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April 3, 1998

Richard A. Sloan

Director, Policy Directives and Instructions Branch

Immigration and Naturalization Service

425 I Street, NW., Room 5307

Washington, D.C. 20536

Re: Proposed Changes To Employment Verification Requirements, 63 Fed. Reg.
5287- 5314 (Feb. 2, 1998); INS No. 1890-97.

Dear Mr. Sloan:

The American Bar Association appreciates the opportunity to comment on the proposed rules and procedures concerning the reduction of acceptable employment verification documents and other changes to the employment verification requirements.

Pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the INS proposes to shorten the list of documents acceptable for verification. Newly hired individuals currently may choose from among 29 documents to establish their identity and eligibility to work in the United States. The proposed rule reduces this number approximately by half. In addition, the proposed rule clarifies and expands the circumstances under which individuals may present a receipt instead of a required document. The proposed rule also details reverification requirements and includes a proposal for a new employment eligibility reverification form (Form I-9A).

The Service proposes these changes in response to enactment of IIRIRA and its ten-year review of the employer sanctions rules. Many of the proposed changes represent the culmination of a long-term effort to reduce the number of documents acceptable for employment verification. The ABA remains concerned, however, that the proposed reduction of documents would place an unreasonable burden on U.S. citizens and authorized aliens and that changing the verification rules may contribute to confusion and generate increased levels of discrimination.

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Our principal concern is that the proposed rule goes too far in restricting the list of acceptable documents and prohibiting use of expired documents. U.S. citizens will be inconvenienced by the proposed elimination of the birth certificate, Certificate of Naturalization, and expired U.S. passports. Other workers will be inconvenienced by the elimination of the unexpired foreign passport with endorsement that indicates eligibility for employment. Although it is true that the statute does not require that these documents be accepted, the statute gives the Attorney General the power to add appropriate documents to the list proposed by Congress.

For example, it is proposed that the Certificate of Naturalization be eliminated as a "List A" document that establishes both identity and employment eligibility. There is nothing in the legislative history to give guidance as to why this document is being eliminated, although its elimination will place an undue burden on certain workers, such as older female garment workers who rely on public transportation and therefore do not have driver's licenses. These workers primarily use their Certificates of Naturalization to satisfy the I-9 requirements but will now have to expend the time and expense of taking time off from their jobs to obtain a passport or another form of identification.

Eliminating use of an expired passport will pose similar burdens. The commentary to the proposed rule states that "some employers have questioned whether an expired passport is a reliable identification document" because "a person's appearance can change a great deal in 10 years." While some people do, no doubt, change drastically in 10 years (or even a shorter period), most people remain recognizable. More important, all that the law requires of an employer is a good-faith determination that a document appears genuine and appears to relate to the individual. If it does, an employer need not concern itself with the small possibility that it has nevertheless been deceived. Not only does that small possibility *not* threaten the employer with liability, but as discussed below, IIRIRA's imposition of new penalties for fraud insures that any fraud committed by an unauthorized worker will have extremely severe consequences.

Furthermore, while it may be true, as the Service says, that accepting expired passports does not help most low income individuals, "those for whom the cost of replacement documents would be the most serious issue, because they would be unlikely to have obtained a passport in the first place," there are many exceptions even among low income individuals, and replacing an expired passport (\$85 for expedited service) involves significant cost in money, time and convenience even for middle-income people. A point of IIRIRA was to reduce unauthorized employment, *not* to make it more costly and inconvenient for the millions of authorized workers who make up, of course, the vast majority of the U.S. economy, to change jobs. Ironically, under these proposed rules, there are four documents that may establish both identity and employment authorization for a noncitizen, but only one document - an unexpired U.S. passport - would be available to a U.S. citizen.

A similar, and even more important point, can be made concerning the proposed elimination of birth certificates from the list of acceptable documents. Many U.S. citizens have no documentation of their citizenship other than a birth certificate. The commentary to the proposed rule "recognizes that the elimination of the birth certificate, in particular, may generate public comment" and that while the Service believes "that eliminating the birth certificate is consistent with Congressional intent," such elimination is not required by IIRIRA since the statute specifically permits acceptance of "other documentation found acceptable by the Attorney General."

The reason given for eliminating birth certificates as an employment document is "the lack of uniform controls among the states over the issuance of replacement birth certificates," and concerns that unauthorized aliens have "fraudulently obtained birth certificates to falsely claim U.S. citizenship and gain employment." While the states do not have "uniform" controls over issuance of birth certificates, Congress rejected proposals to impose such controls and the idea of a national identity card. State-by-state variation in the type of document commonly used to establish identity is the inevitable corollary of this rejection. Moreover, arguments that such documents must not be used to verify employment eligibility because they are vulnerable to fraud are unconvincing: all of the documents listed on the I-9 form -- including critical documents like social security cards -- are vulnerable to fraud.

Birth certificates are probably the most common method used to establish citizenship, whether to secure employment or an identity document such as a driver's license or passport. Since birth certificates will still be used to obtain acceptable identity documents, eliminating birth certificates from the list suggests a contradiction in the INS's rationale and will add another layer of inconvenience and expense to many fully eligible U.S. workers. For these reasons, the birth certificate should not be eliminated from the list of acceptable documents.

The proposed rule also unfairly hurts workers who will be unable to obtain replacement or renewal documents from the INS within the allowed time frame. Workers who have applied for a replacement document may present a receipt for the application, but the proposed rule only gives the worker 90 days in which to then present the new document. In view of current processing delays, caused in part by serious flaws in INS record keeping, this is plainly not enough time. The INS should provide no less time for the worker to present the new document than the INS requires to process and issue that document. The INS should also establish greater uniformity in issuing receipts for replacement documents in order to minimize the risk that a legal immigrant will be denied employment because an employer wrongfully accused him or her of presenting a fraudulent receipt.

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In addition, the ABA recommends that any changes in the employment verification procedures be accompanied by increased outreach efforts because any change in I-9 procedures, however minor, is likely to confuse employers. As you know, the General Accounting Office found a correlation between increased levels of discrimination and increased INS employer education activities. Thus, it appears that INS employer outreach is a contributing factor to the discrimination. In light of this information, in order not to exacerbate discrimination, we believe that such outreach efforts are most appropriately carried out by the Office of Special Counsel for Immigration Related Unfair Employment Practices, with support from the INS.

Furthermore, the INS should clarify that in allowing employers to require individuals to present required documentation "at the time of hire," the Service is permitting the documentation to be requested *after* hiring, although before the individual actually starts work. The Congress accurately recognized that the imposition of penalties for the hiring, recruiting, or referring of certain aliens could encourage employers to "play it safe" and protect themselves by refusing to hire any individuals who sound or appear "foreign" or pre-screening the employment authorization of such individuals prior to actual hire. While it is clearly the intention of the statute and regulations to prohibit such practices, use of the ambiguous phrase "at the time of hire," and even more so of the phrase "before the time of hire" in section 2741.2(c)(2), may mislead some employers and could lead to premature requests for documents and discrimination.

In addition to these major concerns, in section 274a.7, it may be appropriate to define the term "constructive knowledge." If all that is meant is that an employer acts through its agents, perhaps that should be said. Furthermore, section 274.7(c) which recognizes the good faith defense of knowingly hiring an unauthorized alien should probably be modified in two respects. It currently provides that a person "who shows good faith compliance with the employment verification requirements of Sections 274a.2 through 274a.6 shall have established a rebuttable affirmative defense" that the person or entity has not violated the Act. Good-faith reliance by an employer on a state employment agency's referral in accordance with Section 274a.8 should also be recognized as an affirmative defense. Second, section 274a.7 should be modified by dropping the word "rebuttable." If an employer has complied in good faith with the employment verification requirements, how can it have violated the Act?

In conclusion, we commend the INS for adopting a "plain English" approach to this regulation but recommend that no modifications be implemented unless the agency first assesses the rule's impact on employment discrimination and evaluates whether the procedures will place an unreasonable burden on citizens and work-authorized aliens.

Sincerely,



Robert D. Evans

To: Bob Bach

From: Yolanda Vera

RE: VIS Walk - through

Date: August 1, 1996

Bob, I apologize for getting this to you late. As you can imagine, it has been a crazy day. I spoke with Karen Miksch and Barbara Bonifas regarding our general observations after the VIS walk through. We enjoyed the visits and greatly appreciated the opportunity to see the system up close. Below are our brief comments. I hope you find them helpful. We welcome any opportunity to discuss our observations with you in greater detail.

1. Need for increased coordination between INS, EEOC and OSC.

We believe it is critical that VIS employers be better educated on anti-discrimination protections through increased coordination between INS, EEOC and OSC. We base this on the following observations:

* During the employer walk-through, we learned about the INS outreach and training efforts with employers. Current INS trainings stress employer sanctions and how to spot document fraud. Anti-discrimination provisions are not addressed. We received the impression that neither EEOC or OSC is invited to address employers at these INS trainings. Further, the employer VIS manual apparently does not provide much information regarding prohibited discriminatory employer acts.

* If an employee fails secondary verification, the INS and employers seem unclear on whether employees should be immediately laid off, should be given an opportunity to clarify any possible error without loss of pay and, if so, for how long. The INS apparently encourages the employers to immediately terminate these employees within two weeks. Yet, a significant number of employees do pass third tier verification. In non-rush hour traffic, it took us approximately 1 1/2 hours to go from our office to the Van's, Inc. headquarters by car. Given the inadequate public transportation in Los Angeles, it is reasonable to give employees a grace period during which they can clarify any records. Employers could use both INS assurance regarding how much time they have before sanctions will be imposed and they could use OSC guidance regarding anti-discrimination provisions. See, for example, Mountain High Knitting, Inc. v. Reno, 51 F.3d 216 (9th Cir. 1995) (Court finds an employer did not have to automatically put employees on leave when the employer received an INS notice that the employee's employment eligibility documents forms did not match INS records).

* During the INS walk-through, the INS staff demonstrated the system with three real employer requests. In three of the three requests, the employers were committing document abuse. The first two

employers had overdocumented the employees by requesting two documents that showed identity and employment eligibility when one document was sufficient. The third employer claimed a "mismatch" between the employee's name and documentation. However, neither the INS staff nor NILC staff could see any reason why an inconsistency was claimed. For that reason, it seemed the third employer was refusing to accept documents which reasonably appeared genuine on their face. There did not seem to be any system by which these cases are tracked as part of the study, are referred to OSC for investigation, or are flagged for employer education.

2. Need for better and simpler information for employees affected by the VIS project.

Van's provided us with copies of what it provides employees who do not pass secondary verification. The notice was written at an approximate 12th grade reading level and was difficult to understand. Further, the posters advise the employee that their employer will check their immigration status with INS, the posters really do not advise employees of any rights. The INS should create a simple more readable notice for employees who do not pass secondary verification. Further, meaningful employee educational posters could easily be created with OSC guidance and should at least provide OSC's toll-free number. Finally, given transportation problems, third tier verification would be much more accessible for affected employees by simply notifying employees of a toll free number or by allowing employees to undergo third tier verification in the local Orange County INS office rather than forcing a long commute to downtown Los Angeles.

We appreciate the opportunity to provide you with comments, Bob. We look forward to continuing our dialogue with you.

cc: K. Miksch
B. Bonifas

DRAFT**MEMORANDUM**

TO: Michael Myers
FROM: Cecilia Muñoz
Jeanne Butterfield
Matthew Finucane
JanLori Goldman
Karen Narasaki
Gregory Nojeim
RE: Verification System Pilot Programs
DATE: April 3, 1995

As you requested, the following is a summary of some general concerns related to INS implementation of an expanded Telephone Verification System (TVS) and other pilots to test the viability of worksite verification schemes. As you know, many of our organizations are strictly opposed to the creation of a major computerized system to verify work authorization, others have serious concerns about the potential implementation of such a system; we believe such proposals are unlikely to be effective in curbing the job market for unauthorized workers, and are very likely to create discrimination and to erode individual privacy.

However, since the Administration is moving forward on its pilot projects, at a minimum it should establish specific measures to ensure privacy and protect against the discriminatory behavior which such projects are likely to generate, and establish some standards for reconsideration of the merits of the overall pilot. What follows is an initial summary of recommendations thus far. They are focused on the TVS pilot; we have insufficient information about the additional pilots to be able to provide detailed recommendations on their implementation.

1. Overall Standards

- Baselines for measuring discrimination - If one of the goals of the pilot project is to assess its impact on discrimination, it is important to agree upon and establish a "baseline" which can be used to measure the extent to which the system fails to address existing and/or *exacerbates* discrimination. As you know from the employer sanctions debate, despite overwhelming evidence that the policy resulted in discrimination, supporters of sanctions used the baseline issue to diffuse criticism, arguing that, because it is difficult to distinguish sanctions-generated discrimination from "garden variety" discrimination, there was no basis for reconsidering the policy. Tests of the pilot projects should include measures

of various types of discrimination including: ways in which existing discrimination is modified; the creation of new types of discrimination which clearly result from use of the database; and the extent to which "foreign-looking" persons are treated differently at any point in the process. In addition, it may be useful to conduct tests or audits of employer behavior both before and after the system is implemented in order to assess how such behavior changed as a result of implementation.

- Purpose of testing for discriminatory impact - Consistent with the notion that there is value in testing a system before implementation occurs, the Administration must clearly establish from the outset that the purpose of such pilots is to conduct a legitimate test of the viability of the system as well as its potential impact on civil and privacy rights. Outcomes which indicate that discrimination or erosion of privacy will result should be cause to reconsider implementation of the system, rather than indications that "remedies" or "protections" should be instituted. Given the backlogs of cases at the agencies which enforce civil rights laws and the low likelihood that a claims-based system will be able to "fix" discrimination or loss of privacy engendered by a verification system, the Administration should clearly establish the principle that the creation or expansion of such problems by a verification scheme is unjustified. If the system cannot be implemented in such a way as to prevent such outcomes, it should not be implemented.

2. Use and misuse of the Verification System

- At what stage of the process does verification occur? - The employer sanctions experience and the results of the first TVS pilot suggest that, even with explicit instructions that verification take place after an employee has been hired, the temptation to verify before the hiring process is very strong, and the likelihood of and penalties for "getting caught" are minimal. The pilot program should employ vigorous employee testing using "hiring audits", monitoring of payroll records, and employer surveys in order to determine at what point in the process verification actually occurs, and the potential discriminatory impact of using the system to screen job applicants before they are hired.
- For whom is the system used? - Again, the employer sanctions experience suggests that, even with a requirement that the system be used for *all* employees, some employers single out only those who appear "suspect" because of their ethnic appearance, surnames, or accents. The pilot should include vigorous auditing to determine what kinds of differential treatment occur between employees who "appear foreign" and others. In addition, it is possible that some employers could use the system to check persons other than employees; the pilot project should include mechanisms to test for this behavior, and assess the

likelihood that a more comprehensive verification system will be able to "catch" such practices if they occur.

- Potential to monitor misuse - One of the more difficult problems with potential civil rights abuse arising from use of a verification system is the likelihood that some discriminatory behaviors will occur without being able to monitor them. For example, if an employer uses the verification system in the absence of her employees, it may be difficult to assess if she is using the system selectively to check only some employees. It would be useful for the results of the pilot project to include some acknowledgment of such discriminatory impacts for which traditional remedies will not be effective, and an assessment of the likelihood that the pilot projects will be able to identify and measure all types of discrimination which occur.
- Danger of unauthorized access to data - In addition, the creation of a single database to which employers will have easy access creates a legitimate fear that the *contents* of the database may also be accessed by unauthorized persons or entities. The pilot project should include safeguards against unauthorized access to the data, and an assessment of the dangers of abuse. To the extent possible, empirical audits, analogous to hiring audits, should be included in the pilots.

3. Secondary Verification

- Reasons for accuracy problems - The first TVS pilot demonstrated that INS needed to do secondary verification for 28% of all verifications. This figure is consistent with the use of the same database in the SAVE program for verifying eligibility for benefits. However, the first pilot provided no information as to the reasons why secondary verification was required. It would be important to know if there are certain types of statuses which are likely not to be reflected in the database, or if there are specific accuracy problems which lead to verification, such as problems with double last names, spelling errors, or other such problems.
- Persons who are determined to be ineligible - One of the more disturbing findings of the first TVS pilot are the numbers of employees who "disappeared" after they were told to contact the INS. Only a small number challenged the claim that they were unauthorized; apparently all of these were successful. INS *assumed* that the remainder were undocumented; however it is likely that a significant number of these were not. Some could have had some form of temporary status, undocumented family members, or could have been experiencing other factors which discouraged them from challenging the INS findings. The pilot project
① should provide such persons with clear notice and specific procedures to challenge the INS results, and should collect information on database problems which result in a "false positive" result.

