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## Implementing a Long Term Work Visa Program to Document the Undocumented and Protect the U.S. Workforce

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# IMPLEMENTING A LONG TERM WORK VISA PROGRAM TO DOCUMENT THE UNDOCUMENTED AND PROTECT THE U.S. WORKFORCE

## I. INTRODUCTION

Our country's economy relies on foreign labor.<sup>1</sup> This need has continually influenced immigration policies alongside the goals of national security, maintaining sovereignty, and protecting American workers.<sup>2</sup> These policies are commonly born out of public sentiment. The United States has a long history, contrary to popular belief, of being *unwelcoming* to new immigrants, especially in times of economic downturn.<sup>3</sup> In these times, society goes after immigrant, undocumented individuals first (i.e. we need jobs, why are foreign-born persons employed).<sup>4</sup> However, our dependence on foreign labor keeps a steady stream of undocumented persons coming to the United States each year, ready and willing to work.<sup>5</sup>

In an effort to reduce and ultimately stop illegal immigration, Congress passed the Immigration Control and Reform Act of 1986

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1. See Richard A. Johnson, Note, *Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 254 (2007) [hereinafter *Twenty Years of the IRCA*]; see also Shannon Leigh Vivian, Note, *Be Our Guest: A Review of the Legal and Regulatory History of U.S. Immigration Policy Toward Mexico and Recommendations for Combating the Employer Exploitation of Nonimmigrant and Undocumented Workers*, 30 SETON HALL LEGIS. J.189, 191 (2005).

2. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 306 (5th ed. 2009). “[N]ational security is . . . one of the many policy ingredients in the mix.” *Id.* at 816. Protecting American workers can be seen in the labor certification provisions. See *id.* at 307.

3. HELENE HAYES, *U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES* 2-3 (2001).

4. See *Legal Workforce Act: Hearing on H.R. 2164 Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112<sup>th</sup> Cong. 85 (2011) (statement of Tyler Moran, Policy Director, National Immigration Law Center) [hereinafter *Hearing on H.R. 2164*, statement of Tyler Moran], [http://judiciary.house.gov/hearings/printers/112th/112-44\\_66887.PDF](http://judiciary.house.gov/hearings/printers/112th/112-44_66887.PDF).

5. See *Twenty Years of the IRCA*, *supra* note 1, at 252.

(IRCA) which contains increasingly restrictive policies that criminalized the employment relationship between undocumented persons and employers.<sup>6</sup> Although this avenue of immigration control has proven to be ineffective, there is still a major push in Congress to attack the same problem in the same way with the Legal Workforce Act (H.R. 2885).<sup>7</sup> The Legal Workforce Act proposes to maintain the enforcement structure of IRCA and replace the current employment verification requirement with an electronic verification system.<sup>8</sup>

This note proposes an alternative approach to deal with the presence and influx of undocumented workers that balances the need for foreign labor and the need for immigration control. Part II provides an overview of IRCA and its specific provisions designed to deal with the issues of illegal immigration and how it has influenced and changed the situation for undocumented immigrants in our country. Next, Part III outlines the current use of the electronic employment eligibility verification system, known as E-Verify, and its existing problems. Part IV discusses the projected effects of the mandatory use of E-Verify as proposed by the Legal Workforce Act. Lastly, Part V offer recommendations, specifically an alternative approach, proposing a new nonimmigrant visa.<sup>9</sup>

The proposed visa is a long-term visa that would allow visa holders to work. It includes a protection provision for American workers in the form of specified application dates ensuring that visa holders apply after U.S. workers have already had the opportunity. In addition, persons applying for the proposed visa cannot be inadmissible.<sup>10</sup> While the proposed visa does not create a separate path to legal permanent residence or citizenship, there is no penalty or additional process for visa holders to change their status.<sup>11</sup> Implementation of the visa would start

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6. *See id.* at 244-45.

7. Legal Workforce Act of 2011, H.R. 2885, 112<sup>th</sup> Cong. (2011).

8. *See infra* Part IV.A

9. A visa is permission from the U.S. government to enter the United States. Bureau of Consular Affairs, U.S. Dep't of State, *What is a U.S. Visa?*, [http://travel.state.gov/visa/questions/what/what\\_4429.html](http://travel.state.gov/visa/questions/what/what_4429.html) (last visited Feb. 25, 2013). Nonimmigrant visas are issued to aliens who do not intend to immigrate and are in the United States temporarily for a limited purpose. *See Vivian, supra* note 1, at 191 n.11. There are currently over forty nonimmigrant visa categories. Immigration and Nationality Act § 1101(a)(15)(A)-(V), 8 U.S.C. § 1101(a)(15)(A)-(V) (2006).

10. Inadmissibility refers to provisions established within the INA to prohibit certain individuals from entering the United States. *See* Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a) (2006). Examples of individuals who are excludable are those that may become a public charge, individuals with health problems, criminals, and terrorists, to name a few. *See id.*

11. *See infra* Part V.A.1.

with persons already in the United States with no threat of immigration-based reprisals.<sup>12</sup> Having status<sup>13</sup> provided by this new proposed visa will give foreign workers a legal recourse for labor violations. International law and human rights law have set standards regarding both the treatment of aliens and workers' rights. According to the U.N. Universal Declaration of Human Rights, which the United States has ratified, these rights apply to all people, indiscriminate of documentation or lawful presence.<sup>14</sup> Similarly, our own Bill of Rights and other amendments, such as the Fourteenth Amendment's Equal Protection Clause, apply to all people within the United States, again indiscriminate of lawful presence.<sup>15</sup> Currently, under IRCA, there is a lack of protection given to undocumented workers faced with abusive employment situations, in violation of these international norms.<sup>16</sup> The goal of this new visa category is to create a way for the economy to have the foreign labor it requires while protecting the rights of *all* workers within the United States.

## II. IMMIGRATION REFORM & CONTROL ACT OF 1986

### A. History of the IRCA

#### 1. Undocumented Workers in America

Undocumented workers have a particular role in the economy, such as providing inexpensive work in jobs not wanted by others.<sup>17</sup> "It is unquestionably the case that economic forces bring majority of migrants to the United States . . . [They] come to this country for economic

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12. See *infra* Part V.A.1-2.

13. Status refers to an individual's legal right to be within the United States: citizens, legal permanent residents, nonimmigrant visa holders. See Immigration and Nationality Act § 204, 8 U.S.C. § 1154 (2006).

14. Universal Declaration of Human Rights (U.N.) applies to all people. AVIVA CHOMSKY, "THEY TAKE OUR JOBS!" AND 20 OTHER MYTHS ABOUT IMMIGRATION xviii (2007).

15. Our Bill of Rights, specifically the Fourteenth Amendment applies to all people living in the United States. *Id.* at xix.

16. See Lucas Guttentag, *Immigration-Related Employment Discrimination: IRCA's Prohibitions, Procedures, and Remedies*, 37 FED. B. NEWS & J. 29, 31 (1990) ("Unauthorized aliens fall outside the coverage of this provision and cannot invoke its protections.")

17. David W. Haines, *Labor at Risk: The Exploitation and Protection of Undocumented Workers*, in *ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* 346, 351 (David W. Haines & Karen E. Rosenblum eds., 1999). As can be seen by what is going on in both Alabama and Georgia, U.S. citizens are either unable or unwilling to do the work formerly performed by undocumented workers. See *infra* Part IV.C.2.

opportunity far superior to those available to them in their homeland.”<sup>18</sup> Temporary workers are ideal for agricultural industries and undocumented workers are ideal for industries needing day laborers because they are “disposable and self-disposing.”<sup>19</sup> This preference for undocumented workers is recognized within the agriculture industry itself and it “historically has been afforded special consideration in the area of immigration policy . . . .”<sup>20</sup> As early as 1917, the agriculture industry began asking the federal government to make exceptions to its immigration laws.<sup>21</sup> Even today, owners in the agriculture industry claim that they would go out of business if it were not for the cheap labor provided by undocumented workers.<sup>22</sup> These workers make up five percent of the U.S. labor force<sup>23</sup> and are an “integral part” of the American economy.<sup>24</sup>

Our need for foreign labor has continually been dealt with by Congress through various immigration legislation including international agreements, guest worker visa programs, and even by lack of specific legislation, such as leaving out employers from the INA provision regarding harboring undocumented persons through the Texas Proviso.<sup>25</sup> Most notably linked to our current illegal immigration problems is the treaty between the U.S. and Mexico, in which Mexico agreed to supply U.S. agriculture with much needed labor, commonly known as the *bracero* program.<sup>26</sup>

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18. KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICAN NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 119 (2007) [hereinafter *OPENING THE FLOODGATES*]. Although undocumented immigrants receive wages beyond what could have been earned in their home country, they are still considered low by U.S. standards. *Id.*

19. See Haines, *supra* note 17, at 354.

20. Patrick C. McManaman, Comment, *From Bracero to H-2A San Joaquin Valley Shepherders: Lessons Learned from the Failure of Our Nation's Guest Worker Programs*, 16 San Joaquin Agric. L. Rev. 127, 131 (2007).

21. See Philip L. Martin, *Unauthorized Workers in U.S. Agriculture: Old Versus New Migrations*, in *ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* 133, 146-147 (David W. Haines & Karen E. Rosenblum eds., 1999).

22. See Haines, *supra* note 17, at 351.

23. LEGOMSKY & RODRIGUEZ, *supra* note 2, at 1143-44.

24. Vivian, *supra* note 1, at 191; see also *Twenty Years of the IRCA*, *supra* note 1, at 254.

25. See Vivian, *supra* note 1, at 191-92; Darcy M. Pottle, Note, *Federal Employer Sanctions as Immigration Federalism*, 16 Mich. J. Race & L. 99, 106 (2010).

26. The *bracero* program is thought to be the root of contemporary illegal immigration. LEGOMSKY & RODRIGUEZ, *supra* note 2, at 1141. In addition, the *bracero* program is seen as contributing to the immigration problem in two ways, by setting in motion the flow of migration from Mexico and continuing even after the labor flow was no longer authorized. HAYES, *supra* note 3, at 30. What began as illegal migration eventually became illegal immigration; “the easy access to former *braceros* meant that growers substituted illegal labor for the formerly legal *bracero* labor.” LEGOMSKY & RODRIGUEZ, *supra* note 2, at 1142.

The bracero program imported several million temporary Mexican farmworkers and operated from 1942-1947 and again from 1951-1964.<sup>27</sup> “On paper the braceros had considerable rights. . . . [However][,] [t]he [Department of Labor’s] enforcement of the contract guarantees for wages, housing, and suitable food and water was virtually nonexistent.”<sup>28</sup> “[T]here was little that braceros could do about their treatment[;] . . . if they complained they would lose their jobs, be deported, and be black listed from future bracero employment.”<sup>29</sup> Essentially, “workers were subject to the absolute power of their employers.”<sup>30</sup> The Mexican government had reservations about the program because of the discrimination that occurred and even barred certain states from participating.<sup>31</sup> This disapproval along with increased public awareness of the exploitation of Mexican workers by participating employers led to the termination of program in 1964.<sup>32</sup> However, even after the agreement was terminated, many former braceros remained in the United States to work, despite the deplorable working conditions.<sup>33</sup>

## 2. The Push for Interior Enforcement Coupled with Border Enforcement

Prior to the passage of IRCA, the Immigration and Naturalization Act (INA) attempted to stop illegal immigration and reduce the presence of undocumented persons through border enforcement; focusing on admission, entry, harboring and transportation of illegal aliens.<sup>34</sup> The INA was notably silent regarding employment of undocumented workers.<sup>35</sup> The McCarran –Walter Act of 1952 made it illegal to “harbor, transport, or conceal illegal entrants.”<sup>36</sup> However, a proviso, lobbied for

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27. LEGOMSKY & RODRIGUEZ, *supra* note 2, at 1141; HAYES, *supra* note 3, at 29.

28. McManaman, *supra* note 20, at 132.

29. Marjorie S. Zatz, *Using and Abusing Mexican Farmworkers: The Bracero Program and the INS*, 27 LAW & SOC’Y REV. 851, 855-56 (1993). “One Bracero described the experience: ‘[T]hey treated us like animals . . . . But as a Bracero, you knew you couldn’t complain.’” McManaman, *supra* note 20, at 133.

30. Laura C. Oliveira, Comment, A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program, 5 SCHOLAR 153, 158 (2002).

31. See Vivian, *supra* note 1, at 198.

32. See *id.*; McManaman, *supra* note 20, at 133.

33. See LEGOMSKY & RODRIGUEZ, *supra* note 2, at 1141-42.

34. Dennis A. Calderon-Barrera, Note, *Hoffman v. NLRB: Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, HARV. LATINO L. REV. 119, 120 (2003); see also *Twenty Years of IRCA*, *supra* note 1, at 247.

