



# WORKSITE SOLUTIONS TO UNAUTHORIZED MIGRATION

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## EXECUTIVE SUMMARY

Employment opportunities remain the most important factor drawing illegal aliens to the United States. The 1986 Immigration Reform and Control Act (IRCA) cleared the labor market of existing unauthorized workers, required that employers verify the eligibility of new hires, and created sanctions for those who fail to do so. Yet, the failure to effectively implement the provisions on work authorization, combined with strong demand for low-skilled workers, has been associated with two decades of increasing unauthorized migration. Congress has primarily channeled resources towards securing the southern border which has proven ineffective in curbing unauthorized migration. Worksite enforcement as a necessary complement to border strategies merits a renewed analysis.

The Institute for the Study of International Migration (ISIM) has undertaken a two year study. We interviewed stakeholders in Washington, D.C., Los Angeles, Phoenix/Tucson, and Des Moines; and convened a meeting of experts on electronic worksite verification. We have also undertaken quantitative analyses of census data to assess trends in unauthorized migration. This report is a summary of seven background reports on policy, demographics, enforcement, and verification challenges.

### *Unauthorized workers: past and future trends*

The unauthorized population was about 2 percent of the total US labor force in 1980 and 4.9 percent in 2005. As of March 2006, there were an estimated 11.5 million total unauthorized residents, of whom 6.5 million were Mexican. Migration has grown because IRCA's generous legalization led to stable migrant networks, while it failed to control the border *and* worksite. Then the surge in the latter 1990s was driven by the booming U.S. economy and the forces of supply and demand.

### *Worksite enforcement challenges*

An employer is required to verify employment eligibility by checking a combination of more than 20 documents. The verification "I-9 form" is undermined by fraudulent documents, identity fraud, confusion about procedures, reliance on labor subcontractors, and low penalties. Further, the enforcement of employer compliance has been minimal-to-nonexistent with shifting priorities. Simultaneously, there is an unmet need for labor law enforcement to address violations that create demand for unauthorized workers who are unwilling or unable to complain about wages and working conditions.

### *Electronic verification systems*

Electronic systems could support more effective worker verification but they require substantial investment in additional resources to improve their reliability. The DHS-administered Basic

Pilot Program (now called E-Verify) suffers from employer error and misuse, as well as non-compatible and incomplete SSA and DHS data systems. The SSA notifies employers if a worker's name and social security number is "no match;" and its Social Security Number Verification Service allows employers to verify matches online. But the no-matches cannot detect imposters using matching names and Social Security numbers and a small fraction of unauthorized workers are flagged. These faults will likely undermine a just-announced DHS initiative that will use a SSA no-match as an enforcement tool. In the meantime, mistakes in the databases create false negatives that flag otherwise eligible employees for further scrutiny.

Scaling up E-Verify requires the harmonization and timely updating of the agency databases and reducing employer error. Scaling up is possible, but not without effort, greatly enhanced resources, and time. And any system must confront fraudulent identities, but fraudulent birth certificates and social security cards are near impossible to weed out and the federally-required REAL-ID may not secure drivers' licenses. The use of biometrics is seen as a solution, especially in conjunction with traditional documents. However, the perceived need for secure documents may be an artifact of legacy systems without real time capacity. A "data-light" approach might have workers present biometric data and documentation at a government office. They would be issued a secure number like that used in DHS's US-VISIT program to present to an employer who, in turn, could submit the number for verification. The electronic query could produce a biometric such as a picture, somewhat similar to DHS's Photo Screening Tool Pilot Program. While still susceptible to breeder document fraud and requiring better databases, this would remove the employer from the document verification process.

#### *Immigration, Labor and Anti-Discrimination Enforcement*

Policymakers have generally viewed worksite enforcement of illegal hiring and labor standards violations as low priorities. A new strategy began to emerge in 2005, with the Bureau of Immigration and Customs Enforcement giving higher priority to investigations aimed at punishing 'knowing and reckless employers of illegal aliens' by bringing criminal charges and seizing assets. The Department of Labor has also recently redirected some of its enforcement towards investigating employers of low-wage workers to identify violations of wages and working conditions. Appropriations for worksite enforcement continue to lag behind, however, particularly in comparison to funds spent on border enforcement, limiting the capacity of the enforcement agencies to monitor worksites.

Most of ICE's arrests continue to focus on unauthorized workers, rather than the employers who hire them. In the meantime, unscrupulous employers use the threat of immigration enforcement to undermine efforts by workers to demand better wages and working conditions. A Supreme Court decision that bars payment of back wages to unauthorized migrants illegally fired for

union activities has the counter-productive effect of undermining efforts to improve wages and working conditions, which would reduce some of the incentives for hiring unauthorized workers.

### *Resources*

The seriousness with which Congress and the Administration take these issues will be measured not only in the authorizing legislation, but even more so in the appropriations of funds to implement a more effective verification system and more widespread and effective enforcement.

### *Immigration reform—The Way Forward*

George W. Bush campaigned for the presidency in 2000 with a pledge to make immigration reform a top priority of his administration, but the events of September 11, 2001 eclipsed reform. Several legislative alternatives to President Bush's temporary worker proposal were introduced but not enacted during the last three Congresses. Legislation could still pass in the 110th Congress, but the signs are not promising. Some Republicans oppose regularization especially in the House, while the recent Senate legislation raises serious doubts about the ability to pass comprehensive reform.

Different groups are equally committed to ensuring that unauthorized migrants, on the one hand, are kept out of the country and do not receive amnesty if they have entered illegally, or on the other that these workers gain access to legal employment opportunities and, eventually, citizenship. The resolution of these differences will require willingness to compromise on legislation that can successfully control the employment magnet with workable verification systems and meaningful enforcement, while addressing the existing illegally-resident population and the admission of future workers.

Comprehensive reform, incrementally achieved, may be the best hope for balancing these various interests and needs. The contours of such an approach are described below:

- *Targeted approaches are needed.* Employers differ in their reliance and propensity to hire unauthorized workers, requiring different worksite strategies. A one-size fits all approach to verification and enforcement does not fit the realities of unauthorized employment. Employers fall into two categories:
  - *Employers who unwittingly (although perhaps willingly) hire persons who are illegally in the country.* These employers generally adhere to labor standards but hire through networks or recruitment agencies that refer unauthorized workers. They will not willingly participate in effective verification programs if they have no access to a legal workforce or labor-saving mechanisms that reduce their dependence on an inexpensive labor force. However, many such employers are unlikely to participate in legal foreign worker programs unless they face sanctions for hiring unauthorized workers.

- Reliable “data light” data systems can streamline verification of work authorization, reduce identity fraud, minimize security and privacy concerns, diminish employer frustration; and lower incentives to game the system.
- Significant ramping up of DHS enforcement capacity must accompany any new verification strategy in order to educate employers and workers; and to pose sanctions that are likely and substantial enough to be more than the cost of doing business.
- These businesses would need access to targeted programs to facilitate their transition from an unauthorized to a legal workforce.
- *Employers who knowingly hire unauthorized workers to exploit their labor.* Such employers may pay salaries in cash, failing to pay their share of social security taxes; and they may seek unauthorized workers because they are less likely to complain about ill treatment. Here, worksite enforcement is essential not only to stop illegal hiring but also to protect labor standards for all employees.
  - Reliable verification systems and increased DHS enforcement can make a dent on these types of employers, especially if sanctions significantly alter the calculus of those who would benefit by abusing their workforce.
  - Stepped up labor law enforcement is necessary to combat exploitive workplaces because these employers are violating several working standards, as well as circumventing verification requirements.
- *Targeted temporary worker programs.* Such programs often fail when the jobs are permanent with long-term demand for foreign workers. The US could usefully target new temporary worker programs on certain industries, particularly those with natural employment cycles, such as seasonal jobs. In the case of more permanent jobs, the programs should be targeted at industries that are already highly dependent on foreign workers, with provisions to help these sectors reduce this dependence over time.
- *Cooperation at the border.* Unauthorized migration cannot be curbed through border enforcement alone. More secure and efficient borders can be had through cooperation with Mexico. Expansion of the dedicated commuter lanes will enable millions of persons to cross without undue delays, cooperation between police authorities would reduce crime and violence; and joint patrols of dangerous areas will help save lives.
- *Regularization of existing illegal residents.* Having a large underclass unknown to the government and which is highly exploitable is not in the national interest; these persons will not simply go home. Properly implemented, a regularization program would support more effective enforcement, if employers know that compliance with a new worker verification system would not jeopardize their existing workforce. But regularization should only occur in the context of a strong commitment to new verification and enforcement mechanisms to deter future illegal migration.

- *Legal Permanent Admissions.* The long backlogs in some US admission categories, particularly of immediate family, encourage illegal migration. A first priority should be the rapid admission of immediate family members. Second priority should go to reforming the employment-based categories to meet legitimate labor force needs, including the piloting of fee-based admissions, auctions, or objective mechanisms of dynamically regulating visa numbers.

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## INTRODUCTION

The ample opportunity for employment remains the most important factor drawing illegal aliens to the United States. The 1986 Immigration Reform and Control Act (IRCA) cleared the labor market of existing unauthorized workers, required that employers verify the eligibility of new hires, and created sanctions for those who fail to do so. Yet; the failure to properly implement these provisions, combined with strong demand for low-skilled workers, has been associated with two decades of increasing unauthorized migration.