②

*inconsistent or
biased use
of secondary verifi*

- Discrimination resulting from secondary verification - Because secondary verification is so cumbersome for employers, this procedure itself could lead to discrimination. First, employers could simply choose to fire (or not hire) persons who need secondary checks, especially if such checks do not take place in a timely manner. Second, employers could conclude that certain employees (those who appear to be immigrants, and therefore may need secondary checks) are simply too bothersome to hire. Third, as was the case with the initial TVS pilot, some employers could seek other means to verify employees needing secondary verification (one of the employers participating in the pilot contacted the Border Patrol for "answers" about employee eligibility which were unavailable from the database.) These employment practices are likely to be difficult to capture unless specific procedures to do so are included; at a minimum, efforts should be made to thoroughly assess employers' responses to secondary verification, and thorough auditing should be conducted to determine any inclination to screen out "ethnic" job applicants.

4. Accuracy of the Database

- Strict Liability - It is estimated that at least 25% of INS records are inaccurate or incomplete. It is acknowledged that SSA records also have accuracy problems. The individual right to work of a citizen or lawful resident should not be abridged under any circumstances, much less because of government records which are inaccurate. The denial of a job because of bad government records results in significant harm to the individual affected, including but not limited to lost wages. The only way to protect against such harm is to hold the government "strictly liable" for lost wages which are caused by inaccurate or incomplete government records. Otherwise, potentially millions of Americans will have no practical recourse or access to compensation for injuries suffered as a result of government conduct. If the government is to determine and authorize in each instance who may or may not work, then the government must be held responsible for its mistakes and the abridgement of one of the most fundamental of rights, the right to work.
- Individual access to data - The expansion of the pilot project should include provisions to allow individuals to have access to data which is being used to determine their eligibility to work, particularly given the strong likelihood that there will be inaccuracies in individual files. The credit reporting system provides a potential model for this procedure; persons are entitled and have access to copies of their own reports, with mechanisms to correct mistakes.

5. Other considerations

- Likelihood that the system will reach the sectors of the economy which employ undocumented workers - There are strong indications that many employers who

hire undocumented immigrants are doing so deliberately, in violation of the law. There is a strong likelihood that such employment practices will continue, and that such employers are unlikely to use a verification system, or to see its implementation as a threat. In fact, the creation of a verification system for use by employers who are already in compliance with the law could arguably provide a greater competitive advantage to employers who choose to violate the law by hiring unauthorized workers. Evaluations of the pilot project should include assessments of the likelihood that such employment practices will change in the informal sector in industries like the garment, service, and agricultural industries.

• Bias due to employer education - The GAO report on employer sanctions suggests that there is a strong correlation between the extent to which employers are well informed about how to use the system and the likelihood for discrimination. For this reason, a pilot project in which all employers are extensively trained on how to use the system may not yield accurate results to reflect how the system may be used in the "real world" when employers at best will receive a handbook without actual training on how to use the system. One of the goals of the pilot project should be to identify the behavior of employers who receive information about use of the system *without* being extensively trained.

• Validity of Pilot Results - Many of the thorniest issues likely to arise from the implementation of TVS and other pilots are the most difficult to capture through traditional testing or survey schemes. The Administration should make clear at the outset that a sample of 200 employers in a highly regulated pilot is unlikely to reflect the ultimate behaviors of larger sets of employers implementing the same project with less guidance. Ultimately, the results of this pilot are likely to do little more than establish the technical feasibility of an expanded system, rather than capture all of its potential side effects. The results of this next pilot should be used as a guide to identify issues and alternatives for future tests, not as a referendum on whether or not a nationwide system is likely to result in unwanted discrimination or loss of privacy.

7. Recommendations

After considering the range of difficulty and the variety of potential negative effects resulting from implementation of a pilot, we have a few recommendations in addition to those provided above for monitoring activities which the Administration should consider.

- Monitoring should be done by a non-governmental entity - We strongly recommend that the Administration consider working with an outside agency or agencies to conduct evaluations and assessments as part of the expanded TVS pilot. The more employers sense that a government agency, particularly one most associated with enforcement activities, is going to be asking questions and

conducting tests, the more they are likely to respond to a perceived enforcement threat. In order to best capture employer responses, monitoring, surveying and testing should be done by qualified institutions outside of government to the extent possible. The outside monitor should also help determine why some employees "disappeared" and did not go through secondary verification.

*evaluate effect
of diff. degrees
of educ. of employers*

Vary instructions to employers - Of the set of 200 employers, there should be two to three groups which get different levels of instruction from the INS. For example, one group should receive an instruction manual (the likely amount of information most employers will get if a larger system is implemented), a second group should attend group training sessions, and a third receive individualized instruction. This will help determine the extent to which employer education affects their subsequent behavior, and provide information about the level of education necessary to prevent discrimination from occurring.

- Match verification records with hiring records - We are assuming, here that the verification system will be able to track information about each call which is placed, including the employer who places the call, the identity of the employee, and the time and date of the call. By matching this information with the hiring record, you may be able to determine whether the applicant was pre-screened, or verified after the point of hire, and whether persons other than new employees are being verified.
- Conduct extensive surveys of employers - The GAO was able to determine employers own perceptions of employer sanctions through a carefully prepared survey of employers. This should assist in determining the extent to which employers understand their obligations under the system, and -- to the extent that they answer honestly -- the ways in which they use it. Surveys could provide information about whether employers adopt citizen-only hiring policies, or find secondary verification to be burdensome.
- Conduct hiring audits on the secondary verification issue - Specific testing should be conducted with testers who deliberately present the need for secondary verification. We believe this is the only way to capture information about what happens when secondary verification is called for, which may be the place at which discrimination is most likely to occur. This may provide data on the extent to which such applicants are pre-screened and then bypassed, fired, or subjected to differential treatment as a result of needing secondary verification.
- Conduct matched auditing to determine long-term effects - We believe matched pairs of testers are the most reliable way of capturing the extent to which persons who appear "foreign" are treated differently than other potential employees. While we understand that such practices may be difficult to tie specifically to the verification system, there may be differential treatment in certain aspects of

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verification, such as the point at which the applicant attests to U.S. citizenship, and the point at which applicants are asked for their A numbers. In addition, paired testing may be valuable in the *second* year of the pilot with the first 200 employers to determine the extent to which the need for secondary verification has changed their practices toward prospective employees who appear to be immigrants. If secondary verification results in employers staying away from certain job applicants, such outcomes are likely to be longer-term, and more easily captured by matched testers in subsequent years of implementation. In addition, we believe that much discrimination will occur in the context of "giving a break" to those individuals who are "obviously American." Thus, audits should include substantial numbers of "obviously American" testers who require secondary verification, have problems with their records, have their surnames reversed, and who are rejected outright by the data base.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SAN FRANCISCO DISTRICT OFFICE
901 Market Street, Suite 500
San Francisco, CA 94103
(415) 356-5100

MEMORANDUM

DT: September 13, 1996

TO: Gilbert F. Casellas, Chairman

FR: William R. Tamayo, Regional Attorney 
(415) 356-5084

RE: The Potential Impact of Immigration and Naturalization Service Enforcement Activities
on Employment Discrimination Law Enforcement
Revised Memorandum

This memorandum supersedes my memorandum of June 26, 1996 which I submitted to you on this topic.¹ It outlines various issues that were evident following the meeting of officials of the Immigration and Naturalization Service² with Susan L. McDuffie, District Director, Dennis Hayashi, Director, Office of Civil Rights, Department of Health and Human Services, and me on June 20, 1996. Per that discussion, I specifically address the legal issues involved and the impact of INS's planned "increased workplace enforcement" on EEOC's enforcement of civil rights statutes.

I. IMMIGRATION STATUS AND TITLE VII

All persons except those specifically exempted by Congress are covered by Title VII of the Civil Rights Act of 1964. All non-citizens (*including undocumented workers*) in the United States are clearly covered by Title VII. EEOC v. Tortilleria La Mejor, 758 F. Supp. 585 (E.D.

¹Due in part to the recent amendments to the Immigration and Nationality Act created by the Anti-Terrorism Bill which the President signed this summer, revisions are necessary.

²Some of those officials included Robert Bach, Director of Policy, and Thomas Schiltgen, INS San Francisco District Director.

Cal. 1991)³; see also, EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989). Despite the passage of the Immigration Reform and Control Act of 1986, which in part bars the hiring of unauthorized workers, 8 U.S.C. Sec. 1374a, "Congress did not intend [for IRCA to] amend or repeal any of the previously legislated protections of the federal labor and employment laws accorded to aliens, documented or undocumented, including the protections of Title VII." Tortilleria La Mejor, 758 F. Supp. at 593-94. In reaching its decision, the court relied on Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989) (nothing in the legislative history of IRCA suggests that Congress intended to exclude undocumented workers from the FLSA's protections) and In Re Reyes, 814 F.2d 168 (5th Cir. 1987) (despite the passage of IRCA undocumented workers were covered by the FLSA and information regarding their immigration status "was completely irrelevant"). Those cases rest upon the theory that unless undocumented employees are protected by employment and labor laws, employers would have every incentive to hire them and thus undercut the main intent of the Immigration Reform and Control Act, i.e. to remove the incentive for employers to hire undocumented workers. Patel, 704.

Remedies:

Generally, in labor and employment law matters, immigration status per se is actually not the relevant matter, but rather it is the individual's *authorization* for work that determines rights and remedies. EEOC Policy Statement on Remedies for Undocumented Aliens, April 26, 1989, No. 641 citing Local 512, Warehouse & Office Workers v. NLRB 795 F.2d 705 (9th Cir. 1986).⁴

Grandfathered employees⁵ are eligible for the full panoply of remedies as the employer would face no liability under IRCA for retaining such employees. EEOC Policy Statement, *supra*; see also NLRB General Counsel Memorandum 88-9 (1988).

³This case was litigated by the SFDO Legal Unit; plaintiff-intervenor Alicia Castrejon was represented by MALDEF, Equal Rights Advocates, and the Asian Law Caucus. I was one of the co-counsel for plaintiff-intervenor.

⁴In Local 512, decided before the passage of IRCA, the court held that undocumented workers still in the United States could obtain reinstatement and back pay. The court reasoned that the NLRB had neither the expertise nor jurisdiction to determine the immigration status of workers, and thus, as long as the employee was still in the United States, back pay would be available. (Sure-Tan v. NLRB, 467 U.S. 883 (1984) was distinguished on the ground that those employees were already outside the United States). Despite the fact that Local 512 was decided pre-IRCA, the Commission nevertheless adopted its rationale in addressing the backpay issue.

⁵Grandfather employees are those hired on or before November 6, 1986, the date of IRCA's enactment.

Compensatory and punitive damages are recoverable by all workers regardless of immigration status unless a "mixed motive" is established and affects the discrimination charged, e.g. termination, suspension.⁶ Compensatory and punitive damages are perhaps most important in cases involving sexual harassment of female immigrant workers a problem repeatedly raised to us as concerns among our stakeholders. Wages in the industries that employ large numbers of immigrants are often quite low and thus, backpay remedies are minimal.

Reinstatement and backpay remedies for an undocumented worker who is discriminatorily terminated (directly or indirectly) may be contingent upon her showing that she is authorized to work in the United States. The EEOC policy statement declares:

...[T]he Commission believes that an employer cannot be ordered by the court to pay back pay for any period of time during which an undocumented alien was discriminatorily denied work, if the employer proves that, during the period in question, it was prohibited from hiring or continuing to employ such a worker by IRCA. Of course, should the undocumented alien charging party become authorized to work, IRCA would no longer be applicable and the alien worker would be entitled to the full range of remedies.

The Commission's statement rightfully acknowledges that immigration status is not static⁷ and that a person could have a different status at the time that a remedy, i.e. backpay or reinstatement, is ordered. Consequently, the statement presumes that full relief should be sought and the matter of work authorization or immigration status addressed at a later stage.

⁶If part of the "mixed motive" finding is based on the fact that the employer was terminating the employee because she was unauthorized to work, the remedies would be limited to injunctive relief without reinstatement. At the same time, however, if the employer knew at the time of the employee's hire that she was ineligible for employment, and nevertheless hired her, the other remedies might still be available. See A.P.R.A. Fuel Oil Buyers Groups, Inc., 320 NLRB No. 53, 12/21/95 (February 16, 1996 DLR No. 32, E-12) (discussed below).

⁷Undocumented persons can gain lawful status (and authorization to work) through a variety of ways including adjustment of status to permanent residency (through a relationship to a U.S. citizen or lawful permanent resident or employment), political asylum, suspension of deportation (recently curtailed by the Anti-Terrorism Bill), waiver of exclusion (Sec. 212(c) of the Immigration and Nationality Act). (Recent amendments to the INA by the Anti-Terrorism Bill are still being analyzed by immigration practitioners and various lawsuits challenging their implementation or interpretation by the INS have been filed.) Undocumented persons can also be granted work authorization while applications for legal status are pending, while their deportation matters are being processed, and for other matters. 8 CFR §274.12a. Thus, mere lack of permanent resident, U.S. citizen, or asylum status does not render a person ineligible for the full panoply of remedies under Title VII.

The Commission's view was buttressed by EEOC v. Hacienda Hotel, supra, wherein the Ninth Circuit held that in a post-IRCA case undocumented workers were entitled to back pay despite their status, and distinguished Sure-Tan on the grounds that the aliens (1) were still in the United States and not subjected to deportation proceedings and (2) "were available for employment throughout a back pay period that could readily be calculated with certainty." id. 1517.

Additional support can be found in A.P.R.A. Fuel Oil Buyers Groups Inc., 320 NLRB No. 53, 12/21/95 (February 16, 1996 DLR No. 32, E-12). There, the NLRB held that non-grandfathered undocumented workers who had been subjected to unfair labor practices can receive backpay and reinstatement. While backpay was ordered, reinstatement was conditioned upon the workers providing the necessary work eligibility documentation under IRCA.⁸ Backpay was limited to the period from the discharge to the date of reinstatement (with compliance with IRCA) or to their failure after a reasonable time to produce proper work authorization documents.)⁹

II. RETALIATION

It is not uncommon for an employer, aware of the undocumented employee's immigration status, to threaten deportation when he/she asserts his/her labor or employment rights. The

⁸The NLRB imposed this condition, "because the Respondent knew at the time of their hire that [the workers] were ineligible for employment. In the ordinary case, when the IRCA requirements have been met, there may be no need for this additional condition. Employers, of course, will be entitled to raise questions with respect to the continued eligibility of individuals for employment. These issues, however, can only be raised under conditions that comply with the provisions of IRCA." id. fn. 39.

⁹The Board noted:

Under established Board law, "if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct." Marshall Durbin Poultry Co. 331 NLRB 68, 70 (1993) (citing, inter alia, John Cuneo, 298 NLRB 856, 856-857 (190), aff'd. in part, 39 F.3d 1312 (5th Cir. 1994). In this case, however, in view of the Respondent's knowledge of the employees' unauthorized immigration status at the time of their initial employment, the Respondent is precluded from alleging that it would have terminated them on this basis.

A.P.R.A. at fn. 44. (emphasis added).

courts have recognized that the employer's threat of deportation or his taking of steps to initiate the employee's deportation or prevent her from asserting rights is an unfair labor practice under the NLRA. Sure-Tan v. NLRB, *supra*. (employer called in the INS after employees voted for the union); see also, APRA Fuel Oil Buyers Group, *supra*. (undocumented workers fired for union activities and threatened with deportation). Similarly, if an employer calls the INS soon after a charge has been filed or a complaint made of discrimination the EEOC could and should find that Title VII's prohibition against retaliation was violated. However, that finding would have no significance if the employee cannot remain in the United States to testify about the acts supporting a finding of retaliation (or other discrimination) and the employer cannot be held accountable through the payment of damages, both compensatory and punitive.

