
CONTROLLING OUR BORDERS THROUGH ENHANCED EMPLOYER SANCTIONS

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I. INTRODUCTION

As a nation built by immigrants, the United States has historically maintained a generally pro-immigration policy. For many Americans, however, the current immigration system appears broken. Proponents of tighter immigration controls often point to the fact that two of the terrorists involved in the attacks on September 11, 2001 received approval of their immigration applications six months after the attacks took place.¹ This oversight proved especially embarrassing to the then Immigration and Naturalization Service (“INS”), evidencing the ease with which a terrorist could enter the United States. With terrorism currently the chief policy concern of the United States, immigration issues play an increasingly important role on the American national security agenda.

United States Senator John McCain of Arizona—who represents a state with substantial illegal immigration—assesses the danger of the connection between illegal immigration and national security, stating, “[W]e can’t tell the American people that we’re winning the war on terror[] if hundreds of thousands or millions of people are coming across our

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1. *Homeland Security: Tracking International Students in Higher Education—Progress and Issues Since 9-11, Hearing Before the Subcomm. on Select Education and Subcomm. on 21st Century Competitiveness of the H. Comm. on Education and the Workforce*, 107th Cong. (2002) (statement of Glenn A. Fine, Inspector General, Dep’t of Justice) (discussing how “two September 11 terrorists had received approval to change their immigration status from ‘visitors’ to ‘students’ six months after the terrorist attacks”).

border every year, illegally and undocumented.”² He adds:

If someone comes across and you don't know who he or she is, and where they come from, and what their intentions are, I don't know how you can [determine whether the person is a terrorist]. . . . [T]here are people coming across . . . in huge numbers. And without trying to scare anybody, it seems to me that bad guys would find this a rather convenient way to get into the United States.³

Senator McCain is not alone in his assessment of the danger. Heather MacDonald, a Manhattan Institute scholar and an expert on illegal immigration issues, wrote in a recent article that “an al Qaeda website noted in 2002 [that] only 5 percent of the flood of people and goods that cross the Mexican border each year are inspected.”⁴ Last year, Department of Homeland Security (“DHS”) officials told a congressional committee that al Qaeda operatives are seeking access to the United States through Mexico.⁵ Secretary of State Condoleezza Rice has voiced similar concerns about the risk the Mexican border poses to national security.⁶ And according to Gary Bauer, spokesperson for the group American Values, “[I]n 2003, about 5 percent of captured illegal immigrants crossing the [Mexican] border were OTMs or ‘Other than Mexicans.’”⁷ Given all of these warnings about potential terrorists coming across the Mexican border, the United States must take control of its illegal immigration problem. As former INS Commissioner Doris Meissner stated, however, “[E]nforcing the law just at the borders is not enough.”⁸

Despite the billions of dollars spent on immigration regulation, thousands of men and women come through the border illegally every day in hopes of finding employment and prosperity. The number of illegal immigrants surged to twelve million as of March 2006,⁹ growing at a rate

2. *Nightline: Illegal Immigrant Workers* (ABC television broadcast Dec. 14, 2004) (transcript on file with the Southern California Law Review).

3. *Id.*

4. Heather MacDonald, *Homeland Security? Not Yet*, CITY J., Autumn 2004, available at http://www.city-journal.org/html/14_4_homeland.html.

5. Chad Groening & Jenni Parker, *Bonner, Bauer Say Bush Budget Gives Border Patrol Short-shrift, Conservatives Bewildered that White House Fails to See Homeland Security Implications*, AGAPE PRESS, Mar. 7, 2005, available at <http://headlines.agapepress.org/archive/3/72005e.asp>.

6. Genaro C. Armas, *Undocumented Population Surges 23%, Report Says*, DESERET MORNING NEWS (Salt Lake City), Mar. 22, 2005.

7. Groening & Parker, *supra* note 5.

8. *Nightline: Illegal Immigrant Workers*, *supra* note 2.

9. Stephen Ohlemacher, *Number of Illegal Immigrants Hits 12M*, ASSOCIATED PRESS, Mar. 7, 2006, available at <http://www.breitbart.com/news/2006/03/07/D8G6U2KO8.html>.

of approximately 850,000 illegal immigrants per year since 1990.¹⁰ About 14% of the American workforce is foreign born, and an estimated seven to eight million of those workers are undocumented.¹¹ Poll after poll of Americans finds that U.S. citizens, regardless of their political affiliations or racial backgrounds, want less immigration, whether it is legal or illegal.¹² President George W. Bush has placed immigration reform on his agenda, proposing a plan that guarantees guest worker status—but not a right to citizenship—to current undocumented workers who obtain a job offer.¹³ Proponents of his plan argue that the government could better account for and track the millions of illegal aliens in the country. But this program is only a partial fix to the current immigration crisis—it does not adequately address the issue of undocumented immigrants entering the country.¹⁴ As part of the revamping of the immigration system, policymakers must consider implementing significantly enhanced employer sanctions as an effective way to curb the growth of illegal immigration.

Though there have been many proposed legislative solutions to the problem of illegal immigration, none have sufficiently limited the biggest pull factor—employer hiring practices. In fact, a recent *Time* magazine poll found that 71% of those polled were in favor of “mandating major penalties for employers convicted of hiring illegal immigrants and strongly adhering to them.”¹⁵ In 1986, Congress passed the Immigration Reform and Control

10. *Id.* Many sources use the term illegal immigrant or illegal alien. While there are legal definitions for these terms, for the purposes of this Note, they will mean any non-U.S. citizen who resides in the United States illegally. The terms thus include people such as those who overstay their visas as well as those who cross the border undocumented.

11. Office of the Press Secretary, Background Briefing by Conference Call on Immigration Policy (Jan. 6, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040106-3.html>. The agricultural industry is just one example of a sector that relies heavily on undocumented immigrants. Over one million undocumented immigrants contribute to the total 1.6 million workers in this industry. *Dreaming of the Other Side of the Wire*, *ECONOMIST*, Mar. 12, 2005, at 28.

12. *Dreaming of the Other Side of the Wire*, *supra* note 11, at 28.

13. President George W. Bush, Remarks by the President on Immigration Policy: President Bush Proposes New Temporary Worker Program (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html> [hereinafter President Bush’s Immigration Proposal]. See *Nightline: Illegal Immigrant Workers*, *supra* note 2.

14. For many, our nation’s recent experience with terrorism has radically altered the risks involved with the failings of our current system of immigration regulation such that they would agree that we are experiencing an immigration crisis. But others argue that immigration is beneficial, as immigration has an overall positive effect on our economy. In fact, in 2002, the President’s Council of Economic Advisers determined that immigration is beneficial in at least one respect—the overall gain to our nation’s economy contributed by immigrants, based on the difference between the taxes paid and benefits received, is estimated to be up to \$14 billion per year. COUNCIL OF ECONOMIC ADVISERS, *ECONOMIC REPORT OF THE PRESIDENT* 270 (2002).