Despite acknowledgment of IRCA's ineffectiveness in stemming illegal immigration by analysts from a multiplicity of political perspectives, disciplines, and institutions cross-cutting the academic, government, labor, and advocacy communities, there has been little political will for worksite enforcement since its passage in 1986. Instead, Congress has primarily channeled resources towards securing the southern border which has proven ineffective in lowering levels of unauthorized migration. Interior enforcement as a necessary complement to border strategies in curbing unauthorized migration merits a renewed analysis.

In view of the need to update our knowledge and synthesize the research and current practice related to worksite enforcement, the Institute for the Study of International Migration (ISIM) undertook a two year study on worksite enforcement. While the need for an effective interior enforcement strategy is understood, a fair amount of skepticism remains as to whether worksite enforcement is possible and what steps would be needed to make it succeed. A principal goal of the project has been to evaluate the status quo with an eye toward bridging the gap between what is happening in the field and current debates over comprehensive immigration reform in the policymaking community. Thus, interviewing important stakeholders and holding meetings with experts has been a key part of the study methodology.

The research team met with representatives of local and state government, industry organizations, immigrant employers, advocacy groups, unions, and community groups. In an effort to better understand the contours of the national political climate, we interviewed actors in Washington, D.C with additional fieldwork in three sites: Los Angeles which has America's largest population of irregular migrants who are mostly of Mexican origin; Phoenix/Tucson which has a large immigrant and rapidly growing illegally resident population; and Des Moines which has a substantial illegally resident population, many working in meatpacking, in a state that has a relatively new foreign born population. Additionally, ISIM held an experts meeting on electronic worksite verification of employment eligibility. This report presents the findings gleaned from our fieldwork and expert meeting on two major elements of worksite enforcement: verification of employment authorization and worksite investigations.

This project report is a synthesis of separate studies authored by various members of the ISIM team. Susan Martin conducted two reviews of policy developments, one with a comparative perspective on European strategies and another on the recent Congressional agenda. Lindsay Lowell reviewed historic and projected trends in the immigrant labor force, as well as the state of knowledge on unauthorized and Mexican migration. Micah Bump summarized ISIM's fieldwork findings and the expert meeting on verification challenges. Andy Schoenholtz reviewed the state of play in sanctions enforcement, as well as labor law enforcement. And we are pleased to acknowledge the contributions of co-authors Jeanne Batalova, Julia Gelatt, Jeffrey Passel and Carla Perderzini of the Migration Policy Institute, Pew Hispanic Center and IberoAmerican University in Mexico City, respectively.

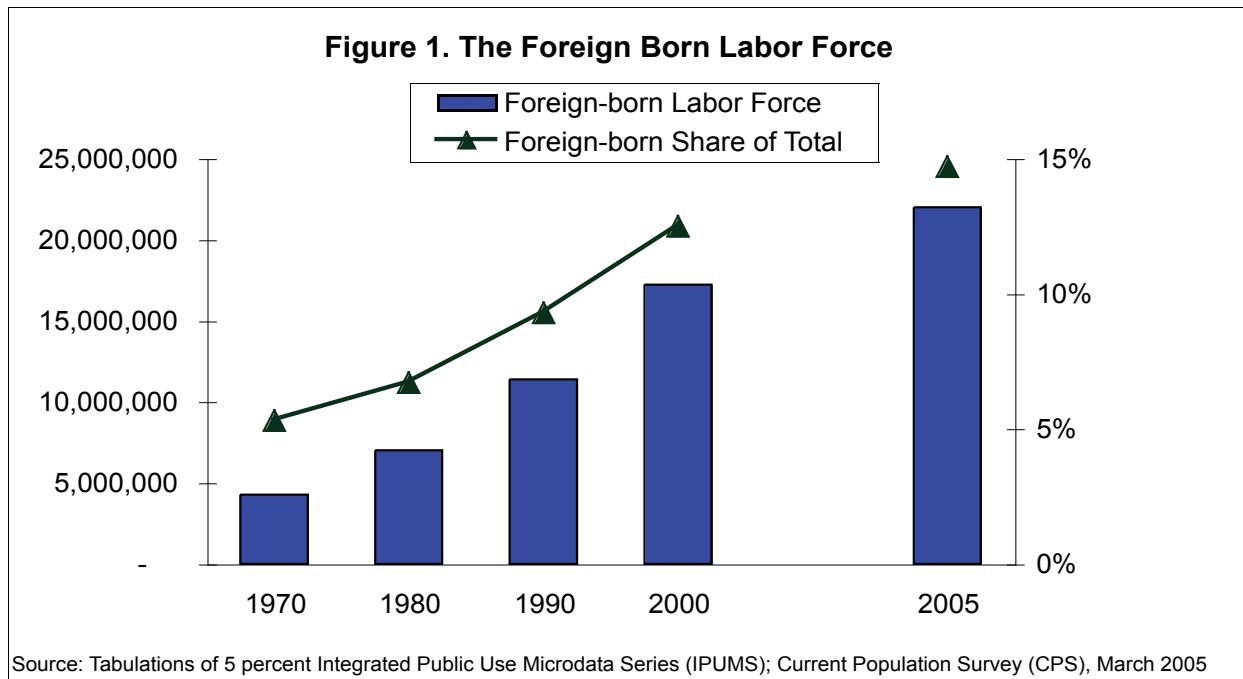
This report covers the following topics. First, it draws the basic statistical picture of U.S. immigration and the growth of unauthorized migration since IRCA. With little doubt there are a large number of unauthorized workers and employment remains a primary motivator. Second, we report on the challenges to enforcement, in particular to IRCA's verification regime that is vulnerable to document fraud, but also of the post-IRCA failure to enforce employer compliance and a parallel need for improved enforcement of labor laws. Third, we discuss efforts to electronically streamline employment verification, especially the Basic Pilot which is dogged by employer misuse and incomplete data systems. Data in the Social Security Administration, likewise, is being marshaled to address employment verification, but by itself is not the answer. Next, we review what we have learned about improving electronic verification systems and establishing identity. This latter is not an exhaustive review of a plethora of ideas, rather we raise what should be obvious benchmarks and simplifying alternatives. Finally, we review the basic elements of the most recent policy proposals in the legislative agenda; and then we present our ideas on the way forward.

## **THE UNAUTHORIZED WORKFORCE: PAST AND FUTURE TRENDS**

The Immigration Act of 1965 opened access to the United States for immigrants from nations that had been virtually excluded since the 1920s and set in play significant growth of the foreign-born population. As the immigrant population grew, the share of immigrants in the workforce also increased. In 1970, the Census counted 4.3 million foreign-born workers aged 16 and over who made up just 5.3 percent of the total civilian labor force. Those numbers increased to 11.4 million by 1990, and 21.7 million in 2005, at which time they made up 14.7 percent of all civilian workers.

As Figure one shows, during the three decades from 1970 to 2000, the native labor force grew by 38 percent while the immigrant labor force grew 218 percent. Immigrant males led labor force growth throughout, with females remaining at about 40 percent of immigrant workers over this

period. But while the number of immigrant workers has reached a historic high, their share of the workforce is roughly the same as it was at its peak earlier in the last century.



Because the 1965 Act opened up immigration from countries that now send most immigrants to the United States, there has been a significant shift from a foreign-born population dominated by Europeans in 1970, to a population dominated by Latin Americans and Asians in 2000. Whereas Europeans, Canadians, Australians, and New Zealanders made up 68 percent of all the foreign-born in 1970, by 2000 that share had dropped to just 19 percent. Meanwhile, Mexicans grew from just 8 percent of all the foreign-born to 30 percent in 2000, while the share of other Latin Americans doubled from 11 to 22 percent. Of equal significance is the increase of Asians from 9 percent of all immigrants to 26 percent during this short three-decade span.

There has also been an increase in the number of foreign-born workers who are unauthorized, particularly in the late 1990s when the number of new unauthorized migrants may have exceeded the number of legal admissions.<sup>27</sup> The beginnings of sizable unauthorized migration also date from the mid-1960s and the demise of the so-called Bracero program that was run cooperatively with Mexico to meet demand for seasonal, agricultural labor. Over time, ex-Bracero and other farmworkers found employment in year-round, urban jobs and began bringing their family members to live with them. Continued population growth has been driven by stable employment opportunities.

