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# E-Verify: Mining Government Databases to Deter Employment of Unauthorized Aliens

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## THE ADMINISTRATION OF IMMIGRATION LAW

### E-Verify: Mining Government Databases to Deter Employment of Unauthorized Aliens

by William W. Chip<sup>1</sup>

#### INTRODUCTION

The ongoing debate over U.S. immigration policy sometimes finds itself trapped in a corner where (1) most admit that the country needs stronger measures to enforce the laws against illegal immigration, including measures to prevent the employment of unauthorized alien workers, but (2) many insist that such measures be accompanied by a legalization program for most if not all of the 11 million aliens estimated to be residing here unlawfully on the grounds that “mass deportations” would be impractical and morally unacceptable. This paper does not delve into the pros and cons of legalization programs, but instead argues that the federal government has data and tools in place that, if properly deployed, could result in the voluntary departure of most aliens who are working here unlawfully, without the need for “mass deportations.”

#### I. INTRODUCTION TO EMPLOYER SANCTIONS

The attitude of the U.S. Government with respect to the employment of aliens not authorized to work in the United States has changed dramatically during the author’s lifetime. The Immigration and Nationality Act of 1952 subjected to fines and/or imprisonment any person who “willfully or knowingly conceals, harbors, or shields from detection” any alien who was not “lawfully entitled to enter or remain in the United States.”<sup>2</sup> However, in what came to be known

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<sup>2</sup> Pub. Law 414, section 274 (1952).

as the “Texas Proviso,” the same section of the Act provided that “employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.”<sup>3</sup> In effect, while a U.S. citizen who helped an illegal immigrant avoid detection by U.S. authorities could be sent to prison, employers were given a “free pass” to engage in the very conduct that incentivized the unlawful immigration.

The “Texas Proviso” arguably had an impact on the Supreme Court’s 1982 decision in *Plyler v. Doe*, 457 U.S. 202 (1982), in which a five-to-four majority held that denying a free public education to unlawfully present alien minors was unconstitutional. The majority was explicitly troubled with the denial of public benefits to a large “underclass” whose presence was de facto tolerated in order to secure cheap labor:

*Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants -- numbering in the millions -- within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.*<sup>4</sup>

<sup>3</sup> *Id.*

<sup>4</sup> 457 U.S. at 218-219.

The “free pass” to employers of unauthorized alien workers was withdrawn by the Immigration Reform and Control Act of 1986 (IRCA), which made it unlawful for a U.S. employer knowingly to hire an “unauthorized alien” or to continue employing an alien if the alien’s “unauthorized” status first becomes known to the employer subsequent to his hiring.<sup>5</sup> An employer that does so is subject to so-called “employer sanctions,” consisting of civil and criminal penalties, including imprisonment.<sup>6</sup> Although this hiring prohibition was primarily aimed at so-called “illegal” or “undocumented” aliens who had no right to be present in the United States, the term “unauthorized alien” also includes any of the millions of aliens, such as tourists and most foreign students, who have been lawfully and temporarily admitted to the United States without the right to work here.<sup>7</sup>

#### A. Form I-9

Enforcement of the prohibition against employment of “unauthorized aliens” begins with statutory requirements that (1) each new hire submit to his employer evidence of his identity and authorization to work and (2) the employer then examine that evidence.<sup>8</sup> The submissions to the employer must be made on an Employment Eligibility Verification Form (Form I-9)<sup>9</sup> within three days of being employed. Certain documents, such as a U.S. passport, establish both identity and authorization to work.<sup>10</sup> Other documents establish only identity (e.g. a driver’s license) or work authorization (e.g. a Social Security card).<sup>11</sup> U.S. Citizenship and Immigration Services (USCIS), which issues Form I-9, describes as follows how the form is to be used:

<sup>5</sup> 8 U.S.C. § 1324a(a)(1); 8 C.F.R. § 274a.3.

<sup>6</sup> 8 U.S.C. § 1324a(a)(1)(B); 8 C.F.R. § 274a.10.

<sup>7</sup> 8 U.S.C. § 1324a(h)(3).

<sup>8</sup> 8 U.S.C. § 1324b; 8 C.F.R. § 274a.2.

<sup>9</sup> Available at <https://www.uscis.gov/i-9>.