35. Calderon-Barrera, *supra* note 34, at 120.

36. Pottle, *supra* note 25, at 106.

by the agricultural industry entitled the Texas Proviso, explicitly excluded employment from the “harboring” category.<sup>37</sup> This was interpreted by the Immigration and Naturalization Service (INS), the agency charged with enforcing the Act, as free rein to employ undocumented workers.<sup>38</sup>

Following the bracero program and the continued influx of undocumented persons into the United States, Congress had to determine the best way to achieve the goals of immigration policy: national security, maintaining sovereignty and protecting American workers.<sup>39</sup> They decided that to best accomplish this would be to change the focus of their immigration policies from border enforcement, which had proven to be ineffective, to interior enforcement.<sup>40</sup> Congress felt that “[s]anctions, coupled with improved border enforcement, [was] the only effective way to reduce illegal entry . . . .”<sup>41</sup> The solution came in the form of the Immigration Reform and Control Act of 1986 (IRCA). Although its roots are in immigration law and reform, its branches have far reaches into the employment and labor sphere through its mandated procedures and employer sanctions. IRCA was passed on the premise that if employment opportunities for unauthorized workers were gone, the “magnet” bringing undocumented persons into the country would be weakened.<sup>42</sup> “[T]he Committee [was] convinced that as long as job opportunities [were] available to undocumented aliens, the intense pressure to surreptitiously enter the [United States] or to violate status once admitted . . . in order to obtain employment [would] continue.”<sup>43</sup> By weakening the magnet, Congress hoped that illegal immigration would go down overall.<sup>44</sup>

Proposals advocating employer sanctions to relieve the problem were being talked about and proposed since 1972.<sup>45</sup> Prior to the passage of IRCA, Congress had concluded that unauthorized workers were a

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37. *Id.*

38. *Id.*

39. See H.R.Rep. No. 99-682, pt. 1, at 46-47 (1986). “[T]he adverse impact of illegal aliens was substantial, and warranted legislation both to protect U.S. labor and the economy . . . .” *Id.* at 52.

40. See *Twenty Years of the IRCA*, *supra* note 1, at 247-48; see also Naomi Barrowclough, Note, *E-Verify: Long Awaited ‘Magic Bullet’ or Weak Attempt to Substitute Technology for Comprehensive Reform?*, 62 RUTGERS L. REV. 791, 796 (2010).

41. H.R. Rep. No. 99-682, pt. 1, at 49.

42. *Twenty Years of the IRCA*, *supra* note 1, at 248.

43. H.R. Rep. No. 99-682, pt 1., at 56.

44. *Twenty Years of the IRCA*, *supra* note 1, at 248.

45. Calderon-Barrera, *supra* note 34, at 121.

major contribution to the 1970s economic “tailspin.”<sup>46</sup> Studies at the time just prior to IRCA’s passage highlighted that undocumented workers took American jobs, depressed wages and impaired working conditions.<sup>47</sup> Congress intended to place the burden on employers regarding the employment of unauthorized workers.<sup>48</sup> The idea was to remove illegal competition and the incentive for employers to employ these workers.<sup>49</sup> It is clear from the legislative history of IRCA that Congress did *not* intend for unauthorized workers to be unprotected.<sup>50</sup> The House Judiciary Committee recognized that in order to assure wages and employment conditions of lawful residents, undocumented workers needed to be protected by labor law.<sup>51</sup> Further, Congress realized that in order for IRCA to be effective, undocumented workers had to remain protected by U.S. employment and labor law to prevent unscrupulous employers from gaining a competitive advantage by ignoring IRCA’s prohibitions and hiring undocumented workers.<sup>52</sup>

### *B. Main Provisions of the Immigration Reform and Control Act*<sup>53</sup>

The Immigration Reform and Control Act is laid out in section 274A of the Immigration and Nationality Act (INA) and deals with the “Unlawful Employment of Aliens.”<sup>54</sup> As mentioned above, this section of the INA asserts that it is unlawful to “hire, or to recruit or to refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment,”<sup>55</sup> and imposes sanctions on the employer for non-compliance, either monetary fines, possible jail time, or both.<sup>56</sup> This puts the onus of unauthorized

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46. *Twenty Years of the IRCA*, *supra* note 1, at 245.

47. Calderon-Barrera, *supra* note 34, at 121.

48. *Id.*

49. *Id.*

50. *Twenty Years of the IRCA*, *supra* note 1, at 249. “It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.” H.R. Rep. No. 99-682, pt.1, at 58.

51. Calderon-Barrera, *supra* note 34, at 122.

52. *Twenty Years of the IRCA*, *supra* note 1, at 250.

53. The provisions presented and discussed here represent only a quick introduction to the legislation.

54. Immigration and Nationality Act § 274A, 8 U.S.C. § 1324a (2006).

55. 8 U.S.C. §1324a(a)(1)(A).

56. 8 U.S.C. §1324a(e)(4); 8 U.S.C. § 1324a(f)(1).



work on the employer rather than the undocumented alien<sup>57</sup> by making employers responsible to verify the employee's right to work in the United States.<sup>58</sup> In addition, IRCA gave amnesty to undocumented immigrants who resided in the United States continuously prior to 1982.<sup>59</sup> The third major provision was the increase in the Immigration and Naturalization Service (INS) budget to allow for both increased border patrol and enforcement of the sanctions imposed by the Act.<sup>60</sup>

Just as with the bracero program and the legislation before it, agriculture had a hand in certain provisions of IRCA.<sup>61</sup> The concessions lobbied for by the agricultural industry appear in the "Special Agricultural Workers" (SAW) and "Replacement Agricultural Workers" (RAW) provisions.<sup>62</sup> Under SAW, farmworkers could be legalized under relatively liberal provisions, as opposed to the general amnesty provided for by the act.<sup>63</sup> Once legalized, SAW workers did not stay in the agricultural industry.<sup>64</sup> Instead, because of increased opportunities, they moved into other industries.<sup>65</sup> Because Congress and the agriculture industry foresaw that both the amnesty provided in IRCA and the SAW provision would move workers out of agriculture, they included the RAW provision.<sup>66</sup> Under RAW, if a labor shortage were ever to develop, replacement workers could be "imported" for the agricultural industry only.<sup>67</sup> However, once gone from agriculture, legalized workers were often replaced by undocumented workers.<sup>68</sup>

Section 274A further lays out what is appropriate documentation to confirm an individual's right to work in the United States.<sup>69</sup> This verification is currently done through the I-9 process.<sup>70</sup> There are twenty-seven documents, some taken in combination with one another, which prove work authorization.<sup>71</sup> Due to the fact that so many

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57. See Calderon-Barrera, *supra* note 34, at 120.

58. See *id.*

59. *Twenty Years of the IRCA*, *supra* note 1, at 244-45.

60. *Id.* at 245.

61. See Zatz, *supra* note 29, at 861.

62. See *id.* at 860-861.

63. See *id.* at 861.

64. Martin, *supra* note 21, at 149.

65. See Haines, *supra* note 17, at 357.

66. See Martin, *supra* note 21, at 149.

67. See Zatz, *supra* note 29, at 861.

68. Martin, *supra* note 21, at 149.

69. See Immigration and Nationality Act § 274A, 8 U.S.C. §§ 1324a(b)(1)(B)-(D) (2006).

70. See Pottle, *supra* note 25, at 114.

71. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-924T, EMPLOYMENT VERIFICATION: CHALLENGES EXIST IN IMPLEMENTING A MANDATORY ELECTRONIC VERIFICATION System 4-5 (2007) [hereinafter EMPLOYMENT VERIFICATION CHALLENGES], available at

documents are available to prove authorization, there is an ever-growing business in fraudulent documents.<sup>72</sup> In addition, employers in general receive incomplete guidance regarding document screening<sup>73</sup> and the magnitude of fraudulent documents makes it difficult for employers to comply with the law.<sup>74</sup> For these reasons, employers are “bound to make wrong enforcement decisions, either in good faith or with discriminatory intent to try to minimize legal liability.”<sup>75</sup>

This section of the INA also provides for an affirmative defense for employers in the good faith provision. Section 274A(a)(3) reads:

A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.<sup>76</sup>

This good faith defense relates to the standard accepted for “knowingly.” According to case law, “knowingly” means willful blindness.<sup>77</sup> This standard is better for employers because it is more difficult to prove. Alternatively, the regulations state that “knowingly” equates to reason to know, a standard very different than willful blindness.<sup>78</sup> Due to the fact that employer sanctions are so infrequently enforced, employers are able to use the good faith defense in all circumstances except for the most egregious.<sup>79</sup>

Lastly, section 274B was added to IRCA because of congressional concern that imposing employer sanctions would result in

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<http://www.gao.gov/new.items/d07924t.pdf>. “Eight of these documents establish both identity and employment eligibility (e.g., U.S. passport or permanent resident card); 12 documents establish identity only (e.g., driver’s license); and 7 documents establish employment eligibility only (e.g., Social Security card).” *Id.* at 5 n.7.

72. See Pottle, *supra* note 25, at 114.

73. See *id.* at 115 (“Even the *Handbook for Employers*, produced by USCIS, contains only a few examples of valid documents, despite the existence of several valid circulating versions of each of the twenty-seven acceptable forms of identification.”).

74. See *id.*

75. *Id.* at 116.

76. Immigration and Nationality Act §274A, 8 U.S.C. §1324a(a)(3) (2006).

77. LEGOMSKY & RODRIGUEZ, *supra* note 2, at 1160. See, e.g., *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1177 (10<sup>th</sup> Cir. 2007); *New El Rey Sausage Co. v. INS*, 925 F.2d 1153, 1157-58 (9<sup>th</sup> Cir.1991); *Collins Food Int’l, Inc. v. INS.*, 948 F.2d 549, 555 (9<sup>th</sup> Cir. 1991), *Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9<sup>th</sup> Cir. 1989), *Am. Fed’n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1003 (N.D. Cal. 2007).

78. See 8 C.F.R. § 274a.1(l)(1) (2008).

79. See Pottle, *supra* note 25, at 107.

discrimination.<sup>80</sup> Unlike the anti-discrimination provisions of Title VII, which only applies to employers with fifteen or more employees, §274B applies to employers with three or more employees and does not carry a designated period of time that employees must be employed.<sup>81</sup> This extra provision added many covered employers and facilitated speedier remedies.<sup>82</sup> However, this section only applies to citizens, immigrants, and non-immigrants authorized to work.<sup>83</sup> Undocumented workers are explicitly not offered protection under this provision.<sup>84</sup>

IRCA was passed by Congress with the specific intent of curbing illegal immigration into the United States.<sup>85</sup> Although the specific provisions of IRCA are meant to accomplish this goal by shifting the focus of immigration control to the interior rather than only at the borders, IRCA has had different effects than originally imagined.<sup>86</sup> Illegal immigration has steadily increased since the passage of IRCA, undocumented persons are still employed, and undocumented workers' rights are being continually violated.<sup>87</sup>

### *C. The Effect of the Immigration Reform and Control Act on Undocumented Individuals*

IRCA has changed the situation for undocumented persons and workers within the United States. Employer sanctions made the plight of undocumented immigrants more desperate and surreptitious.<sup>88</sup> Unauthorized workers have been forced underground, afraid of immigration consequences so they deal with whatever work conditions are forced upon them regardless of federal laws in place to protect workers.<sup>89</sup> “[E]xploitation without legal recourse is a daily fact of life for [undocumented persons].”<sup>90</sup> Even though courts have held that undocumented workers are protected under U.S. labor law, such as the NLRA, many do not come forward when their rights are violated for fear

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80. Guttentag, *supra* note 16, at 29.

81. *See id.*

82. *Id.*

83. 8 U.S.C. § 1324b(a)(3)(A)-(B) (2006).

84. 8 U.S.C. § 1324b(a)(3)(C) (2006).

85. *See Twenty Years of the IRCA, supra* note 1, at 244.

86. *See id.* at 247.

87. *Id.* at 251.

88. HAYES, *supra* note 3, at 121.

89. *See id.*; *see also* OPENING THE FLOODGATES, *supra* note 18, at 120.

90. HAYES, *supra* note 3, at 120.

of immigration reprisals.<sup>91</sup>

### 1. Rights of Undocumented Workers under U.S. Law

Prior to the passage of IRCA, the United States Supreme Court decided *Sure Tan, Inc. v. NLRB*.<sup>92</sup> After a union-organizing drive, the union won its election.<sup>93</sup> However, the employer, Sure-Tan Inc. believed that six of the seven votes for the union were made by undocumented workers and objected to the National Labor Relations Board (NLRB), the agency charged with enforcing the National Labor Relations Act (NLRA).<sup>94</sup> The employer's objection was overruled.<sup>95</sup> The employer then wrote the INS and reported these six employees.<sup>96</sup> Five of them were found to be unlawfully present in the United States and self-deported themselves.<sup>97</sup> The NLRB ordered Sure-Tan to pay backpay to these individuals for committing an unfair labor practice in violation of the NLRA §§8(a)(1) and (3).<sup>98</sup> On appeal, the Court of Appeals for the Seventh Circuit agreed that Sure-Tan violated the Act but modified the Board's remedial order.<sup>99</sup> Sure-Tan applied for writ of certiorari.<sup>100</sup>

The Supreme Court held that undocumented workers are "employees" under the NLRA, which "provides that the term 'employee' shall include 'any employee,' subject only to certain specifically enumerated exceptions," of which undocumented workers are not.<sup>101</sup> The Court felt that this interpretation is consistent with the

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91. See generally *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (holding that the employer committed an unfair labor practice by reporting their employees that were known to be undocumented workers, but the employees had already left the county due to fear of deportation); see also *Calderon-Barrera*, *supra* note 34, at 121-122.