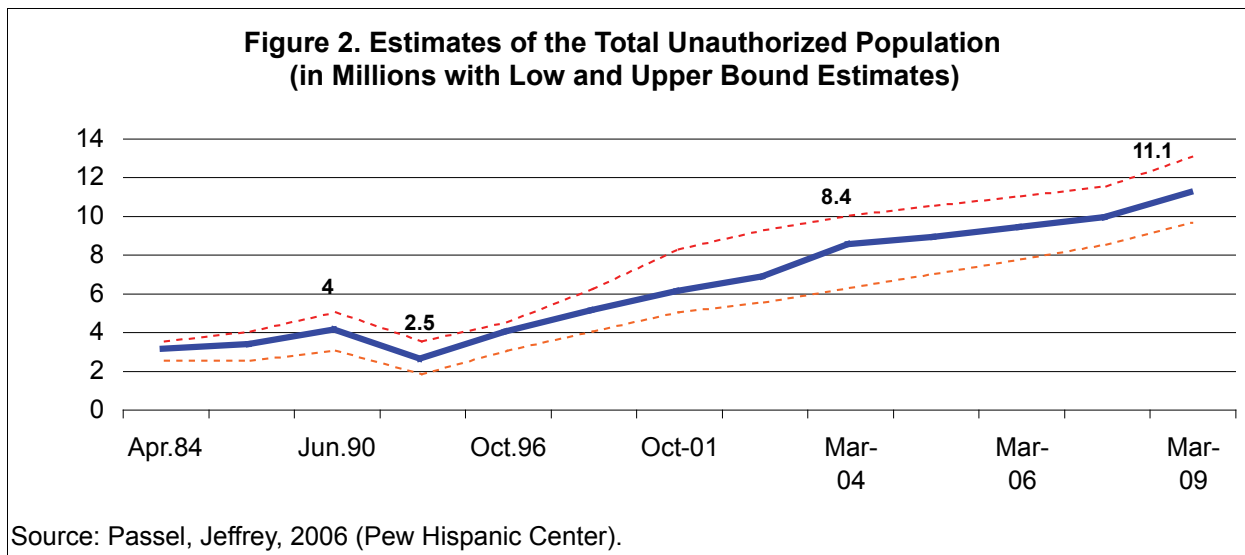


Figure two shows the total illegally resident population estimated by a “residual” method, i.e., the known legal foreign-born population is subtracted from a survey-based count of all foreign born. This is the longest time series available and the figures include adjustments for undercount and other sources of error.<sup>1</sup> As of March 2006, there were an estimated 11.5 million total unauthorized residents, of whom<sup>2</sup> 6.5 million were Mexican or 57 percent of the total unauthorized population; and that percentage has remained about the same compared with similar estimates made over the past decade. Unauthorized residents from elsewhere in Latin America, particularly from Central America, make up another 24 percent of the unauthorized population

Of course, the total unauthorized population is larger than just those in the workforce and, in 1980, there were already an estimated 1.8 million unauthorized workers making up over one-quarter of the foreign-born workforce. In 2005, the best available estimate places the number of unauthorized workers at 7.2 million. The Latin American share of the unauthorized workforce may be a little more than 81 percent. In turn, the unauthorized population was about 2 percent of the total US labor force in 1980 and 4.9 percent in 2005.

There are several important features of these estimates that warrant special comment. First, one frequently heard critique of residual estimates is that U.S. surveys miss or undercount the population, especially persons who are unauthorized and that, therefore, the estimates are suspected of understating the size of the unauthorized population. However, the estimates presented here incorporate research-based allowances for undercounts of both the legal and unauthorized populations. Although the “true” number of unauthorized residents of the U.S. may be higher (or lower), there is no sound, empirical basis for substantially higher estimates.<sup>3</sup>

Then again, the estimate of 11.5 million unauthorized migrants represents the “net” number of *residents*, i.e. persons actually *living* in the United States. It does not include the bulk of say Mexican migrants who circulate back to Mexico within relatively short periods, say less than a year. However, we cannot know the size of that highly circular and temporary population from U.S. data alone.

Another critical point is that an estimated 40 percent of the illegally resident population did not cross the border illegally, but rather entered the U.S. with a legal temporary visa and then “overstayed” the visas permitted length of stay, or engaged in work not authorized by say a tourist visa. About one fifth of illegal residents from Mexico and Central America overstay the terms of their legal visa.<sup>4</sup>

In fact, illegal residency is often a precursor to legal admission and some portion of the illegally resident population is “quasi-legal” because their presence has been recognized by the government, although it has not given them permission to stay permanently. In many cases, these individuals are simply stuck in a backlog of legal-visas awaiting administrative clearance.<sup>5</sup> Perhaps as much as one-fifth of the unauthorized population has been “quasi-legal.”<sup>6</sup> In the latter 1990s, about 31 percent of adult immigrants who adjusted their resident status within the United States to a permanent green card had earlier been in an illegal status.<sup>7</sup>

This discussion has focused on estimates of the resident population or the “stock;” we turn now to a discussion of the number of persons entering the U.S. each year. We must distinguish between the gross in-flows and gross out-flows versus the net flows, where the net flow represents growth of the population of residents (inflow minus outflow).

### **The Yearly Inflow of Unauthorized Migrants**

The number of legal international migrants has certainly grown over time, but has been remarkably consistent compared with the growth in the flow of unauthorized migrants. Legal net yearly migration has been roughly 650,000 from the 1980s through the current decade and, until the mid-1990s, had been greater than unauthorized migration. But by the mid-1990s net legal flows of all unauthorized migrants exceeded legal immigration: the number of unauthorized entries averaged 725,000 from 1995 to 2004.<sup>8</sup>

The balance of our discussion here now focuses on the flow of Mexican migrants because this is the single largest source of all international migrants and the subject of the most intense debate. There is some agreement that during the 1980s net Mexican migration, combining both legal and not, averaged somewhere about 250,000 each year. Legal Mexican migration has run about 100,000 yearly since the 1990s.<sup>9</sup> But by the early 1990s the estimates suggest 260,000 unauthorized yearly Mexican migrants, increasing to 400,000 yearly in the latter 1990s; and 485,000 in the early years of this century.

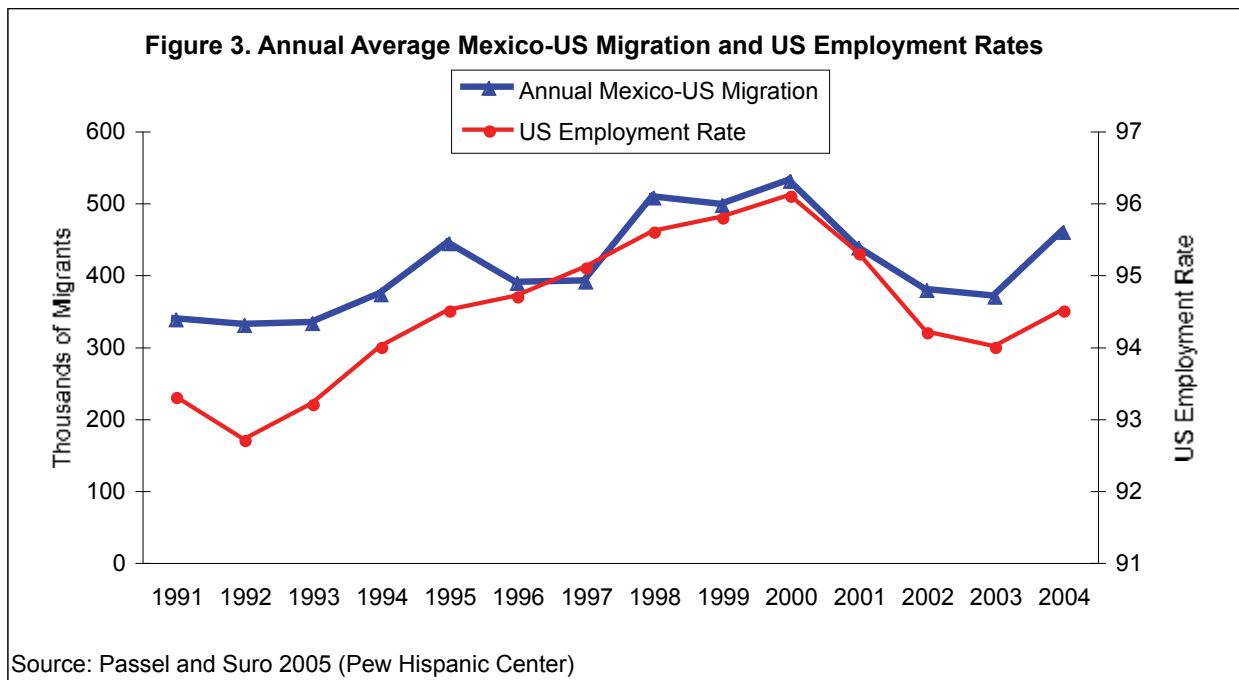
There are many factors behind the rapid increase in Mexico-U.S. migration during the latter 1990s. One major reason, generally agreed upon by all observers, is the legalization of some two million Mexicans by the Immigration Reform and Control Act of 1986 (IRCA). The legal status of these formerly unauthorized persons enabled them to spur further migration by sponsoring family members and anchoring job-hiring networks. While many were eligible for legal admissions, other relatives and friends entered or worked without authorization, undeterred by U.S. enforcement at the border or in the interior.

By itself, border enforcement has been patently inadequate to stemming the flow. The introduction of new border enforcement methods in the 1990s failed to deter migrants who simply found new entry routes; and the new regime may even have led increasing numbers of migrants to give up circular migration in favor of U.S. residence. Thus, migration grew because IRCA's generous legalization generated stable networks for increased migration, while IRCA's enforcement regimes and subsequent efforts to control the border failed to control the new flow.

The most obvious reason for the migration surge, however, was the booming U.S. economy. Both Mexican migration and the "new economy" really took off in the latter part of the 1990s as records for economic growth were surpassed through the first year of the 21<sup>st</sup> century. All Mexico-U.S. employment indicators took off too—plummeting unemployment rates, increasing employment ratios and historic wage gains.<sup>10</sup> The forces of supply and demand; and IRCA's twin success (legalization) and failure (enforcement) provided the context for the growing supply of, and demand for, Mexican workers.

