eligibility because their employees' Form I-9 information, such as the false name or social security number, would not match SSA and DHS database information when queried through the Basic Pilot Program.

Although ICE has no direct role in monitoring employer use of the Basic Pilot Program and does not have direct access to program information, which is maintained by CIS, ICE officials told us that program data could indicate cases in which employers do not follow program requirements and therefore would help the agency better target its worksite

[15]The number of employers who actively used the program in fiscal year 2004 includes a small number of employers who switched between two versions of the program and, as a result, were counted twice as active users. CIS is not able to easily determine which employers were counted twice. In addition, the approximately 2,300 employers who actively used the pilot program in fiscal year 2004 do not reflect the number of worksites or individual business establishments using the program. The about 5.6 million firms in the United States were the number of firms in 2002, which is the most current data available. Under the Basic Pilot Program, one employer may have multiple worksites that use the pilot program. For example, a hotel chain could have multiple individual hotels using the Basic Pilot Program, but the hotel chain would represent one employer using the pilot program. A firm is a business organization consisting of one or more domestic establishments in the same state and industry that were specified under common ownership or control.

enforcement efforts toward those employers. For example, the Basic Pilot Program's confirmation of numerous queries of the same social security number could indicate that a social security number is being used fraudulently or that an unscrupulous employer is knowingly hiring unauthorized workers by accepting the same social security number for multiple employees. ICE officials noted that, in a few cases, they have requested and received pilot program data from CIS on specific employers who participate in the program and are under ICE investigation. However, CIS officials told us that they have concerns about providing ICE broader access to Basic Pilot Program information because it could create a disincentive for employers to participate in the program, as employers may believe that they are more likely to be targeted for a worksite enforcement investigation as a result of program participation. According to ICE officials, mandatory employer participation in the Basic Pilot Program would eliminate the concern about sharing data and could help ICE better target its worksite enforcement efforts on employers who try to circumvent program requirements. Moreover, these officials told us that mandatory use of an automated system like the pilot program could limit the ability of employers who knowingly hired unauthorized workers to claim that the workers presented false documents to obtain employment, which could assist ICE agents in proving employer violations of IRCA.

The Basic Pilot Program may enhance the employment verification process and a mandatory program could assist ICE in targeting its worksite enforcement efforts. However, weaknesses exist in the current program. For example, the current Basic Pilot Program cannot help employers detect identity fraud. If an unauthorized worker presents valid documentation that belongs to another person authorized to work, the Basic Pilot Program would likely find the worker to be work-authorized. Similarly, if an employee presents counterfeit documentation that contains valid information and appears authentic, the pilot program may verify the employee as work-authorized. DHS officials told us that the department is currently considering possible ways to enhance the Basic Pilot Program to help it detect cases of identity fraud, for example, by providing a digitized photograph associated with employment authorization information presented by an employee.

Delays in the entry of information on arrivals and employment authorization into CIS databases can lengthen the pilot program verification process for some secondary verifications. Although the majority of pilot program queries entered by employers are confirmed via the automated SSA and DHS verification checks, about 15 percent of queries authorized by DHS required secondary verifications in fiscal year

2004.[14] According to CIS, cases referred for secondary verification are typically resolved within 24 hours, but a small number of cases take longer, sometimes up to 2 weeks, due to, among other things, delays in entry of employment authorization information into CIS databases. Secondary verifications lengthen the time needed to complete the employment verification process and could harm employees because employers might reduce those employees' pay or restrict training or work assignments, which are prohibited under pilot program requirements, while waiting for verification of their work eligibility.[15] DHS has taken steps to increase the timeliness and accuracy of information entered into databases used as part of the Basic Pilot Program and reports, for example, that data on new immigrants are now typically available for verification within 10 to 12 days of an immigrant's arrival in the United States while, previously, the information was not available for up to 6 to 9 months after arrival.[16]

According to CIS officials, current CIS staff may not be able to complete timely secondary verifications if the number of employers using the program significantly increased. In particular, these officials said that if a significant number of new employers registered for the program or if the program were mandatory for all employers, additional staff would be needed to maintain timely secondary verifications. Currently, CIS has approximately 38 Immigration Status Verifiers allocated for completing Basic Pilot Program secondary verifications, and these verifiers reported that they are able to complete the majority of manual verification checks within their target time frame of 24 hours. However, CIS estimated that even a relatively small increase in the number of employers using the program would significantly slow the secondary verification process and strain existing resources allocated for the program.

[14]In fiscal year 2004, only about 10 percent of total Basic Pilot Program queries were referred to DHS for verification. Of these queries referred to DHS for verification, about 85 percent were confirmed via the DHS automated verification check.

[15]Institute for Survey Research and Westat.

[16]DHS, *Report to Congress on the Basic Pilot Program* (Washington, D.C.: June 2004).

Low Priority and Implementation Challenges Have Hindered Worksite Enforcement Efforts

Worksite Enforcement Remains a Low Priority

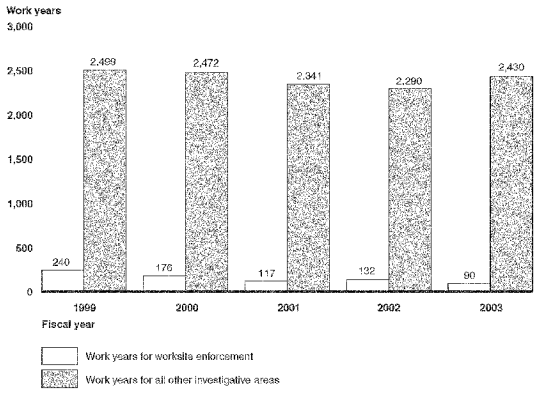
Worksite enforcement was a low priority for INS and continues to be a low priority for ICE. In the 1999 INS Interior Enforcement Strategy, the strategy to block and remove employers' access to undocumented workers was the fifth of five interior enforcement priorities.[17] We have reported that, relative to other enforcement programs in INS, worksite enforcement received a small portion of INS's staffing and enforcement budget and that the number of employer investigations INS conducted each year covered only a fraction of the number of employers who may have employed unauthorized aliens.[18] Furthermore, INS investigative resources were redirected from worksite enforcement activities to criminal alien cases, which consumed more investigative hours by the late 1990s than any other enforcement activity. After September 11, 2001, INS and ICE focused investigative resources on national security-related investigations. According to ICE, the redirection of resources from other enforcement programs to perform national security-related investigations resulted in fewer resources for traditional program areas, like worksite enforcement and fraud.

The resources INS and ICE devoted to worksite enforcement have continued to decline. As shown in figure 2, between fiscal years 1999 and 2003, the most recent fiscal year for which comparable data are available, the percentage of agent workyears spent on worksite enforcement efforts generally decreased from about 9 percent, or 240 full-time equivalents, to about 4 percent, or 90 full-time equivalents.

[17]INS, *Interior Enforcement Strategy* (Washington, D.C.: Jan. 1999).

[18]GAO/GGD-99-33.

Figure 2: Investigative Agent Workyears Spent on Worksite Enforcement Efforts and Agent Workyears Spent on Other Investigative Areas for Each Fiscal Year from 1999 through 2003



Source: GAO analysis of INS case management data.

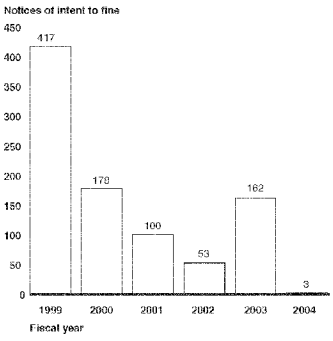
Workyear data for fiscal year 2004 cannot be directly compared with workyear data for previous fiscal years because of changes in the way INS and ICE agents entered and categorized data in their respective case management systems. However, ICE data indicate that the agency

allocated about 65 full-time equivalents to worksite enforcement in fiscal year 2004.[19]

In addition, the number of notices of intent to fine issued to employers as well as the number of unauthorized workers arrested at worksites have also declined. Between fiscal years 1999 and 2004, the number of notices of intent to fine issued to employers for improperly completing Forms I-9 or knowingly hiring unauthorized workers generally decreased from 417 to 3. (See figure 3.)

[19]Fiscal year 2004 and 2005 data cannot be compared with data for previous fiscal years because the way INS agents entered data on investigative workyears into the INS case management system differs from the way ICE agents enter such data into the ICE system. Following the creation of ICE in March 2003, the case management system used to enter and maintain information on immigration investigations changed. With the establishment of ICE, agents began using the legacy U.S. Customs Service's case management system, called the Treasury Enforcement Communications System, for entering and maintaining information on investigations, including worksite enforcement operations. Prior to the creation of ICE, the former INS entered and maintained information on investigative activities in the Performance Analysis System, which captured information on immigration investigations differently than the Treasury Enforcement Communications System.

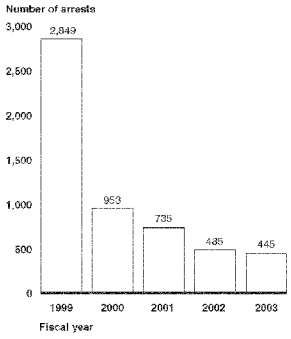
Figure 3: Number of Notices of Intent to Fine Issued to Employers for Each Fiscal Year from 1999 through 2004



Source: GAO analysis of INS and ICE case management data.

The number of worksite arrests declined by about 84 percent from 2,849 in fiscal year 1999 to 445 in fiscal year 2003. (See figure 4.)

Figure 4: Number of Worksite Enforcement Arrests for Each Fiscal Year from 1999 through 2003



Source: GAO analysis of INS case management data.

Difficulties Proving Employer Violations, Collecting Fines, and Detaining Aliens Have Weakened the Worksite Enforcement Program

The difficulties that INS and ICE have experienced in proving that employers knowingly hired unauthorized workers and in setting and collecting fine amounts that meaningfully deter employers from knowingly hiring unauthorized workers have limited the effectiveness of worksite enforcement efforts. In particular, the availability and use of fraudulent documents has not only undermined the employment verification process, but has also made it difficult for ICE agents to prove that employers knowingly hired unauthorized workers. In 1996, the Department of Justice Office of the Inspector General reported that the proliferation of cheap fraudulent documents made it possible for the unscrupulous employer to avoid being held accountable for hiring illegal aliens.[20] In 1999, we reported that the prevalence of document fraud made it difficult for INS to prove that an employer knowingly hired an unauthorized alien.[21] ICE officials

[20]Department of Justice, Office of the Inspector General, *Immigration and Naturalization Service Efforts to Combat Harboring and Employing Illegal Aliens in Sweatshops*, I-96-08 (Washington, D.C.: May 1996).

[21]GAO/GGD-99-33.

told us that employers who they suspect knowingly hire unauthorized workers can claim that they were unaware that their workers presented false documents at the time of hire, making it difficult for agents to prove that the employer violated IRCA.

According to ICE officials, when agents can prove that an employer knowingly hired an unauthorized worker, difficulties in setting and collecting meaningful fine amounts have undermined the effectiveness of worksite enforcement efforts and the deterrent effect of employer fines. Under IRCA, employers who fail to properly complete, retain, or present for inspection a Form I-9 may be administratively fined from $110 to $1,100 for each employee. Employers who knowingly hire or continue to employ unauthorized aliens may be administratively fined from $275 to $11,000 for each employee, depending on whether the violation is a first or subsequent offense. ICE officials told us fine amounts recommended by both INS and ICE agents were often negotiated down in value during discussions between agency attorneys and employers. These officials said that the agency mitigates employer fines because doing so may be a more efficient use of government resources than pursuing employers who contest or ignore fines, which could be more costly to the government than the fine amount sought. Furthermore, the amount of mitigated fines may be, in the opinion of some ICE officials, so low they believe that employers view it as a cost of doing business, and they believe the fines do not provide an effective deterrent for employers who attempt to circumvent IRCA. In addition, the Debt Management Center, which is responsible for collecting fines issued against employers for violations of IRCA, has faced difficulties in collecting the full amount of fines from employers. According to ICE, the agency has faced difficulties in collecting fines from employers for a number of reasons, for example, because employers went out of business or declared bankruptcy. In such instances, the agency determines whether to pursue collection of employer fines based on the level of resources needed to pursue the employer and the likelihood of collecting the fine amount.

Finally, the Office of Detention and Removal[22] has limited detention space, and unauthorized workers detained during worksite enforcement investigations are a low priority for that space. In 2004, the Under

[22]The Office of Detention and Removal is primarily responsible for identifying and removing criminal aliens from the United States. The office is also responsible for managing ICE's space for detaining aliens.

Secretary for Border and Transportation Security sent a memo to the Commissioner of U.S. Customs and Border Protection and the Assistant Secretary for ICE outlining the priorities for the detention of aliens. According to the memo, aliens who are subjects of national security investigations were among those groups of aliens given the highest priority for detention, while those arrested as a result of worksite enforcement investigations were to be given the lowest priority. According to ICE officials, the lack of sufficient detention space has limited the effectiveness of worksite enforcement efforts. For example, they said that if investigative agents arrest unauthorized aliens at worksites, the aliens would likely be released because the Office of Detention and Removal detention centers do not have sufficient space to house the aliens and they may re-enter the workforce, in some cases returning to the worksites from where they were originally arrested.

Worksite Enforcement Focus Shifted to Critical Infrastructure Protection after September 11, 2001

In keeping with the primary mission of DHS to combat terrorism, after September 11, 2001, INS and then ICE has focused its resources for worksite enforcement on identifying and removing unauthorized workers from critical infrastructure sites, such as airports and nuclear power plants, to help reduce vulnerabilities at those sites. According to ICE officials, the agency shifted its worksite enforcement focus to critical infrastructure protection because unauthorized workers employed at critical infrastructure sites indicate security vulnerabilities at those sites. In conducting critical infrastructure operations, the agency has worked with employers to identify and remove unauthorized workers and, as a result, has not focused on sanctioning employers at critical infrastructure sites. In 2003, ICE headquarters issued a memo requiring field offices to request approval from ICE headquarters prior to opening any worksite enforcement investigation not related to the protection of critical infrastructure sites, such as investigations of farms and restaurants. ICE officials told us that the purpose of this memo was to help ensure that field offices focused worksite enforcement efforts on critical infrastructure protection operations. Field office representatives reported that non-critical infrastructure worksite enforcement is one of the few investigative areas for which offices must request approval from ICE headquarters to open an investigation and also reported that worksite enforcement is not a priority unless it is related to critical infrastructure. In addition, some of these representatives, as well as immigration experts we interviewed, noted that the focus on critical infrastructure protection does not address the majority of worksites in industries that have traditionally provided the magnet of jobs attracting illegal aliens to the United States.