15. Karen Tumulty, *Should They Stay or Should They Go?*, *TIME*, Apr. 10, 2006, at 30.

Act (“IRCA”),¹⁶ containing provisions that allowed for civil sanctions and criminal penalties for knowingly hiring or knowingly continuing to employ unauthorized workers or for not filling out the appropriate documentation (an I-9 Form) for all employees. The sanctions and penalties are too low, however, to be effective, and enforcement is almost nonexistent. Because the financial benefits of hiring unauthorized workers at substandard wages outweigh both the risk of being caught and the penalties associated with enforcement, many employers continue to hire unauthorized workers without regard to the law.

This Note argues that by increasing the civil sanctions and strengthening the criminal penalties imposed on such employers to a point at which the risk outweighs the reward of hiring unauthorized workers, employers will stop hiring these workers. As a result, the biggest pull factor of illegal immigration will be eliminated. Fewer illegal immigrants will enter the United States in hopes of finding work, and others will depart after being let go by employers who refuse to continue taking the risk associated with employing illegal workers. This approach will reduce the population of illegal immigrants in America and, with fewer illegal immigrants crossing the border, this plan will also allow border patrol to focus its efforts on stopping potential terrorists.

Part II of this Note describes the history behind employer sanctions and the existing employer sanctions law implemented under IRCA. Part III reviews the lack of enforcement of employer sanctions. Part IV examines the effectiveness of employer sanctions and other proposed immigration reforms, including a guest worker plan that does not enhance employer sanctions and a different plan that has features that do enhance employer sanctions. Finally, Part V proposes a significantly enhanced employer sanctions law as a solution to illegal immigration and national security threats.

II. A HISTORICAL PERSPECTIVE ON IMMIGRATION POLICY AND THE PASSAGE OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

In the early 1970s, Congress, concerned with the effect that unauthorized workers were having on the U.S. economy, sought to

16. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (partially codified as amended in scattered sections of 8 U.S.C.).

implement significant immigration reform.¹⁷ As a result of rising illegal immigration in that decade and throughout the 1980s, Congress began to focus increasingly on border control and enforcement as a means of reducing the tide of illegal immigration.¹⁸ Specifically, employer sanctions became the primary legislative instrument used to control the border.¹⁹

By 1986, a majority in Congress was convinced that sanctioning employers would “withdraw[] the magnet of economic opportunity” provided by the prospect of employment in the United States.²⁰ Accordingly, Congress passed IRCA, making it illegal for employers to knowingly hire illegal aliens in the United States.²¹ IRCA, thus, was not limited to the traditional method of enforcement aimed solely at undocumented aliens. Congress reasoned that subjecting employers to civil sanctions and criminal penalties would reduce the incentive to hire illegal immigrants, which would in turn reduce the availability of employment for illegal immigrants.²² Theoretically, these factors should encourage illegal immigrants in the United States to depart and discourage the entry of those who might otherwise come into the country seeking employment.²³

According to IRCA, it is illegal for an employer “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien”²⁴ or “to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.”²⁵ According to regulations, “[t]he term *unauthorized alien* means, with respect to employment of an alien at a particular time, that the alien is not at that time either: (1) lawfully admitted for permanent residence, or (2) authorized to be so employed by this Act or by the Attorney General.”²⁶ Every employer is required to verify a potential employee’s work documentation and attest under penalty of perjury on an I-9 form that the employee has presented documentation establishing employment authorization and identification within three business days of hire.²⁷ Because there are over fifteen acceptable

17. Michael X. Marinelli, Note, *INS Enforcement of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation Period*, 37 CATH. U. L. REV. 829, 830–32 (1988).

18. *Id.* at 832.

19. *Id.*

20. *Id.* at 833.

21. *Id.*

22. *Id.*

23. *Id.* at 833–34.

24. 8 U.S.C. § 1324a(a)(1)(A) (2000).

25. 8 U.S.C. § 1324a(a)(2) (2000).

26. 8 C.F.R. § 274a.1 (2006).

27. 8 U.S.C. § 1324a(b) (2000); 8 C.F.R. § 274a.2(b)(1) (2006).

authorization and identification forms,²⁸ however, it is often very difficult for employers to know if the forms presented by employees are legitimate or fraudulent.

Knowingly hiring or knowingly continuing to employ an unauthorized immigrant, or not complying with the document verification requirements during the hiring process, may subject employers to civil sanctions,²⁹ and possibly criminal penalties.³⁰ Regulations define the knowledge element as “not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.”³¹ Civil penalties for each offense of employing unauthorized aliens range from \$275 to \$2200 per alien for a first offense, \$2200 to \$5500 per alien for a second offense, and \$3300 to \$11,000 per alien for three or more offenses.³² Criminal penalties can be invoked if there is a pattern and practice of violations, resulting in a penalty of up to \$3000 and six months in jail.³³ In addition, failure to fill out and maintain I-9s correctly results in fines of \$110 to \$1100 per I-9.³⁴ The Bureau of Immigration and Customs Enforcement (“ICE”) now takes the lead role in ensuring I-9 compliance by employers.³⁵

III. THE LACK OF ENFORCEMENT OF EMPLOYER SANCTIONS

Though IRCA was signed into law in 1986, its effect since then has been limited. Employer sanctions have rarely been enforced.³⁶ In fact, no precedent decisions were issued by the Office of the Chief Administrative Hearing Officer in employer sanctions cases during 2003.³⁷ According to the United States Government Accountability Office, employers of unauthorized workers were issued a mere *three* notices of intent to fine in

28. See 8 C.F.R. § 274a.2(b)(1)(v) (2006) (specifying which documents are acceptable).

29. 8 U.S.C. § 1324a(e)(4), (5) (2000).

30. 8 U.S.C. § 1324a(f) (2000).

31. 8 C.F.R. § 274a.1(1)(1) (2006).

32. 8 U.S.C. § 1324a(e)(4) (2000); 28 C.F.R. § 68.52(c)(1) (2005). These amounts are 10% less for offenses that occurred before March 15, 1999. 28 C.F.R. § 68.52(c)(1) (2005).

33. 8 U.S.C. § 1324a(f)(1) (2000).

34. 8 U.S.C. § 1324a(e)(5); 28 C.F.R. § 68.52(c)(5) (2005).

35. See 8 U.S.C. § 1324a(e)(2) (2000) (granting authority to immigration officers to conduct I-9 compliance investigations).

36. See *Nightline: Illegal Immigrant Workers*, *supra* note 2.

37. Jack E. Perkins, *Recent Decisions from the Office of the Chief Administrative Hearing Officer*, 81 INTERPRETER RELEASES 1173, 1174 (2004).