Obviously, if a charging party is retaliated against through an employer phone call to the INS, Title VII's prohibition against retaliation and the other prohibitions against employment discrimination under Title VII, the ADA, the ADEA, and the EPA mean nothing to a charging party if the INS deports her or if the CP believes that INS will initiate deportation proceedings. Thus, in order to insure full enforcement of the civil rights laws, the INS should permanently withhold initiating deportation proceedings when the employee apprises them that a charge has been filed with the EEOC or the source of the deportation-related information arises from the retaliatory act or otherwise arises as a result of the charge being filed or discriminatory acts protested.¹⁰ This is somewhat analogous to the "fruit of the poisonous tree" exclusionary rule argument under the Fourth Amendment to the U.S. Constitution.¹¹

¹⁰If the INS obtains information independently of the employer's phone call or other conduct in retaliation, then INS could initiate deportation proceedings.

¹¹The exclusionary rule barring admission of evidence obtained in violation of the Fourth Amendment is not generally applicable to deportation hearings. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), unless the violations are egregious. *id.* 1050-51. However, Fifth Amendment due process violations may serve as a basis to lawfully suppress information gathered for deportation proceedings. *id.* 1051 citing Matter of Toro, 17 I&N Dec. 340, 343 (1980) (evidence will be excluded if the circumstances surrounding a particular arrest and interrogation would render use of the evidence obtained thereby "fundamentally unfair" and in violation of the due process requirements of the Fifth Amendment); Matter of Garcia, 17 I&N Dec. 319, 321 (BIA 198) (suppression of admission of alienage obtained after request for counsel had been repeatedly refused); and, Matter of Ramira-Cordova, No. A21 095 659 (Feb. 21, 1980) (suppression of evidence obtained as a result of a nighttime warrantless entry into the aliens' residence). For post-Lopez-Mendoza findings of Fourth amendment violations justifying suppression of evidence in deportation proceedings see, Orhorbaghe v. INS, 38 F.3d 488 (9th Cir. 1994) (INS investigator's detention because of "Nigerian-sounding" name); Gonzalez-Rivera v. INS 22 F.3d 1441 (9th Cir. 1994) (Border Patrol officers' stop of deportee solely on basis of Hispanic appearance). Arguably, information obtained by the INS as a result of the employer's retaliatory conduct against an employee seeking to assert her statutory civil rights, could constitute an egregious violation that warrants suppression of such information in a

III. THE CHILLING EFFECT

Although INS officials assert that both the INS and the EEOC "have the same objectives of making employers who violate the law pay the price", that statement alone does not necessarily reflect a common strategy. The EEOC's principal objective, i.e. **to stop discrimination and to make victims whole**, is not necessarily complemented by INS enforcement activities. In fact, the INS' pursuit of its principal enforcement objective under the Immigration and Nationality Act, i.e. to deport illegal aliens, can in certain situations serve to chill discrimination victims' abilities to assert their civil rights. If they are chilled, it would be extremely difficult if not impossible to enforce Title VII and other employment discrimination laws on behalf of an extremely vulnerable sector. **The net result would be that the INS could unwittingly serve as a tool in the hands of the employer to essentially handcuff both the EEOC and the charging parties that the law was intended to protect.** The INS officials expressed that they did not want their agency to be used in such a manner, but the steps to insure against that use must be developed.

The INS' officials proffered the idea that "staggered" or "sequential enforcement actions" wherein an industry could be targeted by the EEOC and then raided by the INS would further both agencies' interests.¹² That concept was largely based on an assumption that EEOC's "targeting" of industries is conducted in a manner similar to that of the INS wherein information about alleged violations leads to a "concerted enforcement action". We noted, however, that over 90% of EEOC charges and cases are generated by individuals walking in the door or calling because of individual experiences. Thus, EEOC relies greatly on individuals feeling free to come forward and file complaints of discrimination. Raids would have a chilling effect in sectors where workers are the most vulnerable to employer abuse and, unfortunately, where sexual harassment and other forms of discrimination continue unabated.

Consistent with the intent to stem any chilling effect, INS requests for information on CPs or respondents must be handled in a manner consistent with EEOC's regulations on confidentiality. 29 CFR Sec. 1601.22. The CPs and Respondents must be assured that the information provided to the EEOC is confidential. The authority to disclose information to the

deportation proceeding.

¹²In view of the chilling effect of raids on employees' assertion of their civil rights, there is a surreal quality to the argument that "workplace enforcement activities" or immigration raids by the INS further the law. Furthermore, INS officials have noted in the past that of the persons processed for deportation, the vast majority (70%+) are identified either through anonymous tips, through applications for immigration benefits for which the applicant is ineligible, or through border entry arrests. Raid operations are expensive and disruptive and do not necessarily or significantly increase the numbers of persons deported. Raids, however, have drawn significant media attention and community protest as the INS officials' confirmed.

INS should be exercised with caution and can be done only if it is "appropriate or necessary to the carrying out of the Commission's function under Title VII or the ADA", Sec. 1601.22. Thus, if the INS wants to know if charges have been pending against an employer targeted for a raid or other immigration enforcement, EEOC can provide that information if the purpose is to insure that the raid is not conducted while charges are pending or the EEOC matter is in litigation. The disclosure of that information would be done pursuant to the applicable provisions (restrictions) of the Privacy Act, 5 U.S.C. Sec. 552a(b)(7) (law enforcement request) and be consistent with Title VII. Disclosure of any information regarding a Charging Party not yet in deportation or exclusion proceedings could thwart the EEOC's mission and does not appear to further Title VII. I would caution that any perception by potential charging parties that the EEOC relays information to the INS - even if the INS stays deportation proceedings - would likely create a chilling effect.

IV. INSURING THE PRESENCE OF WITNESSES AND CHARGING PARTIES

INS officials discussed the possibilities of INS postponing deportation proceedings or actual deportation so that a charging party or a witness could remain in the United States until the discrimination case is resolved. That type of arrangement can already be carried out through the exercise of the INS District Director's discretion either through an Order of Supervision (requiring a person ordered deported to report to the INS on a regular basis), deferred action status (basically placing the case on low priority), or extensions of voluntary departure. These alternatives have been utilized by other parties by respondents in deportation proceedings who are involved in civil litigation or other fora to pursue their rights. INS officials referred to the Thai garment shop situation in El Monte, California to illustrate the teamwork between the Department of Labor and the INS.

This arrangement, however, should be pursued if, and only if, the INS has independently obtained information to initiate deportation proceedings. (That information must be independent of any employer retaliatory action and independent of the EEOC investigation process.)

V. INCREASED INS WORKPLACE ENFORCEMENT IN THE SAN FRANCISCO EEOC DISTRICT

INS officials unequivocally stated that "increased workplace enforcement" would incur in the near future and requested information as to how such activity might impact the District and its ability to carry out its mission. Unfortunately, some past INS activities in the geographic area¹³ covered by the SFDO have included immigration raids at worksites, homes, and streets

¹³The San Francisco District includes the geographic areas covered by the Northern and Eastern Districts of the federal courts in California. This is approximately 2/3 of California geographically (from Kern County, which includes Bakersfield, north to the Oregon border), and

in which lawsuits have been brought charging the INS with violating statutory and constitutional rights. The courts have found INS to be in violation of the law. See e.g. Int'l Molders' and Allied Workers Union Local No. 164 v. Nelson, 799 F.2d 547 (9th Cir. 1986) (granting injunction against unconstitutional raids by the INS in Northern California). See also, Aguayo v. Ilchert (N.D. Cal. 1989) (warrantless INS raids of San Francisco Mission District nightclub in which patrons were detained for several hours and not allowed to use the bathroom;). INS settled Aguayo after much publicity. One patron detained was a city commissioner and the host of a popular Latino television program. In the mid-1980's, INS, in conjunction with the local sheriffs' departments and California Highway Patrol, conducted street sweeps and raids in Parlier and Sanger, California (in the Central Valley covered by our Fresno Local Office) similar to those described in Aguayo. Lawsuits also resulted from those actions.

Regardless of the EEOC's view on the policies that drove these INS actions, civil rights and constitutional violations were alleged and their occurrences remain in the community's and our stakeholders' collective memory. SFDO has targeted sexual harassment in the agricultural industry of California as a priority for our local enforcement plans based on meetings with our stakeholders. We are steadily gaining the confidence of these communities by working through with public interest and community groups that serve this sector. SFDO recently conducted a training for farmworker advocates on sexual harassment law and SFDO intends to provide further trainings for farmworker women associations. Maintaining that working relationship requires a clear bifurcation between EEOC civil rights enforcement activities and INS enforcement activities.

VIII. OPTIONS

The INS's expressed concern about the potential impact of its activities on EEOC's enforcement and the opportunity for dialogue are appreciated. However, in order to ensure that EEOC enforcement remains unthwarted and unfettered by immigration law enforcement the following steps should be considered:

A. In matters in which deportation or exclusion proceedings or other INS enforcement matters have been initiated prior to or independent of an EEOC filed charge or investigation, the INS should adopt a nationwide policy requiring that INS District Directors grant either orders of supervision, extensions of voluntary departure, or deferred action status, to allow the charging party to pursue the case with the EEOC or with private counsel. This practice should also apply to potential witnesses to the case against whom deportation or exclusion proceedings have been initiated.

includes the Central Valley and Salinas Valley - major agricultural areas for the country. The District also includes Hawaii, American Samoa, Wake Island, Northern Mariana Islands and Guam.

B. If the INS arrests an individual for deportation or otherwise initiates deportation proceedings based on information obtained as a result of an employer respondent's retaliatory action, those proceedings must be dismissed and/or terminated and such information destroyed.¹⁴ That effort includes but is not limited to the INS moving to dismiss deportation proceedings in court and cancelling "Orders to Show Cause" for deportation. The INS, however, could initiate subsequent proceedings based on information that is independently obtained.

C. Generally, information regarding pending investigations should remain confidential. Where disclosure is necessary to prevent a raid which could create a substantial chilling effect, discretion should be exercised carefully and in a manner consistent with Title VII, the Freedom of Information Act and the Privacy Act.

These options are for further discussion and may likely be refined and amended.

CONCLUSION

The potential dilemma created by the diverse policy and enforcement interests of two governmental agencies provides interesting challenges. In devising methods to address these challenges, the protection of civil and employment rights must remain primary over enforcement of immigration laws in the workplace or work-related situations. Congress clearly stated that IRCA was never intended to under the labor, employment and civil rights of anyone. Civil rights enforcement can never be relegated to a secondary role to immigration law enforcement concerns if employers are to pay the price for their civil rights violations. An abrogation of those rights either directly or indirectly through INS-related activities would, in effect, render the employer the victor in the civil rights cases and likely chill other victims of discrimination from stepping forward to complain.

Thank you for seeking my views on this important issue. I would be more than happy to discuss this memorandum and related issues with you at your convenience.

WRT/b

cc: C. Gregory Stewart, General Counsel
Claire Gonzales, Director, OCLA
Susan L. McDuffie, District Director

¹⁴There is precedent for such an action. The Immigration Reform and Control Act's legalization ("amnesty") program required the INS to keep all matter in applications confidential and barred the INS from using that information for deportation proceedings. 8 U.S.C. 1255a(c)(5).

9-18-96 (DLR)

NEWS

*Immigration***Fourth Circuit Revives Title VII Claim Even-Though Applicant Lacked Green-Card**

By a divided vote, the U.S. Court of Appeals for the Fourth Circuit has reinstated the employment discrimination claim of a Nigerian national whose authorization to work in the United States had expired. The court held that the requirements of the 1986 Immigration Reform and Control Act do not supersede the requirements of Title VII of the 1964 Civil Rights Act (*Egbuna v. Time-Life Libraries Inc.*, CA 4, No. 95-2547, 9/13/96).

Work eligibility under IRCA is not a factor required in an employee's prima facie case under Title VII, the court said. IRCA makes it illegal to knowingly employ an unauthorized alien. According to the court, the employee's status as an undocumented worker can be raised as a legitimate reason rebutting the plaintiff's case or at the remedies stage.

A dissenting judge urged that the majority position is pointless because an alien without a green card is not qualified for employment. "I do not think that, merely because he is an alien, the immigration laws should be held subject to Title VII," said Judge Donald Russell.

Obiora Egbuna worked for Time-Life Libraries from June 1989 until April 1993, when he voluntarily resigned his job. He sought re-employment some two months later, but his authorization to work had ex-

pired during his initial period of employment. Time-Life offered to rehire him, but later withdrew the offer, citing Egbuna's supposed mishandling during he earlier tenure of a subordinate's complaint of sexual harassment against a co-worker.

Egbuna filed suit alleging that Time-Life refused to rehire him because of his cooperation with enforcement proceedings relating to the employee's sexual harassment complaint. Egbuna apparently corroborated some of the employee's charges against the co-worker.

In seeking the protections of Title VII, Egbuna relied on provisions barring discrimination against a job applicant "because he has opposed any practice" declared illegal by the legislation, or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing...."

Time-Life argued that Egbuna's claim must be cut off at the summary judgment stage because he could not be lawfully hired at a time when he lacked a valid green card.

EEOC Arguments Endorsed

Writing for the Fourth Circuit, Judge Sam J. Ervin endorsed friend-of-the-court arguments presented by the Equal Employment Opportunity Commission. Under the EEOC's approach, work authorization is not part of the prima facie case stage, but the employer may come forward with undocumented status at the second stage—as a nondiscriminatory motivation for its conduct. The applicant or employee would then be free to argue that this justification was a pretext for discrimination.

Ervin agreed that a proof scheme that would permit undocumented status to cut off a claim at the opening stage would insulate an employer based on information on which it did not rely. He found that under such a theory, Time-Life would be shielded from possible Title VII liability even if it did not know at the time that the employee was undocumented.

Noting that other courts have interpreted the Fair Labor Standards Act and the National Labor Relations Act in similar ways, Ervin compared undocumented status to after-acquired evidence as an attempted justification for a firing. It would be inappropriate, he said, for Time-Life to escape all liability for its possible Title VII violation because of Egbuna's undocumented status.

The court found that enforcement of the federal labor laws removes a possible economic incentive to hiring illegal workers and is therefore consistent with congressional intent expressed in IRCA.

Judge David C. Norton joined in the opinion. (Text of the decision appears in Section E.).

- attachment to
B. Tomayo's memo

9-18-96

(DLR)

(No. 181)

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Text

DECISION OF FOURTH CIRCUIT IN EGBUNA v. TIME-LIFE LIBRARIES

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2547

OBIORA E. EGBUNA,
*Plaintiff-Appellant,*TIME-LIFE LIBRARIES, INCORPORATED,
*Defendant-Appellee.*EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,
*Amicus Curiae.*Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-95-197)

Argued: May 8, 1996

Decided: September 13, 1996

Before RUSSELL and ERVIN, Circuit Judges, and NOR-
TON, United States District Judge for the District of South
Carolina, sitting by designation.Reversed and remanded by published opinion. Judge Ervin
wrote the majority opinion, in which Judge Norton joined.
Judge Russell wrote a dissenting opinion.

COUNSEL

ARGUED: John P. Racine, WEISSBRODT, RACIN &
MIELKE, Washington, D.C., for Appellant Samuel Alan
Murcosson, Office of General Counsel, EQUAL EMPLOY-
MENT OPPORTUNITY COMMISSION, Washington,
D.C., for Amicus Curiae. Donald R. Livingston, AKIN,
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berg, DIMUKO, GINSBERG & LIEBERMAN, P.C., Alex-
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Counsel, Gwendolyn Young Reams, Associate General Coun-
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NITY COMMISSION, Washington, D.C., for Amicus Cur-
iae. Lawrence D. Levlen, Neil J. Welch, Jr., Harry J. F.
Korrell, AKIN, GUMP, STRAUSS, HAUER & FELD,
L.L.P., Washington, D.C., for Appellee.

OPINION

ERVIN, Circuit Judge:

We must decide whether a Title VII plaintiff must demon-
strate that he is eligible to work in the United States under the
Immigration Reform and Control Act of 1986 to establish a
prima facie case of employment discrimination. We find that
work eligibility is not part of the prima facie case, and
therefore reverse the district court's summary judgment.

I.