This becomes clear if the trend in the yearly gross inflow of migration is examined. The migration figures discussed *average* a "net" (immigration less emigration) growth of the population over an interval of several years. A measure of yearly inflow, in contrast, is a more dynamic measure of the year-to-year response to various forces; it is a much more sensitive measure of the dynamics of migration and it reflects changes in the trend which are lost in the averaged net-migration data.

In fact, Figure three shows that trends in the flow of incoming Mexican migrants correlate very well with the growth in the U.S. economy and the national rate of employment. Mexican migration increased in line with surging U.S. employment growth through 2000. It then plummeted in 2001 without recovering until U.S. employment growth also bounced back in 2004. The estimates of the yearly trend in flow are derived from averaging several U.S. data sources and, as such, they are a rough indicator of the level of Mexico-to-U.S. migration but reliable indicators of year-to-year changes.<sup>11</sup>



Of course, the flow is still positive since 2001 so the Mexican population in the United States has continued to grow albeit at a slower rate than in the latter 1990s. Indeed, it would be unwise to assume that the recent short-term downswing in yearly migration is a leading indicator of an imminent decline of Mexican migration. Rather, we can strongly assert that the yearly movement tracks the boom and bust of the economy. And so it may be that the first-quarter 2005 up tick in U.S. job creation may soon generate a recurrent upswing in Mexican migration yet unseen with today's data.

Naturally, the future trend of Mexican migration is of great interest to all stakeholders in Mexico and the United States. Will Mexican migration continue at high levels into the foreseeable future, or are there forces that will moderate future migration? There is a viewpoint that Mexican migration is driven by powerful social forces that have cumulated over time and will not readily dissipate; and that the medium-to-long run likelihood is for ongoing high levels of migration.<sup>12</sup>

However, as we have just seen Mexican migration is responsive to economic forces and most observers hold to the belief that future Mexican migration will, like all other historical instances of mass migration, ultimately slow down. In this scenario, Mexican population growth will continue to slow in the wake of dropping fertility rates and economic development, at some point, it should generate enough jobs to keep job seekers in Mexico. Indeed, Mexico's total fertility rate (TFR) is less than one-third of what it was in 1960 as fertility has dropped from about 7 children per woman to about 2.4 or just over replacement level.<sup>13</sup>

Official projections of Mexican migration all agree on a declining trend: those made by the U.S. Census Bureau, projections by CONAPO which is Mexico's premier statistical agency, and projections by the United Nations. From 2025 onward Mexico's CONAPO projections of migration remain higher than either the U.S. or U.N. projections; although there is not much difference between the three official projections by the time they reach 2050.<sup>14</sup> Thus, all three official projections explicitly *assume a declining rate* of Mexican emigration with the greatest reduction in rates forecast to occur in the second decade of this century.

While each of these official projections is bound to change in the next round of periodic updates by each organization, we believe that it is more likely that migration will begin to stabilize in the future than to continue to stay high indefinitely or even increase. However, it is unclear at what point migration might begin to abate and it is a very reasonable bet that the number of migrants will remain at least as high as it has been in recent years for the foreseeable future. And without meaningful reforms of interior enforcement, it is a very sure bet that unauthorized migration will remain a sizeable proportion of the foreign workforce.

Peering into the future is fraught with difficulties of unanticipated events or sea changes in economic trends.<sup>15</sup> But official projections of jobs that require only on-the-job training—and are typically considered “low skilled” of the type employing unauthorized workers—are anticipated to produce over three times as many job openings as those requiring a college education between 2004 and 2014. Additionally, several factors are likely to reinforce a strong demand for immigrants. First, immigrants already present in the country will predictably create a demand for ongoing family reunification. Secondly, the latent demand for immigrant labor will grow stronger as the baby boom generation moves into retirement and an aging population requires labor-intensive personal services. Finally, as globalization knits together international labor markets, this will ensure that US employers will continue to seek to employ foreign workers across the entire occupational continuum.

## INTERIOR ENFORCEMENT CHALLENGES

A key development in the eventual acceptance of employer sanctions was the 1981 report of the Select Commission on Immigration and Refugee Policy (SCIRP).<sup>16</sup> Its assessment was that “the vast majority of undocumented/ illegal aliens [were] attracted ... by employment opportunities.” Legislation was finally achieved when the IRCA was signed into law on 6 November 1986.<sup>17</sup> In order to stem illegal employment, IRCA instituted a verification process that is readily gamed with fraudulent documentation and which has been further undermined by a lack of meaningful worksite enforcement.

### **Circumventing the Eligibility Verification “I-9” Process**

IRCA requirements oblige employers to verify the identity and work authorization of all their employees hired after 1986. An employer fulfills this obligation through completion of the I-9 form in the hiring process by requesting that the employee present a combination of documents from a list that includes more than 20 approved documents. Employers who violate IRCA's verification provisions face different civil and/or criminal penalties, known as employer sanctions, depending on whether they committed paperwork violations or knowingly hired unauthorized workers. The Office of Investigations in the Immigration and Customs Enforcement (ICE) arm of the Department of Homeland Security (DHS) enforces these provisions.

The key factors limiting the effectiveness of the I-9 process include the proliferation of counterfeit and fraudulent documents, unfamiliarity or confusion regarding the verification procedures and employer responsibility; a growing reliance on labor subcontractors; and low penalties for violations leaving the benefits of hiring unauthorized workers greater than the risks.<sup>18</sup> Indeed, counterfeit documents have long been a problem with estimates indicating that as much as half of all unauthorized workers were using fraudulent documents two years after IRCA's implementation.<sup>19</sup> Improvements in secure document technology since IRCA have been readily matched by counterfeiting operations. And several reports have concluded that it is relatively easy to obtain genuine documents, such as birth certificates or drivers licenses, by fraudulent means.<sup>20</sup> The GAO reported that the practice of using genuine documents obtained from friends, relatives or the underground market is on the rise.<sup>21</sup> This leads to some hiring of undocumented workers without employers knowledge and dishonest employers (and employees) using false documents or other's identities.

It is clear that there are categories of employers who still do not understand their obligations with regards to the worksite verification process. The level of confusion and willingness to learn the requirements appear to be somewhat correlated to the time necessary for work verification to be made and the level of employer involvement in the decision-making. The longer the process, the more paperwork required, and the more decisions that have to be made by the employer, the more likely an employer will be confused, reluctant to participate, disposed to committing an error, or simply motivated to game the system by accepting false documentations or opting out altogether. The unfair advantage gained by unscrupulous employers who choose to circumvent the employee verification process is more prevalent in some industries.

Employer response can vary substantially. There are employers who inadvertently hire unauthorized workers but do not predicate their business model on using such workers; and these employers usually take steps to remedy immigration-related problems. There are also employers who comply with I-9 verification process but who are happy to have unauthorized workers as long as they have plausible deniability. Some employers knowingly hire unauthorized

workers because they are the only available workforce or in order to exploit them. Yet other employers attempt to shield themselves from liability by shifting to labor subcontractors instead of directly hiring their employees. Subcontracting encompasses the use of temporary labor agencies, labor contractors, and outsourcing. While useful in protecting employers, workers often suffer because the insertion of a “middle man” into the hiring process depresses wages for all workers.<sup>22</sup>

### **Immigration-Related Worksite Enforcement**

The success of any worksite enforcement strategy turns on DHS enforcing employer compliance with verification procedures. In 1994, the U.S. Commission on Immigration Reform pointed out that even as of 1994 “shifting priorities and reduced funding have led to a greatly reduced emphasis on employer sanctions.” This trend has changed only in the past two years, but the breadth and effectiveness of new enforcement regimes remains uncertain.

Since IRCA, policymakers have viewed worksite enforcement of illegal hiring and employment as a low priority focusing on education and notifications of intent to fine. Briefly under a 1999 strategy, the INS began to audit I-9 forms and, in Operation Vanguard, targeted the meatpacking industry. Employee I-9s were checked against SSA and INS databases and the plants were given no-match notifications. But rather than resolving the mismatch, thousands of workers simply walked away and the political backlash led to the program’s cancellation. Worksite enforcement efforts declined significantly and the number of final orders of employer sanction fines decreased to just 13 in 2002.<sup>23</sup>

Following the events of September 11, 2001, resources for interior enforcement were redirected towards national security-related investigations. Prosecuting criminal employer cases became a subordinate priority to protecting critical infrastructure such as airports, military bases, and nuclear plants and criminal prosecutions plummeted.<sup>24</sup> In fact, in 2003 ICE headquarters required field officers to obtain permission before initiating a workplace investigation.<sup>25,26</sup>

A new strategy began to emerge in 2005 because “employers came to view [administrative] fines as simply the ‘cost of doing business’;<sup>27</sup> and ICE was establishing three priorities—the removal of unauthorized workers from critical infrastructure facilities, an employer outreach program including self-policing; and a focus on egregious and criminal violators targeting such as WalMart or Swift and Co. As of this writing, ICE was in the process of instituting investigative techniques to uncover worksite verification violations.<sup>28</sup>

In April 2006, DHS announced the second phase of its Secure Border Initiative.<sup>29</sup> The first phase focused on border control as well as detention and removal. Its worksite enforcement efforts now are to “punish knowing and reckless employers of illegal alien” by bringing criminal charges

and seizing assets.”<sup>30</sup> Arrests for criminal violations have increased from 46 in FY 1999 to 716 in FY 2006; and there have been 742 criminal arrests through mid- FY 2007.<sup>31</sup>