92. 467 U.S. 883.

93. *Id.* at 886.

94. *Id.* at 887.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 889. Section 8(a)(1) reads, "It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section [7]." National Labor Relations Act § 8, 29 U.S.C. § 158(a)(1) (2006). Section 7 asserts that employees have the right to organize, collectively bargain and engage in other concerted activities for the purpose of collective bargaining or refrain from the above. 29 U.S.C. § 157. Section 8(a)(3) makes it an unfair labor practice for the employer to discriminate in a way that tends to encourage or discourage membership in a labor organization. 29 U.S.C. § 158(a)(3).

99. *Sure-Tan, Inc.*, 467 U.S. at 889.

100. See *id.* at 890.

101. *Id.* at 891. NLRA §2(3) which reads that the term "employee" shall not include

Act's purpose to encourage and protect collective bargaining.<sup>102</sup> In addition, the Court recognized that the application of the NLRA to undocumented workers helps to assure that wages and employment conditions of citizens and lawful permanent residents are not undercut by cheaper labor afforded by undocumented workers.<sup>103</sup> Two years following the decision of *Sure-Tan, Inc.*, the IRCA was passed.<sup>104</sup> Although it criminalized the relationship between employers and undocumented employees, it remained silent on whether these sanctions changed undocumented workers' status under U.S. labor law.<sup>105</sup>

Although the intent of Congress to afford undocumented workers equal protection under labor law (and the law in general) is clear, post-IRCA court decisions have limited undocumented workers' protections.<sup>106</sup> The leading case is *Hoffman Plastic Compounds, Inc. v. NLRB*.<sup>107</sup> In *Hoffman*, the Supreme Court interpreted the IRCA as a barrier regarding undocumented workers' access to the legal remedy of backpay.<sup>108</sup> Employer, Hoffman Plastic Compounds, fired four union organizers.<sup>109</sup> After such action, the NLRB found an unfair labor practice and awarded reinstatement and backpay to the four employees.<sup>110</sup> One of the employees, Jose Castro, testified before the Administrative Law Judge (ALJ) during the hearing for backpay that he was a Mexican national and not authorized to work in the United States.<sup>111</sup> Further, he explained that he got his job by presenting a friend's birth certificate.<sup>112</sup> Based on this fact, "the ALJ found [that] the Board [was] precluded from awarding Castro backpay . . . ."<sup>113</sup> However, the Board reversed the decision of the ALJ holding "the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRA] to

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agricultural laborers, domestic servants, any individual employed by a parent or spouse, independent contractors, supervisors or any individual employed by an employer subject to the Railway Labor Act. 29 U.S.C. §152(3).

102. *Sure-Tan*, 467 U.S. at 892.

103. *See id.* at 893.

104. *See* H.R. REP NO. 99-682, pt. 1, at 1 (1986).

105. *See* 8 U.S.C. § 1324a(f) (2006).

106. *See Twenty Years of the IRCA*, *supra* note 1, at 251.

107. 535 U.S. 137 (2002).

108. *Id.* at 149.

109. *Id.* at 140.

110. *Id.* at 140-41.

111. *Id.* at 141.

112. *Id.*

113. *Id.*

undocumented workers in the same manner as to other employees.”<sup>114</sup> The employer appealed the Board’s finding.<sup>115</sup>

The Supreme Court held that “allowing the Board to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.”<sup>116</sup> The Court decided that *Sure-Tan* did not control because IRCA was passed after that decision which “makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents.”<sup>117</sup> Alternatively, the Court found that the *Southern S.S. Co.* line of cases controlled, which established “where the Board’s chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.”<sup>118</sup> The Court felt awarding back pay trivializes immigration law and encourages future violations.<sup>119</sup>

Unfortunately, employers are using *Hoffman* to deny undocumented individuals rights under state laws as well. “Some states have relied on the Supreme Court’s reasoning to deny workers compensation and other benefits to undocumented workers.”<sup>120</sup> Although the *Hoffman* court only addressed the issue of undocumented workers who obtained their positions by fraud and not undocumented workers who presented no documentation (i.e. it was the employer who committed an IRCA violation), as per *Hoffman*, the NLRB in memo 02-06 stated that undocumented workers are *per se* not entitled to back pay.<sup>121</sup> The NLRB acknowledged that *Hoffman* did not specifically address this and based the decision on the fact that the NLRA and IRCA cannot be harmonized on this issue.<sup>122</sup>

The NLRA is not the only labor and employment law in which the rights afforded to undocumented workers is vague. “A significant uncertainty exists about whether Title VII of the Civil Rights Act offers any protections whatsoever to undocumented immigrants.”<sup>123</sup> Clearly the current system monitoring the undocumented workforce is ineffective at protecting their basic rights. While our economy is

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114. *Id.*

115. *Id.* at 142.

116. *Id.* at 151.

117. *Id.* at 148.

118. *Id.* at 147.

119. *Id.* at 150.

120. OPENING THE FLOODGATES, *supra* note 18, at 120.

121. See Calderon-Barrera, *supra* note 34, at 136.

122. See *id.*

123. OPENING THE FLOODGATES, *supra* note 18, at 121.

dependent upon foreign labor, our society cannot afford to have people exist outside of the law. As stressed above, “undocumented workers retain basic [human] rights that no one would contest.”<sup>124</sup> Therefore, a balance must be reached between our country’s need for foreign labor and the need to protect all persons within the United States. For this balance to be reached, there must be accountability under the law.

## 2. Consequences of Minimal Protection to Undocumented Workers and the Ineffectiveness of IRCA

Not protecting undocumented workers gives employers a greater incentive to both employ and exploit them.<sup>125</sup> As workplace enforcement is no longer a priority, businesses write off any sanctions imposed by the enforcement of IRCA as a necessary business expense.<sup>126</sup> Illegal immigration has steadily increased since the passage of IRCA in 1986.<sup>127</sup> As discussed above, undocumented persons legalized under IRCA’s amnesty moved into other industries because of an increase in opportunities.<sup>128</sup> Positions left open by legalized undocumented workers were filled by new undocumented individuals.<sup>129</sup> In addition, newly legalized undocumented persons became anchors within United States for other undocumented individuals.<sup>130</sup>

IRCA has failed at its purported goals and has been widely unsuccessful. The two major contributing factors of IRCA’s lack of success, as have been discussed, are the lack of enforcement of employer sanctions and the fact that the overall benefit to employ undocumented persons outweighs the risks.<sup>131</sup> In the twenty-five years since its passage, “IRCA has caused our nation more harm than good.”<sup>132</sup> “Flaws in the structure of IRCA have resulted in fraud [and] bias . . . .”<sup>133</sup> Additionally, since 1986, the number of illegal immigrants has continued to grow and the prior pattern of circular migration has stopped and more people remain in the United States permanently.<sup>134</sup>

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124. Haines, *supra* note 17, at 346.

125. See OPENING THE FLOODGATES, *supra* note 18, at 120.

126. See Pottle, *supra* note 25, at 108-09.

127. *Twenty Years of the IRCA*, *supra* note 1, at 251-52.

128. Haines, *supra* note 17, at 357.

129. See *id.* at 357-58.

130. *Id.* at 357.

131. *Twenty Years of the IRCA*, *supra* note 1, at 253.

132. *Id.* at 251 (quoting Judith P. Miller & David Tannenbaum).

133. Oliveira, *supra* note 30, at 164.

134. See *Twenty Years of the IRCA*, *supra* note 1, at 251-52.

However, although the structure of IRCA has not elicited positive results, Congress has attempted to save the legislation through the introduction of the Employment Eligibility Verification Program. This program works within the current structure of IRCA, replacing the existing I-9 process, in which employers manually inspect verification documents, with an electronic database for employers to input information gathered on the I-9 form to immediately check the employee's work eligibility.<sup>135</sup> It is the hope that this new system will make IRCA more effective and help to achieve its original goals.

### III. AN ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM: E-VERIFY

#### A. What is E-Verify?

E-Verify began as a one of “three voluntary pilot programs to test electronic means for employers to verify an employee’s eligibility to work” as required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).<sup>136</sup> Due to the fact that there were twenty-six documents available to prove work eligibility, it was easy for prospective employees to commit document fraud.<sup>137</sup> In addition, employers are not document experts and E-Verify is an effort “to remove guesswork from document review during the I-9 process.”<sup>138</sup> The Basic Pilot Program was designed to determine if the current employment verification process could be improved in “reducing (1) false claims of U.S. citizenship and document fraud, (2) discrimination against employees, (3) violations of civil liberties and privacy, and (4) the burden on employers to verify employees’ work eligibility.”<sup>139</sup> The pilot programs were originally available in only five states: California, Florida, Illinois, New York and Texas.<sup>140</sup> Out of the launched pilot

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135. See *infra* Part III.A.

136. EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 5; Lizzette Romero, Note, *E-Verify: Expansion and Recent Developments*, 4 *VS. J.L. & POL’Y FOR INFO. SOC’Y* 605, 607 (2008).

137. See Shelly Chandra Patel, Note, *E-Verify: An Exceptionalist System Embedded in the Immigration Reform Battle Between Federal and State Governments*, 30 *B.C. THIRD WORLD L.J.* 453, 458-59 (2010).

138. Carl Wohlleben, Note, *E-Verify, A Piece of the Puzzle Not a Brick in the Wall: Why All U.S. Employers Should Be Made to Use E-Verify, Just Not Yet*, 36 *RUTGERS COMPUTER & TECH. L.J.* 137, 156 (2009).

139. EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 5.

140. Patel, *supra* note 137, at 459.



programs, only the Basic Pilot Program now known as E-Verify survived.<sup>141</sup> It was renamed the Employment Eligibility Verification Program in 2007 by the Bush administration.<sup>142</sup> Along with the “rebranding” in 2007 the Bush administration “pledged to expand both civil and criminal investigations of employers who hire unauthorized workers.”<sup>143</sup>

E-Verify is a joint operation between the Department of Homeland Security (DHS)<sup>144</sup> and the Social Security Administration (SSA).<sup>145</sup> It allows employers to check the work eligibility of their current and potential employees through an Internet based database.<sup>146</sup> By doing so, it is hoped that fraudulent documents will be immediately detected and those without work authorization will not become employed. It is meant to confirm the legal status of employees and does this by comparing information provided to employers by employees on an I-9 form to both the SSA database and the DHS database.<sup>147</sup> To enroll in E-Verify employers must visit the United States Citizenship and Immigration Services (USCIS)<sup>148</sup> E-Verify enrollment website, provide a series of information about the company, elect a representative to electronically sign the Memorandum of Understanding (MOU), choose a program administrator and lastly read and agree to the terms within the MOU.<sup>149</sup>

141. Michael B. Barnett, Note, *The High Cost of Low-Cost Workers: Missouri Enacts New Law Targeting Employers of Unauthorized Workers*, 74 Mo. L. Rev. 801, 804, 804 n.23 (2009).

142. Patel, *supra* note 137, at 459.

143. *Id.* at 460.

144. The Department of Homeland Security was created in response to the September 11<sup>th</sup> attacks. See *Creation of the Department of Homeland Security*, U.S. DEP'T OF HOMELAND SECURITY, <http://www.dhs.gov/creation-department-homeland-security> (last visited Feb. 21, 2013). It replaced the Immigration and Naturalization Service (INS), taking over the task of administration and enforcement of the INA. See *Who Joined DHS*, U.S. DEP'T OF HOMELAND SECURITY, <http://www.dhs.gov/who-joined-dhs> (last visited Mar. 17, 2013).

145. See Romero, *supra* note 136, at 606.

146. See *id.*

147. See *id.* at 607.

148. United States Citizenship and Immigration Service (USCIS) is a component of the newly created Department of Homeland Security (DHS) and performs the administrative functions. See *Who Joined DHS*, *supra* note 144. A few examples of the various responsibilities of USCIS are issuing visas, changes of status, applying for citizenship, applying for legal permanent residency, and petitioning a spouse or relative. *What We Do*, U.S. CITIZENSHIP & IMMIGRATION SERVS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=fb89520b9f9a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=fb89520b9f9a3210VgnVCM100000b92ca60aRCRD> (last visited Mar. 17, 2013). Enforcement functions have been delegated within DHS to Immigration and Customs Enforcement (ICE), who are tasked with immigration law enforcement in the interior, and Customs and Border Patrol (CBP), who are tasked with immigration law enforcement at the borders. *Who Joined DHS*, *supra* note 144.