Concluding Observations

Efforts to reduce the employment of unauthorized workers in the United States require a strong employment eligibility verification process and a credible worksite enforcement program to ensure that employers meet verification requirements. The current employment verification process has not fundamentally changed since its establishment in 1986, and ongoing weaknesses have undermined its effectiveness. The Basic Pilot Program shows promise for enhancing the employment verification process and reducing document fraud if implemented on a much larger scale. However, the weaknesses identified in the current implementation of the Basic Pilot Program, as well as the costs of an expanded program, are considerations that will need to be addressed in deciding whether this program, or a similar automated employment verification process, should be significantly expanded or made mandatory. Even with a strengthened employment verification process, a credible worksite enforcement program would be needed because no verification system is foolproof and not all employers may want to comply with IRCA.

We are continuing our work and expect to have several recommendations aimed at improving employment verification and worksite enforcement efforts.

This concludes my prepared statement. I would be pleased to answer any questions you and the Subcommittee members may have.

GAO Contact and Staff Acknowledgments

For further information about this testimony, please contact Richard Stana at 202-512-8777.

Other key contributors to this statement were Orlando Copeland, Michele Fejfar, Ann H. Finley, Rebecca Gambler, Kathryn Godfrey, Eden C. Savino, and Robert E. White.

Related GAO Products

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Mr. HOSTETTLER. Thank you, Mr. Stana.
Mr. Jeffrey.

TESTIMONY OF TERENCE P. JEFFREY, EDITOR, *HUMAN EVENTS*

Mr. JEFFREY. I would like to thank you, Chairman Hostettler and Congresswoman Jackson Lee and the other Members of the Committee for having me here today.

I will briefly outline a problem I believe is happening where national security, Social Security and corporate accountability intersect.

In February, Admiral James Loy, Deputy Secretary of Homeland Security, told the Senate Intelligence Committee, "Recent information from ongoing investigations, detentions and emerging threat streams strongly suggest that al Qaeda has considered using the Southwest border to infiltrate the United States. Several al Qaeda leaders believe operatives can pay their way into the country through Mexico and also believe illegal entry is more advantageous than legal entry for operational security reasons."

If for no other reason than national security, the Federal Government needs to take the most effective steps possible to secure our border and enforce the immigration laws. Yet today, almost 4 years after the September 11, 2001 terrorist attacks, unidentified persons continue to pour across our border and many millions live here in violation of our immigration laws, seemingly with impunity. Certainly the opportunity to find work in the U.S. is a powerful magnet for illegal immigrants. The sheer number of these job seekers makes it more difficult for a limited number of immigration law enforcement officers to secure the border and enforce the immigration law in the interior of the country.

A focused effort to shut down the job magnets, to stop employers from routinely hiring large numbers of illegal immigrants could diminish this flow, thus making it easier to secure our country. Where are those job magnets?

The Social Security Administration I believe has already created what could be an effective road map for worksite enforcement. When SSA gets a W-2 report from an employer that it cannot match to a known taxpayer, it dumps that W-2 into what it calls the Earning Suspense File. These are W-2s, for example, that have bad Social Security numbers or Social Security numbers and names that do not match, and where efforts to find the person to whom the W-2 belong have failed. There are many reasons an employer might file one of these bad W-2s.

One reason, however, is that the W-2 represents a non-citizen, whether he entered legally or illegally, is unauthorized to work in the U.S. In fact, then SSA Inspector James G. Huse told this Committee in 2002, "Our reviews of the suspended wages in the ESF suggest that illegal work is the primary cause of suspended wages."

If that is the case, it can at least be reasonably suspected that employers that routinely file large numbers of unmatchable W-2s may be hiring large numbers of illegal immigrants. According to an audit report published in October by the Social Security Administration's Inspector General, each year the SSA's Office of Public Services and Operations Support develops a national listing of em-

ployers who submit 100 or more suspended wage items. This can be a road map for worksite enforcement.

But perhaps even a better map would be the October report itself, which lists by state, but not publicly by name, the 100 U.S. employers who filed the largest number of unmatchable W-2s between 1997 and 2001. You can see the appendix from the report up here, which lists the No. 1 company on this list, which is based in Illinois. It filed a remarkable 131,991 unmatchable W-2s over 5 years, reporting more than 524 million in wages paid by unknown taxpayers to the Federal Government. SSA believes current law prevents it, with certain exceptions, from naming such companies to the Department of Homeland Security.

The law should be changed. DHS ought to be given the manpower and the mandate to find out if some of the U.S. employers filing large numbers of unmatchable W-2s are also creating a magnet that draws large numbers of illegal immigrants into the United States.

Thank you.

[The prepared statement of Mr. Jeffrey follows:]

PREPARED STATEMENT OF TERENCE P. JEFFREY

The Department of Homeland Security has been failing in its mission to enforce the immigration laws against employers who, by hiring large numbers of illegal aliens, create the magnet that draws large numbers of illegal aliens into the United States.

Meanwhile, the Social Security Administration has information that could be very useful to DHS in getting this job done. But SSA believes the law prevents it from giving this information to DHS.

I will briefly describe for you a problem occurring where national security, Social Security and corporate accountability intersect.

Testifying in the Senate Intelligence Committee in February, Admiral James Loy, the deputy secretary of Homeland Security, said, "Several al-Qaeda leaders believe operatives can pay their way into the country through Mexico and also believe illegal entry is more advantageous than legal entry for operational security reasons."

Loy also pointed to "the threat from criminal groups and persons who engage in criminal enterprise that supports or contributes to terrorism and which has homeland security implications." He cited, among other examples, "people smuggling . . . document forgery and false identity provision."

These are crimes that serve the needs not only of illegal aliens who sneak into the United States to find work, but also of illegal aliens who would sneak into the United States to commit terror.

Mass illegal immigration—and employers who encourage it by hiring large numbers of illegal aliens—has created an inland sea of lawlessness in which terrorist sharks can readily swim.

A recent case illustrates how someone with terrorist connections in the Middle East can enter the United States illegally from Mexico and then live here as an illegal alien.

In March, Mahmoud Kourani pleaded guilty to conspiracy to support the terrorist organization Hezbollah by helping raise money for it in the United States. On June 14, he was sentenced to 4 and ½ years in prison. "The government," the Associated Press reported, "said Kourani paid a Mexican consular official in Beirut $3,000 for a visa to enter Mexico, then sneaked across the U.S.-Mexican border in 2001 . . ."

How many other security risks have entered the United States this way? If we do not secure our border, and do not seriously enforce the immigration laws within the country, how could we ever know?

The government does know, however, where to look for the employment magnets that attract large numbers of illegal aliens into the United States. If it were to shut these magnets down, it could significantly curtail the number of work-seeking illegal aliens trying to enter the country, thus making it easier for the Department of Homeland Security to secure the border itself and to find those who may have illicitly crossed it with intent to harm Americans.

The Social Security Administration has already developed information that can be used as the road map for worksite immigration enforcement.

The SSA maintains something it calls the Earnings Suspense File. This is the place where it puts W-2 forms submitted by employers that cannot be matched to known taxpayers. These W-2s may have a Social Security Number that does not match the name on the form, or a Social Security Number that has never been issued by SSA, or a number that simply could not be a Social Security Number.

There are many reasons employers might file W-2s with bad Social Security Numbers. But one significant reason is the hiring of aliens, who whether they entered the country legally or illegally, are not authorized to work in the United States. In fact, in a statement submitted to this subcommittee on Sept. 19, 2002, then-SSA Inspector General James G. Huse, Jr., said: "Our reviews of the suspended wages in the ESF suggest that illegal work is the primary cause of suspended wages."

This being the case, it is reasonable to at least suspect that employers habitually filing large numbers of bad W-2s may be hiring large numbers illegal aliens.

The Social Security Administration, fortunately, already compiles an annual list of employers who file large numbers of bad W-2s. In an October 2004 audit report entitled "Employers With the Most Suspended Wage Items in the 5-Year Period 1997 through 2001," the SSA Inspector General's office said that SSA's Office of Public Services and Operations Support each year "develops a national listing of employers who submit 100 or more suspended wage items."

The same audit report listed the 100 employers that between 1997 and 2001 filed the largest number of W-2s that could not be matched to known taxpayers. The report did not reveal the names of these employers, but identified them by the state in which they are based. It also listed how many W-2s each company had filed during the five-year period, and how many of these were bad.

Some of these employers apparently filed tens of thousands of bad W-2s, year after year.

The No. 1 filer of bad W-2s between 1997–2001, for example, was based in Illinois. It filed 131,991 bad W-2s over the five years, reporting more than $524 million in wages that SSA could not attribute to known taxpayers. These bad W-2s accounted for 11.68% of all W-2s this company filed during that time.

The No. 2 filer of bad W-2s was based in Texas. It filed 108,302 bad W-2s over the five years, reporting more than $532 million in wages that SSA could not attribute to known taxpayers. More than 14% of this employer's W-2 were bad.

A California employer, ranked No. 13, had more than 78% its W-2s dumped into the Earnings Suspense File. A Florida employer, ranked No. 47, had more than 81%.

One of the Top 100 filers of bad W-2s, the audit determined, was a state agency. The report did not reveal in which state this agency was based.

The report also included troubling information beyond the Top 100 list. For example, it noted that a California based security guard company had filed 8,902 W-2s in 2001 of which 4,321, or 49%, were bad

I asked the SSA IG's office if it had notified the Department of Homeland Security about this security guard company's problem. The IG's office responded that "with limited exception, Section 6103 of the Internal Revenue Code restricts the disclosure of such information. In our January 2001 report on Obstacles to Reducing Social Security Number Misuse in the Agricultural Industry, we recommended that SSA reevaluate the application of existing disclosure laws or seek legislative authority to remove barriers that would allow SSA to share information regarding chronic problem employers with the other federal agencies such as the Department of Homeland Security. Until such disclosure restrictions are removed, we are unable to share this type of information outside the context of a criminal investigation."

In a report published in April, entitled "Social Security Misuse in the Service, Restaurant, and Agricultural Industries," the SSA IG's office said: "Because we believe intentional misuse of SSNs by unauthorized noncitizens has been a major contributor to the ESF"s growth, we will provide a copy of this report under separate cover to the DHS inspector general."

"Furthermore," said the report, "we continue to believe SSA should seek legislative authority to remove barriers that would allow the Agency to share information regarding chronic problem employers with DHS."

Congress needs to tear down the wall that prevents SSA from passing this information to DHS.

Yet, tearing down the wall may not be enough. Clearly, the agents who do immigration investigations for DHS deserve respect and credit for the excellent work they do. But there does not seem to be enough of them.

Last Friday, I asked DHS's Immigration and Customs Enforcement (ICE) division how many full-time active duty investigators it has investigating violations of immi-

gration laws. "There are roughly 5,500 criminal investigators at ICE," the agency responded. "These special agents enforce both immigration and customs laws, which together involve more than 400 statutes. Nearly all ICE criminal investigators have completed cross-training to enforce these 400 statutes. There is not a specific segment of the ICE special agent population that is solely dedicated 'full-time' to enforcing one particular violation of law at the expense of all other violations that ICE is responsible for enforcing. On any given day, investigative resources are prioritized to best address national security and public safety priorities.

"In accordance with ICE's homeland security mission, ICE special agents prioritize worksite enforcement efforts by focusing on those worksite investigations related to critical infrastructure, national security and employers who engage in egregious criminal violations.

"Unauthorized workers employed in sensitive security sites and critical infrastructure facilities—such as airports, nuclear power and chemical plants and defense contractors—pose potential homeland security threats," ICE said. "Not only is their identity in question, but they are also vulnerable to exploitation by terrorists and other criminals."

ICE provided a number of examples of the good work its agents have done in this area.

But, if on "any given day" only a portion of ICE's 5,500 investigators are dedicated to worksite enforcement, that means it is quite possible that the California security guard company that filed 4,321 bad W-2s back in 2001 may have had more people working that year on bad Social Security Numbers than the Department of Homeland Security has working today to enforce the immigration law at worksites across the entire United States.

This is absurd.

Congress has authorized increasing the number of ICE investigators by 800 per year for the next five years. These increases should be fully funded, and more should be added if necessary. DHS should then deploy some of these agents specifically to investigate those employers that SSA has discovered habitually file large numbers of bad W-2s. If the evidence shows these employers have knowingly hired illegal aliens they should be held accountable under the law.

If the federal government shuts down the magnet that attracts illegal aliens here to work, it will be easier to secure our country against those who come here illegally looking not to work, but to harm us.

Mr. HOSTETTLER. Thank you, Mr. Jeffrey.

Mr. Hampe.

TESTIMONY OF CARL W. HAMPE, PARTNER, BAKER & McKENZIE, LLP

Mr. HAMPE. Thank you, Mr. Chairman, Congresswoman Jackson Lee and Members of the Subcommittee. Thank you for inviting me to testify today, and thank you for devoting your time to this critically important issue, the oversight of employer sanctions.

I share my 22-year experience with employer sanctions in my written statement, and would like to highlight the key historical lessons and provide some recommendations in the next 5 minutes.

The history of employer sanctions is not whether they should be part of the law or not. There is a strong bipartisan support for that. There has been for the past 20 years, and there is today. But rather, the historical challenge is how to create a worker verification system that is relatively secure, and that imposes minimal burdens on U.S. employers. Unfortunately, a secure worker verification system has so far proven to be elusive, both politically and practically, and thus is the Achilles heel of employer sanctions.

Enactment of sanctions in 1986, with its reliance solely on existing Federal, State and local documents, created ripe opportunities for fraud, and after sanctions were enacted the fraud became only more prevalent. The subsequent INS implementing regulations provided a long list of documents that satisfied the I-9 form and ultimately only increased the problem. While the low level of employer

sanctions enforcement by ICE is inappropriate and must be reversed, the susceptibility of the current regime to document and identity fraud creates I believe an understandable feeling of futility and low morale within this agency.

And certain structural forms are necessary so that ICE can rededicate itself to sanctions enforcement with a sustainable strategy. One route to doing so is to expand the use of computerized database checks of the alien number or Social Security number of new employees. The Jordan Commission recommended this in 1994. The Congress created the Basic Pilot in 1996 in response, but further improvements to Basic Pilot are necessary, as indicated by GAO.

Another option is to increase the security of current identity and work authorization documents. Congress took a significant step forward toward improving the identity requirement of the I-9 form when it required improvements in State driver's licenses in the REAL ID law.

A remaining significant challenge, however, is the security of the principal work authorization document, the Social Security card, and the political opposition that exists to making this document more secure. A related problem is the recent prevalence of identity theft based on stolen Social Security numbers. Both issues must be addressed if employer sanctions are to obtain a level of internal integrity that policymakers would find satisfactory.