2004, while in 1999 that figure was over *100 times greater* at 417.³⁸ In 1998, the General Accounting Office (“GAO”) determined that the “INS completed approximately 6,500 investigations of employers, which equated to about 3 percent of the country’s estimated number of employers of unauthorized aliens.”³⁹ In that same report, the GAO found that from 1994 to 1999, the INS devoted only about 2% of its enforcement workforce to its worksite enforcement program, which is designed to detect noncompliance with IRCA.⁴⁰

Earlier figures also show how little incentive employers had to comply with the employer sanctions law. From the law’s enactment date through September 1989, government records indicate an incredibly low number of employer sanction violations.⁴¹ Even more notably, of the only 39,594 violations, almost 92% were for paperwork offenses.⁴² Additionally, because many violations involved a single employer, these numbers tend to overstate the number of employers affected.⁴³ Perhaps most startling is the trend and staggering low number of civil fine notices issued to employers, which dropped from an already low figure of 417 in 1999 to a shockingly low number of just three in 2003.⁴⁴

As if the low numbers do not sufficiently demonstrate the absence of tough enforcement, the case is made even more strongly by the fact that the overwhelming majority of the enforcement actions resulted in only a warning or citation, and actual fines (averaging less than \$2500 per company) were levied against only 3532 employers.⁴⁵ In addition, criminal prosecutions under the employer sanctions law “in cases of a ‘pattern or practice’ of knowingly hiring unauthorized aliens . . . have been extremely rare.”⁴⁶

Given the infrequency with which the law is enforced, employers have little reason to adhere to it. In fact, one study found that “almost half of the[] employers suspect that they employ undocumented workers, and 11

38. U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 34 (2005).

39. U.S. GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 3 (1999).

40. *Id.*

41. Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-collar Crime*, 24 LAW & SOC’Y REV. 1041, 1054–55 (1990) (citing U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 88 (1990)).

42. *Id.*

43. *Id.* at 1055 n.16.

44. Julia Preston, *U.S. Puts Onus on Employers of Immigrants*, N.Y. TIMES, July 31, 2006.

45. Calavita, *supra* note 41, at 1055.

46. *Id.*

percent admit outright that they have violated the law.”⁴⁷ Yet, while employer sanctions have been enforced minimally, the number of I-9 government enforcers has increased to about 14,000 after the move to the DHS in March 2003, up from only a few hundred enforcers previously.⁴⁸

There are many reasons why the law is so rarely enforced. According to Doris Meissner, former commissioner of the INS,

The narrow answer is that it’s a very weak law. There have never been enough resources put into it. Even if there were enough resources put into it, it’s very, very difficult to make the cases because [] it’s a weak law. . . . There are fraudulent documents all over. There are lots of illegal immigrants in the country because we enforce the law primarily at the borders. Not in the interior of the country. And enforcing the law just at the borders is not enough.⁴⁹

Others argue that the lack of enforcement exists because undocumented workers are necessary for certain industry sectors to survive, which is important for the U.S. economy.⁵⁰ There are certain industries that have grown dependent on cheap, illegal labor to be competitive in a global economy.⁵¹ In fact, recent estimates are that undocumented immigrants account for 24% of the country’s agricultural workers, 14% of construction jobs, and 9% of manufacturing jobs.⁵²

In these industries, the potential detriment of civil sanctions and criminal penalties is outweighed by the benefit of lower salary expenses.⁵³ Mark Krikorian, Executive Director of the Center for Immigration Studies, believes these industries could adjust by making investments in equipment and training if the law was enforced, but that they currently “don’t have the economic incentive necessary.”⁵⁴ Brian M. Moskowitz, special agent in charge of Ohio and Michigan for ICE, part of the DHS, believes “[h]iring illegal immigrants ‘has been a low-risk, high reward enterprise.’”⁵⁵

47. *Id.*

48. Cynthia J. Lange & Robin P. Kandell, *Corporate Compliance and Immigration Enforcement in the Post 9/11 Era*, 1390 P.L.I. CORP. 97, 100 (2003).

49. *Nightline: Illegal Immigrant Workers*, *supra* note 2.

50. *See id.* (“Some argue that the U.S. simply needs these workers to do the dirty and difficult jobs Americans just don’t want to do anymore.”).

51. *See, e.g.,* Tumulty, *supra* note 15, at 30 (“The business interests in the [Republican] [P]arty base don’t want to disrupt a steady supply of cheap labor for the agriculture, construction, hotel and restaurant industries, among others.”).

52. Brian Grow, *A Body Blow to Illegal Labor?*, BUS. WK., Mar. 27, 2006, at 86.

53. *See* Tumulty, *supra* note 15, at 30 (“On those rare occasions when employers are punished, the penalties are so small that they amount to little more than a cost of doing business.”).

54. *Nightline: Illegal Immigrant Workers*, *supra* note 2.

55. Preston, *supra* note 44.

The number of employer sanctions cases has “declined over the years as the INS [has] shifted its emphasis away from civil enforcement . . . toward criminal prosecution of the more egregious violators and toward a more cooperative, educational approach to employers violating the law through ignorance or inadvertence.”⁵⁶ While the trend of employer civil sanctions has gone down, the trend of criminal sanctions has been increasing, with only twenty-five criminal charges brought against employers in 2002 and 445 criminal arrests of employers already this year.⁵⁷ In those instances where employers have faced sanctions, there is usually an underlying cause other than mere violation of the law. The following cases are instructive.

The 2003 case *United States v. Tyson Foods, Inc.* is one instance where a large employer was threatened with sanctions due to the employer’s alleged conspiracy to smuggle illegal aliens into the country.⁵⁸ Tyson Foods, Inc. (“Tyson”), “the world’s largest producer, processor, and marketer of poultry-based food products,” had been subject to an undercover I-9 investigation that lasted over two years.⁵⁹ Although the investigation began long before September 11, it continued until December of 2001, when a federal grand jury indicted Tyson’s executives and managers on thirty-six counts for failure to comply with their I-9 statutory obligations, and “for conspiracy to smuggle illegal aliens to Tyson Foods processing facilities in the United States for profit.”⁶⁰ INS Commissioner James Ziglar stated that the “case represents the first time INS has taken action against a company of Tyson’s magnitude,” and that “INS means business and companies, regardless of size, are on notice that INS is committed to enforcing compliance with immigration laws and protecting America’s workforce.”⁶¹ Although the INS hoped to show its effectiveness in the wake of September 11, the jury acquitted Tyson and three company executives in March 2003 as a result of the government’s inability to prove that the hiring of the unauthorized workers resulted from the company’s encouragement, as opposed to several managers working contrary to company policies.⁶² The jury issued the acquittal despite the fact that two

56. Perkins, *supra* note 37, at 1174.

57. Preston, *supra* note 44.

58. *United States v. Tyson Foods, Inc.*, 258 F. Supp. 2d 809 (E.D. Tenn. 2003).

59. Press Release, U.S. Dep’t of Justice, Civil Rights Div., INS Investigation of Tyson Foods, Inc. Leads to 36 Count Indictment for Conspiracy to Smuggle Illegal Aliens for Corporate Profit (Dec. 19, 2001), available at http://www.usdoj.gov/opa/pr/2001/December/01_crm_654.htm.