149. *The Enrollment Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS, <http://www.uscis.gov/everify> (last visited Nov. 23, 2011). There are detailed instructions on the E-

Critics note that “DHS does not screen those who enroll in the program to verify that they are bona fide employers.”<sup>150</sup> Therefore, anyone can sign up and have access to the information in the E-Verify system.<sup>151</sup> The employer must input the information from the I-9 form into the E-Verify system within three days of hire.<sup>152</sup> After the employer inputs the information, he or she receives either a confirmation that the employee is eligible to work or a “tentative non-confirmation” (TNC).<sup>153</sup> An employee who was given a TNC has the opportunity to contest the finding, which must be filed within eight days and can take up to several weeks for the employee to receive either a “final non-confirmation” (FNC), meaning the individual is not authorized to work, or an affirmative confirmation, verifying the employee is eligible.<sup>154</sup> The employer is required to allow the employee to continue working throughout the TNC verification process.<sup>155</sup> Although employers are required to allow employees to continue working, one study found that, against the Memorandum of Understanding signed by employers when enrolling in E-Verify, employers were restricting work assignments while an employee was contesting the TNC.<sup>156</sup>

Many people who are authorized to work in the United States, both citizens and legal permanent residents (LPRs) receive TNCs.<sup>157</sup> The main reasons why persons authorized to work in the United States receive TNCs are a change of citizenship status, a name change not properly reported to the SSA or if the employer input information from I-9 form incorrectly into the E-Verify system.<sup>158</sup> “According to SSA officials, although SSA instructs individuals to report any changes in name, citizenship, or immigration status, many do not do so.”<sup>159</sup> To

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verify page, as well as checklists and such to make sure the employer is prepared prior to starting the enrollment process. *Id.*

150. Tyler Moran, *Why States and Localities Should Not Require Employer Participation in Basic Pilot/E-Verify*, NAT’L IMMIGR. L. CTR. (Oct. 21, 2006), <http://www.nilc.org/eev005.html>.

151. Romero, *supra* note 136, at 615.

152. EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 5.

153. Romero, *supra* note 136, at 609.

154. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-146, EMPLOYMENT VERIFICATION: FEDERAL AGENCIES HAVE TAKEN STEPS TO IMPROVE E-VERIFY, BUT SIGNIFICANT CHALLENGES REMAIN 9 (2010) [hereinafter EMPLOYMENT VERIFICATION IMPROVEMENTS], available at <http://www.gao.gov/new.items/d11146.pdf>.

155. See EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 8.

156. See Wohlleben, *supra* note 138, at 151.

157. See Laura Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCullough*, 33 BERKELEY J. EMP. & LAB. L. 153, 172 (2012).

158. Romero, *supra* note 136, at 613; EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 10.

159. EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 10.

contest a TNC, the individual must go to an SSA field office, show documentation of the change and have the information updated in the SSA database.<sup>160</sup>

Employers are not required to fire an employee who receives a TNC and decides not to contest it, or even an employee who receives an FNC.<sup>161</sup> After ten days, if the employee has not contested the finding and the employer has decided to hire the individual, the employer must inform the DHS that they have decided to continue to employ the individual.<sup>162</sup> These instances are referred to as “Employee Not Terminated.”<sup>163</sup> However, the employer is responsible if the retained employee is in fact undocumented.<sup>164</sup> This decision should not be taken lightly and the employer should seek legal counsel when deciding whether to keep an employee who has received a TNC and decided not to contest it.<sup>165</sup> To avoid incorrect, TNCs and FNCs, USCIS offers a new feature in the form of a “self-check,” which allows individuals to check themselves prior to engaging in the hiring process.<sup>166</sup> If E-Verify were made mandatory, it would be in the best interest of employees to complete a “self-check” prior to applying for jobs to avoid lengthy complications and taking time out of work to go to the SSA office to correct information.

### B. Current Use of E-Verify

In 2009, upwards of 112,000 employers were registered for E-Verify,<sup>167</sup> and an additional 4,000 employers signed up each month.<sup>168</sup>

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160. *See id.*

161. *See id.* at 8. Though, once a case becomes an FNC, “[t]he E-Verify employer agent can close the case in E-Verify and the employer *can* terminate employment without penalty.” U.S. CITIZENSHIP & IMMIGRATION SERVS., E-VERIFY: QUICK REFERENCE GUIDE FOR EMPLOYERS 15 (2012), available at [http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify\\_Native\\_Documents/E-Verify%20Manuals%20and%20Guides/guide-employer\\_comp.pdf](http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/E-Verify%20Manuals%20and%20Guides/guide-employer_comp.pdf) (emphasis added).

162. EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 8.

163. *See E-Verify Releases Q&A Discussing TNCs and Employee Rights*, THE E-VERIFY & I-9 NEWS BLOG (Mar. 19, 2010), <http://everifyandi9news.com/2010/03/e-verify-releases-qa-discussing-tncs-and-employee-rights/>.

164. *Id.*

165. *See id.*

166. *See* John Fay, *USCIS Expands E-Verify Self-Check Coverage to 16 Additional States and Adds Spanish-Language Option*, THE I-9 AND E-VERIFY BLOG (Aug. 15, 2011), <http://www.electronici9.com/everify/uscis-expands-e-verify-self-check-coverage-to-16-additional-states-and-adds-spanish-language-option/>.

167. Wohlleben, *supra* note 138, at 149.

168. Barnett, *supra* note 141, at 807.

However, the Government Accountability Office (GAO)<sup>169</sup> reported that only half of the registered employers were “active users.”<sup>170</sup> An employer is considered “active” if it has run a minimum of one query within the past fiscal year.<sup>171</sup> While E-Verify is a voluntary program offered by the federal government, there are some employers that are required to enroll. In accordance with Executive Order 13,465 signed by President Bush on June 6, 2008,<sup>172</sup> federal agencies, federal contractors, and federal subcontractors are required to use E-Verify.<sup>173</sup> The contractors and subcontractors are required to “verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.”<sup>174</sup> This means contractors must verify both new hires and existing employees with the E-Verify system.<sup>175</sup> To implement the Executive Order, a final rule was passed amending the Federal Acquisition Regulation (FAR) by “adding ‘a clause into Federal contracts committing Government contractors [and subcontractors] to use . . . E-Verify’ . . . .”<sup>176</sup>

The Executive Order and the Final Rule prompted a complaint by the Chamber of Commerce, claiming that both were prohibited by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>177</sup> Subsection (a) of IIRIRA states that that the Secretary of Homeland Security cannot require any person or other entity to participate in a pilot program, except as specifically provided in subsection (e).<sup>178</sup> The court found that neither the Executive Order nor the Final Rule was prohibited by IIRIRA because neither made the program mandatory.<sup>179</sup> The court asserted that “the decision to be a

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169. The Government Accountability Office is an investigative arm of Congress that ensures federal funds given to agencies are being used effectively. *See About GAO*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html> (last visited Jan. 11, 2013).

170. EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 3.

171. *Id.* at 8 n. 10.

172. Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (2008). This Executive Order amended Executive Order 12,989 signed by President Bill Clinton on Feb. 13, 1996. *See id.*

173. *See id.* at 33,286.

174. *Id.*

175. Patel, *supra* note 137, at 460.

176. Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726, 731 (D. Md. 2009) (referring to the Final Employment Eligibility Verification Rule (Final Rule), 73 Fed. Reg. 67, 651 (Nov. 14, 2008)).

177. *See id.* at 732.

178. *See id.* at 729 (citing IIRIRA § 402(a)).

179. *See id.* at 733-36.

government contractor is voluntary and that no one has a right to be a government contractor” and went on to say that “potential government contractors have the option not to contract with the government.”<sup>180</sup>

In addition, some states have put through legislation making it a requirement for employers to use the E-Verify program. Currently four states: Arizona, Alabama, Mississippi and South Carolina have passed legislation requiring all employers to use E-Verify rather than rely on the documents available to prove eligibility.<sup>181</sup> In addition, multiple other states have passed legislation requiring state contractors,<sup>182</sup> state agencies<sup>183</sup> or both state agencies and contractors<sup>184</sup> to use E-Verify. These types of laws have sparked a debate over states’ ability to regulate immigration when it has been established over the years that the federal government alone has sovereignty over immigration issues.<sup>185</sup>

180. *Id.* at 736.

181. *Map of States with Mandatory E-Verify Laws*, NUMBERSUSA, <http://www.numbersusa.com/content/learn/illegal-immigration/map-states-mandatory-e-verify-laws.html> (last updated Oct. 20, 2011).

182. *See id.* (showing Colorado and Louisiana as states requiring the use of E-Verify for state contractors).

183. *See id.* (showing North Carolina as the only state requiring E-Verify for state agencies but not for state contractors).

184. *See id.* (showing Idaho, Utah, Oklahoma, Georgia, Florida, Indiana, Missouri, Nebraska, Tennessee and Virginia as states which require the use of E-Verify for both state agencies and state contractors).

185. *See* Wohlleben, *supra* note 138, at 143. States are enacting immigration laws “under the guise of state police powers to protect the safety and welfare of their constituents.” Patel, *supra* note 137, at 468. The IRCA expressly preempts state and local law other than through licensing and similar laws. Wohlleben, *supra* note 138, at 143. See discussions on specific cases and how the lower courts have ruled in Wohlleben at 143-47, Patel, *supra* note 137, at 467-71, and Barnett, *supra* note 141, at 812-18. In June 2012, the Supreme Court weighed in on these issues in *Arizona v. United States*. *Arizona v. United States*, 132 S. Ct. 2492 (2011). Specifically, the Court looked at four provisions of an Arizona statute known as S.B. 1070, which attempts to address the issues faced by Arizona because of the large numbers of undocumented persons within the state. *Id.* The Court held that federal law preempted three of the four provisions. *Id.* at 2495. First, with regards to section 3, which required persons to carry their alien registration document, the Court determined that “with respect to the subject of alien registration, Congress intended to preclude States from ‘complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations.’” *Id.* at 2503. The Court next examined section 5, which made it a crime for an unauthorized alien to work, and determined that the history of the IRCA showed that Congress chose not to impose sanctions on unauthorized workers. *Id.* at 2503-05. Therefore, “[i]t follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.” *Id.* at 2505. Lastly, the Court concluded that section 6 is also preempted. *Id.* at 2507. Section 6 provides that a state officer may arrest, without a warrant, an individual whom he or she has probable cause to believe has committed an offense that makes that individual removable. *Id.* at 2505. The Court held that “authorizing state and local officers to engage in these enforcement activities as a general matter . . . creates an obstacle to the full purposes and objectives of Congress.” *Id.* at 2507. With regards to the last provision looked at by the Court, section 2(B), which requires officers to make an attempt to determine the immigration status of anyone they stop, detain or arrest, the Court determined that “[a]t this stage, without the

Aside from the above stated required users, more than 409,000 employers within the United States currently use the E-Verify program and approximately 1,300 new businesses sign up to use E-Verify each week.<sup>186</sup> In 2007 the GAO was already skeptical about the many challenges existing with widespread mandatory use of E-Verify.<sup>187</sup> Similarly, in 2010 the GAO put out another much more comprehensive report regarding the inefficiencies of E-Verify, which will be discussed below when looking out the viability of passing the Legal Workforce Act, making E-Verify mandatory for all employers countrywide.<sup>188</sup>

### C. Existing Problems with E-Verify

Currently, the E-Verify program is riddled with problems, including false positives (allowing unauthorized people to “pass”), false negatives (restricting legal permanent residents or U.S. citizens from obtaining gainful employment) and expensive start up costs.<sup>189</sup> The reported inaccuracy rate is a striking fifty-four percent.<sup>190</sup> The SSA has estimated upon its own investigation that there were 17.8 million discrepancies in its system, which is what is relied upon by the E-Verify system.<sup>191</sup> False positives occur because E-Verify is only able to detect fraudulent documents.<sup>192</sup> Therefore, if an undocumented employee submits valid documentation that is just not his or her own, E-Verify will confirm that individual is eligible to work because the true document holder is eligible to work. False negatives occur because of the issues discussed above; persons not reporting name changes, immigration status and

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benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law.” *Id.* at 2510.

186. *What is E-Verify?*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=e94888e60a405110VgnVCM1000004718190aRCD&vgnnextchannel=e94888e60a405110VgnVCM1000004718190aRCD> (last updated Nov. 1, 2012).

187. EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 14.

188. *See generally* EMPLOYMENT VERIFICATION IMPROVEMENTS, *supra* note 154.

189. *See* Romero, *supra* note 136, at 613-14; *see also* Philip E. Wolgin, *The 10 Numbers You Need to Know About E-Verify: What it Will Cost Employers, Employees and Taxpayers*, CTR. FOR AM. PROGRESS (September 13, 2011), [http://www.americanprogress.org/issues/2011/09/everify\\_numbers.htm](http://www.americanprogress.org/issues/2011/09/everify_numbers.htm) (detailing the average startup costs for running E-Verify in a small business).

190. Wolgin, *supra* note 189.

191. *See* Patel, *supra* note 137, at 463.

