

Written Statement of Tyler Moran
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to the U.S. Senate Committee on the Judiciary
on Employment Verification Systems in Comprehensive Immigration Reform
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The National Immigration Law Center (NILC) is a nonpartisan national legal advocacy organization that works to protect and promote the rights of low-income immigrants and their family members. Since its inception in 1979, NILC has earned a national reputation as a leading expert on immigration law and the employment and public benefit rights of low-income immigrants. We conduct policy analysis, advocacy, and impact litigation, as well as provide training, publications, and technical assistance for a broad range of groups throughout the U.S. NILC's extensive knowledge of the complex interplay between immigrants' legal status and their rights under U.S. employment laws is an important resource for immigrant rights coalitions and community groups, as well as national advocacy groups, policymakers, attorneys and legal aid groups, workers' rights advocates, labor unions, government agencies, and the media.

NILC is encouraged by the fact that the Senate is addressing the need for comprehensive immigration reform. The renewed attention to the issue confirms our belief that there is an unstoppable momentum towards comprehensive immigration reform, which to be meaningful and effective must include legalization of currently undocumented workers. This momentum is based on the country's economic needs, the reality of a shrinking world and increased trade, demographic change, increased civic participation by immigrants, and the inherently undemocratic and unstable nature of our current immigration system. The only question is the pace and nature of the reforms to come. However, we have grave concerns with proposals that include mandatory, nationwide expansion of electronic employment verification systems, such as the Basic Pilot Program.

Summary of Problems with Vastly Expanding Electronic Employment Verification

Expansion of electronic employment verification systems is often treated as an easy solution to our immigration troubles—a no-brainer—by persons who are unfamiliar with the problems encountered by the current Basic Pilot Program and the improvements and protections that would need to be in place before such a system could be acceptably applied to all U.S. employers. Unfortunately, such a nationwide mandatory system is not yet ready for prime time. If implemented using the existing technology, procedures, and databases, the costs would be high and the results frustratingly inaccurate. In addition, an expanded system would result in dangerous privacy breaches and increased discrimination against individuals who look or sound foreign.

These are exactly the kinds of missteps that should be avoided as our nation embarks on a new chapter in its immigration policy. Faith in the current system has broken down on all sides, and one of the imperatives for a system that works is that it be able, as the 9/11 Commission said, to “deliver on its promises.” The last thing we need is a massive new program involving the entire American workforce that does not address predictable severe implementation problems.

If an expanded employment verification system must be included as a component of comprehensive immigration reform, it is critical that it be implemented in a manner that ensures accuracy of data, privacy of information, and protection from misuse.

Background

The Basic Pilot Program is an internet-based program that allows employers to electronically verify workers' employment eligibility by directly checking the records maintained by the Department of Homeland Security (DHS) and the Social Security Administration (SSA). The Basic Pilot Program is one of the three pilots created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and began operating in six states in 1997. The other two pilot programs were discontinued. However, in December 2004 Congress extended the Basic Pilot to all 50 states, and it is now available to employers who voluntarily choose to participate in the program (several employers are required to participate as a condition of litigation or penalties). According to the Government Accounting Office, there were approximately 2,300 employers that voluntarily used the Basic Pilot Program in 2004.

In creating the pilot programs in 1996, Congress required the former Immigration and Naturalization Service (INS) to have an independent evaluation conducted before they could be extended. The INS selected two firms -- the Institute for Survey Research at Temple University and Westat -- to conduct the independent evaluation. In January 2002, an evaluation of the Basic Pilot Program was issued. It found that although most employers who had volunteered to participate found the program to be effective and most workers were authorized, there were inaccuracies and outdated information in the INS databases that hindered the program. The evaluators also discovered that employers engaged in prohibited practices. For example, 45 percent of employees surveyed who contested a tentative non-confirmation were subject to pay cuts, delayed job training, and other restrictions on working, and 73 percent of employees who should have been informed of work authorization problems were not. In the end, the evaluators recommended that the Basic Pilot Program **not** be expanded to a mandatory or large-scale program, and that the INS and SSA should address the deficiencies of the program.