<sup>10</sup> 8 U.S.C. § 1324b(1)(B); 8 C.F.R. § 274a.2(b)(v)(A).

<sup>11</sup> 8 U.S.C. § 1324b(1)(C), (D); 8 C.F.R. § 274a.2(b)(v)(B), (C).

*Form I-9 is used for verifying the identity and employment authorization of individuals hired for employment in the United States. All U.S. employers must ensure proper completion of Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. Both employees and employers (or authorized representatives of the employer) must complete the form. On the form, an employee must attest to his or her employment authorization. The employee must also present his or her employer with acceptable documents evidencing identity and employment authorization. The employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and to relate to the employee and record the document information on the Form I-9. The list of acceptable documents can be found on the last page of the form. Employers must retain Form I-9 for a designated period and make it available for inspection by authorized government officers.<sup>12</sup>*

**B. “Acceptable Documents”**

An individual who is a U.S. citizen, a U.S. national, or a Permanent Resident Alien (PRA) is automatically authorized to work in the United States and ordinarily requires no separate documentary proof of his or her work eligibility beyond his or her passport or “green card.”<sup>13</sup> An alien who has been admitted as a refugee or with a visa authorizing him to work in the United States will, upon entry, have a Form I-94 confirming that status generated in his name by U.S. Customs and Border Patrol.<sup>14</sup> Form I-94, along with the alien’s foreign passport, establishes both

<sup>12</sup> <https://www.uscis.gov/i-9>.

<sup>13</sup> Form I-9, p.4.

<sup>14</sup> <https://www.cbp.gov/travel/international-visitors/i-94>.

identity and authorization to work.<sup>15</sup> Aliens who have been admitted without work authorization but who may be or become eligible to work, such as asylum seekers, certain students, and spouses of diplomats, must apply to USCIS for an Employment Authorization Document (EAD) using Form I-765.<sup>16</sup> An EAD establishes both identity and work authorization if it carries a photograph of the alien; otherwise it establishes only work authorization.<sup>17</sup> Although a Social Security card may be used to establish work authorization,<sup>18</sup> Form I-9 does not otherwise require disclosure of an employee's Social Security Number (SSN) unless the employer participates in the "E-Verify" program, described below.<sup>19</sup>

## II. INTRODUCTION TO E-VERIFY

In 1994 the U.S. Commission on Immigration Reform, whose members were appointed by President Bill Clinton and whose chair in 1994 was then former Democratic Congresswoman and civil rights leader Barbara Jordan, concluded that "reducing the employment magnet is the linchpin of a comprehensive strategy to reduce illegal immigration" and made the following recommendations:

*The Commission recommends development and implementation of a simpler, more fraud-resistant system for verifying work authorization. . . . In examining the options for improving verification, the Commission believes that the most promising option for secure, nondiscriminatory verification is a computerized registry using data provided by the Social Security Administration [SSA] and the INS. . . . The Commission recommends that the President immediately initiate and*

<sup>15</sup> Form I-9, p.4.

<sup>16</sup> Available at <https://www.uscis.gov/i-765>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Instructions for Form I-9, p.2.

*evaluate pilot programs using the proposed computerized verification system . . . .  
Assuming the successful results of the pilot program, Congress should pass the  
necessary statutory authorities to support more effective verification.*<sup>20</sup>

The “pilot programs” recommendation was mandated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), section 401 of which obligated the Immigration and Nationality Service (INS) (then the agency responsible for implementing and enforcing federal immigration law) to conduct three distinct “pilot” programs that would enable employers to confirm the work eligibility of employees. A history of the pilot programs may be found on the government’s E-Verify website.<sup>21</sup>

One of those programs, the Basic Pilot Program, compared the information contained in the employee’s Form I-9 with information in the possession of INS and of the Social Security Administration (SSA). In a 2003 reorganization, the responsibilities and authorities of the INS were transferred to three newly organized units within the DHS, including USCIS,<sup>22</sup> which inherited responsibility for the pilot programs. In 2007 the pilot program ultimately adopted by USCIS was named “E-Verify.”<sup>23</sup>

A. What is E-Verify?

According to USCIS:

*E-Verify is a web-based system that allows enrolled employers to confirm the eligibility of their employees to work in the United States. E-Verify employers verify the identity and employment eligibility of newly hired employees by electronically matching information provided by employees on the Form I-9, Employment*

<sup>20</sup> [https://www.numbersusa.com/sites/default/files/public/from\\_drupal5/JordanCommissionillegal.pdf](https://www.numbersusa.com/sites/default/files/public/from_drupal5/JordanCommissionillegal.pdf).