192. *See* Romero, *supra* note 136, at 613-14; EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 3 (noting that the Employment Eligibility Verification program helps reduce document fraud, but cannot sufficiently address identity fraud issues such as when employees use genuine documents that were either stolen or borrowed from other individuals).

citizenship changes to the SSA.<sup>193</sup>

Additionally, E-Verify does not relieve employers' angst and fear of liability surrounding the I-9 process.<sup>194</sup> Employers enrolled in E-Verify are unsure of their liability.<sup>195</sup> For example, if they do not check documents closely enough, they may be held responsible for knowingly hiring an undocumented individual and if they look too closely they may be held responsible for discrimination.<sup>196</sup> Additionally, the inspector general found that employers are pre-screening individuals before hiring them and also verifying existing employees, both of which are prohibited in the Memorandum of Understanding that employers must agree to in order to enroll in E-Verify.<sup>197</sup>

Actions taken by employers because of their uncertain liability leads to a major concern that widespread use of E-Verify could lead to employers not hiring people who "look foreign" even though they are authorized to work, such as U.S. Citizens and LPRs, because of the extra processing time.<sup>198</sup> Commentators explain that making the process mandatory for all new hires would alleviate this concern, stating that this burden is equal to all new hires, regardless of how job applicants look.<sup>199</sup> This does not address the concern at all. The concern is that persons who "look foreign" will not even make it past the interview. Therefore, requiring a process for new hires (which means the person has interviewed, had an offer and accepted this offer) does not alleviate *any* concern that foreign looking persons will not be *hired*. In addition, E-Verify is extremely vulnerable to identity fraud.<sup>200</sup> Barnett contends that

193. See EMPLOYMENT VERIFICATION CHALLENGES, *supra* note 71, at 3,10.

194. See *id.* at 4 (describing the Form I-9 requirements and noting that employers are generally found to be in compliance with the Immigration Reform and Control Act (IRCA) if they have followed the process in good faith, including when fraudulent documents appeared to be genuine); see also Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 806 (2008) (noting that employer's concerns include: (1) sanctions would impose onerous administrative responsibilities on employers; (2) the possibility that employers could be held civilly and criminally liable for innocent hiring decisions; and (3) sanctions would cut employers off from requisite immigrant labor).

195. See *Immigrating, E-Verify: "Safe Harbor" for Employers?*, IMMIGRATING TO AM. (July 29, 2008), <http://immigrating.wordpress.com/2008/07/29/e-verify-for-employers-and-employees/> (noting that an employer who puts information into E-Verify that is false or creates a red flag is supplying the information for their own liability since U.S. Citizenship and Immigration Services (USCIS) has stated that there is no "safe harbor" for employers under this program).

196. Wohlleben, *supra* note 138, at 149.

197. *Id.* at 150.

198. See Barnett, *supra* note 141, at 806.

199. See *id.*

200. See Anthony Weigel, *It's Not Time to Expand E-Verify, It's Time to Face Reality*, FOX NEWS (June 10, 2011), <http://www.foxnews.com/opinion/2011/06/10/its-not-time-to-expand-e->

the threat of identity fraud is being addressed in the photo screening tool, which will include photos in fifteen million DHS files.<sup>201</sup> However, this will only address identity fraud in the instances when a picture is on file with DHS.

Another major problem with E-Verify is the amount of tentative non-confirmations (TNCs). LPRs and naturalized citizens are at least ten times more likely to be wrongly identified as “unauthorized.”<sup>202</sup> LPRs and foreign born citizens are thirty times more likely to incorrectly receive a TNC.<sup>203</sup> The burden is then on the employee to contest the incorrect information in order to keep his or her job.<sup>204</sup> Not all employees are properly informed regarding the process to contest TNCs.<sup>205</sup> Many of these problems exist because DHS and SSA are not communicating or sharing information forcing secondary verifications.<sup>206</sup> The SSA does not contain alien numbers and the DHS does not contain the social security number (SSN) of individual work-authorized migrants.<sup>207</sup>

Although there are these wide-spread reported problems, a USCIS report purports that improvements have been made.<sup>208</sup> USCIS reported in an article on their website on June 14, 2010 that they have redesigned E-Verify for better use.<sup>209</sup> Improvements include a new home page, “case alerts” feature, improved case management, streamlined tutorials, enhanced security features, such as hiding SSNs to protect individual’s privacy and verifying that only valid companies enroll in E-Verify.<sup>210</sup>

In theory, E-Verify is the savior of IRCA. The major identified problem with IRCA as it exists now is the ability to falsify documents and obtain gainful employment because employers are not trained

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verify-its-time-to-face-reality/.

201. See Barnett, *supra* note 141, at 807.

202. J. Kelly Conklin, *Mandatory E-Verify: Bad for Small Businesses and the Country's Bottom Line*, THE HILL'S CONG. BLOG (Sept. 16, 2011, 10:38 AM), <http://thehill.com/blogs/congress-blog/labor/182003-mandatory-e-verify-bad-for-small-businesses-and-the-countrys-bottom-line>.

203. See Barrowclough, *supra* note 40, at 812.

204. *Id.*

205. *See id.*

206. *See id.*

207. *Id.*

208. *See USCIS Launches Redesigned E-Verify Employer Web Interface*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (June 14, 2010), <http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=875b328ad0739210VgnVCM100000082ca60aRCRD&vgnnextchannel=8a2791daff2df110VgnVCM1000004718190aRCRD>.

209. *See id.*

210. *Id.*



immigration documentation specialists. If there was a way to guarantee whether or not the documents were fraudulent, many of the problems behind IRCA would be dissolved. Unfortunately, E-Verify has proven to not be up for the job. There is no guarantee when running information through E-Verify, which makes mandatory use dangerous for the United States workforce. Further, it is unlikely that the flaws in the E-Verify system can or will be resolved.<sup>211</sup> However, its mandatory use is being proposed, by amending the INA with the Legal Workforce Act.<sup>212</sup>

#### IV. LEGAL WORKFORCE ACT

##### *A. H.R. 2885, the Legal Workforce Act*

The Legal Workforce Act is the name given to proposed bill H.R. 2885, which makes direct changes to INA §274A(b), deals directly with how to verify that an employee is authorized to work.<sup>213</sup> Instead of requiring documentation from List A or one document each from List B & C as laid out in the section, and familiar to those individuals who have completed an I-9 form, the new bill calls for employers to check employee eligibility through the existing E-Verify system.<sup>214</sup> The most important change made by the bill is that it makes E-Verify mandatory for all employers, from one employee up.<sup>215</sup> The National Immigration Law Center (NILC) describes the act as “an immigration enforcement-only bill that will increase the deficit, cause American workers to lose

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211. Historically there have been continued problems with inter-agency cooperation. Civilian agencies are reluctant to divert scarce resources from their core missions to interagency missions. See NINA M. SERAFINO, CATHERINE DALE & PAT TOWELL, CONG. RESEARCH SERV., R42133, BUILDING CIVILIAN INTERAGENCY CAPACITY FOR MISSIONS ABROAD: KEY PROPOSALS AND ISSUES FOR CONGRESS (2012), available at <http://www.fas.org/sgp/crs/row/R42133.pdf>. In addition, “organizational differences – including differences in agencies’ structures, planning processes, and funding sources – can hinder interagency collaboration, potentially wasting scarce funds and limiting the effectiveness of federal efforts.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-904SP, INTERAGENCY COLLABORATION: KEY ISSUES FOR CONGRESSIONAL OVERSIGHT OF NATIONAL SECURITY STRATEGIES, ORGANIZATIONS, WORKFORCE, AND INFORMATION SHARING (2009), <http://www.gao.gov/assets/210/203867.pdf>. The problems with interagency collaboration are not unique to the objectives described in these reports; these same problems are found in every interagency effort. See *id.*

212. Emily Patten, Note, *E-Verify During a Period of Economic Recovery and High Unemployment*, 2012 UTAH L. REV. 475, 482 (2012).

213. See Legal Workforce Act of 2011, H.R. 2885, 112th Cong. (2011).

214. See *id.*

215. See *id.*

their jobs, decimate agriculture, and grow the underground economy.”<sup>216</sup> In addition to substantive changes, the bill also lays out a timeline regarding compliance; within two years, all employers within the U.S must be enrolled.<sup>217</sup> Proper compliance would require some employers to not only verify future workers, but current employees as well. There is a special carve out for the agricultural industry, proposing a longer compliance time (36 months) and *not* requiring verification of existing employees.<sup>218</sup> Lastly, similar to the IRCA, the Legal Workforce Act contains a good faith clause, which sets the standard of employer knowledge.<sup>219</sup>

The bill was first introduced in June 2011 as H.R. 2164 by Lamar Smith of Texas and reintroduced in September of the same year as H.R. 2885.<sup>220</sup> Currently, the bill has been ordered to be reported on September 21, 2011 and was referred to the Subcommittee on Immigration Policy and Enforcement on September 14, 2011.<sup>221</sup> It has seventy-eight supporters as of March 10, 2013.<sup>222</sup> As discussed above, in December of 2010, the Government Accountability Office still identified significant challenges with the E-Verify system.<sup>223</sup> Although both USCIS and SSA have attempted to increase the accuracy of E-Verify and “reduce opportunities” for unauthorized workers, the government’s ability to accomplish these goals is limited.<sup>224</sup> “Worksite enforcement is an integral part of an effective employment authorization system,” but there are limited resources and ICE is unable to address all but the most egregious employer violations.<sup>225</sup> The GAO reported that the program still remains vulnerable to fraud, as some are using the system to access personal information,<sup>226</sup> and also has challenges in detecting fraud, such as when an unauthorized individual provides

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216. NAT’L IMMIGRATION L. CTR., LAMAR SMITH’S EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM: HARMFUL TO THE ECONOMY AND DANGEROUS FOR U.S. WORKERS I (Sept. 2011) [hereinafter LEGAL WORKFORCE ACT: HARMFUL AND DANGEROUS], available at [www.nilc.org/document.html?id=555](http://www.nilc.org/document.html?id=555).

217. H.R. 2885, at 18-20.

218. *Id.* at 20-21, 25.

219. *Id.* at 35-36.

220. LEGAL WORKFORCE ACT: HARMFUL AND DANGEROUS, *supra* note 216, at 1.

221. H.R. 2885 112th Cong. (2011), <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR02885:@@L&summ2=m&#status> (as reported on Sept. 14, 2011).

222. *Id.*

223. See EMPLOYMENT VERIFICATION IMPROVEMENTS, *supra* note 154, at 53-55; See discussion *supra* Part III.C.

224. *Id.* at 53.

225. *Id.*

226. *Id.* at 21.

legitimate documents taken from an authorized person.<sup>227</sup> They also discovered limited ability to identify and prevent employer misuse and difficulty in sanctioning non-compliant employers.<sup>228</sup> Additionally, both USCIS and SSA have been unable to accurately estimate costs of mandatory implementation of E-Verify, which creates problems as budgets need to be made for effective implementation of programs.<sup>229</sup>

Mandating a system with so many flaws remaining – 54% failure to identify unauthorized workers<sup>230</sup> and 47% erroneous TNCs and FNCs of authorized U.S. workers<sup>231</sup> – in addition to threats of increased fraud by employers, fraud by potential employees and discrimination has evoked strong emotions on the part of interested parties.

### *B. Public Responses to Proposing Mandatory National Use of E-Verify*

Major players are stepping forward and opposing this bill. The American Immigration Lawyers Association believes that the bill should not move forward stating that “[i]f Congress passes this law, we will see thousands of employed or job-seeking Americans wasting their time standing lined up at government offices to clear up their records.”<sup>232</sup> Similarly, the Agriculture Coalition opposes the Act declaring that “[i]f Congress makes mandatory use of the E-Verify program, crops will rot, farms will fail, much U.S. farm production and many farm-dependent U.S. jobs will simply leave the country.”<sup>233</sup> Tyler Moran, Policy Director for the NILC, also brings attention to the fact that a mandatory E-Verify system would drive undocumented workers underground (outside our tax system), move agriculture jobs overseas, force American workers to wait on lines to correct information, and cause many people to lose their job due to government error.<sup>234</sup>

The NILC expresses several concerns with making E-Verify

227. *Id.* at 15.

228. *See id.* at 53.

229. *See id.* at 43.

230. Leann Gerlach, Recent Development, *Mandatory E-Verification in North Carolina: The Adverse Consequences of the System in the Absence of Comprehensive Reform*, 91 N.C. L. REV. 361, 382 n.171 (2012).

231. IMMIGRATION POL’Y CTR., DECIPHERING THE NUMBERS ON E-VERIFY’S ACCURACY (2009), <http://www.immigrationpolicy.org/just-facts/deciphering-numbers-e-verify-accuracy>.

232. *The Lamar Smith Bill to Mandate E-Verify Should Not Move Forward*, AILA INFO NET (Sept. 14, 2011), <http://www.aila.org/content/default.aspx?docid=36983>, [hereinafter *Lamar Smith Bill*].

233. Marcus Restrepo, *Agriculture Coalition Opposes E-Verify*, COLO. INDEP. (June 17, 2011, 2:07 PM), <http://coloradoindependent.com/91444/agriculture-coalition-opposes-e-verify>.