Appellant Obiora Egbuna, a Nigerian national, was em-
ployed by appellee Time-Life Libraries ("TLLI") from June
1989 until April 1993. When Egbuna was initially hired, he
was authorized by the Immigration and Naturalization Service
("INS") to work in the United States. Harrison Jackson, a
TLLI employee whom Egbuna supervised, reported to Egbuna
that he had been sexually harassed by another employee.
Egbuna cooperated with TLLI's internal investigation and
corroborated some of Jackson's allegations. In April 1993,
Egbuna voluntarily resigned from TLLI, but sought reemploy-
ment in June 1993. By this time, Egbuna's authorization to
work in the United States had expired, and in fact had expired
before the end of his prior employment with TLLI. Although
the company apparently initially offered to rehire him, TLLI
ultimately withdrew this offer, claiming that Egbuna had not
followed company policy in reporting Jackson's complaints.

Egbuna sued TLLI, alleging that the company had refused
to rehire him because of his participation in enforcement
proceedings related to Jackson's complaints, in violation of
Title VII, 42 U.S.C. § 2000e-3(a) (1988). The district court
required Egbuna to prove that he was qualified for the position
he sought in order to show that he was a victim of discrimina-
tion. Memorandum Opinion, in Joint Appendix at 93-94 (cit-
ing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).
Because Egbuna lacked employment authorization (a "green
card"), he could not show that he was qualified, the court
found. Accordingly, the court granted summary judgment for
TLLI. Egbuna timely filed his notice of appeal; Fourth Circuit
jurisdiction thus lies under 28 U.S.C. § 1291.

II.

Summary judgments are reviewed *de novo* on appeal. *E.g.*,
Higgins v. E.I. Du Pont de Nemours & Co., 863 F.2d 1162,
1167 (4th Cir. 1988); *Felty v. Graves-Humphreys Co.*, 818
F.2d 1126, 1127-28 (4th Cir. 1987).

This appeal involves the interaction of two separate federal
statutes. One is Title VII, which makes it unlawful to discrimi-
nate in employment, 42 U.S.C. § 2000e *et seq.* The second is
the Immigration Reform and Control Act of 1986 ("IRCA"),
which makes it illegal to knowingly employ an unauthorized
alien, 8 U.S.C.A. § 1324a(a)(1) (Supp. 1996). We must decide
whether an undocumented alien—ineligible to work under the
IRCA—may bring a Title VII action for failure to hire. This is
a question of first impression in this circuit.

Egbuna sued TLLI under 42 U.S.C. § 2000e-3(a), which
provides that it is an illegal employment practice to discrimi-
nate against an applicant for employment "because he has
opposed any practice made an unlawful employment practice
by this subchapter, or because he has made a charge, testified,
assisted, or participated in any manner in an investigation,
proceeding, or hearing under this subchapter." This court has
explained that the proof scheme set forth in *McDonnell Dou-
glas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), applies in §

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E - 2 (No. 181)

TEXT

(DLR) 9-18-96

2000e-3 retaliation claims.¹ *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). First, the employee must make out a prima facie case of retaliation by showing three elements: "1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action." *Id.* Once a prima facie case is established, the employer may proffer a legitimate, nondiscriminatory reason for its action, which rebuts the presumption of retaliation. *Id.* This shifts the burden back to the employee, who must show that the employer's reason is pretextual. *Id.*

TLLI concedes that Egbuna engaged in protected activity, and that it did not rehire him. Thus, Egbuna has met the first two requirements of a prima facie case. TLLI argues that the only issue at the summary judgment stage was "whether Egbuna, who could not have been hired by TLLI, can demonstrate a causal connection between the protected activity and TLLI's failure to employ him." *Id.* Egbuna argues that he has satisfied the minimal requirements of the prima facie case standard, including the third element, by alleging that "the Company declined to [rehire him] based solely upon his witness status."

As far as we can determine, only one other court has addressed the specific question before us here,² and that court held that unauthorized aliens are protected under Title VII despite the provisions of the IRCA. *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585, 593-94 (E.D. Cal. 1991). An undocumented-alien employee filed a Title VII sex discrimination claim. *Id.* at 586. The court found that Title VII applied to undocumented aliens, and noted that the EEOC has always so construed the statute. *Id.* at 589. The court then considered whether the enactment of the IRCA altered the scope of Title VII's protections, and concluded that "Congress did not intend that the IRCA amend or repeal any of the previously legislated protections of the federal labor and employment laws accorded to aliens, documented or undocumented, including the protections of Title VII." *Id.* at 592-94; see also *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 n.10 & n.11 (9th Cir. 1989) (assuming, without deciding, "that the undocumented workers in this case were entitled to the protections of Title VII," but noting that the IRCA "may well . . . change[] the mix of policy considerations underlying the case law which supports our conclusion that undocumented employees may recover back pay in a Title VII action").

In a Fair Labor Standards Act ("FLSA") case, the Eleventh Circuit found that the IRCA did not effect the FLSA's application to undocumented aliens, in part based on the principle that "amendments by implication are disfavored." *Patel v. Quality Inn South*, 846 F.2d 700, 704-05 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989). That court concluded that there was no policy conflict created by applying both statutes:

Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens. To achieve this objective the IRCA imposes an escalating series of sanctions on employers who hire such workers. See 8 U.S.C. § 1324a. The FLSA's coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most attractive feature of such workers—their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA.

By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA. We therefore conclude that undocumented aliens continue to be "employees" covered by the FLSA.

Id. at 705.

The crux of TLLI's argument rests on its claim that Egbuna was not qualified to work. The company argues that Egbuna's lack of work authorization rendered him unqualified, resulting in an inability to make a prima facie case of retaliatory failure to hire; therefore, TLLI argues, it need not make any showing of its motive as required by the second stage of the *McDonnell Douglas* framework. But Egbuna argues that this court "should reject [TLLI's] effort to shield its otherwise unlawful conduct by reference to immigration law that it knowingly violated for a period of forty months."

Both Egbuna and the EEOC, as amicus curiae, argue that the trial court should not have made work authorization part of the prima facie case stage, but instead should have allowed TLLI to come forward with Egbuna's undocumented status at the second stage of the *McDonnell Douglas* paradigm, as the non-discriminatory motivation for its action. Then, Egbuna argues, he could at least demonstrate a material issue of fact as to whether TLLI's proffered justification was pretextual:

The parties' long employment relationship, most of which occurred in violation of the IRCA, [and] the glowing recommendation for reemployment from the branch manager in July 1993 urging creation of a virtually unique position for appellant [] were adequate to put in issue both whether the Company would have employed appellant in violation of immigration law in July 1993 and whether in the circumstances the Company was likely to hold the position open pending appellant's receipt of work authorization. The EEOC argues that ineligibility to work under the IRCA "represents a potential legitimate, non-discriminatory reason for an employment decision"—not a basis for exclusion from the protections of Title VII—and "is relevant if the employer actually relied on it in making the decision." Thus, work authorization should properly be considered not at the prima facie case stage, but rather at the second stage, "if and when the employer asserts it as the legitimate, non-discriminatory explanation for the decision." The plaintiff then has the opportunity to show that the employer's explanation is pretextual and that its actual motivation was discriminatory.

The district court's decision endorses a proof scheme that allows employers who have discriminated to be protected from their discrimination on the basis of information on which they did not rely. In other words, here TLLI really does not claim that it failed to rehire Egbuna because of his undocumented status, but it nonetheless is shielded from its possible Title VII violations because Egbuna turned out to be undocumented. This is contrary to the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), in which the Court held that, when an employee is fired for an illegal reason (there a violation of the ADEA), after-acquired evidence of a legitimate basis for termination does not shield the employer for liability under the violated statute. *Id.* at 881.

This case involves two separate issues, despite TLLI's interest in collapsing the two. TLLI may very well have violated Title VII; and Obiora Egbuna did not have work authorization at the time he sought to be rehired by TLLI. Under the district court's ruling, TLLI would escape all liability for its possible Title VII violation because of Egbuna's undocumented status. That would be inappropriate. Instead, the parties should proceed through the *McDonnell Douglas* framework. TLLI may

9-18-96 (DLR)

TEXT

(No. 181) E - 3

assert Egbuna's lack of work authorization as a legitimate non-discriminatory basis for its decision, and Egbuna may attempt to show that the asserted basis is pretextual.

III.

We believe that the legislative effort to fight employment discrimination by protecting those who make or support allegations of improper conduct is best served by holding that a Title VII claimant need not show work authorization as part of the prima facie case. This conclusion does no damage to the distinct legislative decision to proscribe the hiring of undocumented workers under the IRCA. As the Eleventh Circuit noted, uniform application of this nation's labor laws removes a possible economic incentive to hiring illegal workers. An applicant's lack of work authorization remains a relevant consideration; it may be proffered by an employer as the legitimate, non-discriminatory reason for its action, and it may ultimately be relevant to the question of remedies should a Title VII violation be established.¹

We reverse the decision below and remand the case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED

¹ This is an unusual case in that Egbuna alleges that the failure to hire was retaliatory. Usually, someone who is not hired does not have a prior relationship with the employer and the refusal to hire is alleged to have been discriminatory rather than retaliatory.

² Although the *Ross* court explained that the illegal conduct must be the "but-for" cause of the challenged action in the retaliation context, the Civil Rights Act of 1991 amended Title VII to provide that a statutory violation has occurred if "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (Supp. III 1991). The Civil Rights Act does not specifically address unlawful employment practices as defined by § 2000e-3(a), the statute under which Egbuna seeks recovery.

³ Before the enactment of the IRCA, the Supreme Court acknowledged that Title VII protects aliens against discrimination. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), also decided before the IRCA, the Supreme Court held that undocumented aliens are considered "employees" within the definition of the National Labor Relations Act. *Id.* at 892 (1984). The *Sure-Tan* Court specifically noted that the Immigration and Nationality Act ("INA"), which regulated entry into the United States, did not make it "unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization." *Id.* at 892-93. Because the INA did not proscribe the relationship between employer and undocumented alien employee, there was no conflict presented by applying both the INA and the NLRB. *Id.* at 893. In contrast to the INA, the IRCA prohibits employers from hiring employees without green cards, 8 U.S.C.A. § 1324a(a)(1), and requires verification of each potential employee's status. *Id.* § 1324a(b).

⁴ Under 8 U.S.C.A. § 1324a(a)(2), "[i]t is unlawful for a person or other entity, after hiring an alien for employment . . . , to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."

⁵ See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 889, 902-03 (1984) (reinstatement and backpay may not be appropriate for claimants who have been deported and therefore are not "available for work"). *Sure-Tan* would not necessarily dictate that Egbuna could not be reinstated or recover backpay, however, because he received work authorization only a short time after TLLI refused to rehire him. These factual questions are best left for the district court to consider on remand.

RUSSELL, Circuit Judge, dissenting:

I respectfully dissent to the panel's holding to remand this case so that the parties may litigate this question under the *McDonnell-Douglas* framework. Under that framework, an employee is not to be ordered employed unless he is qualified for the sought-after position. To be qualified, an alien must possess the requisite employment authorization. Egbuna is an alien without a green card. He therefore does not qualify for employment at Time-Life Libraries, Inc., and I do not think that, merely because he is an alien, the immigration laws should be held subject to Title VII.

End of Text

3/3



U.S. Department of Justice

Civil Rights Division

*Special Counsel for Immigration Related
Unfair Employment Practices
P.O. Box 27728
Washington, DC 20038-7728*

February 24, 1997

Mr. Barbara Strack
Special Counsel
Office of Policy and Planning
Immigration and Naturalization Service
425 Eye Street, N.W., Room 6052
Washington, D.C. 20536

Dear Barbara:

Attached is a copy of the palmcard that includes the changes we discussed at our last meeting at the Old Executive Office Building. I hope you'll have a chance to review the revised text before our meeting on Thursday, February 27, at 2:00 pm, and that we can all sign-off on it at that time.

In the meantime, if you have any questions, please call me at 202-616-5562.

Sincerely,

Anita J. Stephens
Anita J. Stephens
Senior Trial Attorney
Outreach Supervisor

cc: Stephen Warnath
William Yeomans
Lucy Koh
Stuart Ishimaru
Juanita Hernandez
James S. Angus

2/24/97

JOB DISCRIMINATION, KNOW YOUR RIGHTS

If you have a legal right to work in the United States, there are laws to protect you against discrimination in the hiring process and in the workplace. You have the right to be treated fairly and cannot be discriminated against because of your race, color, religion, sex, age, national origin, disability or immigration status.

Employers must check the work-authorization of all people they hire. However, you are protected from having this check done in a discriminatory manner. No employer can deny you a job or fire you because of your national origin or, in most cases, citizenship status. Generally, employers cannot require you to be a U.S citizen or permanent resident, be fluent in English, to speak English without an accent, or to speak only English at work. Employers cannot refuse any legally acceptable documents that you show to prove you are authorized to work.

Assistance is Available

The federal government can help employees and job applicants understand and protect their rights. If you have any questions or if you think that you may have been discriminated against because of your race, national origin, or immigration status and want to file a complaint, call:

Department of Justice - Office Special Counsel for Immigration-Related Unfair Employment Practices (OSC) Civil Rights Division. For assistance in your own language, contact the OSC, toll-free, at 1-800-255-7688 (TDD for the hearing impaired is 1-800-237-2525). In the Washington, D.C. area, please call 202-616-5594.

Equal Employment Opportunity Commission (EEOC) - The EEOC is available to assist you with your questions about discrimination in the workplace that may be based on your race, color, religion, sex, age, national origin or disability, toll-free, at 1-800-669-4000, or TDD 1-800-669-6820.

Department of Labor - The Office of Federal Contract Compliance Programs (OFCCP) is responsible for ensuring that employers holding federal contracts do not discriminate on the basis of race, sex, national origin or status as a Vietnam veteran. If you believe that you have been discriminated against by a federal contractor, please call OFCCP, toll-free, at 1-888-376-3227.

In addition, your state or local government and various legal assistance and community groups may be able to help answer your questions about the protections available against discrimination in the workplace.

Our hiring policy is simple:

WE RESPECT THE LAW!

**This company hires lawful workers only—
U.S. citizens and non-citizens with valid
work authorization—without discrimination.**

Federal immigration law requires all employers to verify both the identity and employment eligibility of all persons hired to work in the United States.

In its efforts to meet the law's requirements, this company is participating in the employment verification pilot program established by the Immigration and Naturalization Service (INS) to aid employers in confirming the employment eligibility of newly-hired non-citizen employees. Our participation in this pilot program does not exempt us from the obligation to complete a Form I-9 for everyone we hire.



For additional information on the verification program contact:

**INS, SAVE Branch, 425 I Street, NW (ULLB 4th Floor)
Washington, DC 20536, Phone (202) 514-2317.**

Nuestra política de empleo es sencillo:

NOSOTROS RESPETAMOS LA LEY

Sin discriminación, esta empresa emplea solamente trabajadores legales—ciudadanos de los Estados Unidos y extranjeros con permiso para trabajar.

La Ley Federal de Inmigración y Nacionalidad obliga que todas las empresas verifiquen la identidad y la elegibilidad para empleo de personas que buscan empleo en los Estados Unidos.

Según los requisitos de la ley, esta empresa participa en el proyecto de la verificación de empleo desarrollado por el Servicio de Inmigración y Naturalización (SIN) para ayudar a los empresarios a verificar la elegibilidad de personas que quisieran trabajar en los Estados Unidos. Aquellas empresas que participan en este proyecto tienen la obligación de llenar el formulario I-9 para cada persona ya empleada o que busque empleo en su negocio ó empresa.

Para más informes sobre este proyecto, comuníquese usted con:

Immigration and Naturalization Service (INS)
SAVE Branch, 425 I Street, NW (ULLB 4th Floor)
Washington, DC 20536, Teléfono (202) 514-2317



Chánh Sách Thuê Mướn của Chúng Tôi Rất Đơn Giản:

CHÚNG TÔI TÔN TRỌNG LUẬT PHÁP!

Công ty này chỉ thuê mướn những người làm việc hợp pháp mà thôi--là công dân Hoa Kỳ và không phải là công dân với giấy tờ làm việc hợp pháp--mà không phân biệt chủng tộc.