60. *Id.*

61. *Id.*

62. Sherri Day, *Jury Clears Tyson Foods in Use of Illegal Immigrants*, N.Y. TIMES, Mar. 27, 2003, at 14.

managers plea bargained and testified that Tyson demanded they hire illegal workers.⁶³

National security concerns add another dimension to employer sanctions cases as evidenced by a recent case in which a Texas employer was convicted of falsifying employment eligibility documents to hire illegal immigrant workers.⁶⁴ United States Attorney Michael Shelby charged the company, Tollin Group Inc., which was doing business as Remedy Intelligent Staffing (“Remedy”), with conspiracy to falsify I-9 forms. According to Shelby, Remedy was conspiring “to conceal from the FBI’s Joint Terrorism Task Force that it had illegally and unlawfully hired illegal aliens as employees to work for the Wornick Co[mpany]” packaging food for the U.S. military—a job with clear national security implications.⁶⁵

The FBI conducted the investigation after intelligence reports in March 2003 led them to believe that Wornick was a potential al Qaeda target.⁶⁶ This national security concern brought a heightened urgency to this employer sanctions case. As part of the investigation, the FBI conducted “a thorough background check of all Remedy employees working at Wornick.”⁶⁷ The indictment alleged that Remedy “knowingly hired foreign nationals illegally in the United States,” and that “co-conspirators acting on behalf of Remedy allegedly failed to properly examine and verify the accuracy of information contained in 329 of the 600 I-9 forms submitted to the company by persons seeking and ultimately securing temporary employment at Wornick.”⁶⁸ Additionally, it alleged that the same coconspirators, acting on behalf of Remedy, “reproduced 414 I-9 forms for Remedy employees containing false and fraudulent entries and certifications between March, 19 2003 and June 2003.”⁶⁹ Under IRCA, “false and fraudulent reproduction constitutes a violation of federal regulations and carries a maximum administrative penalty of \$1,000.”⁷⁰

63. *Id.*

64. Press Release, U.S. Dep’t of Justice, U.S. Attorney’s Office, S. Dist. of Tex., Remedy Intelligent Staffing Convicted for Falsifying “I-9’s” of Employees Placed at the Wornick Company to Package MREs (Jan. 4, 2005), *available at* <http://www.usdoj.gov/usao/txs/releases/January2005/050105-Remedy.htm>.

65. Press Release, U.S. Dep’t of Homeland Security’s Immigration & Customs Enforcement, Texas Employment Company Indicted over False Immigration Verification Forms (Sept. 30, 2004) (on file with the Southern California Law Review).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

Additionally, the FBI and the Social Security Administration (“SSA”) determined that fifteen I-9 forms “contained false and fraudulent Social Security numbers.”⁷¹ An investigation by ICE special agents also found that “many of the employees were illegally in the United States.”⁷²

Conviction on a conspiracy charge such as this could have a maximum fine of \$500,000 and a penalty of up to five years probation.⁷³ In this case, under Remedy’s plea bargain agreement, the company must pay the maximum \$500,000 fine and receive the maximum five year probation sentence, as well as pay \$414,000 in civil penalties.⁷⁴

The indictments were not limited to Remedy, as ten temporary Remedy employees working at Wornick also were “convicted of the misdemeanor offense of fraud in connection with the unlawful possession of a false Social Security number following guilty pleas, and sentenced to jail time ranging from 1 to 173 days.”⁷⁵

While the employer sanctions violations committed by Remedy are evident, it was the intelligence report that named Wornick as the subject of a potential al Qaeda threat that led to the investigation. Because terrorism has become the nation’s most pressing policy priority, the indictment was coordinated among various agencies, including the FBI’s Joint Terrorism Task Force, the SSA’s Office of Inspector General, the ICE, Border Patrol, and the Mission, Texas Police Department.⁷⁶ Although this case is unique in that the company had connections with the U.S. military and there were concerns of an al Qaeda threat, the case elucidates the new concerns regarding the connection between illegal immigration and national security. Alonzo Pena, special agent-in-charge of ICE’s San Antonio office said: “We will continue to close the gaps that exist in our immigration system and vigorously pursue those that use fraudulent documents to expose vulnerabilities in our nation’s security.”⁷⁷ This case illustrates the increased justification for the U.S. government’s concern that some undocumented workers may be considered a security risk. It is also important to note that the increased focus on identifying I-9 violations may make the allocation of resources related to employer sanctions potentially less of an issue.⁷⁸

71. *Id.*

72. *Id.*

73. *Id.*

74. Press Release, U.S. Dep’t of Justice, *supra* note 64.

75. Press Release, U.S. Dep’t of Homeland Security’s Immigration & Customs Enforcement, *supra* note 65.

76. *See id.*

77. *Id.*

78. Lange & Kandell, *supra* note 48, at 100.

Many reform proposals have been introduced in light of the lack of enforcement of the employer sanctions laws. Even today, as new proposals are discussed and debated, weakening the “magnet effect” of working in the United States needs to be an important component of any reform plan.⁷⁹

IV. PROPOSED IMMIGRATION REFORM

As the immigration crisis intensifies, more immigration reforms are proposed. Although President Bush’s guest worker plan does not enhance employer sanctions, other plans have features that do enhance employer sanctions.⁸⁰ The problems that undocumented immigrants cause, especially through consumption of economic resources,⁸¹ support the argument for employer sanctions.⁸² As a result of illegal immigrants’ willingness to work for substandard wages, there is greater competition for fewer jobs and higher unemployment among the authorized employment pool.⁸³ One purpose of employer sanctions is to eradicate this problem by the threat of monetary sanctions and criminal penalties.⁸⁴

Deterrence of illegal hiring involves two components: the sanctions and penalties themselves, and their enforcement. As outlined in the previous Part, proposals have addressed the lack of enforcement. There has been little focus, however, on the deterrent effect of the sanctions and penalties themselves.

Studies and statistics have shown that employer sanctions are an

79. See Editorial, *Looking for Doable Policy*, SUN-SENTINEL (Fort Lauderdale, FL), Jan. 9, 2005, at 4H (proposing a solution to illegal immigration that would impose stronger employer sanctions in an effort to decrease the “so-called magnet effect that lures otherwise law-abiding people to jump the border”).

80. There are currently many legislative proposals in Congress. In addition to those discussed in this Part, such proposals include the Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005); and proposals by Senators John McCain of Arizona and Edward Kennedy of Massachusetts; Senator Chuck Hagel of Nebraska; Senator Arlen Specter of Pennsylvania; and Senators John Cornyn and Jon Kyl of Arizona. Business groups are lobbying aggressively, however, to prevent imposition of stricter sanctions. Tumulty, *supra* note 15, at 30.

81. See Jennifer K. Danburg, Note, *Strengthening Employer Sanctions Through Worker Identification Cards and a National Data Base: Effective Barriers to Illegal Immigration?*, 9 GEO. IMMIGR. L.J. 525, 537 (1995) (citing Jenifer M. Bosco, Note, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71, 77–78 (1994)).

82. *Id.* (citing *Proposals for Immigration Reform Before the Subcomm. on International Law, Immigration and Refugee Affairs of the H. Comm. on the Judiciary*, 103d Cong. (1994) (statement of Dan Stein, Executive Director, Federation for American Immigration Reform)).

83. *Id.*

84. *Id.* (citing Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343 (1994)).

effective means of deterring illegal immigration. The undocumented resident population grew 23% during the four-year period ending in March 2004.⁸⁵ While the current undocumented resident population growth rate is similar to the growth rate during the late 1990s, the economy has since slowed.⁸⁶ Even studies from 1992 questioned the long-term effectiveness of employer sanctions, using “such factors as the number of border apprehensions, [the] effect on domestic labor market conditions, and [the] effects there have been in the countries from which most illegal immigrants originate.”⁸⁷ Yet, in March 1990, the GAO concluded that, based on analyzing “INS apprehension data and research by other organizations,” employer sanctions resulted in decreased illegal immigration.⁸⁸

While the 1990 GAO conclusions provide credence to the argument that employer sanctions show signs of success, other data pointing to increases in illegal immigration illustrate the need for immigration reform. There have been many immigration reform proposals. As one commentator pointed out,

[t]he decision [as to what is the best immigration reform] rests upon a balance of factors, including: the cost of the system in comparison with other methods, the willingness of certain industries to comply with hiring laws, the ability of an effective system to deter illegal immigration, and the evaluation of the damage caused by illegal immigration.⁸⁹

While President Bush proposes a guest worker plan that changes current employer sanctions law minimally, other proposals have features that would supplement current employer sanctions law.