I do believe there's a bright spot in this picture. In my post-government experience I have found that most employers agree, most employers agree that they should not knowingly hire unauthorized aliens, and they're willing to tolerate reasonable mechanisms to demonstrate compliance. This is an important fact for ICE to understand, as an improved employer sanctions enforcement regime must view the vast majority of U.S. employers as partners and not adversaries in the enforcement process.

Let me provide three recommendations on some improvements.

One, once the REAL ID law is implemented, Congress or DHS should limit the documents that satisfy the identity aspect of the I-9 form to compliant State driver's licenses and a U.S. passport or appropriately endorsed foreign passport.

Two, there must be an improvement in the security of documents and the processes that satisfy the work authorization aspect of the I-9 form, principally the Social Security account number database and card. I respectfully suggest to this Subcommittee that such a task, though fraught with political turmoil, is worthy of your time and effort.

The Department of Homeland Security can help on this aspect by improving the effectiveness of the Basic Pilot Program, and by utilizing it on a much larger scale. To improve its effectiveness, DHS must standardize its indicators that someone has stolen the identity of the proper holder of the account number, and it must then create a reliable process when identify theft appears likely, so that, one, employers using Basic Pilot are alerted, but importantly, two, that the individual submitting the number to satisfy the I-9 form is given a chance to rectify the problem before being denied employment. I also believe DHS must engage in a dedicated program of recruitment of employers into the voluntary basic pilot program.

Finally, my third recommendation is that DHS and DOJ should significantly increase the investigation and prosecution of document and identity fraud, and I can discuss some details of that if you would like during the question period. For the most part, the enemy of employer sanctions is not the unscrupulous employer, of which admittedly there are some, but rather the false documents vendors and identity thieves that seek to defeat the entire employer sanctions system.

Thank you very much

[The prepared statement of Mr. Hampe follows:]

PREPARED STATEMENT OF CARL HAMPE

Mr. Chairman, Ranking Member Lee, and Members of the Subcommittee:

Thank you for this opportunity to provide an historical perspective on the employer sanctions program. In summary, I believe employer sanctions are a commonsense immigration law enforcement tool that should be a component of any comprehensive regime to detect and deter unauthorized immigration. Implementation of this program in the United States, however, has not had its desired effect for a variety of reasons. I will therefore describe the history and purpose of the employer sanctions regime, discuss recent changes and pilot programs, and make some recommendations for increasing their effectiveness.

I. PRE-ENACTMENT HISTORY AND PURPOSE

I first became aware of the employer sanctions proposal when I began work in 1983 as a staff member of the Immigration Subcommittee of the Senate Judiciary Committee. After the enactment of employer sanctions in the Immigration Reform and Control Act (IRCA) of 1986, I and other subcommittee staff worked closely with then-INS Commissioner Alan Nelson and his colleagues on the program's regulatory implementation. While at the U.S. Department of Justice in the early 1990's, I worked with INS officials on numerous implementation issues and proposed legislative changes. Since entering private practice in 1993, I have represented a number of companies in obtaining amendments to the employer sanctions statute, conducting internal I-9 audits, and responding to sanctions-based enforcement actions by the Service.

When championing the enactment of IRCA, Former Senator Alan Simpson (R-WY) used to observe: "Upon becoming chairman of the Senate Immigration Subcommittee, I was astounded to learn that it was illegal to be an illegal alien, but it was not illegal for a U.S. employer to hire one."

The core logic of this statement remains the most compelling basis for a U.S. employer sanctions law. And employer sanctions indeed were the central feature of the report credited with convincing Congress that it was time to eliminate the "Texas Proviso"—the Final Report of the Select Commission on Immigration Refugee Policy (1981). That bipartisan commission, chaired by Father Theodore Hesburgh, recommended that the United States close the "back door" to illegal immigration in order to keep the "front door" to legal immigration open. Its central proposal to amend current law was to impose civil penalties on employers who knowingly hired unauthorized aliens. The 16-member commission (which included four Carter Administration cabinet members, eight members of Congress, and four members of the public) had little trouble with this proposal, recommending 14–2 that the law be amended to include this rule. Citing the availability of U.S. jobs as the central "pull factor" in the illegal immigration equation, the Select Commission recommended removing the magnet of the U.S. employment market as central to discouraging unlawful immigration. While strong border enforcement mechanisms were undoubtedly important, many illegal aliens obtain lawful access to the United States through temporary visas, such as visitor and student status, and then overstay those visas to work and live in the United States. Border enforcement alone will never stop this form of unlawful immigration, but employer sanctions certainly could.

The critical vote cast by the Select Commission was its narrow recommendation (8–7) of a "more reliable" mechanism to identify persons authorized to work in the United States, such as a counterfeit-resistant social security card. The policy logic of the proposal was strong: (1) in order for an employer to "know" whether he or she was knowingly hiring an unauthorized alien, a simple verification procedure should be established; (2) U.S. employers should not be expected to be fraudulent documents experts, (3) given the insecurity of current documents, a more secure

work authorization system was necessary to avoid creating a gaping loophole in employer sanctions. The politics of the final element of the proposal—a more secure worker verification system—turned out to be critical.

Senators Alan Simpson and Congressman Ron Mazzoli (D-KY) introduced a relatively faithful codification of the Select Commission's recommendations on employer sanctions in 1982. The measure passed the Senate by an overwhelming vote, but was defeated in the final days of session in the House when an insurmountable number of amendments was proposed by bill opponents and the House leadership provided an open rule on the bill. The Senate-passed version of IRCA in 1982 relied on existing documents to prove work authorization, but required the Administration to implement a more secure worker verification system by a date certain. The legislation did not specify the particular method of security, but gave standards that the new system must meet. It also contained detailed protections against abuse of the database that might be created and required protection of the privacy of individuals contained in the database. If a secure card was the result of the more secure system, such a card could not be required to be carried on one's person.

The Simpson-Mazzoli bill would be considered in two additional Congresses before being enacted in 1986. In each subsequent Congress, opponents of a more secure worker verification system watered down this important component of the employer sanctions regime. Senator Simpson responded to Democratic and Republican critics of the secure verification system that, "there is no slippery slope to a national I.D. card or national I.D. system in this bill. This bill prohibits it. If a national I.D. system emerges, it will only occur because we have taken deliberate, specific steps toward creating it. I will oppose those steps."

The Immigration Reform and Control Act was enacted with an employer sanctions system that relied on current, admittedly insecure, documents. Reports were required of the Administration on how to make the system more secure. Ironically, the final version of IRCA contained detailed *prohibitions* on the creation of a more secure system—most in the form of "report to Congress and wait" requirements which are embedded within INA Section 274A. The Achilles Heal of employer sanctions—its insecure employment verification system—has its roots in Congress deciding to rely solely on a vast of array of insecure documents, issued by various federal, state and local governments, to determine U.S. work authorization.

II. POST-ENACTMENT EXPERIENCE

Once enacted, the legacy Immigration and Naturalization Service took an imperfect statutory system and implemented it poorly. After a reasonably well-run public education and implementation program, the INS lost some political capital with U.S. employers by focusing on technical paperwork violations rather than on substantive violations of the ban on knowingly hiring unauthorized aliens. Congress later reduced the grounds for paperwork violations in the 1996 Act.

The INS also failed to correct another early problem—the excessive number of documents that could satisfy the I-9 requirement. This situation was both confusing to employers and an incentive for the counterfeiting of the most easily circumvented documents. Congress reacted again in the 1996 Act by instructing the INS to reduce the number of documents that satisfy the I-9 form, but there were significant delays in that process and today the result is of uncertain value.

Congress continued to receive support from immigration policy experts during this period on the essential role of employer sanctions in deterring illegal immigration. In 1994, the Commission on Immigration Reform (the "Jordan Commission") issued a report entitled U.S. Immigration Policy: Restoring Credibility, which addressed both employer sanctions and worker verification systems. As the late Barbara Jordan testified before the House Appropriations Committee in 1995:

> Our second set of recommendations would reduce the magnet that jobs currently present for illegal immigration. We have concluded that illegal immigrants come primarily for employment. The Commission believes that we need to enhance our enforcement of both employer sanctions and labor standards. But, to make employer sanctions work, we must improve the means by which employers verify the work authorization of new employees. The Commission believes the most promising option is a computerized system for determining if a social security number is valid and has been issued to someone authorized to work in the United States. We are pleased that the Administration has endorsed our recommendations in this area, and we look forward to working with INS and the Social Security Administration on the design of pilot programs that will phase in and test this new verification approach. I urge this committee to provide the funding needed to develop the computerized system and implement the pilot programs.

One encouraging aspect of IRCA was the strong desire by most U.S. employers to comply with the I-9 requirement. I have represented a number of medium-sized and large employers in internal I-9 audits, and in their responses to agency audits or investigations, and I have been impressed by the near universal acknowledgement that employers should not knowingly hire illegal aliens and that employer participation in deterring unlawful employment is a reasonable concept.

Unfortunately, the INS failed to capitalize on this attitude, treating many employers as adversaries rather than partners in deterring unauthorized employment. One example of this missed opportunity was the "Basic Pilot" voluntary employer verification system, enacted as part of the 1996 Act and inspired in part by the Jordan Commission recommendations. Under this program, participating employers were given computer-access to a portion of the INS alien-number and Social Security Administration social security account number databases. New employees would have to submit at least one of these numbers in order to satisfy the I-9 requirement, and the employer would have prompt feedback on whether the employment applicant was submitting a valid number, or a number that matched the name of the person to whom the number was issued. The meatpacking industry widely adopted participation in Basic Pilot, even though it was only available to companies with operations in at least one of only seven states, and the companies in this industry were initially satisfied with the additional capabilities and protections provided by the program.

Indeed, the Basic Pilot program initially fulfilled two of the early promises of employer sanctions: to reduce the lure of U.S. employment to unauthorized aliens, and to reduce the need for immigration authorities to "raid" employer work sites. Changing worksite enforcement to primarily an auditing function, or to an electronic verification process, was a principal objective of the early proponents of employer sanctions. Unfortunately, the "good times" under Basic Pilot were short-lived. When it became clear to the unauthorized alien community that using another individual's valid social security number would be detected by Basic Pilot, the response was to engage in a higher level of fraud: to assume the identity of someone else.

In the late 1990's, "true identity fraud" became the greatest threat to users of the Basic Pilot program. When the INS began worksite enforcement actions at the plants of meatpacking companies participating in Basic Pilot, the employers in this industry asked for access to the database of employees whom the INS suspected of committing identity fraud, so that the employers could deny them employment. Unwisely, the INS declined to provide this information and instead launched the ill-considered work site enforcement program known first as "Operation Prime Beef," which it later renamed "Operation Vanguard." The INS made "work site visits" to interview employees on their "identity fraud" list, and most employees on this list failed to show up and left their current employers—for other employers or other industries. Rather than deter unlawful immigrants from entering the United States, the INS had simply succeeded in chasing the unauthorized alien from one U.S employer to another—while alienating an employer community that had demonstrated its commitment to voluntary compliance.

Finally, all evidence points to a comparatively low level of attention paid to investigating and prosecuting document fraud. One critical example is the INS decision to enter into a settlement agreement in which it agreed to cease issuing civil penalties for document fraud under INA Section 274C, added in the 1990 Act to enhance document-fraud enforcement. On the criminal side, there is scant evidence today of a coherent, coordinated effort between ICE and U.S. Attorney's Offices to put the time, energy and resources necessary into detecting, indicting and prosecuting persons involved in the manufacture and sale of fraudulent documents.

III. FUTURE PROSPECTS FOR EMPLOYER SANCTIONS

Some observers believed that the tragedy of 9/11 would change the political aversion to a more secure worker verification system. That has proven to be belatedly but partially true, in that Congress recently enacted and the President signed the REAL ID Act, the first significant reform of the employment authorization system since the Basic Pilot Program of 1996, and the first mandatory change since IRCA's enactment in 1986.

The REAL ID legislation requires States to meet certain minimum procedural requirements (such as confirming the identity and lawful immigration status of the applicant) before issuing a driver's license, and to satisfy other minimum security requirements to ensure that the cards issued are counterfeit resistant. Given that State Drivers' licenses are one of the principal documents used to establish identity on the employer sanctions I-9 form, this is a significant step toward addressing the

insecure-documents loophole in employer sanctions. But substantial challenges remain.

First, the States must implement the REAL ID standards in a prompt and effective fashion. The technology exists to do so, but it is unclear whether the political will in the 51 U.S. jurisdictions is also present. Second, the I-9 Form also asks for evidence of work authorization, which a State Drivers' license does not demonstrate. The common document for demonstrating work authorization is a social security card. (A U.S. passport would satisfy both aspects of the I-9 requirement.) The social security card is today easily counterfeited, and we know from the Operation Vanguard experience that identity theft is a common scheme that can defeat use of the social security account number to deter unauthorized employment.

So what should be done in response? One option would be to repeal employer sanctions because of their ineffectiveness. I believe such a response would be very unwise, as it would send a message to the world's potential unauthorized immigrants that the United States no longer will discourage illegal immigration—as long as one can simply slip across the border or present enough fraudulent documents to a consular officer to obtain a visitor's visa. However large the unauthorized immigration problem is now, repeal of employer sanctions at this point would certainly make the problem far worse.

What then are the realistic reforms to employer sanctions that Congress and the Administration should consider?

(1) Limit the number of documents that satisfy the "identity" aspect of the I-9 Form to: (A) a State Driver's license that conforms to the REAL ID law's specifications (allowing for a reasonable transition period), and (B) a U.S. Passport. Given the 1996 Act amendments, the Department of Homeland Security should have the authority to achieve this objective by regulation.

(2) Address the problem of insecure documents that satisfy the "work authorization" aspect of the I-9 Form—principally the social security account number database and card. Congress can help by considering legislated changes to the security of social security cards, and by revisiting the onerous "report and wait" requirements imposed on revisions to this card in INA Section 274A. There is legislation pending now in Congress to begin this process, and I respectfully suggest to this Subcommittee that such a task—though fraught with political turmoil—is worthy of your time and effort.

The Department of Homeland Security can help by improving the effectiveness of the Basic Pilot program and utilizing it on a much larger scale. To improve its effectiveness, DHS must standardize its indicators that someone has stolen the identity of the proper holder of the account number. It must then create a reliable process when identity theft appears likely, so that employers using Basic Pilot are alerted and the individual submitting the number to satisfy the I-9 Form is given a chance to rectify the problem before being denied employment. I was told in 2000 and 2001 that such an improvement to the Basic Pilot system was not possible, but I have not pursued the matter since. This would be a good question to ask of DHS officials today.