Luật di trú của Liên Bang đòi hỏi tất cả những chủ nhân phải xác minh cả thẻ nhận diện lẫn thẻ cho phép làm việc của tất cả những người được thuê mướn làm việc trên lãnh thổ Hoa Kỳ.

Trong cố gắng để đáp ứng với sự đòi hỏi của luật pháp, công ty này tham gia vào chương trình duyệt xét việc làm đã được khởi lập bởi Dịch Vụ Di Trú và Nhập Tịch (Immigration and Naturalization Services - INS) để giúp các chủ nhân xác nhận vấn đề hội đủ điều kiện làm việc của những người mới được thuê mướn mà không phải là công dân. Sự tham gia của chúng tôi trong chương trình mới này không có nghĩa là chúng tôi được miễn trừ bốn phần phải điền Mẫu I-9 cho tất cả những người mà chúng tôi thuê mướn.

Để biết thêm chi tiết về chương trình duyệt xét, xin liên lạc với:

INS, SAVE Branch, 425 I Street, NW (ULLB 4th Floor)
Washington, DC 20536, Phone (202) 514-2317

우리의 고용 방침은 간단합니다.

우리는 법을 준수합니다!

이 회사는 미국 시민과 유효한 노동 허가를 가진 비시민 등 적법한 근로자만을 차별 없이 고용합니다.

연방 이민법은 모든 고용주들이 미국 내 근로를 위해 고용하는 모든 사람들의 신분과 취업 자격을 확인하도록 요구합니다.

법의 요건을 준수하기 위한 노력으로, 이 회사는 고용주들이 새로 고용한 비시민 피고용인의 취업 자격을 확인하는 일을 돕기 위해 이민국(INS)에서 수립한 고용 확인 시험 프로그램에 참여하고 있습니다. 이 시험 프로그램에 참여하더라도 고용하는 모든 사람들에 대해 I-9 양식을 작성해야 하는 우리의 의무는 면제되지 않습니다.

확인 프로그램에 대한 자세한 내용 문의처:

**INS, SAVE Branch, 4251 Street, NW (ULLB 4th Floor)
Washington, DC 20536, 전화 (202) 514-2317**



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Office of
the Chairman

MEMORANDUM

TO: Carol H. Rasco, Assistant to the President for Domestic Policy
Domestic Policy Council, Office of Policy Development

Doris Meissner, Commissioner
Immigration and Naturalization Service

FROM: Gilbert F. Casellas, Chairman
U.S. Equal Employment Opportunity Commission

Dennis Hayashi, Director
Office of Civil Rights, U.S. Department of Health and Human Service

DATE: September 27, 1995

SUBJECT: Final Recommendations of Immigration Verification Subgroup of the
Interagency Working Group on Immigration ("Subgroup")

As the co-chairs of the Subgroup, we submit to you the attached memorandum, *EMPLOYMENT VERIFICATION PILOTS: Anti-Discrimination Concerns and Recommendations*, which sets forth the Subgroup's final recommendations regarding anti-discrimination matters related to the development and implementation of the forthcoming expansion of the employment verification pilots. We are especially proud of the diligence and dedication with which the Subgroup worked to wrestle with the many complex discrimination issues presented by the proposed employment eligibility verification systems, and we believe the Subgroup's work reflects some of the best thinking available on this topic. In our judgment, the Subgroup has done an admirable job in formulating fair and practical recommendations to ensure that the pilots will be conducted in the least discriminatory manner.

As stated in the conclusion of the memorandum, the Subgroup stands prepared to assist you further on these issues, particularly the development and implementation of the recommendations presented.

Enclosure

September 26, 1995

**EMPLOYMENT VERIFICATION PILOTS:
Anti-Discrimination Concerns and Recommendations**

As part of the Administration's effort to curtail illegal immigration, the President directed the Immigration and Naturalization Service ("INS") and the Social Security Administration ("SSA") to develop and implement pilot projects designed to test various effective and non-discriminatory work eligibility verification procedures. The Interagency Working Group on immigration convened a group to examine a host of concerns about discrimination and the threats to privacy that may arise during implementation of these pilots.

Many of the concerns are based on problems which arose as a result of employment verification requirements under the Immigration Reform and Control Act of 1986 (IRCA). In a 1990 report (Immigration Reform: Employer Sanctions and the Question of Discrimination), the GAO found that implementation of IRCA resulted in "widespread discrimination" on the basis of national origin. Specifically, employers would refuse to hire job applicants whose foreign appearance or accent led them to suspect that they might be unauthorized aliens, or employers would verify **only** persons with an accent or foreign appearance. GAO recommended that discrimination be addressed in any attempt to improve verification.

The Administration's interagency working group sought to identify and address potential discrimination problems at the time that these pilots are being designed, and before they are actually implemented. This was done in order to ensure that the pilot programs incorporate both appropriate safeguards to prevent discrimination against job applicants and new hires, and proper evaluation mechanisms to test for potential discriminatory impact. Consistent with the recommendations of the Commission on Immigration Reform (CIR), chaired by Barbara Jordan, the Administration is committed to testing various verification techniques **before** making any permanent decisions about the feasibility and practicality of any particular verification system.

This memorandum was prepared by the Immigration Verification Subgroup ("Subgroup") of the Interagency Working Group on Immigration and contains a summary of discussions on civil rights concerns which took place over several months and recommendations arising from those discussions. Privacy issues are also a priority consideration in the development of the pilots; those concerns are addressed herein only on a preliminary basis. Privacy is being analyzed to a greater extent separately and recommendations will be forthcoming.

I. GOALS AND OBJECTIVES

As described above, the general purpose of the Subgroup was to provide guidance on the design and implementation of verification pilots so that they would effectively identify those not eligible to work in the United States without sacrificing civil rights and privacy protections. In the Subgroup's consideration of the possible discriminatory effects of the pilots, consensus was reached on fundamental objectives which are set forth below.

Generally, the pilots should be designed to:

- in a reliable, efficient, non-discriminatory, and secure manner, accurately identify people who are not lawfully eligible to work.
- ensure privacy and confidentiality of information used in verification process
- include appropriate monitoring and evaluation components for a variety of concerns related to effectiveness, discriminatory impact, breach of security, and privacy concerns.

The pilots should be designed with appropriate safeguards to protect against:

- the denial of employment opportunities to citizens and to aliens who are lawfully admitted and authorized to work in the United States or subjecting such individuals to discriminatory treatment.
- the imposition of an unfair burden on U.S. citizens or authorized alien workers to prove their status.
- the placement of undue burdens on employers which would serve as disincentives to participation in the verification processes.
- the unauthorized use of the verification system and information related thereto for unauthorized purposes..

II. BACKGROUND INFORMATION

In Fiscal Year (FY) 1995 and FY 1996, INS and SSA will expand or initiate several pilot verification programs. The potential discriminatory effect of two of those pilots -- INS's Telephone Verification System and the SSA/INS Two Step Process -- are considered in this memorandum. It should be noted, however, that given the imminent expansion of the INS's 1995 TVS pilot, the concerns and recommendations outlined here are addressed primarily to the FY 1996 pilots.

As a predicate to a discussion about discrimination issues, summaries of the two pilots referenced are provided below.

A. Telephone Verification System (TVS)

TVS is designed to aid employers in confirming a legal authorization to work. It is a voluntary program that will allow participating employers who have complied with the Form 1-9 verification procedures to access the INS database by electronic means to confirm employment eligibility of non-citizen employees.

TVS Phase I pilot was conducted from March 30, 1992, to March 31, 1993, with nine participating employers in five states. TVS Phase II pilot is scheduled to be implemented during FY 1995 and will involve at least 200 employers; TVS Phase III is scheduled to be initiated during FY 1996 with approximately 1000 employer participants.

Primary Verification - To initiate the TVS process, an employer must first determine the citizenship status of the new employee; this would be done by completion of the I-9 form. If the new employee certifies that he/she is not a United States citizen, the employer will then conduct a primary verification of the employee by accessing electronically the INS' Alien Status Verification Index ("ASVI") data base. This data base contains information concerning non-citizens. The employer enters the employee's Alien Identification Number ("A-number"), the date of birth, and the first name initial. In response, the employer will be provided specific information electronically about whether the employee is work eligible.

Secondary Verification - If the primary verification process cannot verify that the employee is work eligible, then the employer will proceed to use the TVS secondary verification procedures. Under these procedures, the employer must complete a document verification request and mail it to the local INS office. The local INS office will check additional data bases and, if necessary, files and provide information on an employee's

work eligibility within ten working days of receiving the request.

If the secondary verification procedures still cannot verify that the employee is work authorized, then the employer must notify the employee of his or her right to contact the local INS office concerning his or her status. The employee should be given a reasonable grace period, during which time he/she will continue to be employed and not subjected to an adverse work decision while attempting to resolve the verification issue with INS.

B. SSA/INS Two Step Process

The Two-Step verification pilot is designed to create an automated on-line system that employers can use to verify social security numbers through SSA and, for non-citizens, obtain work eligibility information from the INS. The work eligibility information will complement and support the employers' review of documents submitted to prove identity.

First Step - Using a new employee's name, social security number, and date of birth, the employer will query the SSA database to verify social security numbers. The query would also check for any immigration status coding. If the SSA database reveals that the employee was not a U.S. citizen at the time he or she last applied for a social security card, then the employer will be advised to contact the INS to verify work authorization.

Second Step - If the SSA check indicates the person may be a non-citizen, the employer would verify work eligibility against INS databases or files using the employee's A-number, date of birth and name.

III. DISCRIMINATION CONCERNS AND RECOMMENDATIONS

A. Identification of Possible Discrimination

Discrimination may occur at almost any stage of the employment process: application (including initial inquiry), hiring, or post-hire/employment. In order to minimize the possibility for discrimination that may arise at each of these points, the design of the pilots should include safeguards against:

1. Pre-screening

An employer might refuse to consider applicants or to hire individuals who are "suspect" because of their surname, appearance, or accent. Job applicants may be prematurely turned away by an employer without permitting him/her to submit an application or without making any effort to determine work eligibility.

2. Pre-Hire Verification

Although an employer is permitted to verify an individual's employment eligibility only after hiring, the 1992 GAO Report suggested that employers sometimes seek to verify employment eligibility prior to hiring.

3. Selective or Inconsistent Application of Verification Process

An employer may selectively verify the work eligibility for some applicants or new hires -- particularly those who look or sound foreign, or have a non-English surname -- but not others.

4. Unauthorized Use of Information

An employer may abuse accessed information by using the system for unauthorized purposes. In this manner, privacy rights could potentially be breached for the purpose of harassment or discrimination.

B. Evaluation Recommendations

1. Establishment of a Credible Baseline for Discrimination

There was discussion in the Subgroup of the need for establishing a baseline measure of discrimination prior to or concurrent with the implementation of the pilots. Only by setting such a baseline can the pilots be accurately evaluated for discriminatory impact. The Subgroup recommends establishment of a baseline which should be part of the evaluation process contracted to an independent, non-governmental entity.

2. Testing and Evaluation for Discrimination

designed to put in hiring date which cannot be to agh query date

Should ~~assess~~ have plan to based, in study. Tests are also a part

Training etc. Monitoring + Statistical Analysis of Data captured

Have not put out contract yet. RFP is largely written - should be ready by end of March. ☐ Set up only to discuss elements

Like the establishment of the baseline, recommended above, testing and evaluation of the pilots should be designed and carried out by a non-governmental entity. Utilization of a qualified outside monitor will permit meaningful monitoring and evaluation, and will not be perceived by the participating employers as an enforcement threat. Any evaluation should utilize a collection of mechanisms, as appropriate, to identify incidences of discrimination and provide safeguards, including mechanisms such as:

a. Surveys

Employers, applicants, and employees should be surveyed at all stages of the employment process on a sample basis to provide comprehensive evaluation. It is important to include employees and job applicants in the survey, not simply employers as was done in the evaluation of the initial TVS pilot.

b. Recordkeeping

Effective evaluation of the pilots requires that a number of pertinent records be kept by participating employers and be available for analysis and evaluation. Relevant records would include those documenting the applicant pool, interview pool, those hired, those verified, and those subject to secondary verification.

The pilots should ensure that the verification system is able to track the timing of verification calls. Then, with a randomly selected group of employers, verification records would be matched with hiring records to determine (1) whether the applicant was pre-screened or verified at the time of hire, and (2) whether persons other than new employees are being verified.

c. Hiring Audits

Hiring audits should be conducted at the various phases of the hiring and employment process to test for discriminatory or differential treatment. The use of testers would be an appropriate supplement to the evaluation of pre-screening, selective or inconsistent primary use, inconsistent use of secondary verification, and the effects of secondary verification on terms and conditions of employment.

The Subgroup agreed that employers should be advised in advance that the pilots will be evaluated to determine whether they exacerbate discrimination.

**d. Analyze the Characteristics of Employees
Requiring Secondary Verification**

It is important to evaluate whether there are certain common factors among individuals for whom verification is not accomplished on the first try with SSA or INS. The first TVS pilot indicated that individuals who were work eligible under the TPS program may have been disproportionately represented among the individuals subject to secondary verification. Non-verification of an SSN or work authorization may also occur for a number of other reasons, ranging from clerical errors to name variations.

e. Selection of Employers to Participate

The pool of participating employers will, of course, greatly affect the performance of the pilots. A preferred employer profile should be developed prior to recruitment and selection of pilot participants. The main consideration is that the pool be balanced with an appropriate mix of sizes, industries, and hiring or eeo histories. The search for employers should be active and not rely solely on volunteers who were past sanctions violators.

C. Suggested Anti-Discrimination Safeguards for Pilot Designs

1. Memorandum of Understanding

A Memorandum of Understanding ("MOU") will govern the employers' participation in the pilots. Its terms should include explicit provisions regarding evaluation requirements and compliance responsibilities. Anti-discrimination safeguards should be defined within the MOU and could include: employee notice requirements; guidelines for employee access to information; remedies; defining employer liability or immunity; employer education and training; evaluation matters, including recordkeeping and notice of monitoring; and consequences arising from a breach of the MOU.

2. Employer Education and Training

The Subgroup discussed, but did not reach consensus on, whether the level of training provided to employers should be varied to test effective anti-discrimination education. The group recommends that this issue and development of effective education to the employer be given to the independent consultant to develop a proposal.

3. Opportunity to Challenge or Correct An Adverse Finding

New employees should be given a notice of the results of the verification check and afforded an opportunity to challenge a finding that they are not work authorized. Participating employers should be required to post notices in conspicuous places concerning the rights of employees to challenge the results of secondary verification. Again, because employees who are limited-English proficient are severely limited by lack of knowledge or understanding about what constitutes prohibited national origin or citizenship discrimination, and what their rights are with regard to such discrimination, notices should be in non-English languages where there are significant numbers of employees who are non-English proficient.

4. Grace Period

Employees challenging the results of negative secondary verification results should be given a grace period sufficient to allow them to follow up with the INS without being subject to dismissal or other adverse work decisions. These employees should be provided protection against harassment or other disparate terms and conditions of employment during this period.

5. Remedy for Discrimination and Employer Immunity

The Subgroup recommends that employers participating in the pilots should not be subject to discrimination charges that result from the heightened scrutiny of their business operations. That is to say, as a general matter, the government will not use evidence created by the testing of the pilots to file an immigration-related employment discrimination charge.

However, this is not the same as immunity. Employers could still be subject to prosecution for discrimination if the government independently determines or confirms that an employer has engaged in unlawful discrimination. Further, if an employer relies on the results of testing to defend itself against a discrimination charge, testing information relating to the employer would be relevant and could be used by the government in its prosecution.

D. Miscellaneous Considerations

1. False Citizenship Claims

In the TVS pilot, only individuals who identify themselves as non-citizens will be subject to verification. This may create the incentive for some individuals to falsely claim citizenship to avoid TVS verification efforts. Mechanisms for monitoring this problem, as well as safeguards to protect against this abuse, should be developed. This could be addressed, for example, by implementing random audits.

2. Accuracy of Databases and Files

Concerns were raised about the accuracy of the INS database and files, which could lead to wrongful denials of employment to work-authorized residents. Preventing such errors (and providing for appropriate legal remedies for damages caused thereby) should be a priority.