A. GUEST WORKER PROGRAM

President Bush proposed a guest worker program on January 7, 2004, under which an estimated seven million to eight million individuals living illegally in this country would have the opportunity to become legal residents.⁹⁰ Understanding the reasoning behind this program is a good first

85. Armas, *supra* note 6.

86. *Id.*

87. Danburg, *supra* note 81, at 531.

88. U.S. GEN. ACCOUNTING OFFICE, *supra* note 39, at 5.

89. Danburg, *supra* note 81, at 537.

90. Office of the Press Secretary, *supra* note 11. See President Bush’s Immigration Proposal, *supra* note 13.

step in trying to understand the best way to control illegal immigration.⁹¹

The basic outline of the program is that undocumented workers who are already working in the United States when the proposal is implemented would qualify to become part of the guest worker program.⁹² The program would allow for a three-year term of participation with an opportunity to renew.⁹³ Those who participate in the program would be allowed to travel back and forth to their home country and would receive all the benefits and protections American workers enjoy, including minimum wage and employer adherence to health and safety requirements.⁹⁴ Additionally, participants would have to pay payroll taxes, Social Security taxes, and other potentially applicable taxes.⁹⁵

In order to remain in the United States permanently, those participating in this program would still have to apply and qualify for permanent residence status.⁹⁶ As a way to discourage participants from overstaying their three-year term and not returning to their home country, they would be offered tax favored savings accounts that would become available to them once they return home.⁹⁷

While some find Bush's plan sensible, others consider it to be a prelude to an amnesty program and therefore argue that it will encourage more illegal immigration.⁹⁸ The program is not defined officially as an amnesty program, but it is very similar. In 1986 the amnesty provision of IRCA granted benefits to 2.7 million people and, under six immigration bills between 1994 and 2000, another three million people were granted amnesty.⁹⁹ With Bush's plan, the projected seven to eight million undocumented workers who would qualify would make the numbers from previous amnesty programs seem small. Additionally, past guest worker programs have been criticized by many experts who believe that, without an increase in employer sanctions, the guest worker programs will likely

91. For a comparison of President Bush's guest worker proposal and alternatives, such as relaxing immigration controls to allow immigrants to come and go easily so that they will not feel pressured to stay in the United States permanently upon making it successfully across the border, see *Dreaming of the Other Side of the Wire*, *supra* note 11, at 29.

92. See President Bush's Immigration Proposal, *supra* note 13.

93. *Id.*

94. *Id.*

95. Office of the Press Secretary, *supra* note 11.

96. President Bush's Immigration Proposal, *supra* note 13.

97. *Id.*

98. *Dreaming of the Other Side of the Wire*, *supra* note 11, at 29.

99. *Id.* at 28.

increase illegal immigration.¹⁰⁰ Other critics of Bush's plan "argue that such workers drive down wages because they often work for lower pay and fewer benefits than native-born residents."¹⁰¹ According to a recent NBC News/Wall Street Journal poll, the public opposes Bush's guest worker plan 59% to 37%.¹⁰² According to Steve Camorata of the Center for Immigration Studies, "The best way to approach [the rise in undocumented workers] is attrition by enforcement—better enforcement of the borders and of work sites."¹⁰³ Bush's guest worker program does not enhance any features of employer sanctions, as it tries to account only for undocumented workers currently residing in the country.

B. REFORMS SUPPLEMENTING EMPLOYER SANCTIONS

Some proposed reforms have features that would supplement employer sanctions. Rather than eliminate employer sanctions, these proposals would make the system more efficient. One such example is the Bonner Plan,¹⁰⁴ which would "enhance border security and introduce updated identity technology to the Social Security card system."¹⁰⁵ The Bonner Plan had the support of United States Representative Silvestre Reyes (D-TX), a former border patrol agent, and T.J. Bonner, President of the National Border Patrol Council,¹⁰⁶ among others. This bill addressed some of the flaws in the current employer sanctions law. The logic of the Bonner Plan, however, was partially misguided and its plan of implementation was incomplete.

Under the Bonner Plan, the SSA would be required to issue Social Security cards with a photograph of the cardholder and "an encrypted electronic identification strip, unique to that individual."¹⁰⁷ As a result of the new technology, employers would be able verify an applicant's "true identity and legal status" through a DHS "Employment Eligibility

100. Michael J. Mayerle, *Proposed Guest Worker Statutes: An Unsatisfactory Answer to a Difficult, If Not Impossible, Question*, 6 J. SMALL & EMERGING BUS. L. 559, 576–77, 580 (2002).

101. Armas, *supra* note 6.

102. William Schneider, *Forcing the Debate*, NAT'L J., Apr. 1, 2006.

103. Armas, *supra* note 6.

104. Illegal Immigration Enforcement and Social Security Protection Act of 2005, H.R. 98, 109th Cong. (2005). Both the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005), and the Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006), address employer sanctions in a similar manner as the Bonner Plan.

105. Press Release, Rep. David Dreier, Rep. Dreier Introduces Two Immigration Reform Bills as 109th Congress Begins (Jan. 4, 2005) (on file with the Southern California Law Review).

106. *Id.*

107. *Id.*

database.”¹⁰⁸ Employers that “knowingly hire[d] illegal immigrants who d[id] not pass the scrutiny of the Employment Eligibility database,” would be subject to a fine of up to \$50,000 and a punishment of up to five years in prison for each offense.¹⁰⁹

Unlike a national identification card, which U.S. citizens and legal immigrants would be required to carry at all times, the Bonner Plan would require them to present only the Social Security card upon application for employment in the United States.¹¹⁰ The legislation went so far as to include express language stating that it is U.S. policy that the Social Security card not be used as a national identification card.¹¹¹ Still, the Bonner Plan did not outline the process by which citizens and legal immigrants would obtain this card.

An advantage of the Bonner Plan is that it included substantial funds and resources. A potential criticism of IRCA is that too few resources are available for the enforcement of employer sanctions. In fact, as demonstrated above, limited resources have been one of the biggest issues with immigration law and policy to date. The Bonner Plan would “authorize[] the sums necessary to the SSA and the DHS to carry out” the purpose of the legislation, such as by providing for “10,000 new Homeland Security personnel whose sole job will be to enforce employer compliance,” and allocating “\$100 million to the DHS to enforce compliance by employers and prosecute violations of the [Bonner Plan].”¹¹² United States Representative David T. Dreier (R-CA), who introduced the legislation in 2005, stated, “I am reintroducing the Bonner Plan because I believe it is a good plan that can help the border patrol better do its job, as well as help employers stay in compliance with federal law.”¹¹³

V. A NEW LEGISLATIVE PROPOSAL

This Note proposes a solution to address the problem of illegal immigration entitled the “Enhanced Employer Sanctions Initiative” (“EESI”). The first component, around which much of the analysis centers, is significantly increasing employer sanctions so that the risk outweighs the reward to employers who hire unauthorized workers. If the penalties are

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

substantial enough, employers will no longer hire or continue employing unauthorized workers. The second component is that of enforcement. The majority of the analysis that follows focuses on the former component because there are already signs that the government is taking steps to address the enforcement issue. For instance, there was an increase in I-9 government enforcers to 14,000 after the move to the DHS.¹¹⁴ Additionally, if the punishment is substantial enough, the actual levels of enforcement become less important. Given the scarcity of resources, EESI focuses primarily on the sanctions themselves. In EESI, with substantially increased sanctions, even current enforcement rates should be enough to sway the balance so that the risks would exceed the benefits of hiring unauthorized workers. This change should negate the pull factor bringing illegal immigrants to the United States.