<sup>21</sup> <https://www.e-verify.gov/about-e-verify/history-and-milestones#y2015>.

<sup>22</sup> <https://www.federalregister.gov/agencies/u-s-citizenship-and-immigration-services>.

<sup>23</sup> <https://www.e-verify.gov/about-e-verify/history-and-milestones#y2015>.

*Eligibility Verification, against records available to the Social Security Administration (SSA) and the Department of Homeland Security (DHS). E-Verify is a voluntary program. However, employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation (FAR) E-Verify clause are required to enroll in E-Verify as a condition of federal contracting. Employers may also be required to participate in E-Verify if their states have legislation mandating the use of E-Verify, such as a condition of business licensing. Finally, in some instances employers may be required to participate in E-Verify as a result of a legal ruling.<sup>24</sup>*

USCIS offers examples of how E-Verify can identify and disrupt unauthorized employment, including the following:

*Over 80 percent of employees present a driver's license or state issued identification (ID) card as proof of identity for Form I-9, Employment Eligibility Verification. Information employers use for E-Verify cases comes from Form I-9. E-Verify is able to verify the validity of driver's license and ID card information by matching the data from Form I-9 entered by employers against records available to U.S. Department of Homeland Security. This allows for two-part verification by validating the information on certain identity documents in addition to the existing employment authorization check.<sup>25</sup>*

<sup>24</sup> [https://www.e-verify.gov/?utm\\_medium=search&utm\\_source=google&utm\\_campaign=everify2018&utm\\_content=bg\\_Unbranded\\_Employer\\_Mandated\\_USCIS\\_English\\_Exact\\_Uscis&utm\\_keyword=uscis\\_e\\_verify](https://www.e-verify.gov/?utm_medium=search&utm_source=google&utm_campaign=everify2018&utm_content=bg_Unbranded_Employer_Mandated_USCIS_English_Exact_Uscis&utm_keyword=uscis_e_verify).

<sup>25</sup> <https://www.e-verify.gov/employers/verification-process/drivers-license-verification>.

## B. Matching Names and SSNs

In addition to verifying identify and work authorization documents submitted by employees pursuant to completion of Form I-9 (“information in the possession of [USCIS]”), E-Verify also utilizes SSA databases (“information in the possession of . . . the Social Security Administration”) to verify that an SSN reported by the employee on Form I-9 is valid and matches the name reported by the employee on Form I-9. How the SSA collects that information and how the information is otherwise used by the SSA in its own “no-match” program are discussed in Part III below.

## C. Enrollment and Participation in E-Verify

In order to use the E-Verify system to confirm the work authorization of an employee, an employer must first enroll in the program and register at least one “program administrator.”<sup>26</sup> As part of the process, the employer enters into a Memorandum of Understanding (MOU) with DHS.<sup>27</sup> E-Verification is then conducted on a case-by-case basis, with the employer submitting information from the employee’s Form I-9 and the government comparing that against DHS and SSA databases.<sup>28</sup> If the employee presented an EAD or Permanent Resident Card, the employer will be prompted to compare the photo on the card with the photo in the government’s records.<sup>29</sup>

If the information on the Form I-9 submitted by the employee matches records available to DHS and the SSA, E-Verify will deliver an “employment authorized” result to the employer.<sup>30</sup> If there is a mismatch, E-Verify will deliver a “Tentative Nonconfirmation (TNC)” result, in which

<sup>26</sup> See USCIS, Quick Reference Guide for E-Verify Enrollment, available at <https://www.e-verify.gov/book/export/html/3806>.

<sup>27</sup> <https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf>.

<sup>28</sup> See <https://www.e-verify.gov/employers/verification-process>.

<sup>29</sup> <https://www.e-verify.gov/employers/verification-process/photo-matching>.