3. Consequences of Verification Check -- Primary and Secondary Stages

The absence of positive verification, whether at the primary stage or the secondary stage of verification, may increase the risk of some type of adverse action against the employee, such as firing, downgrading in terms and conditions of employment, or exploitation. The current design of the pilots provides an opportunity for the employee to challenge and cure such a response within a grace period. No adverse work action may be taken during this period. It is important to monitor and evaluate the effect of no verification, including the employer's provision of adequate notice of the right to contact the local INS or SSA office to challenge or correct the records. If employers violate this grace period, they should be subject to appropriate sanctions, including displacement from the pilot.

Employees in this situation need to be fully aware of their rights to challenge a response by proving error or correcting faulty records. They should be provided with a real chance to challenge the government's response without fear of retaliation.

Concerns have also been expressed about the lack of follow-up with employees whose work eligibility was not confirmed during secondary verification in TVS Phase I. Assumptions were made by INS about those that fell out of the system without investigation. It is, therefore, suggested that the pilots should include tracking mechanisms to follow at least a sample of employees through the various stages of verification to determine

why many of those whose employment eligibility cannot be confirmed during secondary verification fall out of the system.

IV. RELATED PRIVACY CONSIDERATIONS

A. Privacy Concerns

Privacy concerns preliminarily discussed by the Subgroup included the following:

1. There is a public perception that the pilots may lead to the establishment of a national ID card.
2. The use of information should be strictly limited to authorized users and for authorized purposes. Individuals should have a remedy available for unauthorized use of data or breach of privacy. Employers should be fined and dropped from the pilot for violations.
3. The pilots should allow employees access to the information which is used to determine their work eligibility. Such access is particularly critical to help identify if database errors are involved in a negative finding.

B. Privacy Protections Provided by Proposed Legislation

The Administration's proposed immigration legislation, the **Immigration Enforcement Improvements Act of 1995**, would provide for the confidentiality of individual information collected in the operation of the pilots. If these provisions are enacted into law during the operation of the pilots, INS/SSA should implement them as soon as possible. Information would only be available for work authorization verification, enforcement of the Immigration and Nationality Act (INA), and for criminal enforcement of Federal immigration-related fraud laws. Further, it would require participating employers to have procedures in place to (i) safeguard the personal information collected or used in the pilots, and (ii) notify employees of their right to request correction or amendment of their records. The sectional analysis accompanying the legislation states that these procedures would be detailed in the MOU signed by the INS/SSA and each participating employer.

The proposed legislation also makes the provisions, rights, and remedies of the Privacy Act, 5 U.S.C. 552a(a)(2), applicable

to all work-authorized persons who would be subject to verification through one of the pilots and to records used in the course of a pilot to make a final determination concerning an individual's work authorization. (Under current law, the Privacy Act applies only to U.S. citizens and lawful permanent residents.)

Additionally, at present, the Privacy Act applies only to government agencies, not to private persons such as employers. To provide employees with a remedy against a private person, the legislation would subject employers and other persons to civil penalties from \$1,000 to \$10,000 for **willful and knowing** unlawful disclosure or use of information or failure to comply with the bill's requirements that employers fulfill their obligations under the MOU.

C. Recommendations for Non-Statutory Privacy Safeguards for Pilots

Until legislative protections are enacted, the Subgroup recommends that the INS and SSA take steps to ensure that individuals involved in the verification pilots receive the maximum protection of their privacy. These steps can best be taken within the terms of the MOU between the agencies and the participating employers. The Subgroup suggests that the MOU include uniform provisions that:

- Ensure the confidentiality of individual personal information collected in the operation of the pilots, including a detailed explanation of the limited authorized uses of this information (i.e., to verify work eligibility, to enforce the INA, to enforce Federal criminal immigration-related fraud laws, and to ensure accurate wage reports to SSA and IRS.)
- Document the procedures that participating employers will be required to follow to (i) safeguard the personal information collected or used in the pilots, and (ii) notify employees of their right to request correction or amendment of their records and the procedures for doing so.
- Define the procedures INS/SSA will follow to allow employees to request access to or correction or amendment of their records, including requirements that the subject agency promptly respond to such requests and allow for reviews of any denials of such requests.

V. CONCLUSION

The Subgroup's discussions served to re-emphasize the significance of ensuring that the pilots are conducted with great attention and sensitivity to potential discrimination. The credibility of the pilots will be inextricably linked to how effectively discrimination is minimized as a result of both design and subsequent monitoring efforts. The Subgroup is willing to assist in the implementation of any of the suggested recommendations.

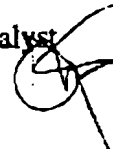


U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

October 29, 1996

NOTE

TO : Claire Gonzales, Director
Office of Communications and Legislative Affairs

FROM : Donna Swanson, Program Analyst
Office of Program Operations 

SUBJECT : Interagency Working Group

As you know, I have been participating in the Interagency Working Group to develop outreach and education materials on immigration and employment. We have been meeting for the last few weeks and have jointly developed a "palm card" that will contain information for workers on enforcement areas for each agency. Attached is the language we agreed upon at our last meeting. If you would review it I can send it on (or you can) to the Office of Legal Counsel for a legal sufficiency review. All agencies are now going through this process.

We also agreed upon the artwork (copy attached) since OSC already has it and this will help keep the cost of printing down. We discussed, but have not yet received, costs for printing some in English and some in Spanish. All agencies agreed that the cost of printing should be shared (our portion will be 1/5th of the total) and we are getting estimates for total 250,000 copies. Justice/OSC can use its existing printing contract with each agency transferring money via an interagency agreement. The amount for each agency will probably be around \$5,000. INS will provide demographics so that EEOC can decide how many we will want in each language. I thought that once we have these numbers, we could discuss how we want to distribute. The committee has discussed the idea of a central distribution based on a combined mailing list developed from each of the agencies' existing lists or distribution to agencies regional or field offices for local dissemination. We will need to discuss this further before the next meeting scheduled for November 7, 1996.

Would you let me know when we can discuss these matters? I would like to get the review process initiated as soon as possible and be in a position to speak for EEOC at the November 7 meeting.

Thanks.

Attachments

cc: Elizabeth Thornton

WORKERS, KNOW YOUR RIGHTS!!

If you have a legal right to work in the United States, there are laws to protect you against discrimination in the workplace. You have the right to be treated fairly and cannot be discriminated against because of your race, sex, religion, national origin, age, disability or immigration status. *Several* ~~Various~~ federal government agencies and departments are in charge of protecting the rights of workers.

Department of Justice

Although employers must confirm the work-authorization of all people hired after November 6, 1986, you are protected from discrimination while going through the employment verification process. No employer can deny you a job or fire you because of your national origin or citizenship status. In most cases employers cannot require you to be a U.S. citizen or permanent resident or refuse any legally acceptable documents. If any of these things have happened to you, call the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), Civil Rights Division. Contact the OSC for assistance in your own language, toll-free, at 1-800-255-7688 (TDD for the hearing impaired is 1-800-237-2515). In the Washington, D.C. area, please call 202-616-5594, TDD 202-616-5525.

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Department of Labor

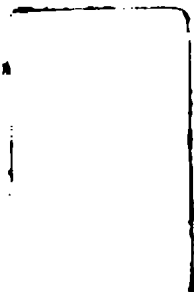
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Department of Health and Human Services

The Office for Civil Rights at the Department of Health and Human Services (HHS) protects the rights of individuals who receive, or are eligible to benefit from, federally assisted health and human services. Institutions, such as state and local public assistance agencies, hospitals, extended care facilities, children and family programs or mental health centers that receive funds from HHS are required to provide services to all sectors of the population, without regard to race, religion, color or national origin. For example, they must provide emergency hospital services, even if an individual has no health insurance and is unable to pay. Some hospitals which have received a specific type of federal funding, must provide services at no charge. Both hospitals and social service agencies are required to provide equal access to services for immigrants, which may require providing services in their own languages. If you believe you did not receive this type of assistance, please call the Office for Civil Rights, toll-free, at HHS at 1-800-368-1019 or TDD at 1-800-537-7697.



Employment
Fairness Comm.

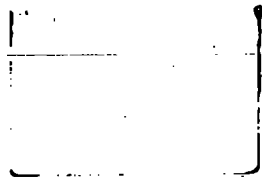
Department of Health
and Human Services

WORKERS
Know Your Rights!!



O-S-C-
I-N-S-
O-F-C-C-P-
E-E-O-C-
H-H-S-

Self-mailer



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EEOC-

11-22-96 : 3:00PM :

SENT BY:

Your Rights as a
Worker

Department of Justice

Office of Federal Con-
Compliance Program

INS 1007

test

1996.10-17

16:23

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Leadership Conference Education Fund

1629 K Street, N.W., Suite 1010 • Washington, D.C. 20006 • (202) 456-3434

LCEF Immigration-related Employment Discrimination

Advisory Committee

Fax Memorandum

~~CONFIDENTIAL~~

Please give this fax to the person(s) named below in your organization:

Lucas Guttentag	ACLU
Richard Womack	AFL-CIO
Angelo Ancheta	ALC
Ed Anciano	APALC
David Marzahl	ICIRP
Wade Henderson	LCCR
Karen Narasaki	NAPALC
Charles Kamasaki	NCLR
Cecilia Munoz	NCLR
Barbara Bonifas	NILC
Susan Drake	NILC
Yolanda Vera	NILC
Vibiana Andrade	MALDEF
Georgina Verdugo	MALDEF
Robert Rubin	SFLCUA
Muzaffar Chishti	UNITE
Ann Hoffman	UNITE

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: By DATE: 11/11/2017
2017-1120-5

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Executive Director
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Leadership Conference Education Fund

1629 K Street, N.W., Suite 1010 ■ Washington, D.C. 20006 ■ (202) 466-3434

October 17, 1996

DETERMINED TO BE AN
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INITIALS: Py DATE: 11/11/2017
2017-1120-S

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TO: LCEF Immigration-Related Employment Discrimination Advisory Committee

FROM: Janet Kohn

RE: Meeting Notices and Draft Recommendations

This is to inform you of two meetings and to transmit to you Draft (that's draft) Recommendations to the INS from this group.

We have a meeting scheduled with EEOC Staff on Wednesday, October 30th at 11:00 a.m. I anticipate that this meeting will be preceded by a breakfast meeting of just us. We will probably have no paper to leave with them, so that each side can pick the brains of the other. We anticipate that the above meeting will be followed by one with EEOC Chair Casellas and Commissioner Igasaki at a date after the election that has not yet been set. For those of you who will be in D.C. in the days preceding the October 30th meeting, we will get to you in D.C. the information as to locus of that meeting and of a pre-meeting, and I will need to know of your attendance on October 30th by close of business Friday, October 25th. For those of you who will attend the October 30th meeting, but will not be at the Welfare Conference during the preceding days, please let me know of your attendance at the meeting(s) by the close of business on Friday, October 25th so that I may provide a list to the EEOC, and I will then give you details as to time and place(s). Further information regarding the meeting with Chair Casellas et al will be sent to you as soon as possible.

Enclosed is a draft (this is only a draft) of recommendations from this group to the INS. Please get your additions, deletions and other desired changes to me as soon as possible, but in any case no later than November 1st.

We anticipate that additional recommendations will be sent to you in draft form in the near future. They will include at least recommendations to the OSC/Civil Rights Division in DOJ and to the EEOC. If you have ideas regarding additional recommendations that should be prepared, please talk with me or with Charles Kamasaki ASAP.

BOARD OF DIRECTORS

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Arnold Aronson	William Taylor	Farisha A. Wright	William L. Robinson	Karen McGowan Lawton
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DRAFT

LCEF Advisory Committee Recommendations 10/7/96

DRAFT

(1) TO THE INS RE PILOT PROJECTS

(a) It is essential that each pilot project be evaluated as to its impact upon employment discrimination and upon employee privacy as well as on matters going to the program's success in separating eligible from ineligible persons, its costs, etc. In order for this to occur, the evaluation design must be established in detail before any project begins, so as to ensure that the necessary data are collected. This may appear to be self-evident, but the fact is that the INS, which has been running pilot projects since 1992, has yet to put in place any pre-designed evaluation component, has yet to involve any independent non-governmental evaluator, and has yet to see to it that data are collected that might enable analysis of a project's impact upon civil rights or employee privacy. Hence, while it is possible that INS will be able to say in FY 97 that it has developed a mechanism by which to assure employers of the work eligibility of aliens whom that employer has employed (though not, in the foreseeable future, that it has developed a like mechanism for assuring the work eligibility of self-identified U.S. citizens), it will not be possible for INS to assert with any credibility that the mechanism developed does not take a toll on employee civil rights protected by the INA or upon employee privacy which the Administration proposed to protect in its proffered immigration legislation. The unhappy fact is that the INS will not be in a position to say anything at all as to the effect of its mechanism or mechanisms upon such rights and privacy.

Evaluation contract(s) must be in place well before any project begins. We urge the INS to proceed rapidly with detailed planning of evaluation. The long-awaited Joint Employment Verification Pilot has yet to begin, but certainly must be evaluated. For this and other pilots, contract(s) must be let and planning undertaken. We urge consultation with experts in the anti-discrimination and privacy areas in and outside the Government, as well as with independent experts in evaluation, as part of those processes.

(b) Among the particulars needed for proper evaluation are inclusion in every Memorandum of Understanding (MOU) between INS and an employer participating voluntarily in a pilot of the details concerning the employer's obligations and the penalties for failure to comply. Among those requirements should be the posting of notices to job applicants and newly-hired employees, i.e. notices to be provided by INS along with instructions as to where they are to be posted. Such notices should contain information as to the possibility of challenges and appeals, together with the Office of Special Counsel (OSC) toll-free phone number and the phone numbers and addresses of EEOC field offices in the area and of appropriate state and local FEP agencies, and should contain also the identity, phone numbers and addresses of non-governmental organizations from which further information or other assistance may be obtained.

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The MOU must also make explicit the duty of participating employers to cooperate with evaluators by making personnel and records available. To this end, the MOU should spell out the duty of the employer to maintain a number of pertinent records and make them available to the third-party (i.e., non-INS) evaluator(s), which would include records documenting the applicant pool, the interview pool, those hired (together with date), those verified on the initial attempt, those verified after tentative nonverification (or nonconfirmation, which we take to mean the same thing) and those finally nonverified. (We relied heavily here, as elsewhere, on the September 27, 1995 memorandum of Gilbert F. Casellas and Dennis Hayashi to Carol H. Rasco and Doris Meissner, containing the Final Recommendations of the Immigration Verification Subgroup of the Interagency Working Group on Immigration.)

The MOU should also annex copies of model communications from employer to newly-hired employees concerning where the employee must or may go in further pursuit of verification and the period of time available for that purpose, together with the information including phone numbers and addresses of governmental agencies such as the Office of Special Counsel (OSC) and EEOC to which employees may go for assistance, and of appropriate non-governmental organizations as well (the IRCA QDEs afford an example of the utility of such groups in dealings between individuals and the INS).

We strongly urge that INS, in developing the notices and model communications described above, as well as any other message from pilot employers to their employees, work in conjunction with the OSC and the EEOC.

[HERE, INSERT A PARAGRAPH ON WHAT IS NEEDED TO PROTECT
PRIVACY, TO BE WRITTEN BY 7]

(c) To facilitate awareness of the existence and purposes of pilot programs as well as evaluation of their effects, information concerning all of the items above should be disseminated as widely as possible within a target area (and, where that is possible, within an industry and its actual or likely workforce), using for this purpose relevant governmental and non-governmental organizations along with the INS itself, the media, etc.

(d) It will also be important to prepare for analysis of patterns that may emerge in the use of secondary and of any third-stage verification, whether these patterns be by industry, by size of employer, by employee characteristics, or by something else. Here, as elsewhere, matched pair testing is an especially useful technique available to evaluators, though much information may be more easily available by simple comparisons of the use and content of employer-sought verification with other employer records. We assume, but perhaps should make explicit the need for, INS electronic methods of controlling timing and frequency of employer-sought verification, the dates of such inquiries, and electronic controls to ensure use of the verification mechanism only by agents of the employer pre-designated for that function and by none outside that cadre of persons.