But only 16 percent of worksite arrests are of employers.<sup>32</sup> At Swift and Company, ICE arrested almost 1,300 unauthorized workers at meat processing plants in six states.<sup>33</sup> The company had been voluntarily participating in the Basic Pilot Program, which is not set up to verify identity, and the ICE review of employment eligibility forms discovered that 30 percent were suspected of being fraudulent. The investigation is ongoing, but the company naturally found it galling to be targeted for playing by the rules.<sup>34</sup>

The National Immigration Law Center (NILC) argues that the perceived increase in worksite enforcement may encourage “unscrupulous employers to engage in unlawful practices.”<sup>35</sup> For example, NILC argues that Smithfield Packing Company, putatively responding to no match letters, fired more than 50 migrant workers involved in organizing a union.<sup>36</sup> Concerns have been raised about employee detentions, sometimes of the sole caregiver, and its impact on families.<sup>37</sup> While ICE has attempted to mitigate such concerns, logistic difficulties can create problems even with small scale operations.<sup>38</sup>

In July 2006, DHS announced the Mutual Agreement between Government and Employers (IMAGE) which is a voluntary partnership aimed at good hiring practices. Employers must adopt ten best business practices, submit to an I-9 audit by ICE, verify employees’ SSNs; and document how any no-match letters are resolved.<sup>39</sup> Employers who follow these procedures are deemed not to have had constructive knowledge that the employee with no-matches were unauthorized to work.<sup>40</sup> As of June 2007, ICE had certified eight employers and one association as IMAGE participants.<sup>41</sup>

### **Enforcement of Labor Law Standards**

Unauthorized workers are among the most vulnerable members of the workforce. Many face labor law violations, but do not seek a remedy because they fear deportation. This may encourage unscrupulous employers to engage in illegal labor practices, create an uneven playing field for employers who do play by the rules, and can drive down wages for all workers. Some States and to a lesser degree the federal government have responded by stepping up labor standards enforcement and increasing punishments for employers who violate the law.

An important suit brought in California actually undermines the applicability of labor law to unauthorized workers. In 2002, the Supreme Court held in *Hoffman Plastic Compounds v. NLRB* that unauthorized workers are not entitled to back pay when they are illegally fired from their jobs when involved in union activities.<sup>42</sup> Some employers believe *Hoffman* precludes all employment benefits for unauthorized workers, although this interpretation has repeatedly

failed in lawsuits which some states have sought to affirm.<sup>43</sup> For example, another California law enacted in 2002 makes it clear that state law applies to all workers regardless of immigration status and takes additional steps to protect migrant workers.<sup>44,45</sup>

One central problem faced by unauthorized workers is employers who fail to pay wages. A 1999 investigation revealed that workers in New York's greengroceries, who are often unauthorized, were receiving less than the minimum wage and working 72 hour weeks with no overtime. The New York Attorney General developed a greengrocer code of conduct in 2002 that exempts cooperative employers from an investigation of past labor code violations.<sup>46</sup> Arizona, Florida, and Ohio have increased the liquidated damages available to unpaid workers to 200 percent,<sup>47</sup> pursuing higher damages to remove incentive for employers to underpay workers.

Misclassification of employees as "independent contractors" is a trend among employers seeking to evade labor laws, as well as responsibility for verifying authorized working status.<sup>48</sup> California, Massachusetts, Colorado, New Hampshire and other states have created a presumption of employee status for workers.<sup>49</sup> New Mexico, Illinois, and Minnesota have similar bills pending. Several states have commissioned studies on the prevalence of the contractor misclassification and lost tax revenue.<sup>50</sup> In the U.S. Congress, the House Committee estimates the misclassification has cost the Treasury an estimated \$35 billion between 1996 and 2004. The Senate has requested that the U.S. Department of Labor (DOL) provide information on its enforcement strategy.<sup>51</sup>

Labor standards enforcement agencies at both the federal and state levels generally do not inquire into immigration status during investigations.<sup>52</sup> Labor investigators express concern that their increased involvement in employer sanctions might impede their ability to gain the trust of illegal aliens who may be the victims of labor violations and potential witnesses against employers. Indeed, a commonly heard criticism, the extent of which is unknown, is that employers call in ICE to deport unauthorized workers who have lodged wage and hour complaints—despite a 1998 MOU between the INS and the DOL to share information but to "avoid inappropriate worksite interventions where it is known or reasonably suspected that a labor dispute is occurring."<sup>53,54</sup>

A renewed emphasis by DOL on ensuring recovery of lost wages and protection from retaliation may lead to greater labor law compliance.<sup>55</sup> Increasing industry wide investigations could also improve DOL's coverage of labor law for unauthorized laborers. Congress has expressed concern that investigations of low-wage industries have fallen precipitously. The Wage and Hour Division experienced a drop in staff of 13 percent since fiscal year 2001. In its fiscal year 2008 appropriations bill, the House Appropriations Committee increased the budget for Wage and Hour Division by 12 million; and suggested increasing the number of investigators fluent in the languages of the workforces.<sup>56</sup> However, even at this higher level, the Wage and Hour Division will have experienced a drop in staff of 12.6 percent since fiscal year 2001, even with the additional resources provided for fiscal year 2008.<sup>57</sup>

### **Anti-discrimination Enforcement**

Congress included several elements in IRCA to discourage employers from knowingly or unknowingly discriminating including provisions prohibiting discrimination on the basis of national origin or citizenship status and the creation of, an office to investigate discrimination. The GAO studies commissioned by Congress as part of the IRCA legislation, as well as some subsequent studies have found that discrimination exists.<sup>58</sup> Opinions diverge, however, as to whether, or how much of, discrimination at the workplace is a result of IRCA's worksite enforcement provisions.<sup>59</sup>

The use of employment verification processes as a means of retaliation against workers who demand better working conditions or higher wages is particularly problematic. Advocates argue that "unscrupulous employers have systematically used the I-9 process in their efforts to retaliate against workers who seek to join unions, improve their working conditions, and otherwise assert their rights."<sup>60</sup> Advocates for immigrant rights point to employers who hire undocumented workers knowingly and only verify documentation if the employee tries to file a labor complaint or join a union. Once the verification indicates that the employee is undocumented the employer can terminate employment without suffering any repercussions.

### **ELECTRONIC VERIFICATION SYSTEMS**

While the I-9 process remains the mechanism used to verify authorized work status by most all compliant employers, there are three additional services that employers may use to verify work authorization: the DHS-administered Basic Pilot Program, the Social Security Administration's (SSA) Social Security Number Verification Service (SSNVS), and the Social Security No-Match Letter program. Only the Basic Pilot effectively offers employers a defense against charges of illegal employment, but the SSA programs are also being used to screen on work eligibility.

#### **The Basic Pilot**

The Basic Pilot program is a voluntary Internet-based verification program that allows employers to electronically verify workers' employment eligibility with DHS and SSA.<sup>61</sup> The Basic Pilot is the only currently operative program of three pilot programs recommended by the U.S. Commission on Immigration reform and created under IIRIRA. It began operating on a trial basis in five states in 1997 and in a sixth state in 1999. In 2003, Congress extended the program to all 50 states under the Basic Pilot Program Extension and Expansion Act of 2003.

Employers who wish to use the Basic Pilot Program must sign a memorandum of understanding with both DHS and SSA. After first completing the I-9 process, the employer enters the employee's name, SSN, citizenship status, or admission A-number, into an online system. The information is verified against the DHS and SSA databases. The SSA checks the person's name, social security number, date of birth, and citizenship status for accuracy. DHS handles the verification of employment status for all non-U.S. citizens, as well as for newly naturalized citizens not in the SSA database. In the small proportion of cases where an employee's information cannot be verified the employer receives an SSA tentative nonconfirmation or a DHS verification in progress.<sup>62</sup>

Employers can first check to see if the information was submitted correctly. If there is no error, the worker must be notified and must indicate whether or not they wish to contest the nonconfirmation. They have eight working days to resolve the dispute.<sup>63</sup> If the employee fails to make contact with DHS within the required time period, or to contest a nonconfirmation, the employer will be notified of a "DHS no show," and the employer must terminate the employee.

But the Basic Pilot is not capable of detecting fraud if a worker presents valid documentation that belongs to someone else or fraudulent documentation that contains valid information and appears authentic.<sup>64</sup> The program on its own cannot stop unscrupulous employers from providing workers with documents that will clear the system or simply not processing documents.

The GAO and the SSA's Office of the Inspector General have found that the Basic Pilot has significant weaknesses.<sup>65</sup> The problems are not solely related to employer misuse, but this does play a large role. A 2002 evaluation of the Basic Pilot found that 42 percent of the final nonconfirmations produced by the Basic Pilot and 50 percent of these (21 percent of the total) were the result of employer error.<sup>66</sup> Furthermore, more than 30 percent of employers admitted to restricting work while temporary nonconfirmation was pending. Obviously, there are high levels of confusion and error among employers.<sup>67</sup>

The problems with employer misuse are compounded by government errors, updating delays, and lack of harmonization of the agency databases.<sup>68</sup> The SSA uses social security numbers (SSN) and the DHS an "alien" (A) number. A 2002 study found that only 10 percent of people in what was the INS database had an SSN on their record, leading to no matches and secondary verifications.<sup>69</sup> The onus then is on the employee to prove that the no match was an error even when it was generated by delays in entry of employment authorization information into the DHS, as well as the SSA databases.<sup>70</sup>

Despite these weaknesses, Congress has authorized the use of the Basic Pilot through 2008 and it is likely it will be extended. The immigration reform bills that passed the House and Senate in 2005 and 2006 would have mandated use of the Basic Pilot. The Senate Bill 2611 attempted to

address some of the shortcomings of the Basic Pilot by including privacy, antidiscrimination, and due process protections.<sup>71</sup> Any ramping up of the Basic Pilot must be carried out with caution and such checks to address the systems widely recognized weaknesses.