Additional problems cited by the report:

- The program was hindered by inaccuracies and outdated information in the INS databases;
- The program did not consistently provide timely immigration status data, which delayed the confirmation of a worker's employment authorization in one-third of the cases (note that, according to the report, the greatest burden for inaccurate and unreliable data falls on workers who are penalized by employers unsure of their work status);
- A sizeable number of workers who were not confirmed *were work authorized* but for a variety of reasons did not correct their records with the INS or SSA (42 percent of a possibly unrepresentative sample taken by the investigators were found to be work authorized compared to less than a quarter which were "most likely" unauthorized);
- Some employers surveyed did not follow the federally mandated memorandum of understanding they were required to sign as a condition of participating in the Basic Pilot;
- Participating employers engaged in prohibited employment practices, including:
 - Pre-employment screening, which not only denies the worker a job but also the opportunity to contest database inaccuracies;
 - Taking adverse employment action based on tentative nonconfirmations of employment authorization, which penalizes workers while they and the INS work to resolve database errors; and

- Failure of employers to inform workers of their rights under the program;
- Some employers compromised the privacy of workers in various ways, such as failure to safeguard access to the computer used to maintain the pilot system, including leaving passwords and instructions in plain view;
- Some employers missed deadlines required by the pilot, and failed to inform workers of their rights when the system was unable to confirm their work authorization;
- Some employers continued to employ workers despite the lack of confirmation;
- The INS and SSA were not accessible: 39 percent of employers reported that SSA never or sometimes returned their calls promptly and 43 percent reported a similar experience with INS; and
- The cost to expand the pilot program to all employers and to convert it from a voluntary to a mandatory system would exceed \$11 billion.

The *Basic Pilot Program Extension and Expansion Act*, which authorized expansion of the Basic Pilot Program to all 50 states, also required DHS to submit a report by June 2004 to the Committees on the Judiciary of the U.S. House of Representatives and the Senate. This report should have evaluated whether the problems identified by the independent evaluation of the Basic Pilot had been substantially resolved, and it should have outlined what steps the DHS was taking to resolve any outstanding problems before undertaking the expansion of the Basic Pilot program to all 50 states.

While the DHS did submit a report to Congress, it failed to adequately address the concerns laid out in the independent evaluation. Most importantly, it failed to address the explicit recommendation by the independent evaluation against expanding the Basic Pilot program into a large-scale national program until the DHS and the SSA address the inaccuracies in their databases that prevent those agencies from confirming the work authorization of many workers.

Most recently, the Government Accounting Office noted in its report, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, that although DHS has taken some steps to improve the timeliness and accuracy of information in its database, it cannot effectively assess increased program usage without information on the “costs and feasibility of ways to further reduce delays in the entry of information into DHS databases.” According to DHS staff, they may not be able to complete timely verifications if the number of employers using the Basic Pilot Program were to significantly increase.

Provisions that Must Accompany a Nationwide, Mandatory Employment Verification System

The biggest weaknesses of the current Basic Pilot Program include its lack of resources, database inaccuracy, and employer misuse of the system to discriminate against workers. In order for an expanded employment verification system to improve upon the existing Basic Pilot Program, Congress should include the following provisions –

- Any nationwide employment verification system that applies to all 5.6 million employers in the country should be implemented in stages, incrementally, with rigorous evaluation of its performance at each stage before any further expansion can take place. As recommended in the

GAO report, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, the USCIS should complete its evaluation of the Basic Pilot Program, which will assess the program's current costs, any improvements in DHS database accuracy, employers' compliance with the program, and the feasibility and costs of addressing these weaknesses;