<sup>30</sup> <https://www.e-verify.gov/employers/verification-process/tentative-nonconfirmations>.

case the employee must be given an opportunity to resolve the mismatch.<sup>31</sup> According to Article 2, Section A, paragraph 13 of the MOU, an employer may not terminate an employee on account of the TNC but may do so if (1) the employer receives a “Final Nonconfirmation” from E-Verify or (2) the employee “chooses not to take action on the TNC.”

Since 2012 individuals have been able to access the E-Verify system to confirm their own work eligibility, affording them the opportunity to rectify any identity or work authorization mismatches before seeking employment.<sup>32</sup>

#### D. E-Verify in Practice

According to DHS, E-Verify is being used by over 870,000 employers, is adding 1,500 new employers each week, and is “one of the federal government’s highest rated services for user satisfaction.<sup>33</sup> In the first two quarters of fiscal year 2019, there were 17,552,472 E-Verify cases, of which 98.45% (17,280,409) were automatically confirmed and 1.55% (272,063) yielded mismatches.<sup>34</sup> Of the 272,063 mismatches, 243,169 (approximately 89%) were not found to be work authorized.<sup>35</sup> Extrapolated to a full fiscal year, the number of workers found not to be work authorized would be approximately 490,000.

A detailed 2015 policy analysis by the Cato Institute questioned the efficacy of E-Verify, in particular on the grounds that the widespread use of counterfeit identity documents, which emerged after the 1986 enactment of employer sanctions, allows unauthorized alien workers to avoid E-Verify detection by appropriating the names and SSNs of U.S. citizens and authorized

<sup>31</sup> *Id.*

<sup>32</sup> <https://www.e-verify.gov/mye-verify/self-check>.

<sup>33</sup> <https://www.e-verify.gov/about-e-verify/what-is-e-verify>.

<sup>34</sup> <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance>.

<sup>35</sup> *Id.*

alien workers.<sup>36</sup> In principle, many of these avoidance techniques, such as the use of SSNs belonging to children, to the recently deceased, to very elderly persons, or to workers simultaneously employed in other locations, could be countered by refinements in the technology behind E-Verify. For example, Form I-9 requires the employee to report his or her date of birth.<sup>37</sup> While the use of a false name is, by itself, unlikely to raise an employer's suspicion, a claim by a middle-aged individual that he was born 15 or 90 years might well do so. Query whether E-Verify (and the "no-match" program described below) might check the purported date of birth against SSA's own records? Nevertheless, even without this or other refinements, the exposure of nearly 500,000 unauthorized alien workers per year should qualify as efficacious.

E. "Mandatory" E-Verify

One of the weaknesses of E-Verify is that employers who knowingly hire unauthorized workers, or who suspect that a number of their workers are unauthorized, are unlikely to use it. Presently, the use of E-Verify is mandated by federal law only for certain employers with federal contracts or subcontracts.<sup>38</sup> An employer may also be required to participate in E-Verify if it operates in a State that mandates the use of E-Verify, usually as a condition of securing a business license. As of year-end 2018, eight States (Arizona, Utah, and six in the deep South) had mandated the use of E-Verify for all or most employees working in their States, with approximately 13 other States mandating it only for State contractors and/or public agencies.<sup>39</sup>

<sup>36</sup> See, e.g., A. Nowrasteh & J. Harper, *Checking E-Verify: The Costs and Consequences of a National Worker Screening Mandate*, Cato Institute Policy Analysis (July 7, 2015), <https://www.cato.org/publications/policy-analysis/checking-e-verify-costs-consequences-national-worker-screening-mandate>.

<sup>37</sup> <https://www.uscis.gov/i-9>.

<sup>38</sup> <https://www.e-verify.gov/>.

<sup>39</sup> <https://cis.org/Fact-Sheet/EVerify-Fact-Sheet>.