### **Social Security Number Verification Service and No-Match Letters**

The SSA allows employers to voluntarily use an internet-based social security number verification service to check if employee names and social security numbers are consistent. As with the Basic Pilot, this system can only confirm whether the names and SSNs submitted by the employer match SSA records. However, the system is not able to detect a worker's misuse of another person's name and SSN as long as the name and SSN match. The system was piloted with 80 employers in 2002 and then made available to employers nationwide. As with the Basic Pilot, the ease of online submission since 2005 is attracting employer interest, but it is still not widely used.<sup>72</sup>

Additionally, "no-match letters" are sent by the SSA when it determines that the names or social security numbers listed on an employer's W-2 forms are not consistent with SSA records. The stated purpose of the no-match letter is to notify the worker and the employer of the data mismatch and that employees are not receiving proper credit for their earnings. The SSA will either send the notification to the worker, the employer, or both. In 2005, the SSA sent 8.1 million letters to workers at their homes; and to 1.5 million employers who are required to advise the employee to resolve the problem with the SSA. Until new rules announced in August 2007 go into effect (see below), employers are prohibited from taking adverse action against the employee on the sole basis of receiving a no match letter.

Both the SSNVS and No-Match letter programs were designed as administrative mechanisms to help workers get their earnings credited to their correct Social Security account, but have become de facto tools of worksite verification of employment eligibility. In an unknown number of cases, the employer terminates the employer immediately, requests further documentation, or gives less time than allowed to assemble the proper documents. All of these actions are discriminatory, but frequently take place.<sup>73</sup> Employees are also confused by the system and often assume that a no-match is part of an immigration enforcement investigation and simply quit. At the same time, a 2003 study letters found that 23 percent of employers retained employees receiving no-match letters.

### **Newly Introduced Enforcement and No-Match Letters**

In August of 2007, the DHS announced an initiative for Improving Border Security and Immigration within Existing Law.<sup>74</sup> The reforms, apparently in reaction to Congress's failure to pass immigration reform, represent steps that the Administration can take within existing law

and they were slated to go into effect in September 2007. However, the Ninth Circuit granted a preliminary injunction of the initiative on October 10, 2007, which has put the proposal on hold for the present. If the initiative goes forward it will reduce the number of documents needed for an I-9 work authorization form and increase fines on employers who knowingly hire unauthorized workers. The Basic Pilot will be expanded to about 10 times its current size and its use will be mandated among more than 200,000 Federal contractors and vendors.

The new regulation will allow ICE to use a Social Security no-match as an immigration enforcement tool. After notification, workers will have a 90 day window to resolve their no-match letters and, if they do not, the employer is required to terminate their employment or face penalties and they will receive guidance to that effect. While federal prosecutors have seldom considered an employer's disregard of no-match letters as evidence of a knowing hire of an unauthorized worker, under the new rules it will be more difficult for employers to plead ignorance or confusion. But as an enforcement tool, the no-match letters are problematic. The new provisions do not address situations in which name and SSNs match, even if fraudulently obtained. Moreover, the no-match letters are generated months after employment takes place and workers in high-turnover industries may have already completed their jobs. Thus, the use of no-match letters appears to be punitive to both employer and legitimate employees but not likely to deter significantly employment of unauthorized workers.

## **DEVELOPING AN EFFECTIVE VERIFICATION SYSTEM**

Legislation adopted in both houses of Congress would mandate implementation of expanded, and eventually, universal electronic employment verification systems. An effective system should provide timely and accurate verification; limit document fraud and identity theft; and protect the rights and privacy of authorized workers. None of the current systems are effective in meeting all of these objectives. Overcoming problems will require financial resources, technological expertise and political will.<sup>75</sup>

### **Scalability: Expanding the Basic Pilot**

The Basic Pilot has thus far only functioned as voluntary pilot system. If it was scaled up from the current level of 17,000 to approximately 7 million employers the number of queries on the system would increase exponentially. About 92 percent of employer inquiries get a response in 3 seconds, so the current 8 percent non-automatic response would need to be reduced significantly or frustration, costs, and adverse impacts on workers would be unacceptable. As discussed above, there are serious deficiencies and inconsistencies in the data systems that are currently used by the Basic Pilot.

Can these systems be successfully integrated? Federal computer systems are extremely complex and when multiple agencies are involved there are multiple security parameters, multiple budgeting issues, political conflicts between and outside agencies; all working against integration. Even if the agencies can overcome these problems, it will take lots of time and database integration would only be part of the solution given the high level of employer error. A nationwide system would scale the number of queries on the system up about 20 to 30 times the current level, but would scale the number of employers up approximately 400 times the current level.

Updating databases in a timely fashion continues to be a challenge.<sup>76</sup> The Basic Pilot Program Extension and Expansion Act required DHS to submit to Congress a report by June 2004 that addressed whether the problems identified by the 2002 independent evaluation had been substantially resolved, as well as steps the DHS was taking to resolve any outstanding problems before expanding the Basic Pilot program to all 50 states.<sup>77</sup> Arguably, that report failed to address steps for resolving inaccuracies before the expansion of the program.<sup>78</sup>

Clearly, there are several technical challenges to successfully expanding the Pilot, not least the fact that scaling up will generate new problems that have not yet been encountered. There is also a need to accurately budget for the additional costs: the staffing, programming, and equipment necessary to carry out such a system.

### **Secure and Reliable Identification**

Another challenge to success is that the Pilot or any similar electronic system still relies on identity documents and must confront fraudulent, stolen, or borrowed documentation. A unifying and repeated theme of all past studies has been the urgent need to improve, simplify, and strengthen the current documentation system. But the challenges to secure documentation become more complex the deeper one delves into attempting to seek solutions.

Reliance on “breeder documents,” which are documents designed to verify other documents, creates a fundamental challenge to secure documentation. The most common breeder documents are birth certificates, social security cards, and driver’s licenses. Problems arise because there is no standardized means to verify that information contained in breeder documents is legitimate. The primary ways in which breeder document fraud occurs are by obtaining breeder documents under false pretenses, or counterfeiting/altering breeder documents.

Birth certificates are commonly used to get other breeder documents. A 2000 study conducted by the Office of the Inspector General concluded that “efforts to make the birth certificate into a reliable identity document are complicated by the more than 14,000 different legitimate versions in existence, and the more than 6,000 entities which issue them and the processes they use to do so. Efforts are also complicated by the ease with which birth certificates can legitimately be

obtained and counterfeited..."<sup>79</sup>

Fraudulent or stolen birth certificates can be used to gain access to a social security card which, in turn, can be used to verify employment eligibility. There have been numerous legislative efforts to safeguard Social Security cards from counterfeiting, tampering, alteration, and theft; improve the system of verification of submitted documents and replacement cards; and increase enforcement against the fraudulent use or issuance of Social Security numbers and cards. Nevertheless, the social security card remains vulnerable to fraud and the database used to store and verify information is flawed.<sup>80</sup>

In turn, the driver's license has also been easily obtained with a birth certificate or social security card. Many states have implemented stricter measures for obtaining drivers licenses after the events of September 11, 2001; and many states have upgraded security features using biometrics, holograms, magnetic strips, and scanable bar codes. In 2005, Congress passed the Real ID Act which created national standards for the issuance of state driver's licenses and identification cards and stipulates that applicants must prove that they are either U.S. citizens or lawfully present.<sup>81</sup> These standards are to be met by states by the end of 2009, but many states are contesting the Act or its timeline. Further, one tenth of U.S. workers do not drive, not everyone eligible for a driver's license is also work authorized, and there can be 51 different state designs.<sup>82</sup>

The use of biometrics or the use of physical traits to unique identify individuals is often seen as a solution to the weaknesses of current verification systems. While there are technical limitations, experts believe that biometrics can improve identification especially in conjunction with traditional documents. The DHS has begun a Photo Screening Tool Pilot Program as an enhancement to the E-Verify program. And over 10 million Department of Defense Common Access Cards have been issued to all US Service personnel and it contains biometric data and digitized photographs. But presumably, a biometric card would require America's more than 150 million workers to present documentation verifying their identity and work eligibility, making it dependent on the quality of breeder documents.

At the same time, the perceived need for secure documents may be an artifact of legacy systems which have not had the ability to do real time verification.<sup>83</sup> Documents are expensive, they wear out, must be replaced, and no matter how secure they are made, they are still vulnerable to counterfeiting, fraud and the vulnerability of private information. An alternative verification system might combine biometrics with a more secure and reliable means of establishing both identity and work authorization.