To expand employer utilization of Basic Pilot, DHS must engage in a dedicated program of employer education and recruitment into the program, and work as true partners (rather than as adversaries) with the employers and employer organizations that participate. A recent amendment to the Basic Pilot program makes it available in all 50 states. The Administration should use this tool to increase employer participation by a substantial degree.

(3) Increase the investigation and prosecution of document and identity fraud.

A significant increase in ICE and U.S. Attorney's Office resources should be dedicated to prosecuting documents vendors, document smuggling rings, and those who facilitate the theft of the identity of others, through the social security card or any other common document. This renewed focus needs to come "from the top"—from the Secretary of Homeland Security and the Attorney General. It is simply unacceptable in light of current terrorist threats for the United States to allow its principal national documents to be subject to such widespread fraud. While Congress can review the sufficiency of current Sentencing Guidelines for these offenses, I believe its time is better spent dedicating appropriated funds to this mission and then conducting the oversight afterward to ensure that the enforcement initiatives occur. Even if the social security card remains an insecure document for a number of years to come, the goal of a concentrated investigation and prosecution effort should be to raise the black-market price of a fraudulent social security card or of a stolen identity linked to such a card to $10,000 or more. If that result is achieved, the incidence of document and identity fraud will decline sharply, and the benefits will inure not only to the employer sanctions system but to overall U.S. national security as well.

In addition, the late 1990's settlement agreement that ended the use of Section 274C's civil fines for document fraud should be re-examined, with a view toward its repeal. Every available tool, civil and criminal, should be used to combat those who would attempt to profit from the insecurity of our current documents.

(4) ICE should dedicate additional resources to unauthorized employment. Until the recent supplemental appropriations bill was enacted, ICE was operating under a hiring freeze. It now needs to focus on the integrity of the employer sanctions system. My experience representing U.S. companies is that worksite enforcement actions are, with rare exceptions, not worth the expenditure of the resources. A fair, consistent system of I-9 auditing would help reinforce most employers' current compliance with this requirement, and would also develop leads on pockets of noncompliance. And as mentioned above, document and identity fraud should be targeted with an all-out effort, at both the criminal and civil level. The effort should be undertaken with the knowledge that most employers comply or desire to do so, and that they should be partners, not adversaries, in the process.

CONCLUSION.

Employer sanctions is an important and reasonable enforcement regime to deter unauthorized immigration to the United States. The difficult policy questions arise when one attempts to implement it effectively. It has lost any enforcement priority that it ever might have had, and this fact should be recognized and corrected by the Departments of Homeland Security and Justice. I believe this hearing is a good step in encouraging such a change in attitude, and I commend you for holding it. I also thank you for inviting me to contribute my views on the topic and stand ready to answer any questions that you may have.

Mr. HOSTETTLER. Thank you, Mr. Hampe.

Ms. Gordon.

TESTIMONY OF JENNIFER GORDON, ASSOCIATE PROFESSOR OF LAW, FORDHAM LAW SCHOOL

Ms. GORDON. Chairman Hostettler, Ranking Member Jackson Lee and Members of the Subcommittee, thank you for the opportunity to testify today.

For the past 18 years, I have worked with low-wage immigrants and their employers in a context of employer sanctions, and from that vantage point I can say that sanctions have been an unequivocal failure.

Congress had two principal goals in including employer sanctions in IRCA in 1986: deterring undocumented immigration, and protecting the jobs of U.S. workers. Sanctions have done neither.

Since 1986, the undocumented population in the United States has grown from an estimated 5 million then to an estimated 10 to 12 million today. There is no clearer evidence that sanctions are no deterrent to undocumented immigrants or their employers.

With regard to the second goal, ironically, sanctions have not only failed to protect the working conditions of U.S. citizens and legal immigrants, but have contributed significantly to undermining them by handing a trump card to those employers who seek to maintain a vulnerable and exploitable workforce. Such an employer may simply ignore the requirement that undocumented workers complete I-9 forms at the time of hire, or may fill them out in a pro forma way. But if those workers complain about any aspect of their working conditions—wages below the legal minimum, no protection from hazardous chemicals, or a ban on discussion of unions in the workplace—they are suddenly told that unless they can provide the documents to fill out the I-9 form they will be fired.

The fear this generates is intensified by the doubt employer sanctions have cast on whether employers will be penalized when they

violate basic workplace laws with regard to undocumented employees.

At the time IRCA passed, it was clear in most States and Federal circuits that minimum wage, health and safety and anti-discrimination laws, as well as the National Labor Relations Act, applied to workers who were illegally present in the country. IRCA's own legislative history reaffirms the importance of this coverage.

Although almost all courts and agencies continue to maintain that undocumented immigrants are protected by workplace statutes, in 2002 the Supreme Court in its *Hoffman Plastics* decision, insulated employers who fired undocumented employees in violation of the NLRA from monetary penalties. The Court cited Congress's passage of employer sanctions as the primary reason for its holding.

Although Hoffman was technically limited in scope, employers have used it repeatedly to intimidate those few undocumented workers who still dare to report sub-minimum wages and to demand better working conditions.

The effect of this dynamic is the exact inverse of what Congress intended. Through sanctions undocumented immigrants have been pushed further underground, rendered ever more uncertain about whether they have rights, and ever more terrified to claim any of the rights to which they are aware they are entitled. Basic workplace rights are guaranteed to undocumented workers under U.S. law for the precise reason that to deny them those rights would make them unfairly attractive to employers, thus undercutting U.S. workers. But unless undocumented workers know that reporting violations will not put their jobs at risk and subject them to potential deportation, they will remain silent. Without their participation, lawbreakers in the underground economy are hard to detect and nearly impossible to convict.

Employer sanctions have harmed U.S. workers in another way. Employers in immigrant heavy industries, wishing to avoid liability for sanctions, have shifted en masse to subcontracting in the wake of IRCA. Now predominant in such industries as agriculture, janitorial, landscaping and construction, subcontracting exerts downward pressure on wages in two ways. Contracts are put out to bid, encouraging contractors to offer the lowest possible price, which translates directly into falling wages. In addition, subcontracting introduces a middleman who takes a cut of the contract, further lowering the wages that workers receive. And of course, once subcontracting becomes the standard arrangement in any industry, its impact on wages affects all workers, documented or not, in that industry. Far from protecting U.S. workers, then employer, sanctions lower their wages and undercut their efforts to obtain jobs and improve working conditions.

Instead of sanctions we need two things. One is an unequivocal statement from Congress that employers will be penalized for violations of workplace protections independent of the immigration status of the victim. The other is a new commitment to intensive and strategically targeted government enforcement of minimum wage and health and safety laws in industries and geographic areas with high concentrations of undocumented workers. Only through this sort of approach do we have a hope of addressing the exploitive

working conditions and unfair competition that undermine the work opportunities, health and wages of workers throughout our Nation.

Thank you, and I welcome your questions.

[The prepared statement of Ms. Gordon follows:]

PREPARED STATEMENT OF JENNIFER GORDON

Chairman Hostettler, Ranking Member Jackson Lee, and Members of the Subcommittee:

Thank you for the opportunity to testify regarding employer sanctions. I appear before you today as someone who has worked on issues surrounding undocumented immigrant work and employer sanctions since the program's very inception. In 1987, my first job out of college was to educate Boston employers and employees about their responsibilities and rights under the just-implemented employer sanctions provisions of the Immigration Reform and Control Act. In that capacity, I spent two years visiting over 100 Boston-area employers as they struggled to comply with the new provisions. I then went on to Harvard Law School, and upon graduation founded the Workplace Project, a New York organization that among other goals seeks to enforce basic wage and safety standards in immigrant workplaces. My recent book, *Suburban Sweatshops,* explores the re-emergence of sweatshop work on the United States and discusses strategies to eradicate it. I am now on the faculty of Fordham Law School in New York, specializing in immigration and labor law.

When Congress included employer sanctions in the Immigration Reform and Control Act of 1986, it had two principal goals: deterring undocumented immigration and protecting the jobs and wage levels of U.S. workers. After nineteen years, sanctions have proven an unequivocal failure on both fronts. Today, the undocumented population has grown considerably. And, ironically, sanctions have not only failed to protect the working conditions of US citizens and legal immigrants, but have contributed significantly to undermining them. Furthermore, sanctions have created a burgeoning black market in false documents, increased discrimination against legal immigrants and U.S. citizens, and created an undue burden for employers, who have been deputized against their will as agents of the Department of Homeland Security.

The increase in undocumented immigration to the United States to its present level despite employer sanctions speaks for itself. In 1986, at the time employer sanctions went into effect, approximately 5 million undocumented immigrants resided in the United States. Today, the best estimate is that this country is home to between 10 and 12 million undocumented immigrants. There is no clearer evidence of the failure of sanctions to deter illegal immigration.

What requires more explanation is the dynamic that has rendered employer sanctions the source of more, not less, competition for jobs between legal workers and their undocumented counterparts. While sanctions have put a considerable burden on responsible businesses, who according to an INS study spend over 13 million hours per year to comply with this law, it has handed a trump card to those employers who seek to maintain a vulnerable and exploitable workforce. An unprincipled employer wishing to hire undocumented workers may simply ignore the requirement that workers complete I-9 forms, or may ask new employees to fill them out but pay little attention to the quality and consistency of the documents offered. If those workers complain about any aspect of their working conditions, however—if they ask that their wages be raised to the legal minimum, or request gloves as protection from hazardous chemicals, or express an interest in joining a union, all of which are rights guaranteed to them under U.S. law for the precise reason that to deny them those rights would make them unfairly attractive to employers, thus undercutting U.S. workers—the employer remembers employer sanctions. The workers who have stepped forward are suddenly told that unless they can provide documents to fulfill the I-9 form's requirements, they will be fired.

This cycle is intensified by the doubt employer sanctions have cast on whether employers will be penalized when they violate basic workplace laws with regard to undocumented immigrants. At the time IRCA passed, it was clear in most states and federal circuits that minimum wage, health and safety and anti-discrimination laws, as well as the NLRA, applied to workers who were illegally present in the country. And the legislative history of IRCA states explicitly that "[i]t is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law. . . . As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB,* 467 U.S. 833 (1984), application of the NLRA 'helps to assure that the wages and employment conditions of law-

ful residents are not adversely affected by the competition of illegal alien employees who are not subject to standard terms of employment.'" Although most courts and agencies continue to maintain that undocumented immigrants are covered by workplace statutes, in 2002 the Supreme Court issued its *Hoffman Plastics* decision, which confirmed that undocumented workers were covered under the National Labor Relations Act but insulated employers who fired undocumented employees in violation of the Act from monetary penalties. The Court cited Congress's passage of employer sanctions as the primary reason for its change of heart after *Sure-Tan.* Although the *Hoffman* holding was limited in scope, employers have used it repeatedly to intimidate those few undocumented workers who still dare to report subminimum wages and to demand better working conditions.

The effect of this dynamic is the exact inverse of what Congress intended. Undocumented immigrants have been pushed further underground, rendered ever more uncertain about whether they have rights and ever more terrified to claim any of the rights to which they are aware they are entitled. These rights are not just a matter of human dignity, although they are certainly that. They are the only force restraining a race to the bottom in which undocumented immigrants can be had for any price and under any conditions, thus making them a much more attractive workforce for unscrupulous employers, foreclosing job opportunities for U.S. citizens and legal residents, and dragging down wages and working conditions for all. If our minimum wage laws are to have any meaning at all, they must be reinforced where they are in peril, in immigrant-heavy workplaces. But unless undocumented workers know that reporting violations will not put their jobs at risk and subject them to potential deportation, they will remain silent. Without their participation, lawbreakers in the underground economy are hard to detect and nearly impossible to convict.

This argument becomes clearer by analogy to other law enforcement situations. When government authorities need the cooperation of undocumented immigrants in times of serious threat to safety or national security, they make clear that those who come forward with information will not be reported to Immigration Control and Enforcement (ICE). Thus, when the Beltway sniper was terrorizing the DC suburbs in 2002, Maryland Chief of Police Charles Moose made a public promise that that any undocumented immigrant who came forward with information about the sniper would not be turned over to the INS. Similarly, recognizing that crime prosecution and prevention will only be successful if all city residents feel comfortable working with the police, the New York City Police Department and numerous others around the country have declared that they will not ask questions about immigration status of a witness or victim of a crime. In the same way, once we recognize that effective enforcement of basic workplace rights for all employees is the lynchpin in any strategy to protect the wages and working conditions of U.S. workers, it becomes clear that immigration enforcement must be taken out of the workplace.

Social scientist Douglas Massey has documented additional negative labor market effects of employer sanctions. He notes that employers in sectors characterized by high levels of undocumented employment—such as agriculture, janitorial, landscaping and construction—shifted to subcontracting arrangements in the wake of IRCA in order to insulate themselves from the consequences of hiring unauthorized workers. Subcontracting exerts downward pressure on wages in two ways. Contracts are put out to bid, encouraging contractors to offer the lowest possible price in order to prevail. Since all of these are labor-intensive industries, falling contract prices translate directly into falling wages. In addition, subcontracting introduces a middleman where once employment was direct, and the middleman takes a cut of the contract. This cut further lowers the wages that workers receive. Of course, once subcontracting becomes that standard arrangement in a particular industry, it affects all workers in that industry, whether documented or not. Thus, increased subcontracting—a direct consequence of employer sanctions—has decreased the wages of U.S. workers.

The idea of repealing employer sanctions is politically unpopular at the moment. On all sides, the current debate in Washington over immigration reform assumes that sanctions will either continue in place or be strengthened, for example through the addition of harsher penalties or a national i.d. card. To continue on this road is to trade short-term political gain for long-term disaster. More enforcement of the existing law, or the intensification of documentation requirements for workers or punishment for employers, will only increase the power of sanctions to drive undocumented workers underground. The problem with this law is not a matter of a few technical glitches amenable to a legislative fix. The premise on which sanctions are based is fundamentally flawed.

Far from protecting U.S. workers, employer sanctions lower their wages and undercut their efforts to improve working conditions. Instead of sanctions, we need two

things. One is an unequivocal statement from Congress that all workplace protections apply equally to documented and undocumented workers. The Supreme Court's 2002 decision in *Hoffman Plastics* should be corrected through legislation that explicitly renders employers equally liable for the failure to obey the Fair Labor Standards Act, the Occupational Safety and Health Act, the National Labor Relations Act, and all of the other bedrock pieces of workplace legislation, independent of the victim's immigration status. The other is a new commitment to intensive and strategically targeted government enforcement of minimum wage and health and safety laws in industries and geographic areas with high concentrations of undocumented workers. Only through such an approach do we have the hope of addressing the exploitative working conditions and unfair competition that undermine the work opportunities, health and wages of workers throughout our nation.