These State programs have reportedly had some success in preventing the employment of unauthorized aliens. According to the Public Policy Institute of California, nearly 100,000 aliens left the unauthorized workforce in Arizona in the first year after the state mandated the use of E-Verify for all Arizona employers.<sup>40</sup> A 2016 study published by the Institute of Labor Economics found as follows:

*During the 2000s, several states adopted laws requiring employers to verify new employees' eligibility to work legally in the USA. This study uses data from the 2005–2014 American Community Survey to examine how such laws affect unauthorized immigrants' locational choices. The results indicate that having an E-Verify law reduces the number of less-educated prime-age immigrants from Mexico and Central America—immigrants who are likely to be unauthorized—living in a state. We find evidence that some new migrants are diverted to other states, but also suggestive evidence that some already-present migrants leave the country entirely.<sup>41</sup>*

Mandatory E-Verify for all employers has been a component of several versions of “comprehensive immigration reform” that have been introduced into Congress, but none has been enacted, in large part because (1) most Democratic members will not support mandatory E-Verify unless most aliens now living without authorization in the United States are given lawful status and (2) most Republican members are opposed to any broad-based “amnesty.” More recently, President Trump’s 2020 budget proposal has called for “mandatory, nationwide use of the E-Verify system.”<sup>42</sup>

<sup>40</sup> <https://www.ppic.org/press-release/arizonas-e-verify-mandate-reduces-number-of-unauthorized-immigrants/>.

<sup>41</sup> <https://link.springer.com/article/10.1186/s40176-016-0053-3>.

<sup>42</sup> <https://www.whitehouse.gov/wp-content/uploads/2019/03/budget-fy2020.pdf>.

### III. INTRODUCTION TO “NO-MATCH” LETTERS

The information available to USCIS may not be helpful in identifying unauthorized alien workers who claim on Form I-9 that they are U.S. citizens or nationals and therefore do not require documentation of their PRA status or temporary work authorization. However, the SSA does possess information that may serve that purpose. The U.S. Social Security System delivers retirement and other benefits to the vast majority of American citizens over their lifetimes. Most of those benefits are tied to the amount earned by the recipient over the years before the receipt of benefits. In order to associate earnings with beneficiaries, U.S. citizens and certain other categories of individuals authorized to work in the United States are each issued in their respective names a nine-digit SSN.

#### A. IRS Forms W-4 and W-2

When commencing employment in the United States, every employee, whether citizen, national, or alien, must complete, sign under penalties of perjury, and submit to his or her employer Internal Revenue Service (IRS) Form W-4, reporting *inter alia* the employee’s name, SSN, and the number of tax withholding allowances to which he or she claims entitlement.<sup>43</sup> The employer transfers information from IRS Form W-4, including the employee’s name and SSN, to IRS Form W-2, which reports the employee’s wages for the taxable year. The employer submits the Form W-2 to the SSA, which credits the reported wages to the employee’s Social Security account and then forwards the form to the IRS for purposes of tax administration.

The amount of fraudulent identity data entered into our federal income tax and Social Security systems is very considerable. In 2006, the GAO reported to Congress that earnings were being posted each year for over a million aliens who had been issued a SSN or a Tax Identification

<sup>43</sup> <https://www.irs.gov/pub/irs-pdf/fw4.pdf>.

Number (TIN) that was not to be used for work authorization.<sup>44</sup> Also in 2006, the SSA testified to Congress that in 2003 it had received approximately 200,000 wage reports using an SSN numbered 000-00-000.<sup>45</sup> In 2015, the SSA's inspector general reported that 66,920 of the mismatched SSNs reported from 2006-2011 belonged to individuals who were born before June 16, 1901, and were almost certainly dead.<sup>46</sup>

On the other hand, probably the large majority of mismatches relate to U.S. citizens or authorized alien workers whose name or SSN was reported incorrectly through inadvertence of the employee or the employer, or through changes in status, such as a female employee's changing her last name upon marriage but neglecting to report that change to the SSA. When weighing the arguments against programs like E-Verify, we should recognize that failure to identify and rectify "mismatches" between a reported name and SSN will likely result in enormous financial losses for U.S. citizen and authorized alien workers. In 2005, the Government Accountability Office (GAO) reported to Congress that, for the period 1985 to 2000, there were 86.4 million wage reports where the employee's name and SSN did not match and that in 2002 alone the SSA received almost nine million "mismatched" reports, representing \$56 billion in earnings that may never be credited toward the Social Security entitlements of their users.<sup>47</sup>

<sup>44</sup> "Benefits and Limitations to Using Earnings Data to Identify Unauthorized Work", GAO-06-814R DHS, General Accounting Office, July 11, 2006.

<sup>45</sup> Statement of Martin H. Gerry, deputy commissioner, Office of Disability and Income Security Programs, Social Security Administration, before the House Committee on Government Reform Subcommittee on Regulatory Affairs, July 25, 2006.