### **Privacy Concerns**

The security of a total verification system is of paramount importance and should take

precedence over speedy processing times. The potential for the destruction, misuse, loss, theft, or modification of identifiable information on an electronic database could be devastating. And the semblance of an employment verification document to a National ID system should raise serious concerns.

The technical details are complex, but electronic data must be secure when transmitted over the internet and there must be ongoing evaluations of data security. The privacy concerns of individuals must be upheld and individuals notified if their identity is compromised. With tens of millions of individuals, the system should be able to log user access and have strong security measures controlling access.

There is also a need to design identity documents and systems that minimize concerns over violations of privacy. Here experts distinguish between a “data-heavy” and “data-light” approach to identity management. The REAL-ID or the Department of Defense Common Access Card are “data-heavy” approaches in that they require an ID that contains high levels of personally identifiable information.

Instead, consider the “data-light” approach of the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) system. The person using US-VISIT provides digital fingerprints and a photograph, other personal data, and is assigned a random number. The system checks the biometrics against the database and agents compare the photo to the individual. A match against the system confirms that the individual is the same as the one who originally applied and was screened at the time of application by a government official.<sup>84</sup>

A similar such program could be used for worksite enforcement. The potential employee might first present themselves at a federal government office (such as a post office) where they would present biometric data and other documentation supporting their work eligibility. In exchange, they would be issued a secure number like that used in US-VISIT and that number would be presented to a potential employer. The employer could, in turn, submit that number electronically to verify that the number matches the individual. The employer query could produce a biometric such as a picture that would aid in verifying the worker’s identity. While this program would still be susceptible to breeder document fraud and require database improvement, it would, in large part, remove the employer from the document verification process.

The current system is based on the idea that non-experts in document evaluation will determine if documents are genuine. The reality is that there is great confusion among employers as to which documents are in fact genuine. As long as employers must make decisions about who to hire and who to fire based on verification of eligibility they will make mistakes. The government is in the best position to give potential employees the red light or green light, with very few yellow lights that are easily resolved.

### **Accessibility and Education**

Any nationwide system will involve many different types of employers remotely accessing the system. The employer who hires a day laborer to work in construction or agriculture will often not have the same resources or computer literacy as a bank hiring an executive. Many smaller employers may lack the computers or high-speed Internet access to run a real-time verification system. Future systems need to address start-up costs and alternatives such as telephone verification, as well as vulnerabilities to internet identity theft scams that inexperienced users present.

Education on the use of the system will be necessary given what we know about existing levels of employer confusion and misuse. Additional problems to address will include employers circumventing training by sharing entrance passwords, using the program to prescreen potential employees, reverify employees already approved, limiting work hours or training until permission is obtained, and entering the same information for multiple workers. And employers, more than anything else, want to pre-screen applicants for obvious reasons even though the Pilot requires that they not do so. While the program must not encourage discrimination, the needs of employers to quickly and accurately verify their workforce must be taken into account.

Given the pitfalls of the current system, the implementation of an electronic employer verification system should be gradual, taking into account issues related to scalability, education, user management, data quality and control as well as privacy. Implementation in the near term should not cause detriment to what may need to be done a decade in the future. Progress is needed now towards the full implementation of a reliable employment verification system. A key to building such a system is the appropriation of sufficient resources over the next few years to improve the databases used in verification to reduce false negatives and speed verification time, as well as funding to test different uses of biometrics to reduce fraud.

### **IMMIGRATION REFORM IN THE CONGRESS**

George W. Bush campaigned for the presidency in 2000 with a pledge to make immigration reform a top priority of his administration. He had served as governor of a border state with close ties to Mexico, where over one-third of the population is of Hispanic origin.<sup>85</sup> Mexican president Vicente Fox, who had a personal relationship with Bush, supported reform and many Mexicans hoped to see the regularization of unauthorized Mexicans.<sup>86</sup> Although it was by no means certain that such legislation would have passed Congress, the events of September 11, 2001 eclipsed immigration reform.

Three years later, in 2004, President Bush unveiled his proposal for Fair and Secure Immigration

Reform to “match willing foreign workers with willing American employers, when no Americans can be found to fill the jobs.”<sup>87</sup> At its most basic the proposal was for an uncapped temporary worker program that would grant eligibility to work for an initial period of three years and the possibility to renew for an unspecified number of three-year periods. There was very little emphasis on *interior* enforcement, although funding for border enforcement was increased.<sup>88</sup>

Several legislative alternatives to President Bush’s temporary worker proposal were introduced but not enacted during the 108<sup>th</sup> and 109<sup>th</sup> Congresses. At the time of writing, the 110<sup>th</sup> Congress was considering legislation, with the Senate debating a compromise bill negotiated with the Administration and the House holding hearings on various specific topics.<sup>89</sup> A number of competing and sometimes complementary bills reflect the various approaches taken to immigration reform. Two of the bills, AgJOBS and the Dream Act, have been reintroduced each Congress. Separate bills passed separately by each house in the 109<sup>th</sup> Congress and, in the 110<sup>th</sup> Congress, the Senate alone.

**AgJOBS.** Introduced by Senator Larry Craig in 2004, has been the principal legislative effort to reform temporary agricultural programs. First, it would grant legal permanent residence, on a one-time-only basis, to unauthorized migrants who had worked for the equivalent of 100 workdays, during any 12 consecutive months, of the 18-month period ending on August 2004. Permanency could be possible after an additional 360 days of agricultural work over the next six years. Second, existing H-2A temporary work program would be streamlined with only the simpler “attestation,” similar to the hi-skilled H-1B program, being required for hiring.<sup>90</sup>

**DREAM Act.** The Development, Relief, and Education for Alien Minors Act (S. 1545) was originally sponsored by Senator Orrin Hatch and obtained 47 cosponsors before an amended version of the bill was approved by the Senate Committee on the Judiciary in October 2003. The bill was reintroduced in the 109<sup>th</sup> Congress by a bipartisan group, and is also included in the Senate legislation under debate in the 110<sup>th</sup> Congress. The DREAM Act seeks to facilitate the entry into institutions of higher education of those illegally resident minors who have obtained a high school diploma. The DREAM Act further would create a two-stage process whereby eligible unauthorized aliens could acquire legal permanent residency.

**Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.** This bill addressed a number of enforcement issues, but it was roundly criticized for including draconian measures and no legal alternatives to unauthorized migration. The bill’s border security provisions included increased staffing for the Border Patrol with the expansion of technology and physical infrastructure. The bill also required a mandatory employment eligibility verification system, building on the Basic Pilot Program. However; the bill increased the penalties for

“harbouring,” “shielding,” or “transporting” an unauthorized migrant in a manner that would risk the imprisonment of the staff of religious and social services organizations, as well as family members and employers.<sup>91</sup> And the bill initially made unlawful presence in the United States a felony offence.

**The Secure America and Orderly Immigration Act.** This bill was introduced by Senators McCain and Kennedy; and Representatives Kolbe, Flake and Gutierrez in May 2005. It addressed a range of issues including the clearance of immigration backlogs and expansion of employment-based immigration. The legislation established an H-5B program for persons who were employed in the U.S. without authorization before the date of the Act’s introduction. After six years, the worker would be eligible to adjust to permanent status after an additional fine, application fee, and meeting other requirements. The legislation created a 3-year renewable H-5A temporary worker visa for up to 400,000 workers who could apply for permanent residence. The legislation phased in a new employment verification program for employers of H-5A workers and, over time, would replace the current system for all new hires. The legislation also increases the number of officers available for worksite enforcement.

**Comprehensive Enforcement and Immigration Reform Act of 2005.** Introduced by Senators Cornyn and Kyl in July of the 109<sup>th</sup> Congress, this bill provided a mechanism for regularization of unauthorized migrants in the United States, but it was relatively restrictive. It created a new Deferred Mandatory Departure (DMD) status for eligible migrants present in the U.S. on the date of the bill’s introduction. Migrants could remain in the country for up to five years but would then be required to return home; and their visa provided no adjustment to permanent status. The bill included a “W” work visa good for two years but with a one-year return requirement; after which the visa could be renewed for another cycle up to a total of six years of work. New worksite enforcement mechanisms required the issuance of secure machine-readable, tamper-resistant Social Security cards; it also required that all new hires participate in a Social Security-based electronic verification system.

**Reform in the 110th Congress.** As of the writing of this paper, the Senate has failed to pass yet another legislative initiative with little likelihood that comprehensive reform legislation will be reintroduced in this Congress. Bipartisan and with support from the Administration, the bill represented a compromise that lifted elements from previous legislative attempts, introduced new policies, and was comprehensive in scope and radical in many of its strategies. After clearing the backlogs of current immigrant applicants, the legislation would have eliminated the extended family, employer-petitioned and diversity visa categories for admission, substituting a point system that would reward education, English language ability, and qualifications in shortage occupations.

The legislation included an earned regularization program (Z visa) that was generous in its scope,

providing a route to legal status for all unauthorized migrants in the country as of January 2007. The Z visa could be renewed every four years with a pathway to regularization. It also included a temporary worker program (Y visa) good for an initial two years, renewable at most twice more; and requiring a one-year return home between each renewal. The bill included provisions for mandatory electronic employment verification, as well as increased penalties for illegal hiring of unauthorized workers.