Mr. HOSTETTLER. Thank you, Ms. Gordon.

The Subcommittee Members will now turn to questions. Mr. Stana, in your written testimony you revealed that an ICE policy memo prohibits ICE agents from engaging in worksite enforcement in restaurants and farms without prior approval. What is the basis of this policy, do you know?

Mr. STANA. My understanding is that ICE headquarters sent that memo out to reinforce the idea that they wanted their resources focused on issues of national security. So to keep its agents from opening investigations in areas not connected to national security, they set up the critical infrastructure program, which focused attention to places like airports, nuclear power plants and so on. Locations can, however, ask for and get exemptions from that memo. We visited 12 locations in the course of our work, and in those 12 locations combined, we only found 5 or 6 exemptions.

So what it has done, it has focused resources on the areas of priority in their strategic plan, but it has discouraged workforce enforcement.

Mr. HOSTETTLER. This notion of the strategic plan and the place that employer sanctions worksite enforcement plays in it is a common theme. How has the Department of Homeland Security been doing with regard to critical infrastructure issues?

Mr. STANA. Well, there are two major programs that I am aware of, Tarmac and Glow Worm, and in Operation Tarmac they have identified about 1,000 illegal aliens working in airports. They treat this as a worksite enforcement action in that if they are undocumented they will take enforcement actions which include possible deportation. So it has had some effect that way, but perhaps not as many terrorists as they thought they might identify have been acted upon.

Mr. HOSTETTLER. Would you say that the dedication of resources and the return on the investment is substantial?

Mr. STANA. Well, I think there is a policy decision here that ICE and DHS have made, that they have a limited number of resources and they are going to put them in the areas where they feel it is most prudent to put them. I do not think any of us want another 9/11. However, on the other side of that, what it has done is it has taken resources away from worksite enforcement. In the late 1990's, we had 240 roughly FTEs devoted to this. Now there is—well, this year there is about 50, 65, depending on how you count them. So it has had an impact on ICE's ability to undertake worksite enforcement activity.

Mr. HOSTETTLER. I guess my question is, more clearly stated, with the concentration of resources to the notion of critical infra-

structure worksite enforcement, are we finding a lot of problems in critical infrastructure?

Mr. STANA. Well, in fact, there was an article in today's newspaper and on the news about a nuclear facility, I believe it was a weapons manufacturing facility, where the Department of Energy IG found through its checks there were 16 illegal aliens identified, and that the normal I-9 process had not identified.

So there is cause for focusing on these things, but it hasn't found that many aliens, and it's usually aliens working in areas where aliens are working in other areas, nonsensitive, such as construction and food service and whatnot.

Mr. HOSTETTLER. Very good, thank you.

Mr. Jeffrey, do you think that if there were credible deterrents in worksite enforcement, there would be a widespread reduction in illegal immigration? And if that is the case, if ICE concentrates on worksite enforcement and creates deterrents, many of its other problems with immigration enforcement, such as detention bed space and deportation might be drastically reduced, is that not correct?

Mr. JEFFREY. I think in the long run I think there will be a deterrent effect. If you look at that list from the October report from the Social Security Administration Inspector General, the top 100 employers that had filed the worst W-2s, and you assume there's some correlation between those bad W-2s and the hiring of illegal aliens, which of course is something that hasn't been demonstrated because DHS apparently is not investigating these companies. I think you see that year after year after year you have certain employers that are hiring large numbers of people that they can't identify correctly by Social Security number. These have to be major companies if you look at the size of their payroll. That Illinois company paid more than $524 million to employees that it could not identify to the IRS or Social Security Administration by Social Security number for 5 years.

It seems to me if a company like that, assuming that there is some hiring of illegal aliens there, were publicly exposed and were penalized that the public pressure on the corporate managers would force them to stop the practices that have led to the filing of the bad W-2s. If in fact it is the hiring of illegal aliens, those jobs will dry up. I think if you do that in a fairly focused manner, the message will get out that the jobs magnet is closing down in the United States.

Mr. HOSTETTLER. Thank you, Mr. Jeffrey.

The gentlelady from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much.

I would like to pursue the line of questioning, Mr. Stana, on this whole issue of resources. You know, we have had a battle about 200 versus 800, 300 versus 800. The 9/11 Commission recommended I believe 800 ICE officers a year for the next 5 years. There are those of us, and many on this Committee, that have submitted amendments and continue to push and work for the higher numbers of ICE officers as well as others who are part of immigration enforcement as well as immigration services.

So just again have me understand the breakdown of resources as relates to the large threat, the large concern of terrorism. And

again, not to be redundant, you know, I do not equate immigration to terrorism, so I think the work of the Homeland Security Department, of which I am a Member of the Homeland Security Committee, really should be distinguished or distinguishable fighting terrorism versus the concern about immigration, whether it be legal or illegal.

So are you suggesting that with the numbers we have now—and my remarks earlier indicated that we have not prioritized work as it relates to employer sanctions or enforcement. Is that what you are saying is a clear problem that we face today?

Mr. STANA. Let me say this, that in almost every measure worksite enforcement is at about the bottom of the priority scale. In terms of number of agents devoted to the activity, it's near the bottom. In terms of detention priority it's near the bottom.

We have testified, I have testified in the past that we need to have a more balanced effort between border enforcement and interior enforcement, and there are a number of people we have put over the years on the line of scrimmage, so to speak, on the border, less so in the interior.

Let me also say though that in the context of worksite enforcement, simply putting another 100 or 200 or 300 agents on this likely would not make the major dent in the problem that having an effective employment authorization verification system would, and it might even be less resource intense.

Ms. JACKSON LEE. Now, when you say that, would that mean that the individual comes with better documents and the employer still makes the determination, or would we have a central pooling place for people to funnel through, and then say these are available for hiring?

Mr. STANA. There are a number of different models available, but what would happen is, is that the prospective employee or the employee would present documents to the employer stating their eligibility to work, and there are a number of documents that they can do that with now that would be pruned back. But this information would be sent to central databases at DHS and SSA. If it came back that the person was authorized to work, the employer would not have a worry of whether they are hiring illegal workers, and a sanctions regime could then reliably take place. If a person then knowingly hires someone not authorized, the ICE investigators would have a much better case to make for knowingly hiring.

Ms. JACKSON LEE. Let me pose questions to Mr. Hampe and Ms. Gordon, and then I will listen to your answers.

I am fascinated, Mr. Hampe, with your comments about the actual document fraud creator, and explore that a little bit more because I believe that that is the right track, and I said I would listed today for themes for legislative response, and I think that that is going in the direction of where we might go on going after those who are creating the documents, even though we might come up with a system of better documents.

And, Ms. Gordon, brilliance on your part with respect to whether or not we even enforce, as we should for Americans, workplace protections, particularly the hourly wage, the minimum wage, et cetera, which unfortunately we have such uneven circumstances in different states. But would you explore again as well the value of

really focusing on workplace conditions, because it is negative not only for those who are working undocumented, but it is also a negative atmosphere for those who are either documented and/or Americans. The other thing is the threat against documented workers if we do a full sweep of purging when you begin to talk about employer sanctions.

Mr. Hampe, if you could talk more about how we would go and explore this, if you will, prosecuting the fraudulent document maker. And I would like to acknowledge that my colleague, Congresswoman Maxine Waters, has joined me this afternoon.

Mr. HAMPE. Yes, Congresswoman. The question you asked does go to the heart of the concept behind employer sanctions, which is that employers would review documents that theoretically are reasonably reliable, and that therefore the system becomes self-enforcing, and one needn't rely on constant workplace-worksite actions in order to effectively enforce the workplace ban. Even if Congress continues to grapple for a number of years, as it may well, on making current documents more secure, there are initiatives that can be taken by Congress and by the Executive Branch to make it more difficult for documents vendors to be effective.

A targeted prosecution—investigation and prosecution campaign, relying on the cooperation of DOJ and DHS, a reduction by DHS in the number of documents that would satisfy the I-9 form, which has been a pending regulation for quite some time now, approaches such as that, which if they could, for example, drive up the black market price of a fraudulent Social Security card from however many hundreds of dollars it is now to, say, $10,000, then I think there would be a discernible reduction in the number of people who can afford to purchase that different identity and defeat the system. It wouldn't be perfect and there still would be a need to resolve the structural problems, but it's a good interim step.

Ms. GORDON. Yes, thank you, Congresswoman. With regard to your question about workplace rights—workplace rights, and in particular the minimum wage, are really the only force that we have that is restraining a race to the bottom, a race in which the end result is that you can have an undocumented immigrant at any price and under any condition. And the only way to stop that is to really focus on what it takes, what does it take to enforce the minimum wage and basic health and safety laws and so on in the workplace?

And what it takes is the cooperation of the workers who know the harms best, and those workers are undocumented workers. And when you look at any law enforcement effort, enforcing a law that recognizes—where the agency recognizes it needs the cooperation of undocumented workers, what you see is the agency takes immigration out of the equation. So you have Maryland Chief of Police Charles Moose, during the time of the Beltway sniper, coming forward and saying, "If any undocumented immigrant has information about this, you can come forward secure. We won't bring you to immigration." The same with police departments all around the country.

And by the same logic, if you want to enforce workplace rights in the workplace—and that is the only way to protect U.S. workers

and guarantee that the minimum wage will be respected—you have to take immigration enforcement out of the workplace first.

Mr. HOSTETTLER. The gentlelady's time has expired.

Gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Stana, I was very much impressed by the chart that we saw on the screen a few minutes ago, and that is a part of your written testimony, and that is the chart that referred to the number of Notices of Intent to Fine. What an incredible commentary, unfortunately, on the current Administration and what would appear to be their unwillingness to enforce current law when it comes to employer sanctions. I had heard that there was not a single fine levied against an employer in 2004, despite the fact that there were roughly 7 million people employed illegally. Your chart seems to bear that out. There were only 3 Notices of Intent. Are you aware of any of those Notices of Intent actually resulting in a fine against an employer in 2004?

Mr. STANA. No, I'm not, but it does take several months for the process to work to the point where they do get a notice to, or an intent to fine.

Mr. SMITH. Right. But it does sound like my information may well be accurate, that not a single employer was fined in 2004?

Mr. STANA. And if you look at the chart, in fiscal '03 I think we had 100 and some, and those may have resulted from actions taken months or years before, so there was a lag time.

Mr. SMITH. Let me ask you, Mr. Stana, and also Mr. Hampe, what conclusions you might draw from the Government's inaction or unwillingness to levy fines against employers who are breaking the law?

Mr. STANA. Well, I think there's a couple of things that I would say. First, I think there's a certain dispiritedness among ICE agents that when they do take worksite enforcement action, the actions don't result in much because fines are reduced in the negotiation process, or if they do take aliens out of the workplace there's not enough detention space and they're told to appear some months later and, and they find another job in the meantime.

Also, I think it demonstrates to some degree a lack of political consensus on how to deal with this issue. One of the locations, one of the 12 we went to, the agent in charge told us that there's a rumor going around in his particular city, a large city, of an impending employment action on the part of ICE, and even though it wasn't true, he had different delegations calling his office, either saying, yeah, you know, this is—we're all behind it, or other delegations calling, saying, this isn't what you should be doing.

And so in that kind of environment, without a clear signal, they're really not sure which way to go.

Mr. STANA. They can always enforce the law.

Mr. SMITH. That is true.

Mr. Hampe, what conclusions do you draw from the Government's inaction, and furthermore, based upon your 22 years of experience with the issue, Do you think the Government's inaction is actually increasing illegal immigration?

Mr. HAMPE. Let me take the second one first because I think the answer to that is pretty clearly yes. However susceptible to defeat

the employer sanction system is because of insecure documents, the fact that there is no attention being paid by ICE whatsoever to the entire employer sanctions regime, which we can include, say, I-9 audits, document fraud prosecutions and worksite enforcement, is certainly sending the message that if someone can get past the consular officer for a visa or past one of the U.S. borders, then they're unlikely to be detected.

I do believe that failure to enforce—to issue Notices of Intents to Fine, my understanding is, given the low levels of ICE personnel, is that they tend to desire to go after big enforcement actions, which would suggest go after large employers. Well, the truth is today that large employers tend to have gotten more sophisticated, and they have an I-9 process that would show that they did rely on documents presented to them which reasonably on their face appear genuine. Therefore, they're not legally liable.

So all roads lead back to the insecure document, I think in that sort of situation.

Mr. SMITH. Thank you, Mr. Hampe.

Thank you, Mr. Chairman.

Mr. HOSTETTLER. The Chair now recognizes the gentlelady from California for 5 minutes.

Ms. WATERS. Thank you very much. Mr. Chairman, and Members, this is not as complicated as many of us would make others believe. The simple fact of the matter is we have illegal immigration, an Administration that talks out of both sides of its mouth, and little or no enforcement. It seems to me that there is no will or desire, as has been demonstrated, for employer sanctions. We simply do not wish to fine employers or to make them accountable. If we had enforcement and if we had a system by which to do that, we could stem the illegal immigration problem.

I believe that what was demonstrated about the number of companies that, well, the lack of enforcement and the lack of sanctions, and the lack of making these employers accountable is just, I mean it's blatant. It's just not there. I can't believe that in the United States of America we can't set up systems by which to get this done. If you tell me that the documents are all left in the workplace so that employers can use them to basically intimidate undocumented workers when they began to speak out about lack of proper wages and conditions, then why don't we do something about that? Why don't we have a central place in cities or counties where the employers have to file these documents under penalty of perjury?

It's not good enough to say, I thought, or I guessed, or it's almost. I think that we should have criteria, requirements that the employers could depend on, and I think that we can do that. So there's not a will to do this.

If you take a look at the industries where they are most needed, then I think we can find out who's protecting these employers. We know what's happening in the agricultural industry. We know that this Administration attempted to come up with a plan by which to have workers come in, I guess at the height of agricultural seasons, to do the work, and I don't know what they planned on doing with them afterwards, sending them back or giving amnesty or working out some kind of program where if you have worked for so many

years you'll be able to get citizenship. But we just aren't doing anything. I mean nothing is being done.

So we can hold these hearings all we want, and many of the hearings I think are very valuable, but now, they have become redundant. We know what we have to do is not being done, it's not in the best interest of certain industries to stand the wave of undocumented.

I was in one of our cities in California, spending a few days. I'll tell you what city it was, Palm Springs. Everybody who works there, you know, appears to be Latino. I don't know whether they're documented or undocumented. I hear the rumors down there about who they are or who they're not, but I suspect that that city does not want to do anything about illegal immigration or undocumented workers, because, you know, who would do the work for all those tourists that are coming in there?