<sup>46</sup> "Numberholders Age 112 or Older Who Did Not Have a Death Entry on the Numident", A-06-14-34030, Office of the Inspector General, Social Security Administration, March 4, 2015.

<sup>47</sup> "Social Security: Better Coordination among Federal Agencies Could Reduce Unidentified Earnings Reports", GAO-05-154, General Accounting Office, February 2005.

B. Social Security Number Verification System (SSNVS)

One of the services offered by the SSA to employers through its online service, Business Services Online (BSO), is the Social Security Number Verification System (SSNVS), which allows employers to confirm that an employee's SSN is valid and matches his name.<sup>48</sup> Some employers who may be concerned about the legality of some of their employees may choose to use SSNVS rather than E-Verify in order to avoid involvement of USCIS in the matter.

C. "No-Match" Letters

In 1993, to ensure the accuracy of earnings records that are used to determine Social Security benefits, the SSA began issuing annual letters to employees (Decentralized Correspondence or DECOR letters) and to certain employers (Employer Correction Request or EDCOR letters) informing them of discrepancies between the information reported on Form W-2 and the SSA's own records.<sup>49</sup> These letters are more commonly referred to as "no-match" or "mismatch" letters. They had a more comprehensive reach than even a mandatory E-Verify program because they covered all employees listed on Form W-2, not just new hires. At least initially, they had a less comprehensive reach in not being sent to all employers.

According to the SSA, an employer receiving a "no-match" letter was to take the following steps:

*Check to see if your information matches the name and Social Security number on the employee's Social Security card. If it does not match, ask your employee to provide you with the exact information as it is shown on the employee's Social*

<sup>48</sup> <https://www.ssa.gov/employer/ssnv.htm>.

<sup>49</sup> <https://secure.ssa.gov/poms.nsf/links/0101105027>.

*Security card. If the information matches the employee's card, ask your employee to check with any local Social Security office to resolve the issue.*<sup>50</sup>

Prior to the September 11, 2001 attacks on the World Trade Center, the SSA reportedly sent “no-match” letters only to employers “with about 10 percent of employees whose information did not match.”<sup>51</sup> In 2002 SSA began sending letters to all employers for whom there was a “mismatch.”<sup>52</sup> As discussed below, the issuance of “no-match” letters was suspended by the Obama Administration in 2009 and was reinstated by the Trump Administration in 2019.

D. “Constructive Knowledge”

As noted at the outset of this paper, the “employer sanctions” imposed by IRCA apply only to employers who “knowingly” employ an unauthorized alien. According to USCIS regulations, “constructive” knowledge is sufficient for the imposition of penalties and is defined as “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.”<sup>53</sup>

The limits on finding “constructive” knowledge of immigration law violations were noted in the case of *Aramak Facility Services v. CLC*, 530 F.3d 817 (9th Cir. 2008), wherein the Ninth Circuit Court of Appeals upheld an arbitration award against an employer who had received 48 “no-match” letters, had given the affected employees only three days to apply for a new Social Security card, and had fired 33 of the employees who had not done so. According to the court:

*As we explain below, Aramark has not established constructive knowledge of any immigration violations. Constructive knowledge is to be narrowly construed in the immigration context and requires positive information of a worker's undocumented*

<sup>50</sup> <https://faq.ssa.gov/en-us/Topic/article/KA-10008>.

<sup>51</sup> <https://immigrationforum.org/article/social-security-administration-ssa-no-match-letters/>.

<sup>52</sup> *Id.*

<sup>53</sup> 8 C.F.R. § 274a.1(l).