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(e) It is important that employees be provided an effective and useable means of establishing their right to verification where the Government's agent has issued an erroneous tentative nonverification. To be useable as well as effective, such a means must allow the employee to use a third party intermediary rather than herself or himself having to go to or telephone the INS. The latter alone may well in the situation be unfair in that an employee will not -- perhaps cannot -- use it, some because they are intimidated simply by the prospect of direct dealing with the INS, others because the travel time, distance and cost are prohibitive, still others because of their pressing need to apply for a job elsewhere instead of seeking vindication through INS verification to the requesting employer (who, by definition has already hired the individual for whom verification is then sought). The INS has been sensitive to the need for such a "buffer" system in the past, e.g. where undocumented persons resident for the requisite time sought to legalize their status, and we call upon INS to show a like sensitivity here.

(f) If both discrimination violative of the INA and fraud are to be minimized, self-identified citizens as well as self-identified aliens must be included in pilot or test projects. This situation points up, although it does not exhaust, the need for evaluator attention to the accuracy of official data base(s) used and the means by which and the time in which corrections are made by the government agencies when inaccuracies are revealed.

We recommend that INS initially establish for itself and any other agency participating in the pilot mechanism goals as to accuracy and tight limits within which corrections must be made in any database utilized, and then obtain evaluators' analyses of what happened in fact regarding accuracy and the timing of corrections. Only thus can anyone -- INS, Attorney General, Congress, observers -- judge whether the standards that have been set must be raised or in some way augmented in any acceptable "permanent" mechanism.

(g) We recommend a somewhat similar approach to the establishment of baselines for measuring discrimination. The situation today is not like that in 1986, when before/after analysis was not possible because there were no before measures. Today, at least in theory all employers have been following the I-9 requirements for as much of the last decade as they have been in business. Thus, while there is still no true "before" measure, such a pure measure could be approximated by comparing a sample of non-pilot (i.e., I-9 only) employers with a matched sample of pilot employers.

(h) Experience indicates that the most likely because least detectable means of employer discrimination on a prohibited basis is to do so prior to employment in the first place -- the most glaring examples being exclusion of those with the wrong kind of name even before interviews, and those with "foreign" appearance or accent after interview but before hiring. Nothing in the present pilot mechanism or in those called for by Subtitle A of Title IV of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 appears likely to diminish this. Therefore we recommend that the pilots use vigorous testing through hiring audits and surveys of both job applicants and employers to determine whether pre-selection occurs (though forbidden), and a like attention to whether the verification mechanism is used before or after actual hiring, or

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otherwise selectively, i.e. the forbidden pre-screening.

(i) Returning to INS' formal relationship to the anti-discrimination provisions of IRCA and with the other government agencies having responsibilities under those provisions, we recommend:

That OSC prepare, in consultation with outside expert groups, a section on the INA anti-discrimination protections for inclusion in the user manual provided to employer participants in pilots, and that the EEOC augment that section with brief information on Title VII of the Civil Rights Act of 1964, as amended, on the ADA and on ADEA.

That there be training in IRCA anti-discrimination requirements for ALL employers participating in pilots and for ALL INS district and local staff who will have any role in the pilots, with OSC and/or its grantees participating in that training. Also included there should be appropriate EEOC and state/local FEP agency staff. It has not been the case that even all federal agency personnel sang from the same hymnbook regarding civil rights, and this should be rectified.

That OSC, EEOC and the LCEF Advisory Committee or its successor be invited to review and comment on the pilot project user manual(s) that will be provided to every employer participant.

That the existing INS/DOL MOU regarding IRCA be updated to include OFCCP responsibilities.

(2) TO THE INS RE INS OTHER ACTIVITIES

(a) It seems to us likely that the INS will prepare and distribute a new version of the Employer Handbook or at least a new Form I-9, in light of the 1996 legislation and INS' own experience and intended changes in documents. We urge that any such new or revised document contain more material than has been the case in the past regarding INA Sec. 274B, and that this material be prepared by the OSC and the EEOC, working with the INS. We recommend also that the new or revised material be submitted for review and comment to expert non-governmental organizations.

Because the explanation of 274B is as relevant to job applicants and employees as it is to employers, we recommend that the civil rights and privacy parts of the new document be extracted and printed as a document to be supplied to job applicants and new employees. This should require no additional work by any government agency, but should help ensure that all who participate in United States employment have a common understanding of the IRCA requirements. (Needless to say, we would urge that copies of the worker as well as employer document be provided to all relevant employees and managers of the INS, the OSC, the EEOC, the DOL, and state/local FEP agencies and to employee representatives such as unions also.)

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(b) For the same reasons that we believe it would be advantageous to all for OSC and EEOC to participate in document production, see (a) above, we urge also their participation in training sessions for employers and for INS and DOL staff who will play any role in IRCA enforcement. As NILC, which has itself done many training sessions for a variety of persons, has pointed out, presently when the INS conducts a training for employers on fraudulent documents or I-9 enforcement, it stresses employer sanctions and document fraud and the anti-discrimination provisions of the INA are not addressed.

Similarly, whether in the same training sessions or in separate sessions, employers who participate in the pilots would benefit from training on Title VII and other workplace anti-discrimination laws such as the ADA and the ADEA. OSC, its grantees and the EEOC should work together in preparing materials for such training, and OSC-OSC grantee materials explaining the I-9 form in languages in addition to English should be available to such employers and their employees. It may not be essential that entire forms be translated into all additional languages that may be relevant to particular areas or workforces; the decision on how best to achieve the needed understanding will benefit from participation by these expert groups. Again, state/local FEP agencies and the parts of DOL that may play a role in INA enforcement will need training in 274B requirements, as they may not be familiar with these from their other activities.

It is evident that we see great benefit in, and therefore recommend, that there be considerably more outreach in the future than there has been in the past. This is so because all involved have been doing matters in a different way and therefore will have to unlearn as well as learn new behaviors. That outreach can and should be done by INS but not by INS alone: other federal agencies such as OSC, the EEOC and parts of the DOL should participate in outreach as outlined above, and so also should state and local FEP agencies and nongovernmental organizations that participate in or monitor employer sanctions and/or INA Sec. 274B. The funds for expanded outreach will have to be supplied by those who have funds, and we urge that INS make funds available to the maximum extent possible to those who will be its fellows in this endeavor.



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Washington, D.C. 20507

October 29, 1996

NOTE

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Office of Communications and Legislative Affairs

FROM : Donna Swanson, Program Analyst
Office of Program Operations

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Department of Justice

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Department of Labor

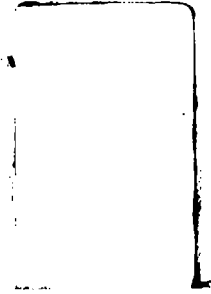
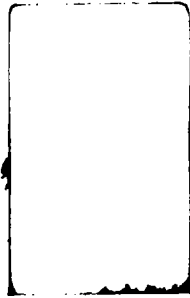
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Department of Health and Human Services

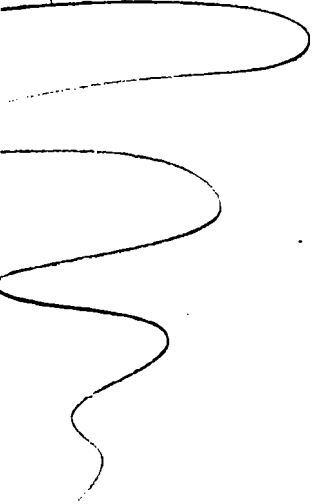
The Office for Civil Rights at the Department of Health and Human Services (HHS) protects the rights of individuals who receive, or are eligible to benefit from, federally assisted health and human services. Institutions, such as state and local public assistance agencies, hospitals, extended care facilities, children and family programs or mental health centers that receive funds from HHS are required to provide services to all sectors of the population, without regard to race, religion, color or national origin. For example, they must provide emergency hospital services, even if an individual has no health insurance and is unable to pay. Some hospitals which have received a specific type of federal funding, must provide services at no charge. Both hospitals and social service agencies are required to provide equal access to services for immigrants, which may require providing services in their own languages. If you believe you did not receive this type of assistance, please call the Office for Civil Rights, toll-free, at HHS at 1-800-368-1019 or TDD at 1-800-537-7697.



Employment
Unity Comm.

Department of Health
and Human Services

WORKERS
Know Your Rights!!

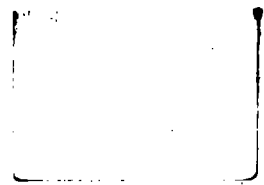
ext


text


Self master



O-S-C-
I-N-S-
O-F-C-C-P-
E-E-O-C-
H-H-S-



Your Rights as a
Worker

Department of Justice

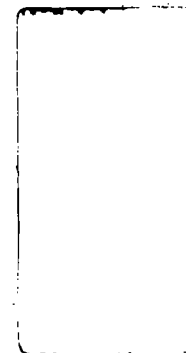
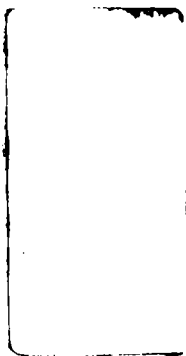
Office of Federal Con-
compliance Program

INS 7-10

INS 7-11

INS 7-17

7-17



I called about
this not being
13 pages (as
cover states).

There was problem
w/ their fax +
this along
w/ the other
fax is complete
set.

Lauren

OCLA fax

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF COMMUNICATIONS AND LEGISLATIVE AFFAIRS
1801 I STREET, N.W.
WASHINGTON, D. C. 20507
FAX: (202) 683-4012

DATE:

3/29/96

TIME:

TO:

Steve Wornath

FAX NUMBER:

456-7028

SENDER:

CLAIRE E. GONZALES, DIRECTOR

SENDER'S TELEPHONE NUMBER:

(202) 683 4015

DOCUMENT:

Proposed : Existing EEOC/OSC MOUs + Tomayo's memo

NUMBER OF PAGES TRANSMITTED (INCLUDING COVER):

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SAN FRANCISCO DISTRICT OFFICE
901 Market Street, Suite 500
San Francisco, California 94103

FAX TRANSMITTAL COVER PAGE

DATE: March 19, 1996

TIME: 9:01 a.m.

TOTAL PAGES TRANSMITTED: Six (6) + 1 COVER PAGE

TO: Ms. Claire Gonzales

OFFICE: Office of Communications & Legislative Affairs (OCLA)

FACSIMILE NO: (202) 663-4912

PHONE NO.: (202) 663-4900

OUR TELECOPIER NO: (415) 356-5046 (LEGAL UNIT)

SENDER: William R. Tamayo, RA, SFDO TELEPHONE: (415) 356-5084

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SPECIAL INSTRUCTIONS: "REVISED OSC MEMO"

3/19/96 (TIC) Bill T. - need to get Greg/OGC in loop ASAP
OGC share memo w/ Greg

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SAN FRANCISCO DISTRICT OFFICE
901 Market Street, Suite 500
San Francisco, California 94103

MEMORANDUM (REVISED)
CONFIDENTIAL

BY FACSIMILE

TO: Gilbert F. Casellas, Chairman
FR: William R. Tamayo, Regional Attorney *WR Tamayo*
RE: Proposed Enforcement of Title VII (National Origin) Against
Private Employers by Office of Special Counsel, DOJ
DT: March 19, 1996

Claire Gonzales recently contacted me to seek my views about a proposal to allow the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, U.S. Department of Justice ("OSC") to litigate a national origin issue under Title VII wherein a citizenship status discrimination and/or document abuse charge has also been filed under IRCA. While every effort should be made to streamline the process and utilize existing resources, this proposal appears inconsistent with the law, will not necessarily benefit the Commission, and establishes unnecessary precedents.¹ This memorandum summarizes my opinion on this proposal, and I look forward to discussing it with you during your visit to San Francisco on Wednesday, March 20, 1996.

¹Prior to joining the Commission, I prepared and delivered legislative testimony on behalf of the National Asian Pacific American Legal Consortium regarding the impact of IRCA, its anti-discrimination provisions, and the role of the OSC. Part of that testimony highlighted the disadvantages in IRCA discrimination prosecutions created by the lack of any regional or local presence by OSC. For three years, I also worked very closely with the OSC in litigating an important case (U.S. v. Guardsmark) which established that persons claiming "document abuse" were not required to be "intending citizens" (i.e. applied for U.S. citizenship within six months of eligibility) to be protected.

I. LIMITED LEGAL AUTHORITY

A. Delegation of Authority

The proposal interprets 42 U.S.C. 2000e-4(a) as authorizing the Chairman of EEOC to appoint the OSC to litigate national origin cases under Title VII. Congress, however, specifically delegated litigation authority to the EEOC, but did not authorize the requested delegation by the Chairman. The appointment provisions of section (a) limit appointments within the Commission. That is the most consistent reading of the statute. After the 1972 amendments to Title VII and the issuance of Executive Order No. 12068, the only statutory authority remaining for DOJ to litigate Title VII involves those matters against local and state governmental entities. 42 U.S.C. 2000e-6(c); Reorg. Plan No. 1 of 1978, Sec. 5, 43 F.R. 19870, 92 Stat. 3781. .

B. OSC's Authority

OSC's authority is defined by 8 U.S.C. Sec. 1324b, as amended. That is, it can only litigate cases involving citizenship status (4 or more employees), national origin discrimination (4-14) employees, and document abuse (4 or more employees). OSC can only challenge hiring and termination-related charges, and not "terms and conditions". Furthermore, OSC is only allowed to litigate cases for "protected individuals". 8 U.S.C. Sec. 1324b (a) (3), as amended. The prohibition against "citizenship status discrimination" is only applicable to citizens, lawful permanent residents (who apply for citizenship within six months of eligibility), political asylees, refugees, and lawful temporary residents. 8 U.S.C. Sec. 1324B(a) (3) (B) (i). IRCA's national origin and "document abuse" provisions, only covers citizens and aliens who have work authorization, while Title VII protects all employees, regardless of their immigration status. EEOC v. Tortilleria "La Mejor", 758 F. Supp. 585 (E.D. Cal. 1991)².

Remedies under IRCA are limited to injunctive relief and backpay, and do not include compensatory or punitive damages. Similarly, Title VII enforcement authority over state and local governmental entities does not allow for the pursuit of such damages. 42 U.S.C. Sec 1981a (b) (1). Accordingly, DOJ attorneys' litigation experience under IRCA and Title VII does not include the preparation of witnesses to substantiate claims for such damages. In Title VII actions against private employers there is a possibility for the award of such damages.

Furthermore, IRCA-related violations are brought before an

²This case was litigated by the SFDO Legal Unit. While at the Asian Law Caucus I was co-counsel for the intervenor, Alicia Castrejon.

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SAN FRANCISCO DISTRICT OFFICE**

901 Market Street, Suite 500
San Francisco, CA 94103
(415) 356-5100

**MEMORANDUM
~~CONFIDENTIAL~~**

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: Rey DATE: 11/11/2017
2017-1120-5

BY FACSIMILE (202) 663-4110

DT: March 28, 1996

TO: Gilbert F. Casellas, Chairman

FR: Bill Tamayo, Regional Attorney *BT*
(415) 356-5084

RE: Proposed Enforcement of Title VII (National Origin) Against
Private Employers by Office of Special Counsel, DOJ
Correction

Please accept my apologies for any confusion in my memorandum regarding the scope of DOJ's authority to seek damages. My revised memorandum of March 19, 1996 on this topic states:

Remedies under IRCA are limited to injunctive relief and backpay, and do not include compensatory or punitive damages. Similarly, Title VII enforcement authority over state and local governmental entities does not allow for the pursuit of such damages. 42 U.S. Sec. 1981a(b)(1). Accordingly, DOJ attorneys litigation experience under IRCA and Title VII does not include the preparation of witnesses to substantiate claims for such damages. In Title VII actions against private employers there is a possibility for the award of such damages.

id., page 2.

It should be clarified that state and local governmental entities under Title VII can be liable for compensatory damages but not punitive damages. I apologize for not making this distinction.

If you have any questions, please do not hesitate to contact me.

cc: Claire Gonzales, Director, OCLA, (202) 663-4912 fax

administrative law judge and not in federal district court.⁸ U.S.C. Sec. 13243(e). Thus, under the proposal, OSC would have to initiate a separate Title VII filing in district court, just like the EEOC General Counsel. The IRCA charge could not be resolved in the same court and consequently, OSC attorneys would be litigating in two fora for separate matters with specific remedies.