So I mean we either—we can't have it both ways. We're either going to have to decide that we're going to stem the tide with employer sanctions, and we're going to have to come up with a program by which some recognition is given to some folks who have been in, you know, the United States over a long period of time and have families that have grown up here. We're going to have to do something. We're going to have to come up with a program and a response that recognizes all aspects of the issues and try and do the right thing.

So with that, I have no questions. They can't say anymore than they've already said. We know what it is, and that's it. So I yield back the balance of my time.

Mr. HOSTETTLER. I thank the gentlelady.

The Chair now recognizes the gentleman from California, Mr. Issa, for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman. At my own peril, I associate myself with the gentlelady from California. I think that she's hit on something, which is this is deja vu all over again, again, again, again. One of our challenges here today is, are we hearing what the problem is? Yes. Is it the first time we've heard any of it? No. As a matter of fact, the only thing that I found surprising was Ms. Gordon's statement that basically in a failed system you can blame everything as ineffective, including employer sanctions, even though substantially there aren't any. I found that to be new. I don't happen to agree with it, but I did find it to be new.

My question for Mr. Stana, by the way, what year did you graduate from Kent State?

Mr. STANA. 1972, and a Master's in '76, with 2 years as a draftee in between.

Mr. ISSA. And I never saw you while I was driving campus bus during that period of time. I'm wondering what two alums—how we missed each other. Only 28,000 of us there though.

Mr. STANA. Yeah.

Mr. ISSA. The questions I'd have for you, certainly in the testimony it becomes obvious that ICE does not—cannot live up to its priorities. In the INS 1999 strategy paper, the INS claimed that its strategy is 5 major principles in order of priority. First, identify and remove criminal aliens and minimize the recidivism. Second,

deter, dismantle and diminish smuggling or trafficking of aliens. I won't even get to the next three.

The U.S. Attorney in San Diego has set up criteria that requires multiple felonies before she will prosecute a smuggler. There is no criminal alien removal program unless they are already incarcerated, and then of course they are not removed to Federal prison, they're kept in State prison, and in many cases they're not picked up at the end of their term.

In light of that, my question to you is, should this Committee and should this Congress, considering fully breaking off INS and ICE and all these other agencies into separate immigration only departments, meaning not for the war on terror, and organizations that continue to do the war on terror and drugs and all these other things? And I ask that question because it now occurs to me that no matter how much money and no matter how the instructions are and no matter what they write in their own white papers, that agencies will simply fall back into anything except dealing with 7 million illegal workers and 11 million illegal residents.

Mr. STANA. Going back into the mid to late '90's, there was a lot of frustration on activities and inactivities of INS dealing with interior enforcement. And I have testified before this Subcommittee on several occasions on some of the issues you've raised, you know, criminal alien removal and so on. When the Department of Homeland Security was created, the only agency that was specifically abolished was INS, and I think that was a reflection of the frustration.

There are a number of different ways to attack this, and I think it ultimately boils down to a policy issue. If the Congress would like to reassemble an immigration agency, or at least a component of DHS, there are certainly lots of good reasons to do it. In creating DHS, and in the aftermath of 9/11, the goal was to make sure something like that did not happen again. And therefore, most of the immigration activities flow from the overall strategic plan to deter and detect terrorism. You can see what the numbers show, what has happened to some of the more traditional INS activities. They have been downplayed or at least morphed into antiterrorism events.

And so what I would say is, is that's a decision that you would have to make, but it's clear that what's happening now is not geared to those traditional interior enforcement programs.

Mr. ISSA. Thank you. One question is more than enough in this case.

Thank you, Mr. Chairman. Yield back.

Mr. HOSTETTLER. Thank the gentleman, and I commend the gentleman for his line of questioning with regard to the focus of immigration law enforcement.

The Chair now recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I appreciate the testimony, and however many times I hear it, I don't get to this point where I just think there's nothing we can do. It's a redundant verbal exercise. I think there are many things we can do, and I think every time any of us speak up to the issue, it helps move it in this coun-

try, and it might even help the President get more conviction on enforcement of our immigration laws.

Firstly, Mr. Stana, you testified about 2,300 employers have used the Basic Pilot Program. I would assume—is that in this calendar year basically?

Mr. STANA. That's the number who are subscribed now.

Mr. KING. Okay. And—but that—and I notice as I looked through your testimony, I didn't see—that doesn't really indicate how many hits there are or how heavy the usage might be on an overall numbers basis, whether they're large employers or small?

Mr. STANA. We can get the information for you.

Mr. KING. I'd be curious. And maybe you just have a judgment answer that would answer my curiosity, but is the software large enough? Is the technology in place well enough? Are there restrictions, the fraudulent use of documents and the DHS delays in entering the data, or is it software and technology?

Mr. STANA. If the Basic Pilot Program were to be mandatory, and it would have to expand to accommodate all the employers in the country, the millions of employers in the country, a number of things would have to be done. You know, they have to expand the technology. You have to put the number of people who actually verify the documents in the secondary steps, you have to increase that number. But you'd also have to find some different way to pay for it. Right now this is paid through the fees that are paid through applications, and when the State DMVs query the system for the checks that they make. So there's not a lot of money to expand it.

In fact, if maybe several thousand more employers were added to the 2,300, that would be the limit with the current system.

Mr. KING. Thank you, Mr. Stana. And I wonder also if the utilization goes up incrementally we'll be able to adapt to that; if we did this mandatory as a drop-dead date, then chances are we could have a system that could melt down around us?

Mr. STANA. Yeah. We'd have to be careful how quickly we expand it.

Mr. KING. Thank you. We may need some advice on that.

I turn to Mr. Jeffrey, and I think you brought some information before this Committee that has been something that I hadn't at least noticed that I had seen before in my piles of paperwork, and I'd look at it from a bit different perspective.

Although you sorted this list, or at least brought the largest number of dollars up to the top, the Illinois employer with $524 million, almost $525 million in—I call them "no match wages"—out of 5,454,000,000 so 9.62 percent. And then as I look down through on that percentage on the right-hand column I come quickly to item No. 13, California employer, almost 71 percent of those employees are no match. One might presume that the vast majority of those 71 percent are illegals. And then I go to employer No. 22, page D2, 70.76 percent no match, $86 million out of $121 million. Next page over, D3 toward the bottom, 75.53 percent of those wages paid out in no match.

We're in a technology day and age, and how hard would it be to go to a company like that and step in and apply employer sanctions given the odds that if 7 out of 10 or 7½ out of 10 that are there right now as we speak are there illegally?

Mr. JEFFREY. I think Congress ought to ask Homeland Secretary Chertoff why he isn't sending ICE agents to these companies, why he isn't demanding the names and why he isn't sending ICE agents. I think it's just simply inexplicable. You know, if you look at—there's the argument that these employers might be accidentally hiring these people who they don't know their Social Security number. Five years in a row, 131,991 W-2s they file with the Federal Government that are not accurate. I don't believe it.

But there's another reason I'm skeptical about it, if you look at the reports of the Social Security Administration's Inspector General, and that the Government Accountability Office has done, about this Earning Suspense File. Although the bad W-2s are focused in particular industries that are somewhat predictable, they're also focused in certain States, particularly in California and Texas and Illinois. And apparently not all employers in those industries in which the bad W-2s are concentrated are problem employers for filing these bad W-2s. It seems that there are particular employers that tend to do it, tend to do it repeatedly.

And then there are other things, Congressman, that the Government Accountability Office talks about. For example, many employers, as I think the Chairman mentioned, file multiple W-2s in the same year with the same Social Security number. Can they not pick that up?

So I think we need to have, we need to have a Federal investigative authority that goes to these corporations on this list, finds out exactly what's going on, and if the evidence shows that the corporate managers have knowingly hired illegal aliens, if that's what the evidence shows, then the law should be brought to bear against them.

Mr. KING. $11,000 per employee at the max.

Mr. JEFFREY. Whatever the law says, it should be brought to bear against them.

Mr. KING. Thank you, Mr. Jeffrey, appreciate your testimony.

I yield back. Thank you, Mr. Chairman.

Mr. HOSTETTLER. The Chair now recognizes the gentleman from California, Mr. Gallegly, for 5 minutes.

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

Ms. Gordon, I tell you, I couldn't agree with you more on, on your statement that employer sanctions under IRCA have failed dramatically, failed, I guess, as much as anything could fail. My interpretation of that is, in the absence of—it's not very easy for something to succeed if you've never implemented it.

One of the things that's happened—and I hope I understood your testimony correctly—that all too often legal immigrants or American citizens sometimes get painted with the same brush as illegals on the job site. Would you say that's not correct?

Ms. GORDON. I would say that's partially correct, although my point was that when wages go down because of unfair competition, they are affected equally.

Mr. GALLEGLY. Would you say the best way to deal with that as an officer of the court and as an advocate of the rule of law, that we should enforce the law and aggressively remove all of those that have no legal right to be in this country under the employer sanctions law that are working here illegally?

Ms. GORDON. As an officer of the court and an advocate dedicated to the rule of law, I would say that a focus on workplace rights enforcement is the best way to ensure that the rule of law is respected——

Mr. GALLEGLY. Meaning remove them from their jobs?

Ms. GORDON. No. Meaning enforce the minimum wage, enforce basic health and safety protections, therefore remove the incentive for employers to break the law with regard to these workers.

Mr. GALLEGLY. But if the workers are working there illegally, should they or should they not be removed?

Ms. GORDON. It's my opinion that the best way to deal with problems created by the presence of undocumented immigrants is to focus on the enforcement of basic workplace laws, that a focus on removal——

Mr. GALLEGLY. Meaning——

Ms. GORDON. —a focus on bringing immigration enforcement into the workplace, inevitably undermines the very goals as intended to protect——

Mr. GALLEGLY. If someone is driving 100 miles an hour down the freeway, should you stop that person and tell them not to drive 100 miles an hour anymore?

Ms. GORDON. If we're just talking about the freeway, I would 100 percent——

Mr. GALLEGLY. If they are working illegally, should they be denied access to work, continue to work illegally?

Ms. GORDON. It would be my point that if that is your ultimate goal, the way to go about it is not through employer sanctions.

Mr. GALLEGLY. No. Ma'am, if you'd please just answer the question. Do you believe that someone that is working illegally in this country under our laws, should they or should they not be denied the right to work? Yes or no.

Ms. GORDON. I would say that if that is the goal that you seek——

Mr. GALLEGLY. Obviously, the——

Ms. GORDON. —there's only one way to achieve it.

Mr. GALLEGLY. I wish—I guess I'm not articulate enough to get a straight answer, and my time is expired, and I can't get a simple yes or no. Those are difficult answers. I yield back.

Mr. HOSTETTLER. Thank the gentleman.

The Chair now recognizes the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

Mr. GALLEGLY. Is that correct? Did my time never start? I just thought it was taking me longer to get a yes or no answer than was necessary. Could I have a couple of minutes, because my time really didn't expire?

Mr. HOSTETTLER. I believe so. I saw the red light. I apologize to the gentleman from California, and the gentleman is recognized.

Mr. GALLEGLY. Maybe Ms. Gordon was pushing other buttons over there. [Laughter.]

Mr. Jeffrey, we understand—and maybe you could correct me if I'm wrong—that according to the Social Security service there is somewhere in excess of 10 million Social Security cards that are in

use today where the name and the number does not match. Are you aware of that number?

Mr. JEFFREY. Social Security, I am not, sir.

Mr. GALLEGLY. Well, according to the Social Security service, my staff has received information that they do have in excess of 10 million Social Security cards where the name and number does not match, which means that there is an inconsistency at best, knowing that there is a large percentage of those are likely counterfeit or not legitimate cards. And as I believe it was Mr. King mentioned, some employers that have as many as 70 percent of the Social Security numbers that they're using that are not matched.

Would it not be a fairly simple process—or maybe Mr. Stana could better answer this—that the Social Security service advise the employers? At one time I understand they were doing this aggressively, but for some reason just in the middle of the night this procedure stopped.

Mr. Stana, maybe you would be the one to answer. Why could they not advise the employer that we have a list of names and numbers that don't match? You have 10 days to send us the numbers to see if maybe it was a typo or something, and in the absence of being able to clarify it, you're notified to terminate that employee immediately.

Mr. STANA. Well, they should be doing that as part of the I-9 investigation process.

Mr. GALLEGLY. Are they doing that?

Mr. STANA. I don't know how well they're doing it. They should be, they should be doing that.

Mr. GALLEGLY. Could you get a report back to this Committee letting us know what the status is on that, how many notification letters went out in the last 12 months. I'd also like to know, out of that 10 million last year, how many people were deported as a result of their illegal status working in the country?

Mr. STANA. Okay.

Mr. GALLEGLY. Mr. Chairman, that probably used my full 5 minutes.

Mr. HOSTETTLER. I thank the gentleman.

The Chair now recognizes the gentleman from Texas for 5 minutes, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

Professor Gordon, I appreciate your being here today, and obviously you're here because of some expertise and your training and background. So I'll ask you, in your opinion, should illegal aliens be hired to work in the United States?

Ms. GORDON. In my opinion, the United States has a very complicated relationship with undocumented immigration, on the one hand inviting it in many ways——

Mr. GOHMERT. Professor Gordon, pardon my judicial background, but I asked you a direct question. I asked, in your opinion should illegal aliens be hired in the United States to work? Yes or no. If you cannot answer, then say, "I cannot answer." If you can, then answer yes or no.

Ms. GORDON. If the question is what does the law permit, the law——

Mr. GOHMERT. The question was, in your opinion should illegal aliens be hired in the United States, yes or no? In your opinion, please answer.

Ms. GORDON. My opinion is it's against the law.

Mr. GOHMERT. In your opinion, should illegal aliens be hired in the United States?

Ms. GORDON. In my opinion it's against the law and it's too complicated a question for me to answer with a yes or no.

Mr. GOHMERT. Okay. So you know you're discounting everything that you have said by being unable to answer a direct question. Do you realize your credibility is shot when you cannot answer a direct question?

Ms. GORDON. With all due——

Mr. GOHMERT. Is it too complicated for you to answer? It's a very simple question. In your opinion, in your opinion, should illegal aliens be hired in the United States?

Ms. JACKSON LEE. Mr. Chairman?

Mr. GOHMERT. And that means if there are exceptions, the answer would be yes. If there are not, then you can say no, but you're saying it's too complicated for you to answer. Is that correct?

Ms. GORDON. I'm saying the situation that has led to the immigration situation we are in is a very complicated one, and if you give me the time I would be very glad to give you an answer.

Mr. GOHMERT. I gave you the time. I've given you a great deal of my time to answer yes or no. You've been unsuccessful, and as far as to this individual on this Committee, you have blown your credibility because you cannot——

Ms. JACKSON LEE. Mr. Chairman, Mr. Chairman, I think the witness should be given the time to answer the gentleman's question.