*status. Moreover, we are required to defer to the arbitrator's factual findings even when evaluating an award for violation of public policy. Accordingly, given the extremely short time that Aramark gave its employees to return with further documents and the arbitrator's finding that Aramark had no "convincing information" of immigration violations, the employees' failure to meet the deadline simply is not probative enough of their immigration status to indicate that public policy would be violated if they were reinstated and given backpay.*<sup>54</sup>

Notwithstanding the "narrow" interpretation of "constructive" knowledge when used to penalize employers that have hired unauthorized aliens, employers need to exercise caution when following up on the receipt of a "no-match" letter. Even if a "no-match" letter does not itself give rise to "constructive knowledge," the process of complying with the letter may disclose "convincing information" that an employee is unlawful. The Office of Special Counsel for Immigration-Related Unfair Employment Practices has taken the position that the receipt of a "no-match" letter does not by itself give rise to "constructive" knowledge that an employee is "unauthorized"<sup>55</sup>; however, it has provided guidance to employers on the steps to be taken upon receipt of a "no-match" letter, including advising "the employee to contact the Social Security Administration (SSA) to correct and/or update his or her SSA records," giving the employee a "reasonable period of time to address a reported no-match with the local SSA office," and "periodically" meeting with or otherwise contacting the employee "to learn and document the status of the employee's efforts to address and resolve the no-match."<sup>56</sup>

<sup>54</sup> 530 F.3d 817, 820-21.

<sup>55</sup> <https://www.justice.gov/crt/case-document/file/1138471/download>.

<sup>56</sup> *Id.*

Perhaps one might imply from the Office of Special Counsel's guidance that a failure to follow the guidance will be taken as evidence that an employer was aware of an employee's unlawful status. An immigration attorney at a prominent U.S. law firm recently posted the following insights into this topic:

*From a workforce enforcement standpoint, a no-match letter that is not properly addressed by an employer can have implications under the Immigration Reform and Control Act (IRCA). Because a no-match letter raises questions regarding an employee's work authorized status in the U.S., it can expose the employer to potential liability under IRCA for knowingly hiring or continuing to employ an individual who is not authorized to work in the United States.*

*The most obvious liability under IRCA arises when an employer has actual knowledge of an individual's unauthorized status; for example, because the employee admitted to it. IRCA liability is also implicated when an employer acquires "constructive knowledge" of an employee's lack of work authorization. Receipt of a no-match letter with respect to an employee that is not work authorized can potentially lead to a finding of constructive knowledge if the employer did not take reasonable steps within a reasonable time of receipt to resolve the discrepancy. This typically comes up in the course of an I-9 Form inspection conducted by Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HSI), an enforcement action under IRCA provisions. In the course of such inspections, HSI often requires the employer to submit copies of any no-match letters received in the past, along with the Forms I-9, copies of payroll records and a list of contractors and staffing agencies utilized the employer. No-*

*match letters can potentially be used as evidence of the employer's actual or constructive knowledge of an employee or contractor's undocumented status if adequate measures were not taken.*<sup>57</sup>

Whether or not the employer complies with an HSI request for copies of no-match letters, ICE should be able to secure them from the SSA or IRS by filing an application with a Federal district court.<sup>58</sup>

#### IV. THE BUMPY HISTORY OF “NO-MATCH” LETTERS

Different Administrations have sought to strengthen or to weaken the impact of “no-match” letters. The SSA provides a brief summary of the history of “no-match” letters in its Program Operations Manual System (POMS).<sup>59</sup>

##### A. The George W. Bush Administration (“Safe Harbor Rule”).

In 2006, under the George W. Bush Administration, DHS issued proposed regulations that would have added to the examples of “constructive” knowledge an employer’s failure to take action upon the receipt of a “no-match” letter from the SSA or of a DHS notification of certain Form I-9 discrepancies.<sup>60</sup> The regulations included steps the employer could take to correct the employee’s record (including ultimately terminating the employee if the record could not be corrected) in order to gain a “safe harbor” from potential prosecution for employing an unauthorized worker (the “Safe Harbor Rule”).<sup>61</sup> DHS published a final regulation in 2007 that left these provisions in place.<sup>62</sup>

<sup>57</sup> <https://www.bipc.com/second-wave-of-ssa-no-match-letters-coming-this-fall>.

<sup>58</sup> See I.R.C. § 6103(i)(1), (2).

<sup>59</sup> <https://secure.ssa.gov/poms.nsf/links/0101105027>

<sup>60</sup> <https://www.federalregister.gov/documents/2006/06/14/E6-9303/safe-harbor-procedures-for-employers-who-receive-a-no-match-letter>.

<sup>61</sup> *Id.*

<sup>62</sup> <https://www.federalregister.gov/documents/2008/10/28/E8-25544/safe-harbor-procedures-for-employers-who-receive-a-no-match-letter-clarification-final-regulatory>.