Thus, only through a statutory revision of Title VII or possibly another Executive Order similar to E.O. 12068 could DOJ reassume jurisdiction over Title VII national origin claims involving private employers. (As I understand, EEOC was not given the authority in 1986 to handle IRCA-related discrimination for various reasons including the EEOC's backlog. Ironically, however, Congress gave EEOC more responsibilities when it passed the Civil Rights Act of 1991 and amended the Americans with Disabilities Act!)

II. COMPARISONS BETWEEN EEOC AND DOJ

A. OSC's Resources

The main justification for the proposal is that the EEOC could utilize OSC's investigative resources when OSC handles related charges of citizenship status discrimination or document abuse. The proposal presumes that this is more efficient, but the current staffing patterns do not support this presumption. Currently, there are 8 attorneys in the OSC that litigate less than 9 complaints before the ALJs.⁹ There are approximately 400 pending IRCA charges and only a handful of non-attorney investigators nationwide. There is one non-attorney investigator for the Western Region which encompasses the Seattle, Los Angeles, Phoenix, Denver, and San Francisco EEOC Districts. Consequently, OSC trial attorneys (GS-14 and GS-15) conduct the investigations nationwide. EEOC investigators do the same type of work already but are largely in the GS 7-12 category. Aside from the troubling perceptions created by and lack of a compelling justification for the differences in grade between these attorneys and EEOC's investigators, the benefit towards the development of litigation is minimal if not negligible, when the investigator is in Washington, D.C. (If, however, there is helpful information that the OSC investigator or attorney finds that may lead to a conclusion that national origin discrimination violation under Title VII exists, that information can readily be transferred to the EEOC as the current process allows.)

⁹This relatively low number is the product of several factors including an extremely narrow statute with unreasonable restrictions on coverage, and more importantly, the lack of regional or local presence by the OSC.

Travel costs, time zone issues, and lack of a close relationship with a CP seem to defeat the need for such a proposal.* In fact, it is precisely because of its lack of an outreach and regional presence as an agency in California, that OSC has asked Western Regional EEOC offices to assist them in identifying groups, organizations, etc. to meet with. While EEOC should accommodate OSC's request for assistance, I believe that it illustrates the limitations of OSC.

III. SUGGESTED ALLOCATION OF RESOURCES

One clear way to improve the use of resources and the service to affected communities, would be for the Civil Rights Division to detail the OSC attorneys when appropriate to the Employment Discrimination unit that prosecutes Title VII and ADA cases against local and state governments. It is because of the lack of resources in that unit that such cases are rarely prosecuted, which, inevitably undercuts the EEOC's investigatory and conciliatory powers. In the San Francisco District, public employers employ a significantly large percentage of the workforce. For example, in Hawaii, approximately 40% of the workers are employed by the state, county, or municipal governments. Approximately 50% of the Honolulu Local Office's charges involve public employers. In Northern California, a major employer is the University of California, the California State University system, the State of California, and local governments. In meetings with our stakeholders, particularly those in Alameda County (Oakland) they have raised race discrimination in the public sector as a major problem.

Public employer respondents in Title VII and ADA matters have little incentive to conciliate when they know that the EEOC lacks litigation authority and that DOJ is more than likely not going to litigate the matter despite the EEOC's strong recommendation for litigation. Thus, from a resource allocation and practical view, detailing OSC lawyers to handle public sector cases is a better use of resources and strengthens EEOC's investigations and conciliation process.

*8 USC 1324b(c)(4) authorizes the OSC to establish regional offices. Although community groups have always encouraged the establishment of such offices and have criticized the lack of an OSC presence outside of Washington, D.C., OSC has never exercised this authority. I personally believe it is, in part, that lack of regional and local presence that results in a low exceedingly caseload for OSC.

B. Attorney Grades

There is already a significant disparity between the grade levels of OSC attorneys (GS-14 and GS-15) who handle IRCA-related charges before Administrative Law Judges and EEOC Trial Attorneys (GS 11-13, and GS-14 for one Senior Trial Attorney per EEOC District) who handle more complex statutes in federal district court. "Punting" the national origin cases involving private entities to the OSC raises a potential set of contradictions and/or serves to sharpen the existing disparity.

IV. IMPACT ON NATIONAL AND LOCAL ENFORCEMENT PLANS

Among the cases that are included in the National Enforcement Plan are "claims presenting national origin discrimination involving language issues, including accent discrimination and restrictive language policies or practices." Our Local Enforcement Plan will likely include claims of national origin discrimination, including language policies and practices given the demographics of our district and the comments of our stakeholders.⁵ As you have noted in your public comments, the post-Proposition 187 climate and the California Civil Rights Initiative (if passed), would likely lead to increased discrimination claims by Latinos and Asians. We are already incorporating extensive outreach plans and creating collaborative working relationships with Latino and Asian based civil rights organizations in order to carry out the LEP.

SFDO has represented that EEOC wants to litigate national origin cases. I believe that "punting" part of what should be EEOC's cases over to an exclusively Washington, D.C.-sited agency would send the wrong message to the stakeholders and somewhat contradict our representations. Furthermore, service to the affected communities is not necessarily improved under the proposal.

V. CONCLUSION

The possible statutory and executive revisions that would be required, the policy implications, and potential personnel issues lead me to conclude that the proposal causes more problems than it attempts to resolve. Consequently, I do not recommend against the adoption of such a proposal. However, I do recommend that the Civil Rights Division, when appropriate, allocate some of its

⁵Latinos and Asians are approximately 30% the District's population. At meetings on the Local Enforcement Plan held with stakeholders in Honolulu, Fresno, Oakland and San Francisco, discrimination against Mexicans, other Latinos, and Asians was raised as an issue of major concern.

resources in OSC to the Employment Discrimination unit so that Title VII and ADA charges against public employers can be litigated. This would be more helpful to the Commission and the public.

If you have any questions, please feel free to contact me at (415) 356-5084. I look forward to discussing my opinions with you on your visit on Wednesday.

cc: Claire Gonzales, Director, OCLA

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U.S. Department of Justice
Office of Special Counsel
for Immigration-Related
Unfair Employment Practices



You Have The Right To Work.
Don't Let Anyone Take It Away.



U.S. Department of Justice

Civil Rights Division
Office of Special Counsel for Immigration-Related
Unfair Employment Practices



You Have The Right
To Work.

Don't Let Anyone Take It Away.

Real Life Stories That Can Help You.



You have the right to work.
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Salga de las Dudas.

7

U.S. Department of Justice

Civil Rights Division
Office of Special Counsel for Immigration-Related
Unfair Employment Practices



Salga de las Dudas.



Usted Tiene El Derecho A Trabajar. No Deje Que Se Lo Quiten.

U.S. Department of Justice
Office of Special Counsel
for Immigration-Related
Unfair Employment Practices



MANUEL Y CRISTINA BUSCAN EMPLEO ...

Me llamo Cristina Torres. Tengo experiencia empacando frutas y haciendo limpieza. Estoy lista para trabajar. Sólo dígame cuando comienzo.

ESH PRODUCE



Veo que su inglés no es muy bueno. ¿Usted no nació en este país, verdad?

No señor. Pero hace muchos años que vivo aquí.

Bueno, revisaré su solicitud de trabajo y después la llamaremos.



Me llamo Manuel Pérez y soy electricista. Aquí tiene mi licencia de conducir y mi tarjeta de seguro social.



Pero ... ¿por qué? Este es un permiso válido.

Sólo aceptamos papeles del Servicio de Inmigración.

Lo siento, pero no queremos problemas con Inmigración.



MANUEL Y CRISTINA VISITAN A JULIA RAMOS

... entonces me negaron el empleo por ser latinoamericana y por mi acento.

Y a mí no me dieron el empleo por no tener mi tarjeta de residencia.



Eso es discriminación laboral. Tienen que quejarse.

¿Quejarse?

¿Y a dónde?

Hagan lo que yo hice cuando me discriminaron. Llamen ahora mismo a la Oficina del Consejero Especial. La ayuda es gratis y rápida.



Voy a traerles el número de teléfono.

... y creemos que nos han discriminado por lo que quisieramos que nos ayudaran con nuestro problema.



DIAS DESPUES ...

¿Cómo les fue con sus quejas de discriminación laboral?

¡Ganamos nuestros casos! Los abogados lograron convencer a los empleadores que nos dieran los trabajos.

Dénme los datos para comenzar ahora mismo la investigación.

Sí, y además tuvieron que pagarnos por todo el tiempo que no trabajamos desde el día que hubiésemos empezado a trabajar.



Solamente nos preocupaba que los jefes fueran a tomar represalias contra nosotros, pero menos mal que no pasó nada porque los abogados del Departamento de Justicia estaban listos para defendernos.

Usted tiene el derecho a trabajar. No deje que se lo quiten.

¡Y usted haga como nosotros!
¡Defienda sus derechos laborales! La llamada y los abogados son gratis. Si se siente discriminado en su trabajo, llame ahora mismo al 1-800-255-7688. Personas con problemas de audición pueden llamar al 1-800-237-2515. En Washington, D.C., llamen al (202) 616-5594. TDD (202) 616-5525



Mis amigos. Me alegra mucho que no se hayan dejado discriminar.



o escríble a la Oficina del Consejero Especial:
U.S. Department of Justice
P.O. Box 27728
Washington, DC 20038-7728

John Tresvina

12/18/97

Outreach to employees

Feb./March: Program
protecting immigrants
against fraud. (promise papers for \$)
targeting 5 cities

NY/Newark/Houston/Miami/LA
toll free #

Employment verification - pilot
all employees
INS/SS

Citizens
non-citizens

38 employers
trained
software

after they hire someone
I-9

name/dob/SS/A# (if
not-citizen)

tap into SS: get back whether that #
belongs to that person & whether that
person is legal to work

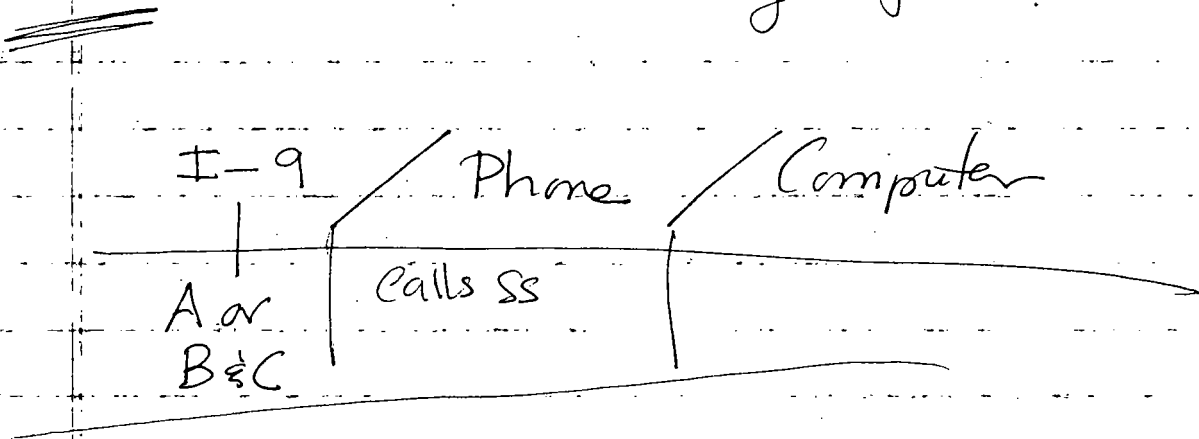
SS does not have a consistent way
of tracking whether naturalized

Since 1979: need to tell SS about
change in immigration status

If SS

Note to employee:

If Δ is born in U.S. prior to 79, SS assumes they are fine.



SS confirms or not whether authorized to work.

(All native born citizens have no records @ INS.)

~~go to INS~~ End

If discrepancy b/w SS and ~~INS~~ employee (on whether born in U.S.)

employee has 30 days to work it out w/ SS.

Under new pilots (8 days)

If not born in U.S. (Alien)

go to INS - A #

name

INS can tell if

~~match~~ this person is auth. to work.

Name / # / auth. to work

(work with data base)

3 \$

If not auth. to work, INS prompts employer for more info. from I-9.

(May come back (confirmed, not authorized)
So know if more info will help

If still no authorization

Let ~~to employer~~ ~~employee~~
(bilingual)

~~employee~~ has 30 days
(will be 8 days)
to clear it up. w/ INS

Pilots are in 5 states:

now:
100-200
employers have
signed up.
(total)

Illinois
NY
CA
TX
FL

~~Statute: Employer is entitled~~

~~##~~ Employer is entitled to a 10 day turn around
from INS/SS. (on 2nd round verification)

INS/SSA will send back to an employer a
"not auth. to work" letter. (?)
or an interim letter

will
be told
still be
walked
out, may
take more
time.

Employers are trained (but poorly)

John saw 3 employers (picked by INS)

tool company / baker / high-tech

intuitiv
what to do
w/ letter

Training for employers were too complex.

OSC - trying to make the training more
user-friendly + guards against discrim.

⊗ Hot-line (?)

⊕ INS will train the employers
(w/ test @ the end)
(tutorial)

Sept.

OSC / EEOC / Wage & Hour / DFCCP / W. men's office
Employee educ. sessions w/ advocacy
and labor groups. ⊗
Rights / pilots

~~OSC gives money to 11 groups in blue~~

Labar piece w/INS reform?

Feinstein

Endorses CIR proposal

she is on immigration subcommittee
of judiciary committee

Trevino

Smith and Abraham will not prevail
on this

Carnegie Endowment for International Peace

November 11, 1997

EK/Jose/JF

-BL

Mr. Bruce Reed
Assistant to the President for Domestic Policy
White House
2nd Floor, West Wing
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500
Fax: (202) 456-2878

Admin's
supportive of
workforce enforcement
④ verification

Dear Mr. Reed:

At a recent roundtable convened by the International Migration Policy Program, participants expressed concern about the implementation of employment verification pilot programs by the Immigration and Naturalization Service (INS):

To ensure that the pilot programs meet the criteria mandated by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, we feel there must be an evaluative mechanism in place from the commencement of such programs to insure that concerns regarding privacy issues, civil rights and other possible infringements these programs may visit upon individuals are addressed. As of today, no such mechanisms are in place, and the request for proposals for the evaluation work has yet to be published. Realistically, this implies that evaluation will trail the pilot programs by at least six months. Such a time lag between the implementation of the employment verification pilot programs and a proper evaluative exercise casts doubt on the seriousness of the evaluation process.

It is our hope that this expression of concern will prompt immediate action by the INS in proceeding with an evaluation program forthwith.

We look forward to hearing from you on this matter.

Sincerely,

American Civil Liberties Union (ACLU)
American Immigration Lawyers Association (AILA)
Center for Democracy and Technology
Electronic Privacy Information Center (EPIC)
National Association of Latino Elected and Appointed Officials (NALEO)
National Council of La Raza (NCLR)
National Immigration Forum (NIF)
National Immigration Law Center (NILC)
Civil Rights Project, Harvard Law School
Rick Swartz & Associates
Union of Needletrades, Industrial & Textile Employees (UNITE)

① Bob Baeh
could be something
somewhere.
overview

② John Trasvina
Office of Special
Counsel @ DoJ
616-5528

Carnegie Endowment for International Peace

November 11, 1997

Mr. Bruce Reed
Assistant to the President for Domestic Policy
White House
2nd Floor, West Wing
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500
Fax: (202) 456-2878

*Tulie -
could you look
into this?
Elena*

EK/JOSE/JF

-BR

Dear Mr. Reed:

At a recent roundtable convened by the International Migration Policy Program, participants expressed concern about the implementation of employment verification pilot programs by the Immigration and Naturalization Service (INS).

To ensure that the pilot programs meet the criteria mandated by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, we feel there must be an evaluative mechanism in place from the commencement of such programs to insure that concerns regarding privacy issues, civil rights and other possible infringements these programs may visit upon individuals are addressed. As of today, no such mechanisms are in place, and the request for proposals for the evaluation work has yet to be published. Realistically, this implies that evaluation will trail the pilot programs by at least six months. Such a time lag between the implementation of the employment verification pilot programs and a proper evaluative exercise casts doubt on the seriousness of the evaluation process.

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