Mr. GOHMERT. I did not yield, and I have a right to have a question——

Ms. JACKSON LEE. I understand, but——

Mr. GOHMERT. —answered and it was——

Ms. JACKSON LEE. —abuse of witnesses is—seems to be the trade of this Committee, and I don't think this witness should be abused.

Mr. HOSTETTLER. The time belongs to the gentleman from Texas.

Mr. GOHMERT. I would point out to the Chairman that this questioner is being abused by saying that I'm abusive. So all I was trying to get was a rather straightforward answer, yes or no, and I——

Ms. WATERS. Well, she said she wouldn't give it to you, so you're badgering her. [Laughter.]

Mr. HOSTETTLER. The gentleman yields to the gentleman—the gentleman's time——

Mr. GOHMERT. Obviously, I'm being badgered because I tried to get a yes or no answer, and I appreciate the condemnation when I can't get an answer.

But please know, when you ask a direct question, I will support you in trying to get a direct answer——

Ms. WATERS. If the gentleman will yield, I will——

Mr. GOHMERT. —because I have that much respect for you and the process.

Ms. WATERS. But if you can't get it, you can't make her give it to you.

Mr. HOSTETTLER. The time belongs to the gentleman from Texas. The time belongs to the gentleman from Texas.

Ms. WATERS. There is a point that you badger.

Mr. GOHMERT. Thank you very much, Mr. Chairman.

All right. Now then, let me see if I can get a question answered. Mr. Stana, if I said 2,000 Border Patrol agents hired today and 1,000 employer enforcement agents hired this very day, how long would they be able—before they would be able to actually start working in their respective areas?

Mr. STANA. For the Border Patrol agents, I believe that's about—if you hired them today and they passed all the physicals and the other checks, the training itself would be, say, 3 to 4 months. Interior, roughly the same amount of time.

Mr. GOHMERT. Thank you. I'm curious. I'm asking about the database that ICE has—of course going back to the INS days—what would you say the status of the database is? Is it good? I keep hearing reports from individuals that it is not what it should be, some bad information that's never been corrected. What's your opinion?

Mr. STANA. Within the last year or so, they've transferred their data into the former, the Legacy Customs text system. So the INS data is beginning to go away. And that's why when you look at charts like the ones you see here with the lines going down, the general trend is the same, but trying to get the exact numbers requires some interpretation.

The old INS data had some difficulties, and we've reported on that before.

Mr. GOHMERT. Thank you. And just so that I can explain myself, when you're asking questions that will give you answers about a witness's credibility, then it is important to find out what that witness thinks about a given area. And the only badgering of a witness occurs when the answer is forthcoming, but never in judicial proceedings is it badgering a witness to continue to get an answer, a direct answer to a direct question. It's only seeking credibility information, and I got the credibility information.

Ms. JACKSON LEE. Would the gentleman yield for a moment for an inquiry?

Mr. GOHMERT. My time has expired.

Mr. HOSTETTLER. The gentleman's time has expired. The Chair now recognizes the gentleman from Arizona for 5 minutes.

Mr. FLAKE. I thank the Chairman.

Mr. Hampe, with regard to the '86 law, you had a hand in writing that I understand.

Mr. HAMPE. Yes.

Mr. FLAKE. Was there a thought at that time that we would perhaps need additional workers that weren't in the country and weren't part of the amnesty that was given at that time? Why wasn't that written into the law, some kind of process for additional worker visas beyond what we already have?

Mr. HAMPE. Congressman, it certainly was, it was probably the most difficult issue that caused IRCA to pend for three Congresses before it was enacted. And the ultimate version—or let me step back. The reason IRCA—the principal reason IRCA was not enacted in the 98th Congress was the existence of competing guest

worker systems in the Senate and House bills, and the Senate bill had a very generous agricultural guest worker system that was not acceptable to the House. And so when IRCA was finally enacted in the 99th Congress, the solution was the SAW program, which was sort of an amnesty in the agricultural sector.

So there was an awful lot of attention paid back in the '80's to temporary guest worker issues. It proved to be very complicated, and you know, I think there was an uncertain result as to did SAW, did the SAW program satisfy those needs?

Mr. FLAKE. Well, given the fact that we have anywhere between 10 and 15 million illegals here now, it would suggest that maybe there wasn't a sufficient program for new flows of legal workers.

Just along those lines, does it follow that any, any solution we find to the current crisis, if we want to return to the rule of law and actually enforce what we have, what does history suggest that we need to recognize in terms of the need to provide for the flow of additional workers?

Mr. HAMPE. That's a very good question. I think I would flip it just a little bit and say political history suggests to me that you probably will not be able to enact a large-scale guest worker program without the assurances that either employer sanctions or something like it will ensure that the entire flow from this point forward is lawful. Otherwise, many would view another guest worker program as simply a magnet for yet again more unauthorized migration.

Mr. FLAKE. I could not agree more, and that is why the legislation that we've proffered already has the enforcement, but it also recognizes we're going to need significantly more workers than we have right now, and it's just, it's unreasonable to enforce a law that says we're done, we don't need any more new workers, like we did essentially in 1986. I would suggest that's why we've had such a problem here in terms of legal flows, we simply didn't recognize we'll need more workers, and I don't think that we ought to make that mistake again.

I appreciate the time.

Mr. HOSTETTLER. I thank the gentleman.

The Chair now informs the Subcommittee that we'll go to a second round of questions. I myself have several more questions.

First of all, before I begin my questions, I want to refer to a comment made by you, Mr. Stana, that was so on point, and I know sometimes I forget that I want to definitely give a supportive voice of this entire Subcommittee and the entire Congress. You talked about a, "dispirited attitude on the part of ICE agents" in a quote earlier. While we talk about policy in this Subcommittee, and resources, we all uniformly in a bipartisan fashion support and are very appreciative of the hard work that our ICE agents, our folks at CBP and ICE do for our national security and enforcing the law. We are very much appreciative of them and do not in any way wish to downplay the importance of the work they do.

That being said, Mr. Hampe, I appreciate your written testimony. It gives a very interesting and succinct history of the issue of employer sanctions, especially with regard to the work of the Select Commission on Immigration Policy Reform in 1981, and the fact that, "The critical vote cast by the Select Commission was its

narrow recommendation, 8–7, of a more reliable mechanism to identify persons authorized to work in the United States, such as a counterfeit-resistant Social Security card." You go on to recount some of the testimony, some of the discussion by Senator Simpson, when he said, "There is no slippery slope to a national ID card or a national ID system in this bill. This bill prohibits it. If a national ID system emerges, it will only occur because we have taken deliberate specific steps toward creating it. I will oppose those steps."

Now, if you will humor me, the American Heritage Dictionary, Second College Edition, defines the phrase "ID card" as "A card, often bearing a photograph, that gives identifying data"—if I can editorialize, a Social Security number—"as name, age or organizational membership about an individual."

Would you essentially agree with that definition, that an ID card is a card bearing—often, not always, but often bearing a photograph, identifying data as name, age or organizational membership about an individual?

Mr. HAMPE. A lawyer never quibbles with a dictionary.

Mr. HOSTETTLER. I appreciate it. Secondly, if that card was issued by a national government, would you not suggest that that would be a national ID card?

Mr. HAMPE. Certainly.

Mr. HOSTETTLER. Thank you. You also speak in your written testimony about—and you elaborate on this very well—the fact that after the notion of true identity fraud became the greatest to users of the Basic Pilot Program that employers in the—I believe it was meat packing industry—asked for access to the database of employees whom the INS suspected of committing identity fraud so that the employers could deny them employment.

Could you elaborate on that and maybe suggest what we can do to reform the Basic Pilot Program to allow such access?

Mr. HAMPE. Yes, Mr. Chairman. I'll be happy to. And I believe the GAO testimony referred to that present problem in the Basic Pilot system right now, which is it detects invalid Social Security numbers, and it detects mismatches between a name and a number. But if someone has engaged in identity theft and has a valid name matching a valid number, then the Basic Pilot Program, at the moment, cannot detect such an employee.

The SSA and the legacy INS, back when I was very involved in this issue, said that they had certain indicators they came up with that suggested the existence of identity fraud, and they were two addresses—address changes—two addresses for the same Social Security number. A variety of other factors.

But they weren't absolutes, but when you stacked all the factors up, they allowed the INS back then to decide that it was worth issuing interview letters to individuals meeting this profile in the meat packing industry, which, in 1999 and 2000, was the subject of an enforcement action specific to that industry.

So the meat packing industry, which is one of the principal industry participants in Basic Pilot, said we want to keep unauthorized aliens out of our industry, we think that's the thing to do for a variety of reasons. Give us this opportunity to use Basic Pilot and screen them out at the time of employment—at the time of initial

employment, and the Immigration Service said, "that's too complicated, and we can't."

I think pursuing that—Senators Hagel and Roberts actually introduced a bill that never went anywhere—but that directed the Immigration Service to do so, and I think it's something that's certainly worth exploring now because that is the Achilles heel of the Basic Pilot Program: identity theft linked to the Social Security number.

Mr. HOSTETTLER. Thank you. Mr. Jeffrey, if I can find the Statement that you made with regard to an IG—Social Security Administration IG report. When talking about barriers between the Social Security Agency—Administration—and the Department of Homeland Security, you say, "furthermore, we continue to believe that SSA should seek legislative authority to remove barriers that would allow the agency to share information regarding chronic problems with DHS—chronic problem employers with DHS."

Could you elaborate on that? I know we've talked a lot about the numbers and the high numbers by some employers. Could you just elaborate on that type of work?

Mr. JEFFREY. Right, Mr. Chairman. I believe that I was quoting from the Social Security Administration's Inspector General report that was published in April about misuse of Social Security numbers in the agricultural and service and some other industries.

But I wrote a piece a few weeks ago about the fact that the Social Security Administration Inspector General had discovered a security guard company, based in California, that in tax year 2001, had 49 percent of its W-2 forms dumped into this Earning Suspense File because the Social Security Administration could not match them up to a taxpayer. And I asked the Inspector General of the Social Security Administration if they informed the government of the State of California, if they had notified the Department of Homeland Security about this security guard company, and they told me, in response, that they believed that, with some exceptions—and my understanding of the key exception was in the context of a criminal investigation—but with some exceptions that section 6103 of the Internal Revenue Code prevented them from sharing that information.

So I believe that what the Inspector General is referencing in that April report that I quoted there was this wall that they think prevents the Social Security Administration, which knows the identity of these companies that are filing all these bad W-2s, from giving that information to the Department of Homeland Security.

To me, it's analogous to the wall of separation we had between counterintelligence investigators who couldn't hand over information they got on FISA warrants to criminal investigators before the PATRIOT Act was passed.

I think it's a similar problem, if it is, in fact, this section of the IRS code that prevents this information from being passed on. I think that part of the code should be amended.

I think that the Social Security Administration should actually be statutorily mandated to routinely and regularly pass on this information to the Department of Homeland Security.

Mr. HOSTETTLER. Thank you, sir. The Chair now recognizes the gentlelady from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Let me as well acknowledge my good friend from Texas, who happens to be a jurist in his former life. Maybe he still is, and so when he poses the question to a witness and begins to analyze credibility, I believe that he is somewhat in the courtroom. And I don't know whether credibility can be based upon whether you agree or disagree with the witness. But I will say that another legal theory that you would use in the courtroom, a lawyer would rise and say, asked and answered.

Ms. Gordon was asked, and she answered it. She was asked and she answered it. So I hope that we can apply ourselves equally and fairly to a number of legal guidelines when it comes to our mutual witnesses, and I do understand the frustration that many of us sometimes engaging with our witnesses.

But in any event, let me proceed by suggesting, Mr. Jeffrey, I may, in fact, agree with you a lot to the extent that we need more resources. And so I pose to you this question.

I notice—I'm not sure if you've said this, but immigration seems to find its way to the southern border, where Texas is, and it seems to be where we—as far as I'm concerned—we have been too heavily weighted to immigrants who happen to come from the southern border and make it only that issue.

I don't think we've found one terrorist amongst the Hispanic population that's come across the border that may be considered undocumented aliens working in various places around the nation—whether it's hotels, hospitals, or in the agricultural areas.

Not to say that I am either reckless or ignorant of the fact that we have to be secure on our borders, but I think it's important to note that when we talk about reducing the number of undocumented aliens, and that helps fight the War on Terrorism, frankly, I believe that the War on Terrorism is distinctive. It requires technology, intelligence. It requires keeping the terrorists away from our respective countries. So I would try to get you to try to—if you're saying something that employer sanctions have something to do with terrorism, I'd appreciate the opportunity for you to clarify.

I'm going to ask all my questions, and then I'll yield to you all.

Mr. Hampe, I don't think you are clear enough—I'm not going to go into ask and answered—but I don't think you were clear enough to give me guidance on getting the guys who are perpetrating the illegal documents. I want some legal guidance from you. You've obviously dealt with this issue, both professionally, and I sense that you're a little sensitive to taking a hammer to employers, the business community, and you're saying these guys are victims because they're getting all these random documents.

So if you would guide me a little bit more.

Ms. Gordon, I understand what you're saying, and I'd like you to explore it more. And that is, I understand you to say—you're not answering the question on whether there should be illegal immigrants—I'll say that I think there should be a circumstance where we document those who are here illegally. That will certainly part the sheaves, if you will. That will separate the wolves from the sheep. You'll know who they are. You put them in line to get legalization, and you'll have an answer. I hope people will look at the Save America Comprehensive Immigration bill that I have that

deals with that aspect; that fixes a lot of broken system; protects American jobs; gets more resources for the border.

But help us understand more what you're saying by your words of suggesting that going after the illegal immigrant in the workplace is not going to help American jobs. It's not going to help employers stop doing what they're doing. If you treat the illegal immigrants badly by lower wages and can't go to the bathroom, they'll throw those out and get the next group. And so they keep coming, as I understand that may be a thrust. You may want to refine it a little better than what I've said.

And, Mr. Stana, you know, we have the oversight, but it's a shame that when we go to experts like yourself and we ask what should we be doing, and we ask for more resources, because frankly I think that's what you need—trained individuals, not throwing good money after bad. But for example, you indicated the Basic Pilot Program, you can't do it because you don't have resources.

But when we go to experts like yourself to the Department of Homeland Security, you know what you do? You turn into reticent, shy, on the wall, no comment, because you have the overall policy of a budget line item from the Administration that's cutting you off at the path. We're not going to be able to solve this problem unless experts have enough courage to say to their supervisors, I'm going to break rank. We're never going to get our hands around security, immigration unless we get the resources we need—from Customs, from ICE, from those who are on the border, from the Immigration Services that are backlogged, holding up people's documentation, 'cause they can't find the fingerprints, from the Basic Pilot Program—that's a shame. There are people who are fighting to get the standard ID program to get through the airport.