A. OTHER IMMIGRATION PROPOSALS ARE LESS EFFECTIVE

For nearly twenty years, the law has prohibited employers from employing unauthorized workers, yet illegal immigration has increased. President Bush's plan to add only 210 more border patrol agents in 2006, brings the total to 10,949.¹¹⁵ Given the lack of resources provided to control illegal immigration, combined with the new need to control our borders as a matter of national security, resources must be used as efficiently as possible not only to stop those who illegally seek employment but also to root out potential terrorists.

Many of today's proposed immigration reforms ignore the impact significant employer sanctions would have in reducing illegal immigration. Even the Bonner Plan, which proposes higher sanctions than those currently imposed, focuses only on the difficulty employers have verifying documents. According to the Bonner Plan, employers "currently have difficulty establishing the veracity of the identity documents of prospective employees in order to verify their work eligibility."¹¹⁶ While the bill does outline in minimal detail a new verification system,¹¹⁷ it does not explore any of the advantages to increasing employer sanctions—the crux of EESI. Additionally, the Bonner Plan does not outline the way in which its

114. Lange & Kandell, *supra* note 48, at 100.

115. Billy House & Sergio Bustos, *State's Funding at Risk; Bush Budget Would Rein in Spending*, ARIZ. REPUBLIC, Feb. 8, 2005, at A1.

116. Illegal Immigration Enforcement and Social Security Protection Act of 2005, H.R. 98, 109th Cong. (2005).

117. *Id.*

program would be implemented or any of its ramifications.¹¹⁸ While the focus of EESI emphasizes the advantages of increasing employer sanctions as it relates to decreasing illegal immigration, some of the proposal's provisions also enhance those included in the Bonner Plan.

The Bonner Plan's verification system lacks key components included in EESI. Storing fingerprints and tracking departures from and arrivals into the United States are two examples of essential provisions of EESI that are not considered in the Bonner Plan. Perhaps most importantly, the Bonner Plan focuses on its verification system as the means to prevent unauthorized employment, while EESI focuses on significant sanctions as the most effective method of preventing unauthorized employment, merely using an enhanced verification program as a feature that would allow significant sanctions to be viable.

President Bush's proposed guest worker program ignores the effects of enhanced employer sanctions.¹¹⁹ Despite being supported by influential decisionmakers like Senator McCain, the guest worker program will not solve the problem of illegal immigration. While its goal is to account for all illegal immigrants, it does not provide the correct incentives to do so. Proponents argue that by providing an opportunity for unauthorized workers to work legally, illegal immigrants will come forward and be accounted for by becoming part of the guest worker program. The primary reason employers hire unauthorized workers, however, is for the financial benefit they provide. In a guest worker program, employers cannot pay below minimum wage and must deal with all of the tax consequences and benefits an authorized worker would require.

As such, a guest worker program will still lead to unauthorized workers receiving job opportunities due to the continued financial advantage of hiring people illegally. If employees come forward to be part of the guest worker program, they still may lose their jobs to other unauthorized workers who do not become part of the guest worker program. Illegal immigrants will work at almost any wage because they are providing for their families back home, as illustrated by the \$16.6 billion remitted in 2004 to Mexico from workers even while they earned substandard salaries.¹²⁰ Although the guest worker program provides advantages to individuals, such as being allowed to travel back to their home country and receiving Social Security benefits, those advantages

118. See discussion *supra* Part IV.B.

119. See discussion *supra* Part IV.A.

120. *Dreaming of the Other Side of the Wire*, *supra* note 11, at 29.

would be irrelevant if they lost their jobs.

The guest worker program fails to address the source of the problem—employment opportunities for illegal immigrants. The program attempts to account for all undocumented workers, but even accounting for them will not root out the problem. Arguably, past amnesty-like programs have led to more illegal immigration because people may assume that there will be another amnesty program again and decide to enter the United States for that reason. Since President Bush proposed allowing illegal immigrants to stay in the United States as guest workers, a large increase in illegal immigration has taken place in border states such as Arizona.¹²¹ This approach does not send a sound message to immigrants and, furthermore, it does not provide for the correct results—less undocumented workers *and* less illegal immigration.

B. INCREASED SANCTIONS

The most effective way to control illegal immigration is to truly eliminate the pull factor—employment opportunities. Currently, the fines are too low for employers to be concerned with the employer sanctions law. Given the financial benefits of hiring immigrant workers, employers would likely recoup the costs associated with any fines in a very short time due to the cost differential between hiring an undocumented worker and a documented worker. The financial benefit is a huge driving force for employers to hire unauthorized workers. In fact, in a survey conducted in 1990, some undocumented workers reported having been told by their employer to obtain false papers.¹²²

The only way to curtail illegal immigration is to increase significantly the penalties for violations. As opposed to having fines that start as low as \$275 and reach only as high as \$11,000,¹²³ imposing substantially higher fines is necessary. Even \$11,000 can easily be recovered by paying an undocumented worker a substandard salary.

The most effective way to curtail illegal immigration would be to create penalties equal to one and a half times the fair market wage for that particular job, based on figures provided by the Department of Labor, for every year that an unauthorized employee worked for the employer illegally. One and a half times the fair market wage for the job is more than the cost of the job, so it would be a big deterrent without being excessive.

121. *Nightline: Illegal Immigrant Workers*, *supra* note 2.

122. Calavita, *supra* note 41, at 1051.

123. 8 U.S.C. § 1324a(e)(4) (2000); 28 C.F.R. § 68.52(c)(1) (2005).

This penalty would eliminate the financial benefit of hiring an unauthorized worker because the risk of paying both the unauthorized worker's salary and potentially paying a sanction of an additional one and a half times the fair market wage of that job's salary would be too great a risk for the employer to bear.

This proposal is better than having fines of a fixed amount, even a very high amount, because this proposal's sanctions are increased for every year the unauthorized worker was employed illegally by the employer. Thus, there would be no benefit to the employer in having made it through the year without getting caught. The financial risk to the employer would increase with each passing year.

Another way to impose the fine, which would require a study by the DHS, would be to determine the average cost of investigating and litigating the average employer sanctions case and making that figure the penalty invoked so that the government, in theory, would not lose money in this program. This penalty, however, would be potentially far less than the EESI proposal for an unauthorized worker who has been employed for many years. The EESI proposal of fines is fairer than this idea, as they are tied to the fair market value of the job.