234. *Id.*

mandatory for all employers, as the Legal Workforce Act proposes. Specifically, the NILC states that the implementation timeline, as briefly laid out above, is “impractical and unworkable.”<sup>235</sup> It further explains that it took ten years to enroll the 250,000 employers who currently participate and there are 5.5 million employers that would need to be enrolled.<sup>236</sup> This would equate to enrolling approximately 219,492 each month for two years.<sup>237</sup> Additionally, the bill “fails to address the real needs of the agricultural industry.”<sup>238</sup> These concerns were expressed in a statement made to the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement at a Hearing on the Legal Workforce Act by Ms. Moran where she stressed to Congress that the Legal Workforce Act was not the answer.<sup>239</sup> Instead, Moran argued that the United States needs to enforce labor, employment, and civil rights laws or couple the use of E-Verify with a more comprehensive immigration reform plan, such as a legalization program.<sup>240</sup>

In addition, several prominent politically active groups in the U.S. have written letters to Congress urging members not to endorse Smith’s bill. The *Coalition Letter to Congress re: E-Verify* states that the data breaches are too great to make this system mandatory, a system which holds so much personal information.<sup>241</sup> Similarly, in another E-Verify Letter to Congress, many prominent groups state that they believe that E-Verify poses a threat to both the Constitution and law-abiding citizens.<sup>242</sup> The groups signing onto this letter cited specific reasons why Congress should vote against the Act, such as that it creates a de facto national I.D. system, violates individual civil liberties such as the right to work and free speech, mandates a costly job-killing regulatory burden that cripples small business, requires employers to become enforcement agents of the federal government and encourages identity theft.<sup>243</sup>

These reactions stem from the projected ramifications of making E-

235. LEGAL WORKFORCE ACT: HARMFUL AND DANGEROUS, *supra* note 216, at 4.

236. *Id.*

237. *Id.*

238. *Id.* at 3.

239. See *Hearing on H.R. 2164*, statement of Tyler Moran, *supra* note 4, at 83-94.

240. See *id.* at 83-84.

241. See *Coalition Letter to Congress re: E-Verify*, THE MULTIRACIAL ACTIVIST (June 29, 2011), [http://multiracial.com/site/index2.php?option=com\\_content&do\\_pdf=1&id=1668](http://multiracial.com/site/index2.php?option=com_content&do_pdf=1&id=1668).

242. See *E-Verify Letter to Congress*, TAKE BACK WASHINGTON 1 (Sept. 15, 2011), [http://www.takebackwashington.org/Clint\\_s\\_Open\\_Letter\\_html.html](http://www.takebackwashington.org/Clint_s_Open_Letter_html.html).

243. *Id.*

Verify mandatory as seen already in states that have passed similar laws to that being proposed by Representative Smith.

*C. Congress Should Heed the Lessons Learned from Mandatory Use of E-Verify.*

The concerns that follow E-Verify are at the forefront regarding the projected ramifications for the Legal Workforce Act. On January 1, 2008, Arizona's Legal Arizona Workforce Act went into effect, which made E-Verify mandatory for all businesses in the state of Arizona.<sup>244</sup> "While the purpose of the law was to 'turn off the job magnet,' it has simply resulted in the growth of Arizona's cash economy, U.S. workers losing their jobs, and burdens on small businesses."<sup>245</sup> NILC contends that Arizona's E-Verify law has resulted in the growth of the state's cash economy, that it has not stopped unauthorized work and has hurt both American workers and small businesses.<sup>246</sup> The NILC urges federal policymakers to "take heed of the outcome of Arizona's law," declaring that undocumented workers are not going to leave the U.S. because Congress makes it harder for them to work here.<sup>247</sup>

1. Impact on American Workers and Other Authorized Workers

Mandating E-Verify will have a negative impact on American workers. Concerns most frequently identified by the USCIS in Arizona include the problem that notices of database error are issued on work-authorized individuals.<sup>248</sup> For example, a U.S. citizen construction worker has been fired twice because E-Verify failed to confirm his employment.<sup>249</sup> Additionally, a father tried to hire one of his daughters, a U.S. citizen, at his restaurant and she also received a FNC.<sup>250</sup> On a national scale, an estimated 770,000 American workers will lose their jobs because of mistakes in the E-Verify system.<sup>251</sup> Another estimated

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244. NAT'L IMMIGRATION L. CTR., COSTLY AND INEFFECTIVE: WHAT ARIZONA'S EXPERIENCE WITH MANDATORY E-VERIFY TEACHES US 1 (2011), *available at* [www.nilc.org/document.html?id=328](http://www.nilc.org/document.html?id=328).

245. *Id.*

246. *Id.* at 3.

247. *Id.*

248. *Id.* at 2.

249. *Id.*

250. *Id.*

251. Wolgin, *supra* note 189 at 6. *See also* Conklin, *supra* note 202 (noting that a mandatory E-Verify system would cause about 800,000 American workers to erroneously lose their jobs, and

1.2 to 3.5 million Americans will be required to go to the SSA to fix erroneous information at a personal cost and lose time at work.<sup>252</sup> This will happen in spite of the fact that the SSA is already overburdened.<sup>253</sup> These errors will cause workers to lose their jobs because, as mentioned above, the bill requires employers to re-verify the employment eligibility of most of the current workforce.<sup>254</sup> NILC estimates that over 47% of U.S. citizens and authorized workers who have database errors would be unable to correct their records and would therefore lose their jobs under the proposed law.<sup>255</sup> NILC also emphasizes that “at a time of 9 percent unemployment, putting millions of workers’ jobs on the line is grossly irresponsible.”<sup>256</sup> The remedy for legal residents who receive FNCs is currently an unanswered question.<sup>257</sup>

For undocumented workers, the threat is that they may be driven further underground, which may make the conditions they work in even worse. Tyler Moran expressed her concern in her statement to the Subcommittee on Immigration Policy and Enforcement stating that the undocumented workers who turn to the underground economy in Arizona make less money and face more victimization.<sup>258</sup> Moran explains that this “continues to make it harder for Arizona’s good employers to compete against low-road employers.”<sup>259</sup>

A major concern for employers is the new legislation’s increased sanctions if they were to hire an undocumented person unknowingly.<sup>260</sup> For example, Swift & Co., an E-Verify participant since 1997, was subject to an Immigration and Customs Enforcement (ICE) raid where 1,282 *legal* and illegal immigrants were arrested.<sup>261</sup> The raid cost the company \$50 million.<sup>262</sup> As employers receive little or no training in how to identify legitimate documents, and are not exculpated from running documents through the E-Verify system, the risk of sanctions causes a “serious pattern of discrimination.”<sup>263</sup>

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approximately 3.6 million others to have to spend time correcting such errors).

252. See Wolgin, *supra* note 189, at 5.

253. See Barrowclough, *supra* note 40, at 809.

254. See *Hearing on H.R. 2164*, statement of Tyler Moran, *supra* note 4, at 88 (stating that there are currently 15,287,000 workers in the labor force).

255. LEGAL WORKFORCE ACT: HARMFUL AND DANGEROUS, *supra* note 216, at 2.

256. *Id.*

257. See Patel, *supra* note 137, at 464.

258. *Hearing on H.R. 2164*, statement of Tyler Moran, *supra* note 4, at 84.

259. *Id.*

260. See Patel, *supra* note 137, at 465-66.

261. *Id.* at 465.

262. *Id.*

263. Pottle, *supra* note 25, at 137-38.

For this reason, employees and advocates fear that the Legal Workforce Act will encourage prejudice against legal individuals authorized to work, such as Legal Permanent Residents (LPRs) or foreign-born citizens who look foreign and are therefore not hired because employers do not want to take the risk by hiring someone who *might* be undocumented.<sup>264</sup> “A DHS-funded study has concluded, the current E-Verify system already contributes to discrimination among foreign-born workers, since they are more likely to be the subject of database errors.”<sup>265</sup> Additionally, Smith’s bill allows employers to prescreen workers, which will potentially increase discrimination.<sup>266</sup> “E-Verify error rates are 30 times higher for naturalized U.S. citizens and 50 times higher for lawfully present non-immigrants than for native-born U.S. citizens,” so if these individuals are prescreened, they will appear undocumented and therefore not authorized to work.<sup>267</sup> Examples of this type of activity by an employer are the acts of Kinro Manufacturing Inc., where there were allegations that the company engaged in a pattern or practice of discrimination against work-authorized non-citizens in the employment eligibility verification process.<sup>268</sup> The only remedy currently available to employees who suffer discrimination is “to sue the government for lost wages under the restrictive Federal Tort Claims Act.”<sup>269</sup>

## 2. Impact on the American Economy

In addition to the negative impact on the American workforce, the Legal Workforce Act could be particularly bad for small businesses as they would suffer financially and could even be put out of business because of the extensive cost involved with implementation.<sup>270</sup> Start up costs range from \$1,254 to \$24,422 per small business.<sup>271</sup> Start up costs include “procuring and maintaining a computer, financing internet access, and allocating time and labor for data entry and potential

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264. See LEGAL WORKFORCE ACT: HARMFUL AND DANGEROUS, *supra* note 216, at 4

265. *Id.*

266. *Id.*

267. *Id.*

268. Press Release, U.S. Dep’t Justice, Justice Department Settles Allegations of Immigration-Related Employment Discrimination Against Kinro Manufacturing Inc. (Aug. 26, 2011), available at <http://www.justice.gov/opa/pr/2011/August/11-ag-1098.html>.

269. *Lamar Smith Bill*, *supra* note 232.

270. See Conklin, *supra* note 202.

271. See Wolgin, *supra* note 189, at 4.

correspondence with the SSA and DHS.”<sup>272</sup> The estimated start up costs of compliance would total \$188 million in fiscal year 2009 alone.<sup>273</sup> “E-Verify requires high-speed internet access. A lot of rural communities, where small businesses are the backbone of the local economy, don’t have it. What are they to do?”<sup>274</sup>

Lastly, putting immigrants out of work will disrupt the economy.<sup>275</sup> “[Undocumented workers] and their employers will simply move into the cash economy, taking a greater share of their earnings off the tax rolls and destabiliz[e] the playing field even more for lawful workers and honest employers.”<sup>276</sup> According to the Congressional Budget Office (CBO), the projected lost tax revenue totals \$17.3 billion over the course of ten years when undocumented workers move off the books into underground economies where the government cannot collect taxes.<sup>277</sup>

The largest hit to the economy will be to the agricultural industry. American agriculture is dependent upon the undocumented workforce for both their cheap labor and hard work. Harsh anti-immigrant immigration laws in various states, similar but not identical to mandating E-Verify, have caused immigrant workers to relocate and has made it abundantly clear just how dependent we are on them. And even though there is particularly high unemployment, Americans are unwilling to do the back-breaking labor required. In Georgia negative effects of mandatory use as imposed by the state can already be seen.<sup>278</sup> House Bill 87, Georgia’s extremely harsh anti-immigrant immigration law, has “scared away migrant workers” and caused huge labor shortages on farms in Georgia.<sup>279</sup> Governor Nathan Deal announced that Georgia wants to try and recruit probationers to do the work in the fields, arguing that it would be “a great partial solution.”<sup>280</sup> However, probationers

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272. Barrowclough, *supra* note 40, at 809.

273. Patel, *supra* note 137, at 464.

274. Conklin, *supra* note 202.

275. Patel, *supra* note 137, at 467.

276. LEGAL WORKFORCE ACT: HARMFUL AND DANGEROUS, *supra* note 216, at 1.

277. Wolgin, *supra* note 189, at 2.

278. See Jeremy Redmon & Daniel Malloy, *Report: Farm Labor Shortage May Cost Georgia Economy \$391 Million*, ATLANTA JOURNAL-CONSTITUTION (Oct. 4, 2011, 11:04 PM), <http://www.ajc.com/news/news/local-govt-politics/report-farm-labor-shortages-may-cost-georgia-econo/nQMPT/>.

279. *Id.*

280. *Georgia Scours Probation Rolls For Farm Labor; D.C. Begins To Look At Federal Solutions*, PEACH PUNDIT (June 15, 2011, 5:00 PM), <http://www.peachpundit.com/2011/06/15/georgia-scours-probation-rolls-for-farm-labor-d-c-begins-to-look-at-federal-solutions/>.



were unwilling to do the work required.<sup>281</sup> Since the probation farm-work program did not work, Georgia is now proposing to use prison labor to fill the labor shortage.<sup>282</sup> These farm labor shortages may cost Georgia's economy \$391 million in total,<sup>283</sup> including \$74.9 million in crop losses, as reported by the Georgia Fruit and Vegetable Growers Association.<sup>284</sup> Charles Hall, Executive Director of the Georgia Fruit and Vegetable Growers Association has said that, "Georgia is the poster child for what can happen when mandatory E-Verify and enforcement legislation is passed without an adequate guest-worker program."<sup>285</sup>

In the wake of all that has happened in Georgia, Alabama still passed its own brand of harsh immigration law. Alabama's "harshes-in-the-nation" immigration law has caused the exodus of the state's undocumented workers and legal immigrants who do not want to face harassment.<sup>286</sup> Similar to what happened in Georgia, this has created a major labor shortage.<sup>287</sup> To deal with this shortage, Jerry Spencer, Founder of Grow Alabama, which delivers locally grown produce in the state, attempted to recruit unemployed U.S. citizens to do the work by giving them free transportation and paying them to pick the fruit and clean the fields.<sup>288</sup> After two weeks, Spencer says that the experiment is a failure; out of fifty people recruited to work, only a few lasted more than two or three days.<sup>289</sup> Additionally, there is a huge difference in productivity between migrant fieldworkers and U.S. citizen workers.<sup>290</sup> The Alabama Department of Agriculture and Industries advanced a plan to replace immigrant workers with prisoners because of the huge labor

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281. See Ray Henry, *Georgia Introduces Probation Farm-Work Program*, USA TODAY (June 25, 2011, 3:00 PM), [http://usatoday30.usatoday.com/money/industries/food/2011-06-25-probation-farm-work-program\\_n.htm#](http://usatoday30.usatoday.com/money/industries/food/2011-06-25-probation-farm-work-program_n.htm#).