- The employment verification system must include a secondary verification process where the employer is required to request manual verification by SSA and/or DHS if the employee chooses to contest the non-confirmation. The current system puts the burden of the secondary verification process on the employee; however, according to the GAO report, the primary reason for non-confirmations is delays in entry of employment authorization information into DHS databases. Additionally, the timeframe of 10 working days that is currently allotted to employees to contest their nonconfirmation has been inadequate. Workers have had a difficult time meeting this deadline, particularly when they need to obtain source documents to correct the discrepancy or they live in rural areas far from a local DHS office;
- The employment verification system must allow individuals to view their own records and correct any errors through an expedited process established by SSA and DHS. Even if significant resources are devoted to cleaning up the databases, it is probable that some workers will continue to experience problems which may result in denial of employment based on misinformation. We believe that all workers must be able to view their own records and have a reasonable time in which to fix inaccuracies with DHS and/or SSA;
- The employment verification system must be designed to prevent discrimination based on citizenship status and national origin. The 2003 evaluation found instances where employers were able to use the Basic Pilot program to engage in unlawful employment-related practices such as pre-screening potential employees and re-verification of status when an employee lodges a complaint or engages in organizing;
- The employment verification system must protect against abuse of the system. Specifically, it should be unlawful for employers or other third parties: 1) to use the System selectively or without authorization; 2) to use the System prior to an offer of employment; 3) to use the System to exclude certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required; 4) to use the System to deny certain employment benefits, otherwise interfere with the labor rights of employees, or any other unlawful employment practice; and 5) to take adverse action against any person, including terminating or suspending an employee who has received a tentative nonconfirmation. Finally, penalties for discriminatory practices must be included;
- The employment verification system must protect information in the database from unauthorized use or disclosure. It is critical that privacy protections be included so that the information contained in the databases is not used for non-employment verification purposes. The 2003 evaluation found several instances where employers or other non-authorized individuals gained access to the Basic Pilot Program for uses other than the designated purpose. Privacy protections and penalties for failure to comply must be included; and
- The employment verification system must require an independent assessment of the program once implemented. Reports to Congress in years two and three of the program should be

included to ensure that the program is meeting the needs of both employers and employees. Reports should specifically evaluate the accuracy of DHS and SSA databases, the privacy and confidentiality of information in the databases, and if the program has been implemented in a nondiscriminatory manner.

Analysis of Proposed Employment Verification Systems in the Secure America and Orderly Immigration Act of 2005 and the Comprehensive Enforcement and Immigration Control Act of 2005

The Secure America and Orderly Immigration Act requires the Commissioner of SSA, in consultation with DHS, to establish an Employment Eligibility Confirmation System (the “System”) that allows employers who have hired individuals under the new temporary worker program to electronically verify their identity and employment eligibility through machine-readable documents. SSA must also establish a process to require employers to conduct annual reverification of the employment eligibility of all individuals. The goal of the system is to replace the I-9 process to verify the employment eligibility of all workers. The bill incorporates important protections within the new System that we have recommended, including a secondary verification process, prohibited practices, privacy protections, and anti-discrimination protections.

The Comprehensive Enforcement and Immigration Control Act requires DHS to expand the Basic Pilot Program nationwide. Within a year of the bill’s enactment, all 5.6 million employers in the U.S. would be required to participate in the Basic Pilot. While the bill does include important confidentiality provisions, it does not provide general guidelines regarding use and misuse of the program.

Our concerns with these proposals include the following –

- Neither bill requires USCIS to finish its evaluation of the current Basic Pilot Program before further expansion. Without this information, Congress cannot effectively assess possibilities for future implementation of the program.
- Neither bill extends the amount of time that workers are given to contest a nonconfirmation of their employment eligibility beyond 10 working days, which has been inadequate.
- The Secure America and Orderly Immigration Act transfers the authority of verifying workers’ employment authorization status from DHS to SSA, which fundamentally changes SSA’s mission rendering it more like an immigration enforcement agency than an agency administering benefits.
- The Secure America and Orderly Immigration Act requires annual reverification of the employment eligibility of every worker in the U.S. Under the Basic Pilot Program, employers have used reverification of employment eligibility as a means to retaliate against workers who complain about labor conditions. This situation would likely be exacerbated with a system that requires annual reverification.
- The Secure America and Orderly Immigration Act requires a host of new information to be collected on all workers, including occupation, annual wages paid, period of employment eligibility, when a worker begins a job and when they are terminated. This information will be

warehoused in a massive database that sets the framework needed for a national ID system, which raises grave civil liberties and civil rights concerns.

- The Comprehensive Enforcement and Immigration Control Act does not provide any guidance regarding use and misuse of the program. At minimum, the bill must include a secondary verification process, anti-discrimination protections, and prohibited practices to prevent the program from being misused.

Any expansion of employment verification systems should build on the lessons learned from the current Basic Pilot Program. Put simply, DHS and SSA cannot currently administer a successful, national mandatory program. Moving forward without addressing the current deficiencies would hurt employers and employees alike without improving immigration enforcement. If Congress does move forward with such a proposal, we hope that it will consider the recommendations we have listed above.

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