Some may argue that Congress could never pass legislation with such significantly increased employer sanctions because employers help fund politicians' campaigns.¹²⁴ Yet, the Bonner Plan was introduced as a House Bill and contains higher sanctions than before. It illustrates some legislators' willingness to address the problems caused by unauthorized employment. Furthermore, those employers that conduct their businesses in a legal manner should welcome harsher sanctions as it will make them more competitive. For example, if one garment company hires unauthorized workers and pays them substandard wages while a second company does not, the company that follows the law will likely not be able to bid as low on a project and might lose work. In an interview with a garment shop owner who was explaining the "competitive pressure" on businesses to evade the employer sanctions law, the owner complained, "When you have someone who's bidding against you and using illegals and paying them under the table, it's not really right."¹²⁵

In addition to increasing civil sanctions, the criminal penalties associated with EESI would be as high as ten years in jail, as opposed to

124. See *Dreaming of the Other Side of the Wire*, *supra* note 11, at 29 (stating that employer sanctions "alarm the very businessmen who finance [the politicians'] election campaigns").

125. Calavita, *supra* note 41, at 1053.

the six-month penalty currently imposed under IRCA. The threat of increased criminal penalties, coupled with significantly higher fines under EESI, would finally alter the balance so that employers would discontinue hiring unauthorized workers.

C. EMPLOYMENT VERIFICATION SYSTEM

Another major complaint of the current employer sanctions law is that the employer's responsibility to verify documentation is confusing and susceptible to fraud and deception. As part of EESI, the verification process would be made more feasible for employers. According to Senator McCain:

[M]any of these people come with valid driver's licenses, Social Security cards and others, which they can get counterfeited on both sides of the borders very easily. So, the employer, then is placed in a difficult situation by trying to determine whether those papers or documents are legal or not. That's a lot to expect of an employer.¹²⁶

A more feasible verification program alone, however, would be insufficient to preclude unauthorized employment. It is the increased employer sanctions that most strongly discourage unauthorized employment. A more feasible verification program merely makes it fairer to impose these increased sanctions on employers. EESI enhances the Bonner Plan's verification program by providing much needed detail as to how to implement such a system and a more thorough set of uses and features. The Bonner Plan states that an enhanced Social Security card would be used to verify employment,¹²⁷ but it does not outline how people will be issued this new card. Additionally, the bill explicitly rejects the idea that this document could be used as a personal identification card, therefore avoiding any potential negative connotations that may be associated with the term "national identification card."¹²⁸

While the term "national identification card" seems to cause concern for many, the term "enhanced Social Security card" can be relatively easily substituted for the more worrisome phrase. Therefore, EESI would include an enhanced Social Security card that is linked to a new centralized

126. *Nightline: Illegal Immigrant Workers*, *supra* note 2.

127. Illegal Immigration Enforcement and Social Security Protection Act of 2005, H.R. 98, 109th Cong. (2005).

128. *Id.*

database to which the DHS and the SSA would have dual access.¹²⁹ Similar to the Bonner Plan, EESI would have just one form of identification used in employment authorization, an enhanced Social Security card. This new card would include the cardholder's photograph and an encrypted magnetic strip with the cardholder's information, including name, Social Security number, date and place of birth, immigration status, employment eligibility status, fingerprint, and departures from and arrivals to the United States. EESI's required information, moreover, includes two important additions to what would be required under the Bonner Plan. The Bonner Plan would neither require fingerprints nor track departures from and arrivals to the United States. While the United States currently tracks only arrivals, tracking departures is also an important component to controlling immigration and reducing the number of illegal immigrants due to the fact that 40% of illegal immigrants are individuals who have overstayed their visas.¹³⁰ This new card and database would be more effective and efficient than the outdated systems currently employed.

While the Bonner Plan fails to outline how cards would be issued, an explanation is necessary to understand the reasoning behind such a program. The process by which these new cards would be issued and information stored in the centralized database would depend on whether the person was a noncitizen or citizen. The DHS would enter all of a noncitizen's required information, other than a Social Security number, as part of the immigration process. The noncitizen would have his or her name, date and place of birth, immigration status, employment eligibility status, and fingerprint entered in the database upon entering the country legally. Then, the noncitizen would have to go to a Social Security office at which time a digital fingerprint would be taken and matched to the

129. While 5 U.S.C. § 552a(b) (2000) does not allow for the sharing of a person's Social Security information between the SSA and any other government agency, there would potentially be a way in which the system could be designed such that no information was shared between the agencies. It would require that limited access be granted to each agency. Yet, this would negate some of the benefit of having a centralized database. Thus, as part of this proposal, amending 5 U.S.C. § 552a would be necessary. Another way of addressing this problem would be to call the card a "national identification card" and have it administered completely by the DHS, assuming the negative stigma associated with the term "national identification card" was less disconcerting than amending 5 U.S.C. § 552a.

130. *Dreaming of the Other Side of the Wire*, *supra* note 11, at 28. It is important to recognize that those immigrants who use a visa that does not entitle them to work will never get this enhanced Social Security card. Therefore, this new system would not account for these individuals, even if they overstay their visa expiration date. The lack of employers willing to hire such people without the new card, however, would create a situation in which many illegal immigrants would return to their home countries. While presumably the DHS could also start tracking these individuals' departures through other means, the reduction in the number of illegal immigrants would allow the DHS to better control the immigration crisis in the country.

database. After matching the fingerprint with the one in the database, a Social Security number would be issued and photograph would be taken to complete the card. All the information would reside on the encrypted magnetic strip as well as in the database.

The process for a citizen would be more extensive at the Social Security office. The citizen would be required to bring a certified birth certificate or U.S. passport to prove citizenship. Newly trained SSA staff would verify the documentation, at which point the additional information, including the citizen's name, Social Security Number, date and place of birth, citizenship status, and fingerprint would be recorded both on the encrypted magnetic strip and in the database. These staff members would be better equipped to verify documentation as that would be their primary job, as opposed to an employer whose primary job is running a business. As a result, fraud likely will be reduced. In addition, this new card would be more difficult to counterfeit, given that all of the information contained on the card must also match the information in the database.

The goal of implementing a system that requires this new card would be twofold. First, the system would improve the ease by which an employer could verify a job candidate's employment status. Second, it would reduce the potential for fraud. The proposed timeframe to obtain this new card would be one year from the enactment of EESI. While it would be time-consuming and expensive, the improved control of illegal immigration and the ease of use for an employer make it worthwhile.