We can't do it, because we don't have enough money to do it. So you have these automatic travelers who could get that ID card. They can't get it, because there's not enough money.

So I want you to answer that question. Why you don't speak up about the resources we need so we can fight for you in the United States Congress.

If I can get Mr. Jeffrey to answer the question that I asked, and thank you, all, very much as witnesses.

Mr. JEFFREY. Congressman, I appreciate your question. I think—first, I take your point that Latin American immigrants coming to the United States looking for a job are not a terrorism threat to the United States. I think the connection is first, as I quoted, Admiral Loy did say in the Senate Intelligence Committee that al-Qaeda leaders have looked at infiltrating terrorists across the Mexican border.

Ms. JACKSON LEE. OTMs.

Mr. JEFFREY. Right. Because they think that will provide them with more operational security, i.e., the ability to operate secretly within the United States.

Also, he said in his testimony, he cited criminal enterprises that can support terrorists or terrorism, and among those he cited, if I remember correctly, were people smuggling, document forgery, and identity fraud—the sort of crimes that Mr. Hampe was talking about are precursors to illegal aliens feigning employment in the United States of America. So I believe that in order to secure the

border against the threat and the terrorists that may be infiltrating it, we need to limit the flow of people in general across the border so that the resources we have will be more effective in intercepting those malefactors.

And if the people who are coming for jobs know they're not going to get a job because the job magnets have been closed down, we can more surely know that those who are illicitly trying to cross the border are coming for an intent that is not a job, and could be harmful to the American people. And so there's the market created for the criminal activity the terrorists use that the illegal aliens also use, and there's just the sheer numbers of people coming across the border that facilitates the movement of terrorists. And, in fact, last week, I believe June 14th, in Detroit, a Federal Judge sentenced a man named Mahmoud Kourani to 4-and-a-half years in jail for material cooperation with the terrorist group Hezbollah. He was raising money for them apparently in Detroit. But the Federal Government said this man had come across the Mexican border in the trunk of a car. So we do know that people come from the Middle East and do sneak across the Mexican border, and I believe that has to be stopped.

Mr. HAMPE. Congresswoman, I think the focus on documents fraud is appropriate now because A, not enough attention is paid to it, and B, if you do shift the focus primarily to employers, you run into the conundrum of, there are a small group of employers that do do very bad things. They should be—there's no question that, you know, the full resources of the law should be used against them. And, you know, indicators such as the mismatch statistics that were displayed earlier, I think would be an advisable way to target the specific employers you'd want to go after.

But the majority of Americans are employed by large employers. The large employers tend to be more sophisticated. They do, for the most part, have very well running HR departments that handle the I-9 process in such a way that they're not going to be found liable if ICE conducts an I-9 audit.

So I think, if you were to ask, so what specifically should we do to target documents fraud, my suggestion is this: ICE should, as the legacy INS did in the 1980's and early 1990, designate a cadre of attorneys to go into U.S. Attorneys offices in the major cities. U.S. Attorneys offices have these all the time. They're called Special Assistant U.S. Attorneys, or "Specials," as the AUSAs call them, dedicated to immigration law enforcement where an ICE attorney, designated as a Special Assistant U.S. Attorney in a large U.S. Attorneys office, would prosecute specifically immigration crimes, would bring his or her expertise to that body of law that they're familiar with, the immigration crimes, and would specifically go after a priority list of crimes, including, I believe, documents fraud, with the objective being to substantially raise the price of a fraudulent Social Security card, driver's license, you know, the critical I-9 documents.

What could we do right now? I would say that's what you can do, absent some major reform in, you know, in document security.

Ms. JACKSON LEE. But performing document security is an important challenge?

Mr. HAMPE. Absolutely. It has proven to be politically very challenging. Sorry.

Ms. JACKSON LEE. Thank you. Ms. Gordon?

Ms. GORDON. Thank you, Congresswoman.

As you know, we have not admitted, as Congressman Flake said, enough immigrants to meet the demand in this country. We have jobs going begging, and we have an immigration policy that claims to bar undocumented immigrants from taking these jobs, but covertly admits them in.

It is my goal to have good jobs in this country and to have them filled by legal residents and by U.S. citizens. And I think the best means to achieve this is by immigration reform that is adequate to the demand, and then to deal with any residual of undocumented immigration through intensive and targeted enforcement of basic workplace laws.

Ms. JACKSON LEE. Okay. Mr. Stana. Thank you.

Mr. STANA. Yeah. I think you have a good point. I think the Department of Homeland Security ought to be honest about the resources it needs to do its job. Our role is to make sure that it does the best job it can with the resources it has, and we have found areas where it has been a bit wasteful in its use of resources.

As for the GAO, I'd love to have more resources than we have right now, but we've decided to hold the line in these tough budget times.

Ms. JACKSON LEE. Well, the light has been turned on in this room, Mr. Chairman. Thank you very much.

Mr. HOSTETTLER. The Chair now recognizes the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

And I do appreciate the instructional information from the gentlelady from Texas on how to question, and I completely agree questions should not be all that affected by whether we disagree or agree with an answer, and in the case like today, if I had ever gotten an answer, then I could have determined whether I agreed or disagreed.

But I would also point out that whether it's at the courtroom, the hearing room, the living room, the board room, or just in life in general, credibility is always, always an issue. And none of us should ever forget that.

Now, Mr. Stana, your testimony that you had provided in writing indicated that you believe ICE had chosen to concentrate on critical infrastructure, and I believe that you have talked about that some. So I would ask you, and then I'll follow with others, but in your opinion, what are the three most important things we could do with our money and our resources to address the problem? You get my question. You said we had chosen to concentrate on critical infrastructure. What three do you think would be most important to concentrate on?

Mr. STANA. Within critical infrastructure, I would—

Mr. GOHMERT. Well, just in anywhere.

Mr. STANA. Oh, anywhere?

Mr. GOHMERT. Anywhere.

Mr. STANA. In homeland security or in worksite enforcement?

Mr. GOHMERT. Anywhere you feel like would be most helpful to concentrate resources.

Mr. STANA. Let me start with worksite enforcement. I think the most critical things in worksite enforcement are these four: first, I think we need to get a better idea of how many foreign workers or illegal or legal immigrants we need to make our economy hum. Okay.

Second thing I would do is I would set up an effective worker eligibility verification system with reliable documents so that I know the people I'm hiring are eligible to work in the United States.

The third thing I would do is I'd have an effective regime of sanctions so that it would make a difference to me whether I hired—if I were an employer—whether I hired an illegal person or an unauthorized person or not. That doesn't exist right now.

And the fourth thing is I would fund a credible system of worksite enforcement with enough agents to do that job.

But I think you have to do all of those, not just one or the other.

As far as critical infrastructure, I think that nuclear facilities and airports, airplanes are two good areas. I would expand that to targets—trophy targets that we have—and there are some efforts along those lines—trophy targets meaning White House, Capitol Hill, Golden Gate Bridge. I would make sure that those were protected because they would have a devastating impact, as the Twin Towers did on 9/11, if something happened to that, on the American people.

Mr. GOHMERT. Thank you. Mr. Jeffrey, just in dealing with the issue of illegal immigration, what do you feel would be the three most important places to concentrate our resources?

Mr. JEFFREY. I think Mr. Stana has some good ideas. I think that Congress is doing the right thing by going forward and fully funding the new ICE agents that were authorized in the 9/11 reform bill. It may turn out that there needs to be even more—it may turn out that there needs to be very strict—a very strict mandate from Congress that these agents are actually deployed to worksite enforcement. And I accept the argument of the people at ICE that they want to concentrate first on critical infrastructure.

But considering that we have a $2.6 trillion Federal budget, and my view, as a conservative, there's a great many things this Government is spending money on that it doesn't need to spend money on, that the Constitution does not mandate that it spend money on, I believe this is such a priority that there shouldn't be, you know, penny ante budget restrictions on what it takes to make sure that we enforce the immigration law.

Mr. GOHMERT. Okay. Mr. Hampe?

Mr. HAMPE. I would agree with Mr. Stana's list, but would make one amendment to it, and that is in 1994 the Jordan Commission recommended that the best way to obtain a secure worker verification system is to come up with something like Basic Pilot. They had envisioned more than just a pilot.

I think that makes a lot of sense. I think expanding its effectiveness, you know, the politics of making it mandatory are uncertain; but certainly making Basic Pilot capable of addressing queries from most of the U.S. employers and making it effective enough so that it can give an employer a heads up on whether an identity theft

situation is present would be an extremely important item to add to the agenda.

Mr. GOHMERT. Thank you. I yield back my time.

Mr. HOSTETTLER. The Chairman recognizes the gentlelady from California, Ms. Waters, for 5 minutes.

Ms. WATERS. Thank you very much. There was a little bit of a discussion here with Ms. Gordon about a particular question that was asked by my colleague that she did not answer to his satisfaction, and while I recognize that Members would like to have their questions answered, we can't make anyone answer anything.

But I want to say to Ms. Gordon that one of the problems we have with this issue is a failure to deal with it head on simply because it's too painful. Yes, there are problems with immigration in this country, and while we would like to have some humane answers, the fact of the matter is we have too much illegal immigration, and it does cause problems. We recognize that people are coming here because they're poor. They want to have opportunity. They want to be able to have a decent quality of life.

However, we cannot excuse the illegal immigration and somehow create a sophisticated argument that talks about how we must target the employer for better pay and more humane work policies as a response to the illegal immigration. That just doesn't wash.

The fact of the matter is this President said that he would put resources in the budget for 2,000 more border guards, which he did not do, which we are trying to force him to do, and that's not enough. We need to recognize there's a difference between legal immigration and illegal immigration.

People who are here legally should be treated as American citizens. They should have a right to work and to earn a living. People that are here as illegal immigrants must be dealt with, and hopefully in the most humane ways.

I believe that employers should receive sanctions. They should be real, and they should be enforced.

People who've been in the United States for some period of time under certain conditions, we should recognize this as such, and there should be something that we could do. Nobody wants to talk about amnesty. It' a dirty word. It just creates all of this discussion and debate, and people use it in a political way. But I think there must be room for some kind of amnesty for people who have lived and worked here under certain conditions.

But again, Ms. Gordon, that's not to say that we should not have sanctions against employers and not anything should continue to go. And while we have a lot of jobs that we need additional workers on, there is confrontation. There is confusion and competition for jobs that we have to recognize as a problem and deal with.

Now having said that, Ms. Gordon, do you believe that we can create the kind of public policy that will recognize all of these complications and do the right thing by those immigrants who are getting here by any means necessary, employers who need to have some sanctions, people who need to be recognized as having lived and worked here for some period of time that should be allowed some amnesty and that this not have an either or, but some kind of public policy that recognizes all of these difficulties and complications?

Ms. GORDON. I do believe that such a public policy is possible. And I think as you point out, Congresswoman, an important part of that is legalization and I do think that it is one of those rare confluences of interests across the spectrum here about making sure that jobs are available for U.S. workers. From my 18 years of experience working on the ground in the industries and with the employers that hire those workers—the small underground economy employers, the only thing that they respond to is consistent targeted enforcement that is brought about by the workers themselves. And the only way those workers are going to come forward is if they know they can enforce all the laws the employer is breaking—the wage and hour laws, the health and safety laws, and so on—by safely going to the Government to report them.

What we're talking about here is competition for wages and working conditions. That's what's at the core of everything everybody has said.

Ms. WATERS. Okay. And I understand that, and I have to interrupt you here for a moment, because my time is going to run out and I have a great appreciation for that. But let me tell you where you must examine your argument.

You must examine the argument that says someone who's here illegally in the first place has a right to go and challenge anybody about the conditions of the workplace. That argument won't fly in this public policy making that we have to do.

I want to do something for workers who have been here and who deserve the opportunity to petition even this Government to say, you know, my children were born here; I've been here for so many years. I own a house. I pay taxes. And I want to support the immigrant that falls in a certain category.

But when you say that somebody who came across the border yesterday, goes and works on a job, does not like the pay, does not like the fact that they don't have certain benefits, can now go and charge the employer with not having treated them right, something is wrong with that argument, and I want you to think about it and think about how to, you know, come up with other ways by which we can be honest, have some integrity in our public policy making, and do the right thing.

Mr. HOSTETTLER. The gentlelady's time has expired. I thank the gentlelady.

The Chair now wishes to thank and commend the members of the panel for being here—for your very important contribution to this discussion. And the business before the Subcommittee completed—

Ms. JACKSON LEE. Mr. Chairman, may I have unanimous consent just to thank the witnesses as well because it's been a feisty hearing, and I want to thank them. We really appreciate you coming forward, and I just say to Mr. Jeffrey just a sentence: that intelligence is part of having pointed out the indicted gentleman in Detroit, and so it's not just resources and going down to the border, but intelligence will help separate the illegal immigrants from the OTMs, or others that might come for terrorist activities. When I say intelligence, the intelligence gathering opportunities of this nation.

But I thank, you, and I'd like to thank the witnesses as well.

Mr. HOSTETTLER. I thank the gentlelady.
Ms. JACKSON LEE. Thank you.
Mr. HOSTETTLER. Without objection, the hearing is adjourned.
[Whereupon, at 4:20 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, we have a real problem with the illegal entry of aliens into the United States and with employers illegally hiring such aliens. With the lure of a job and a better life, more and more aliens illegally come across American borders every day. As it stands, the current law requires prospective employees to provide employers with specified documentation to prove that they have a legal resident status. However, illegal aliens have easy accessibility to fraudulent documentation to prove that they are legal residents. Therefore, this requirement needs to be strongly enforced by the overseeing agencies—the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE). But this is not being done.

Mr. Chairman, workplace enforcement and employer sanctions are dysfunctional. There is a huge problem with the employment of illegal aliens in this country and neither DHS nor ICE has made this problem a high priority. And with such lax enforcement by both agencies, there is no incentive for employers to stop hiring illegal immigrants, or for aliens to stop coming to America illegally.

Also, with employers not being penalized for hiring illegal immigrants, illegal immigrants are being exploited at the workplace. They do not belong to unions out of fear of being fired; they consistently receive extremely low wages, and usually work in unsanitary or unsafe conditions. With such little enforcement at the workplace, the enforcement of immigration law is put into the employers' hands, leaving illegal aliens vulnerable to exploitation and abuse.

Mr. Chairman, hopefully today we can explore options to effectively prioritize workplace enforcement and employer sanctions so as to better safeguard our borders and to prevent the exploitation of illegal immigrant labor. Hopefully our witnesses today can provide some insight into this pervasive problem and come up with strategies as to how to effectively address this problem.

I yield back the balance of my time.