282. See Jeremy Redmon, *Georgia May Use Prisoners to Fill Farm Labor Gap*, ATLANTA JOURNAL-CONSTITUTION (Oct. 5, 2011, 6:12 PM), <http://www.ajc.com/news/news/local-govt-politics/georgia-may-use-prisoners-to-fill-farm-labor-gap/nQMRm/>.

283. Redmon & Malloy, *supra* note 278.

284. *Id.*

285. *Id.*

286. Marie Diamond, *Alabama Agriculture Department Advances Plan to Replace Immigrant Workers With Prisoners*, THINKPROGRESS (Dec. 6, 2011, 5:10 PM), <http://thinkprogress.org/justice/2011/12/06/382852/alabama-agriculture-department-promoting-plan-to-replace-immigrants-with-prisoners-to-farmers/>.

287. *Id.*

288. Jay Reeves, *Efforts to Replace Immigrant Workers in Alabama Fields Coming Up Short*, AL.COM (Oct. 17, 2011, 6:14 PM), [http://blog.al.com/wire/2011/10/state\\_program\\_to\\_replace\\_immig.html](http://blog.al.com/wire/2011/10/state_program_to_replace_immig.html).

289. *Id.*

290. See *Id.*

shortage.<sup>291</sup> Many feel that Alabama should have learned from Georgia. Bryan Tolar, President of the Georgia Agribusiness Council, expressed his disbelief at the actions of Alabama: “It was like, ‘Good Lord, you people can’t be helped. Have you all not been paying attention?’”<sup>292</sup>

Why is there such a large labor shortage when the national unemployment rate is 9%? Many feel that Americans do not want to do the labor intensive work required by agriculture.<sup>293</sup> Colorado corn farmer, John Harold, wanted to help local workers find work.<sup>294</sup> However, he has found that people just are not coming.<sup>295</sup> “You have to understand there is a work ethic of migrant laborers that is just not found with local labor,” Harold said.<sup>296</sup> Kent Scott, a blueberry farmer in Alabama, says that Alabamians do not have the motivation to work.<sup>297</sup> “Immigrants are willing to work. They are trying to feed their families. They are hustling.”<sup>298</sup> However, others feel it is the lack of benefits and decent wages in the industry that deter Americans (Alabamians) from working in the fields.<sup>299</sup> Americans work other hard jobs, such as foundries and steel mills.<sup>300</sup> However, these jobs offer better wages and benefits.<sup>301</sup> Americans expect more than agriculture has to offer (i.e. wages and conditions). Farmers say they pay the wages they do to remain competitive. Doug Massey who studies population migration believes that there is a stigma attached; agriculture is an immigrant job category.<sup>302</sup> Massey asserts that this happens in other parts of the world as well.<sup>303</sup> For example, Europeans will not work jobs that Americans do because they are considered “immigrant jobs.”<sup>304</sup> “Immigrants aren’t

291. See Diamond, *supra* note 286.

292. *Id.*

293. See Elizabeth Dwoskin, *Why Americans Won't Do Dirty Jobs*, BLOOMBERG BUSINESSWEEK (Nov. 9, 2011), <http://www.businessweek.com/magazine/why-americans-wont-do-dirty-jobs-11092011.html>.

294. Ryan Grenoble, *Colorado Corn Farmer Can't Find U.S. Citizens to Replace Immigrant Labor (VIDEO)*, HUFFINGTON POST (Sept. 2, 2011, 5:08 PM), [http://www.huffingtonpost.com/2011/09/02/colorado-farmer-cant-find-workers\\_n\\_947093.html](http://www.huffingtonpost.com/2011/09/02/colorado-farmer-cant-find-workers_n_947093.html).

295. *See id.*

296. *Id.*

297. Amanda Peterson Beadle, *Alabama Official Suggests Using Prisoners as Farm Workers After Immigration Law Scares Away Laborers*, THINKPROGRESS (Oct. 7, 2011, 3:40 PM), <http://thinkprogress.org/justice/2011/10/07/338922/alabama-prisoners-immigrants-farm-labor/>.

298. *Id.*

299. *See Dwoskin, supra* note 293.

300. *See id.*

301. *See id.*

302. *Id.*

303. *Id.*

304. *Id.*

stealing anything from anyone . . . . Businesses turned to foreign labor only because they couldn't find enough Americans to take the work they were offering."<sup>305</sup> Immigrant workers and native-born workers are imperfect substitutes for one another because of educational differences.<sup>306</sup> Regardless of the reason, the bottom line is that Americans are not taking the thousands of jobs available that are available in the fields.

*D. Will the Legal Workforce Act have the desired effect?*

As far as immigration reform goes, it is likely that the Legal Workforce Act will not have its desired effect of lowering the presence of undocumented workers within the United States. In addition, it is likely to create animosity towards immigrants. As the mandatory use of E-Verify becomes commonplace, local people will start to view immigrants as enemies.<sup>307</sup> It also promotes exceptionalism.<sup>308</sup> Rhode Island Governor Lincoln Chafee repealed an executive order requiring some Rhode Island employers to use E-Verify because "it has ostracized Latino communities" and "has caused needless anxiety within Latino communities."<sup>309</sup>

However, Barrowclough states that the shift towards "interior" enforcement (focus of both IRCA and Legal Workforce Act) as opposed to the previous focus of "border" enforcement has been successful in its immigration goals and has us moving in the right direction.<sup>310</sup> She points to the fact that from 2005 to 2008 the number of legal immigrants surpassed the number of illegal immigrants entering the United States.<sup>311</sup> Although, there are semi-positive results within the scope of immigration, as discussed above, the ramifications for the U.S. economy, American workers and undocumented workers in the way of human rights does not justify it. Immigration and unauthorized work is a major issue for the American community. As expressed by many speaking on the potentially damaging effect of the Legal Workforce Act if it is passed into law, we need to approach the problem in a different

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305. *Id.*

306. *See Hearing on H.R. 2164*, statement of Tyler Moran, *supra* note 4, at 85.

307. *See Patel, supra* note 137, at 455.

308. *See id.* at 455, 474.

309. NAT'L IMMIGRATION L. CTR., QUOTATIONS FROM LAWMAKERS: STATE POLICYMAKERS CRITIQUE E-VERIFY 2, <http://www.nilc.org/document.html?id=326> (last updated July 2011).

310. *See Barrowclough, supra* note 40, at 797.

311. *Id.* at 797-98.

way. Various suggestions will be discussed below in the recommendations section.

## V. RECOMMENDATIONS

### A. Long-Term Work Visa Program

The Legal Workforce Act operates under the idea of attrition through enforcement. In other words, increased enforcement of tough immigration laws will encourage undocumented persons to self-deport. Proponents of the Legal Workforce Act and similar legislation assert that “the ratcheting up of enforcement produces a dramatic decline in lawbreaking,”<sup>312</sup> further explaining that the only thing needed for attrition through enforcement to work is the “realistic probability that enforcement will occur.”<sup>313</sup> However, this is the exact premise that the IRCA operates under and it is clear how ineffective it has been.<sup>314</sup> Attrition through enforcement is not the only middle ground lying between deporting all persons here unlawfully and granting amnesty to everyone.<sup>315</sup> There are other possibilities that lie between these two extremes of total enforcement or no rule of law at all. The proposed long-term work visa program does just that.

The following proposal is somewhat radical. It involves something approaching open borders; a long term visa program that allows visa holders to work. The individuals are here and will come regardless. The current legislation (IRCA) has failed to stop illegal immigration or even to slow it down. From 1995 through 2004, nine years after IRCA’s enactment, the number of illegal immigrants has surpassed the number of legal immigrants.<sup>316</sup> Documenting the individuals who are in the United States currently and creating a system to document individuals who will come in the future, will accomplish immigration goals of national security and protect American workers.

Protecting American workers means protecting jobs and protecting wages and working conditions. However, as stated above, individuals

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312. Kris W. Kobach, *Attrition through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP & INT’L L. 155, 156 (2008).

313. *Id.* at 162.

314. As Tyler Moran expresses, “[w]e have been trying an ‘immigration enforcement-only-approach’ for at least two decades now, and it has not worked.” *Hearing for H.R. 2164*, statement of Tyler Moran, *supra* note 4, at 94.

315. See Kobach, *supra* note 312, at 155-56.

316. See Jeffrey S. Passel, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 6 (2005), available at <http://pewhispanic.org/files/reports/46.pdf>.

who have surreptitiously entered the United States are here and working, meaning they have jobs that could be taken by an LPR or USC and are most likely being paid much less and are made to endure much worse conditions.<sup>317</sup> In industries with high proportions of undocumented workers, these lowered wages and working conditions can spread throughout the industry and effect individuals authorized to work in the United States. If we provide a way for persons to live and work here legally, everyone can then exist under the rule of law. This will eliminate the conflict of who to afford rights to among lawmakers and will comfort them when extending rights to foreign workers in addition to eliminating the threat of reprisals to the individuals themselves. Therefore, there is a hope that unscrupulous employers, who are paying below minimum wage, not paying wages at all or forcing workers to work in unsafe conditions, will be more readily turned in.

### 1. Description of the Long-Term Visa Program

This proposed visa would create a new nonimmigrant category.<sup>318</sup> With it, visa holders can apply for any type of nonprofessional work. Once here, if a worker wants to change jobs to a professional position, such as those that require labor certification, he or she can change their nonimmigrant visa category.<sup>319</sup> The visa would be for a specified period of time, either nine or ten years. A labor certification would be required; however it would not be as formal as the labor certification required for immigrant visas<sup>320</sup> or even for the other nonimmigrant visas.<sup>321</sup> The documentation required that would be used for support would be that an employer attempted to recruit LPRs or USCs and was unsuccessful. Similar to the I-9 form, the employer would compile this documentation and keep it on file in the event of an investigation. It will work in this

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317. See *supra* Part II.A.2.

318. The new visa category would be proposed to be a new H category as H visas already pertain to employment.

319. This restriction would be in place because immigrants seeking out skilled jobs already have a non-immigrant category. Additionally, unskilled labor is usually more conducive to temporary working situations, like seasonal employment or industries with high turnovers, where positions are not extraordinarily long term.

320. Department of Labor must certify that there are no sufficient workers in the U.S. who are able, willing, qualified and available at the time of application and admission and that employment will not adversely affect the wages and working conditions of U.S. workers. 8 U.S.C. § 1182(a)(5)(A)(i) (2006).

321. Labor condition application set forth for H1-B visa holders in 8 U.S.C. § 1182(n)(1)(A)-(C) and H2-A agricultural workers, both of which require a formal application and DOL certification process.

more self-regulated manner because some certification is necessary to protect the American workforce and to allow native workers and permanent residents preference over foreign workers. Allowing for this type of preference can be managed by putting an “apply after” date on advertisements for employment, by specifying a specific date that persons holding this visa can apply after.<sup>322</sup> This will help to ensure there will not be discrimination. For instance, the employer will not have to worry about whether an applicant is a visa holder or not and therefore turn away persons who may be visa holders, such as individuals who look foreign.<sup>323</sup> Employers can work under the assumption that prior to the date, those applying will be LPRs or USCs.

The proposed self-regulation labor certification differs from that required for the H-2A deliberately. To get workers in under the H-2A visa, employers have to file and apply for the workers they need after providing evidence that they were unable to recruit American workers for these positions.<sup>324</sup> This process, meant to protect U.S. workers, is extremely cumbersome and often leads to employers hiring undocumented individuals.<sup>325</sup> A study done by the Department of Labor (DOL) concluded that “the H2-A program’s hiring process was ineffective, and characterized as having extensive administrative requirements that often seemed counterproductive to the Department of Labor’s mandate to protect American worker’s jobs.”<sup>326</sup> It is difficult to determine if the proposed visa program can co-exist with the current H2-A program (specifically supplying workers for agriculture) or if it would supplant it all together.<sup>327</sup>

The long-term visa program would in no way change any of the current paths to legal permanent residence or citizenship.<sup>328</sup> Additionally, this proposal is not a “legalization” proposal because it does not afford workers entering under the visa the rights and duties

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322. A tentative suggestion would be two weeks after the posting date.