The House has been holding extensive hearings on immigration reform proposals. The bipartisan Security through Regularized Immigration and a Vibrant Economy Act Of 2007 (STRIVE Act), incorporates some of the concepts in the Senate bill, including triggers for implementation of the regularization and temporary worker programs and mandatory electronic employment verification. The new temporary worker program would provide a route, however, to permanent residence on the basis of either an employer petition or self-petition. The regularization process involves a two step, with unauthorized migrants first qualifying for a six year grant of conditional non-immigrant status and then an opportunity to adjust to permanent residence.

It is too soon to know if comprehensive legislation will pass in the 110th Congress, but the signs are not promising. The House leadership has raised serious questions about the compromise negotiated between the Administration and the Senate leadership on immigration reform, particularly related to the new temporary worker program and the changes in legal permanent resident admissions. Republican opposition to regularization remains strong in the House as well. The most recent Senate legislation raises serious doubts about the scope of its reforms and its likely effectiveness in reducing unauthorized migration, much less improving the broken legal admission system.

## THE WAY FORWARD

Part of the reason for the repeated failure to achieve comprehensive immigration reform is the controversial nature of the immigration issue. Different groups are equally committed to ensuring that unauthorized migrants, on the one hand, are kept out of the country and do not receive amnesty if they have entered illegally, or on the other that these essential workers finally gain access to legal employment opportunities and, eventually, citizenship. Among the plethora of issues that have been under debate in Congress, some of the recurring questions are the following:

- Whether to create a separate guest worker program for agricultural workers and another for nonagricultural workers, or whether to include both groups in the same program;
- Whether to limit eligible participants to aliens currently within the United States, aliens outside the country or both groups;
- Whether to include a legalization or earned adjustment program that would lead to legal

- permanent residency in the United States;
- Whether to include multi-year work requirements in the criteria for legalization, or whether to leave out such conditions for fear they could lead to exploitation of workers that fear being fired or could exclude many short-term agricultural workers;
- Whether to offer derivative status to family members under a new guest worker program, or whether such measures should be eliminated to encourage eventual return to the country of origin;
- Whether current procedures for labor certification should be retained to protect job opportunities for U.S. workers, or whether a more streamlined process should be created, for example, replicating the labor market attestation process currently in place for H-1B specialty workers or developing a certification process specific to an employment sector or region of the country;
- Whether numerical limits should be placed on the number of individuals able to participate in the guest worker program, and whether such limits should be phased out over time;
- Whether to enforce return to the participant's country of origin – for example, through deportation – at the end of the guest worker program, or whether to provide financial incentives for return home;
- How to protect homeland security through the operation of the guest worker program, and how to ensure that individuals that pose a security threat are not allowed to enter the country under the guest worker program.<sup>92</sup>

The resolution of these various questions will require further debate and a willingness to compromise in the interest of legislation that can meaningfully control the employment magnet with workable verification systems and meaningful enforcement, while rationally addressing the existing illegally-resident population and the admission of future workers. While comprehensive reform that addresses all of these issues simultaneously would be in the best interest of the country, the politics of immigration argue against such action. We believe that the aim of comprehensive reform—to substitute a legal workforce for an illegal one—can be achieved incrementally if Congress and the President can agree on a set of immediate actions, to be followed by further reform.

### **Secure and efficient borders**

This report has argued that border enforcement is a necessary but insufficient approach to unauthorized migration. Within the constraints of both the Mexican and US governments, more can be done to foster cooperation to ensure secure and efficient borders on our southern border without a never-ending build-up of border enforcement.<sup>93</sup> A diversion of funds from such controversial activities as the building of additional border fences to increasing the effectiveness of worksite verification and enforcement would greatly improve the country's capacity to curb illegal migration. At the same time, greater attention should be given to pre-screening and

trusted traveler and transporter programs along the border. Such trusted programs facilitate beneficial movements and permit limited enforcement resources to be targeted elsewhere. For example, expansion of the dedicated commuter lanes will enable the millions of persons who cross regularly to do so without undue delays. Increased cooperation between U.S. and Mexican police authorities would further reduce crime and violence along the border, and encourage migrants to seek lawful admission. Greater cooperation in mounting joint patrols of dangerous areas between ports of entry will help save lives.

### **Worksite verification and enforcement**

As long as employers hire persons without authorization to work in the United States, migrants will continue to enter the country illegally in order to obtain jobs. Deterring employment of unauthorized migrants requires a combination of improved employment verification and enhanced enforcement of employer sanctions, labor standards and anti-discrimination measures. It is premature, however, to mandate use of the Basic Pilot for all employers because of the weaknesses in its ability to detect fraudulent identity and the poor quality of the data used in verification. Immediate steps should be taken, however, to improve the verification system so it can be scaled up for broader use, by committing resources to improve the quality and accessibility of the data, test mechanisms to verify identity through biometrics, and educate employers on their responsibilities in the verification process. The Congress should signal its intent to continue to increase appropriations annually until the verification systems are ready for universal implementation, providing a clear timeline of expected improvements.

Also in the interim, ICE should receive significantly increased resources to ramp up its efforts to identify and prosecute employers who knowingly hire unauthorized workers, as should the Department of Labor to increase its targeted enforcement against employers who violate labor standards. To ensure that unscrupulous employers can no longer call upon immigration enforcement to frighten workers into accepting sub-standard wages and working conditions, the Congress should take steps to 1) overturn the Hoffman decision, thereby requiring employers to pay back pay when they illegally fire unauthorized workers who are involved in union activities, 2) clarify that employers are also responsible for paying back wages when they violate wage and overtime provisions; and 3) make it an immigration-related unfair employment practice to use worksite verification or enforcement actions as a means of retaliation against workers who petition for improved wages or working conditions. These steps would level the playing field and ensure that unscrupulous employers gain no advantage from hiring an exploitable workforce.

### **Targeted temporary worker programs**

The purpose of temporary worker programs is to add workers temporarily to the labor force; the temporary adjective implies that the foreigner is expected to leave the country when his

job ends. In most cases, temporary workers are to be a transitional presence in an industry or occupation, employed until jobs are mechanized or replaced by trade or until additional workers are trained locally. Alternately, temporary worker programs can function properly if the jobs to be filled are truly temporary, generally seasonal in nature.

Such programs often fail, however, when the jobs are permanent ones with long-term demand for foreign workers. These are the situations in which the old adage “there’s nothing as permanent as a temporary worker” applies. The employers do not want to lose good workers and a high proportion of the workers do not want to go home.

The US could usefully target new temporary worker programs on certain industries, particularly those with natural employment cycles, such as seasonal jobs. In the case of more permanent jobs, the programs should be targeted at industries that are already highly dependent on unauthorized workers, with provisions to help these sectors reduce this dependence over time and mechanisms for workers to obtain permanent resident status. The legislation must also take into account that these programs can be successful only if unauthorized migration is curtailed, so that both employers and workers participate in the temporary worker program.

### **Regularization**

Having a large underclass of persons who are unknown to the government and are highly exploitable is not in the national interest. Regularizing the status of unauthorized migrants in the country would bring them out of the shadows and recognize the fact that it would be exceedingly expensive, disruptive and inhumane to attempt to remove them from the country. But as we have learned from IRCA, regularization should only occur in the context of new enforcement mechanisms to deter future illegal migration. Moreover, the backlash against regularization that has doomed comprehensive reform to date makes it unlikely that the Congress will pass legislation that includes immediate legal status for a large proportion of unauthorized migrants.

Properly implemented, a regularization program would support more effective enforcement. If employers know that compliance with a new worker verification system would not jeopardize their existing workforce, they are more likely to participate in programs designed to ensure that new hires are authorized. Regularization can help ensure that businesses now highly dependent on unauthorized workers and the workers themselves are not driven underground, making enforcement more difficult and expensive. We recommend a step-by-step approach, with businesses and their workers given the opportunity to regularize their operations and legal status as they participate in such initiatives as E-Verify and the Photo Screening Tool Pilot Program. When E-Verify or a successor system is ready for universal implementation, the Congress should assess the residual unauthorized population to determine what combination of further regularization or removal is appropriate.

### Legal Permanent Admissions

Many migrants living illegally in the United States are awaiting approval of their applications for family reunification. The long backlogs in some US admission categories, particularly the Family 2A preference that grants legal permanent immigrant status to the spouses and minor children of green card holders, encourage illegal migration. As of November 2006, the US was processing Mexicans who applied in December 1999 for these visas. When policies promise legal admissions for such close family members, but take years to fulfill, it is not surprising that some applicants resort to unlawful entry instead of waiting for their turn in the queue.

The first priority should go to reforming the family categories to permit the more rapid admission of immediate family members. The US Commission on Immigration Reform, a bipartisan body mandated by the US Congress, recommended a rapid clearance of this backlog and adoption of sufficient admission numbers for spouses and minor children. There continues to be a need for such backlog clearance to regularization for those with pending green card applications as well as to deter future unauthorized flows of immediate family.

Second priority should go to reforming the employment-based categories to meet legitimate labor force needs. At present, these admission categories are also managed by quotas and waiting lists, not by market needs.<sup>94</sup> One suggestion are fees that test demand by pricing immigration in a way that tests employers' resolve, others use objective measures of shortages or demand to vary visa allotments. The idea is to make it as or more expensive to hire a foreign worker as it would be to hire a domestic one. Auctions have been proposed as another way to test employer demand. Hiring fees could go into a pool that would help fill skills shortages and/or support the research and development of mechanization and other alternatives.

### ENDNOTES

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