In addition to preventing fraud, this new verification system would be easier for employers to use. This ease of use will not in itself preclude the hiring of unauthorized workers, as the Bonner Plan predicts, because the hiring of these workers is driven by financial benefit. The ease of use, however, will better justify increasing sanctions, which will result in preventing the hiring of unauthorized workers. The employer would no longer have to verify many forms of identification. The employer would just have to swipe the card through a specially designed machine-reader or call a phone number and provide the person's Social Security number in order to get verification that the job candidate qualifies as an authorized worker. There is currently a pilot program in all fifty states and the District of Columbia utilizing a phone verification system,¹³¹ as well as a pilot

131. Expansion of the Basic Pilot Program to All 50 States and the District of Columbia; Providing Web-Based Access, 69 Fed. Reg. 75,997, 75,997-99 (Dec. 20, 2004). *See also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 39, at 11. According to the GAO:

Under the first pilot, called the Basic Pilot, the employer is to verify the employment eligibility of all new hires, regardless of citizenship status, by querying an SSA database

program in Iowa utilizing a machine-readable system.¹³² To give a sense of how prevalent counterfeiting is, a January 1997 Office of the Inspector General audit report revealed that, after reviewing just thirty INS fraud cases in five INS district offices, the INS confiscated nearly 300,000 counterfeit documents.¹³³

In this new process, the employer would have to make only a good faith effort to ensure that the person pictured on the card was the person being hired. A major enhancement to the Bonner Plan's employment verification system is that EESI would utilize fingerprinting in certain circumstances. Those employers that have hired more than 100 employees from one hiring location would be required to purchase a system that would take a digital fingerprint of the job candidate and would verify it with the fingerprint on the card and in the database. This requirement would alleviate any potential fraud caused by employees using someone else's card and would even make inspection of the cardholder's picture irrelevant. Despite being required, the fingerprint matching system would be a beneficial investment considering that sanctions would be so significant, and a likely target for an employer sanctions audit would be a large employer.

This new card system would eliminate the current need for employers to become experts in the field of verifying the many forms of acceptable documentation and should make the entire verification process quicker and easier. There would no longer be an argument that the employers could not verify the documents. As a result, there would be no excuse for not verifying a job candidate's employment status, therefore giving ample justification for imposing particularly severe sanctions for noncompliance.

Once employers stop hiring undocumented workers, the draw to come to the United States will subside. Additionally, given the ease with which the new verification system would operate, employers would be required to reverify their current employees to ensure that they are not continuing to employ unauthorized workers. As a result of the reverification process, unauthorized employees would be terminated. Under EESI, employers would have six months from the time at which everyone is required to have

containing the names of all individuals with Social Security numbers. If the SSA database cannot confirm employment eligibility and the employee indicated that he or she is not a citizen or national of the United States, an employer would then query INS' database containing the names of all of those individuals to whom INS has issued alien numbers.

Id.

132. INSTITUTE FOR SURVEY RESEARCH, FINDINGS OF THE MACHINE-READABLE DOCUMENT PILOT (MRDP) PROGRAM EVALUATION xi (2003).

133. U.S. GEN. ACCOUNTING OFFICE, *supra* note 39, at 10.

the new Social Security card to release any unauthorized workers without facing the new sanctions. One goal of the six-month time period is to ensure that employers are able to conduct these reverifications. The other goal is to spread out the termination of the seven to eight million unauthorized workers to alleviate any potential chaos caused to companies and the country as a whole. In total, employers will have a year and a half from enactment of EESI to comply, one year for everyone to obtain the new Social Security card, and six months to reverify and terminate unauthorized workers. Some may argue that this procedure will still cause problems because many unauthorized workers would be in the United States with no job prospects. The loss of jobs, however, should lead to their departure back to their home country, which is the plan's primary goal, given that they are illegal immigrants.

D. ADDITIONAL ARGUMENTS SURROUNDING EESI

An additional benefit to having fewer unauthorized workers is that it would result in the United States having a much less prevalent underground economy. Because employers would no longer hire unauthorized workers, all those current unauthorized workers in the United States who do not pay taxes would be replaced by authorized workers who would have to pay taxes. As a result, this increase in local, state, and federal tax revenue would be a major financial benefit to the government. Further, given that there are an estimated seven to eight million undocumented workers currently in the United States who do not pay income tax,¹³⁴ the new Social Security card system (which is estimated to cost \$3 billion to \$6 billion) could be easily paid for as long as the program resulted in the government being able to collect, at a minimum, \$100 of taxes per currently-unauthorized worker.¹³⁵ If these jobs were filled with authorized workers, the increase in income tax revenue would easily cover all the implementation costs. The argument that workers would be making less because they would now be paying taxes is countered by the fact that, as authorized workers, they would no longer be earning substandard wages.

While the overall economy benefits up to \$14 billion from immigrants,¹³⁶ illegal immigrants can be an economic drain if they are not paying their fair share of taxes. For example, California spends \$7.7 billion per year educating illegal immigrants and their children, \$1.4 billion per

134. Office of the Press Secretary, *supra* note 11.

135. Danburg, *supra* note 81, at 540.

136. COUNCIL OF ECONOMIC ADVISERS, *supra* note 14, at 270.

year on healthcare, and another \$1.4 billion on illegal immigrants in prison.¹³⁷ The additional income tax revenue from tax-paying workers would certainly help offset these huge costs.

While the card would have detailed information, the only information that an employer would receive would be the person's employment status. The other information would be accessible only by certain government employees to which the DHS or the SSA gave clearance, depending on the nature of the inquiry. A system in which there is a way to account for all people in the United States, including where they are working, their critical biographical information, and their departures and arrivals into the country, would allow the government to better control national security.

One counterargument to this proposal concerns privacy and government tracking. Arguably, though, the additional tracking is consistent with post-September 11 security-related legislation, such as the Patriot Act. Additionally, individuals' information and activity is constantly monitored by the private sector, whether it consists of buying patterns or personal information that credit card companies sell.

A second counterargument concerns the diminishment of the labor pool, but this concern is of minor importance when placed alongside the country's national security responsibilities. Employers will have to pay more for labor, making certain industry sectors less profitable, which overall could hurt the economy. The occurrence of another terrorist attack, however, will greatly hurt the economy as well. Still, some wonder who will fill these lost jobs. First, as a result of no longer earning substandard wages, citizens will have more interest in these jobs. Exploiting unauthorized workers is not beneficial for those workers or authorized workers who cannot compete for jobs in which they would be more expensive for the employer to hire. EESI would rectify that situation. Also, if there were concerns that there were not enough citizens to fill the needs for certain jobs, then it would be beneficial to decrease the amount of time required for people to legally immigrate to the United States and obtain the proper work visa. This remedy would fill the supply and demand gap, while still allowing citizens to compete for jobs they presently cannot obtain.

VI. CONCLUSION

While some argue that guest worker programs are a way to account

137. *Id.*

for illegal immigrants, the argument is flawed. Employers hire unauthorized workers because of the financial benefits of being able to pay them substandard wages without providing them with standard protections. Many unauthorized workers will not take part in a guest worker program because employers will no longer hire or continue to employ them once the financial benefits cease to exist. Therefore, there will still be unauthorized workers who seek employment and employers that hire them until Congress actually addresses the source of the problem—the absence of real risk to employers for hiring illegal immigrants.

It is time for Congress to act. A plan like EESI will reduce illegal immigration and the number of illegal immigrants in this country by eliminating the number one pull factor for illegal immigrants—employment opportunities. The plan will better account for those immigrants who are in the United States through the use of an enhanced Social Security card. This new card will reduce the difficult responsibility an employer currently has of verifying many different types of documents, as it will be the only acceptable form of identification. Furthermore, the ease of use of this system will justify the heightened sanctions imposed on employers that continue to evade the law. Finally, and perhaps most importantly, by reducing illegal immigration, this plan will allow the limited number of border patrol officers to better focus their resources and attention on potential terrorists, the most pressing issue currently facing our nation.