323. There is a fear of liability for hiring visa holders during the initial two weeks of recruitment and, thus, there is a concern that employers will engage in the same discrimination that is occurring under E-Verify and the IRCA.

324. See U.S.C. § 1182(a)(5)(A)(i) (2006). See also Oliveira, *supra* note 30, at 164.

325. See Oliveira, *supra* note 30, at 172.

326. *Id.*

327. Replacing the H2-A program with the proposed long-term visa program would not further any labor and employment goals, such as protecting U.S. workers; however, it would afford the workers themselves a way to get documentation with the hope of encouraging more reporting of workplace violations and discouraging employer exploitation of these workers.

328. See 8 U.S.C. § 1153(a)-(c) (2006) (proscribing requirements for allocations of immigrant visas, including family sponsored immigration, employment-based immigration, and diversity immigration).

associated with legal permanent residence. Rather, it will function similarly to all other nonimmigrant categories with regards to all legal matters such as unlawful presence, criminal violations, and civil violations. Conceptually, it is difficult to place this type of visa in a nonimmigrant category because of the intent requirements for non-immigrants. However, as described above, one of the main goals of this visa program should be to help restart circular migration; where workers in seasonal or temporary positions go back to their home countries during the off season.<sup>329</sup> Therefore, it would be in contradiction with this stated goal to work under the assumption that all persons already present in the U.S. have the intent to remain here permanently.

This program can be implemented by starting with the persons already here. The DOL and DHS can begin outreach to industries with the highest concentrations of undocumented workers. The top industries are agriculture, building, cleaning and maintenance, construction, food preparation and serving, production, installation and repair, and transportation and material moving.<sup>330</sup> By reaching out to these industries, the dissemination of information will be quick, efficient and cost effective. Concurrently, the DOL and DHS can put this new visa category in literature and online information can be made available to persons both inside and outside of the United States. The only active "recruitment" would be of persons already within the country, in order to give them documentation and work authorization.

Lastly, persons applying upon first entering the United States under this visa category would have a certain amount of time to find employment before automatically falling out of status. Similarly, if a visa holder becomes unemployed while remaining in the U.S. for a specified period of time, they too would fall out of status. This provision would hope to avoid individuals becoming a public charge and to prevent individuals who have no intention of working while in the United States from using this visa category as a path into the country.

## 2. Requirements for Applicants of the Long-Term Visa

The main requirement to fit into this non-immigrant visa category will be to produce a resume or similar documentation with the application to demonstrate that the applicant has either previously been

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329. See *supra* note 19 and accompanying text (noting that temporary (or seasonal) workers are ideal for agricultural industries).

330. Passel, *supra* note 316, at 27.

employed or has a basic education level that would make him or her employable. Additionally, applicants would need to pass a basic physical showing that in addition to having a marketable skill, they are also physically capable of doing the work. Further, similar to applications under every other non-immigrant category, applicants must show that they are not inadmissible, and do not intend to immigrate, which can be demonstrated by an individual having “residence in a foreign country which he has no intention of abandoning.”<sup>331</sup> Also similar to other entries of non-immigrants is the concern of intent to remain permanently. A pre-conceived intent to remain in the United States violates the INA, which states that upon entering as a non-immigrant, an individual may have no intent to abandon his or her country of origin.<sup>332</sup> However, the presence of dual intent, when a non-immigrant hopes to become an immigrant, is common. In such cases there is no violation of the statute.

The application process would mirror that of the I-765 form, which is the application for an I-766 Employment Authorization Document (EAD).<sup>333</sup> The EAD is currently one of the documents accepted to prove work authorization on the I-9.<sup>334</sup> The proposed new nonimmigrant visa category cannot fit into the existing structure of the I-765 and I-766 because the latter specifically states “Not Valid for Reentry,” which contradicts the basic premise of this proposal to re-encourage circular migration. For persons already in the United States who qualify for this visa, there will be a certain date that they must be present before and there will be a deadline for submitting an application.<sup>335</sup> In this way it will be an amnesty of sorts, and individuals who fall within this bracket can apply to the DHS without fear of reprisal, such as deportation.<sup>336</sup>

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331. 8 U.S.C. § 1101(a)(15)(B) (2006).

332. *Id.*

333. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., LIST A: DOCUMENTS THAT ESTABLISH BOTH IDENTITY AND EMPLOYMENT AUTHORIZATION [hereinafter LIST A], <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=30341921c6898210VgnVCM100000082ca60aRCRD&vgnnextchannel=30341921c6898210VgnVCM100000082ca60aRCRD> (last updated May 13, 2011).

334. See 8 U.S.C. §§ 1324a(b)(1)(B)-(D) (2006); See also Pottle, *supra* note 25, at 114; LIST A, *supra* note 333.

335. This provision would be put in place to show that people are not entering surreptitiously and then applying.

336. A provision such as this does not quell the concern of reprisal against individuals who have committed identity fraud. Identity fraud is a charge brought against an individual by another individual, therefore the proposed legislation cannot waive this individual right. Therefore, if undocumented persons have committed identity fraud and are subsequently discovered, they run the risk of facing charges.



However, if an individual does not fall within these brackets and either enters without authorization after the cutoff date or fails to register prior to the deadline, he or she would then be considered unlawfully present.<sup>337</sup>

### *B. Addressing Possible Concerns Regarding Implementation of a Long-Term Visa Program*

#### 1. Concerns of Unions and Organized Labor

Unions have historically had a restrictive stance on immigration,<sup>338</sup> as foreign labor can easily be seen as a threat to the domestic labor force. Although organized labor is starting to recognize the need to organize immigrants (both undocumented and documented) because they are a major part of the workforce,<sup>339</sup> a proposal for open borders may still raise some concerns. However, one of the main purposes of this new category of visa is to *all* protect workers in order to stabilize wages and working conditions. When employees are not protected by the mechanisms in place for protection, employers have incentives to exploit their workers in a variety of ways, such as underpaying them, discriminating against them, allowing poor work conditions, and more. This exploitation “results in further downward pressure on wages and working conditions of all U.S. workers.”<sup>340</sup> It is the law that should set the standards for employee wages and work conditions, not unscrupulous employers. The idea of not investing in a worker is a direct assault on basic employee benefits and rights.<sup>341</sup>

Conversely, the idea of “unlawful presence” creates a unique juxtaposition regarding affording persons here unlawfully and working without authorization the same rights afforded to those lawfully here. Creating a legal document that permits individuals to both be present in the United States and make a living here removes this juxtaposition and supports affording all persons protection under the law. Therefore, the focus on enforcement should be towards general enforcement of both federal and state labor and employment laws in regard to fair wages

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337. See 8 U.S.C. § 1182(a)(9)(B)(ii) (2006).

338. Robin Jacobson & Kim Geron, *Unions and the Politics of Immigration*, SOCIALISM & DEMOCRACY ONLINE (Mar. 7, 2011), <http://sdonline.org/48/unions-and-the-politics-of-immigration/>.

339. *Id.*

340. *Hearing on H.R. 2164*, statement of Tyler Moran, *supra* note 4, at 94.

341. Haines, *supra* note 17, at 355.

under FLSA,<sup>342</sup> fair and safe conditions under OSHA,<sup>343</sup> the right to protected concerted activity under NLRA,<sup>344</sup> and the right to not be discriminated against under Title VII.<sup>345</sup> Increased enforcement helps protect all workers' rights.

Lastly, the provisions in place regarding job postings guaranty that U.S. workers, both LPRs and USCs, get the first opportunity to apply for available positions. This gives LPRs and USCs a distinct advantage and ensures that visa holders will not be "taking" jobs before domestic workers have had the chance to apply.

## 2. Another Possible Concern: Danger of Creating a Subclass

Another concern that surrounds a visa allowing persons to work is the danger of creating a permanent subclass within society to be exploited and "trapped" in their situation. This concern mainly stems from the results of the bracero program and other guest worker programs.<sup>346</sup> However, the long-term visa proposed, differs from the bracero program in key ways. The nature of the bracero program itself set up participants to be exploited and created a subclass of individuals who could not escape their situation.<sup>347</sup> This was because they had a contract drawn up by their independent governments and had no legal recourse when employers did not abide by the terms of the contract.<sup>348</sup>

Similarly, guest worker programs have the same threat as the former bracero program in that the worker is tied to his employer.<sup>349</sup> The employer who sponsored him or her and the provisions of the visa do not allow for mobility of positions; once an individual is working in the United States, that individual is stuck with the employer contracted with under the visa.<sup>350</sup> The long-term visa proposed is deliberately different from the H-2A and other guest worker programs to avoid this

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342. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2006).

343. Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (2006).

344. National Labor Relations Act, 29 U.S.C. §§ 141-197 (2006).

345. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2006).

346. *See supra* pp. 4-5.

347. *See* Francis Gabor & John B. Rosenquest IV, *The Unsettled Status of Economic Refugees from the American and International Legal Perspectives—A Proposal for Recognition Under Existing International Law*, 41 TEX. INT'L L.J. 275, 289 (2006).

348. *See id.*

349. *See* Oliveira, *supra* note 30, at 169. "[T]emporary foreign workers are unable to switch jobs and are bound to the contractors who hired them." *Id.* Because of this "temporary workers are exploited more than those who come illegally because [they] are bound by the H-2A visa program." *Id.*

350. *Id.*

possibility of exploitation and creation of a subclass or underclass unprotected by the law.

The structure of the visa program itself is designed to avoid this very real danger. It is based on allowing visa holders to do *any* unprofessional work. Applying for the visa through USCIS, like any other visa, means that visa holders are not sponsored by a particular employer and therefore have the same mobility as LPRs and USCs to change positions if an employer ignores labor and employment laws. Further, visa holders will be documented and therefore protected by labor and employment law to the same extent as LPRs and USCs. Lastly, with no hurdle to change non-immigrant visa categories or change statuses, visa holders can network and get other jobs if they present themselves, even ones that require labor certification.

It is the goal that these safeguards within the structure of the program itself will help to avoid the possibility of visa holders being exploited and trapped in jobs so that an employer will not take advantage. Having a legal status to work will likely encourage abused workers to stand up for themselves because there is no threat of immigration based reprisals.

### *C. Benefits of a Long-Term Visa Program*

This proposal will help to eventually end surreptitious entrance into the country because there would be no reason to come without documentation. It relieves the problems that arise from illegal immigration, such as national security – when the government is unaware of who is present within our borders, and protects American workers by taking the steps described above. This proposal goes beyond accomplishing the goals of attrition through enforcement legislation such as the Legal Workforce Act and dispenses with the concerns that arise from such legislation. First, it reduces the potential for employer discrimination that stems from fear of liability. Employers will no longer fear the possibility of hiring someone who is undocumented or unauthorized because everyone who can work can get documents to work. Further, tentative non-confirmations, final non-confirmations, loss of jobs (due to both TNCs and FNCs) and overburdening the SSA because of these incorrect results would no longer be a problem because they would not be part of the equation. There would be no threat to overburden other agencies, such as the DOL, because the DOL is not heavily involved. Certification is self-regulated and violators of the program will be dealt with by the USCIS, the agency responsible for

administering the INA. Similarly, the effect on the DHS will be the same of any proposed legislation or program aimed at correcting the current situation by trying to effect illegal immigration and protect U.S. workers.

This proposal changes the face of our immigration structure. It is a visa designed to take into consideration the needs of the workforce first and foremost – domestic workers and foreign workers alike. It is certainly a radical proposal, especially given the current unemployment rates. However, “there is no statistically significant relationship between unemployment and recent immigration.”<sup>351</sup> “[E]mpirical evidence does not show a causal relationship between immigrant labor and negative employment outcomes for native workers.”<sup>352</sup> More importantly, employment rates are higher in higher immigrant areas because immigrant spending stimulates the economy and creates jobs.<sup>353</sup> Therefore, enacting and implementing a program like this should not be feared because of the current economic climate, but rather embraced because of the possibilities for a positive outcome.

## VI. CONCLUSION

The Legal Workforce Act and similar attrition through enforcement legislation is not what is needed for immigration reform or the American workforce.<sup>354</sup> It threatens discrimination and loss of jobs.<sup>355</sup> A better solution which would eventually accomplish the same goal of decreasing and eventually stopping *illegal* immigration is one that distinctively looks at and considers all of the needs of domestic workers, foreign workers and employers.<sup>356</sup> This can be accomplished through the long term visa work program, giving eligible immigrants the documentation needed to “legalize” our workforce.<sup>357</sup> This in turn will help to stop exploitation of foreign workers and help to improve the working conditions and wages for all workers.<sup>358</sup>

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351. *Hearing on H.R. 2164*, statement of Tyler Moran, *supra* note 4, at 85.

352. Barrowclough, *supra* note 40, at 805.

353. *See id.*

354. *See supra* Part IV.C.

355. *See supra* Part IV.C.

356. *See supra* Part V.A.

357. *See supra* Part V.A.

358. *See supra* Part V.A.

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