The “Safe Harbor Rule” was challenged in a California Federal district court,<sup>63</sup> and a preliminary injunction blocking the implementation of the regulation was issued.<sup>64</sup> The court acknowledged, based on two Ninth Circuit opinions,<sup>65</sup> that in some circumstances failure to take account of third-party information concerning the authorization of an employee to work, including a “no-match” letter from the SSA, could constitute “constructive knowledge” of their status.<sup>66</sup> Nevertheless, the court concluded that, treating as “constructive knowledge” an employer’s mere failure to act after the receipt of a “no-match” letter was so significant a change in DHS regulatory practice that the absence of a “reasonable analysis” for the change was a potential violation of the Administrative Procedures Act.<sup>67</sup> The court was also concerned that the regulatory process had not exhibited due concern for the likelihood that many lawful employees might lose their jobs given inadequacies in SSA databases and the short time frame for “safe harbor” qualification.<sup>68</sup> Importantly, the court rejected the plaintiff’s claim that DHS and SSA had each exceeded its statutory authority by collaborating in resolving “mismatches” that had implications for the enforcement of both immigration and social security laws.<sup>69</sup>

In order to deal with the court’s concerns, DHS issued a “supplemental” final rule in 2008.<sup>70</sup>

<sup>63</sup> <https://www.aclu.org/legal-document/afl-cio-v-chertoff-complaint?redirect=cpreirect/31491>.

<sup>64</sup> *American Federation of Labor v. Chertoff*, 552 F. Supp. 2d 999 (2007).

<sup>65</sup> *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989); *New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991).

<sup>66</sup> *American Federation of Labor v. Chertoff*, 552 F. Supp. 2d, *supra*, at 1003.

<sup>67</sup> *Id.* at 1009.

<sup>68</sup> *Id.* at 1005.

<sup>69</sup> *Id.* at 1011.

<sup>70</sup> <https://www.federalregister.gov/documents/2008/10/28/E8-25544/safe-harbor-procedures-for-employers-who-receive-a-no-match-letter-clarification-final-regulatory>.

## B. The Barack Obama Administration

Before the district court could determine whether the Bush Administration's supplemental rule adequately addressed its concerns, the newly elected Obama Administration withdrew the regulation, asserting that other tools available to DHS, including E-Verify, were more effective at detecting and thwarting unauthorized employment and noting that a report by the SSA Inspector General had questioned "the efficacy of the continuing use of no-match letters."<sup>71</sup>

In 2012 the Obama Administration suspended the use of "no-match" letters entirely.<sup>72</sup> No announcement of this suspension was made, and therefore no reason was given, leading some to speculate that the suspension was initiated to avoid "scaring off" potential applicants for the Administration's Deferred Action for Childhood Arrivals (DACA) program.<sup>73</sup>

## C. The Donald Trump Administration

In 2018 the Donald Trump Administration announced that the SSA would resume the issuance of "no-match" letters to employers (but not to employees). According to the SSA:

*The Social Security Administration (SSA) is committed to maintaining the accuracy of earnings records used to determine benefit amounts to ensure customers get the benefits they have earned. In March of 2019, we began mailing notifications to employers identified as having at least one name and Social Security Number (SSN) combination submitted on wage and tax statement (Form W-2) that do not match our records. The purpose of the letter is to advise employers that corrections are needed in order for us to properly post its employee's earnings to the correct record. There are a number of reasons why reported names and SSNs may not*

<sup>71</sup> DHS Press Release, "Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify: Announces Intention to Rescind 'No match' Rule", July 8, 2009.

<sup>72</sup> <https://immigrationforum.org/article/social-security-administration-ssa-no-match-letters/>.

<sup>73</sup> <https://cis.org/Oped/Dreamers-and-Social-Security-fraud>.

*agree with our records, such as typographical errors, unreported name changes, and inaccurate or incomplete employer records.*<sup>74</sup>

As in the past, these notices are designated by the SSA as “EDCOR” letters or requests.<sup>75</sup>

The resumption of the “no-match” program was communicated to all employers registered with SSA in a three-page letter that made the following points:

*We ask that you help us ensure the accuracy of wage reporting for your employees by registering for Business Services Online (BSO). . . . To ensure the accuracy of Social Security number (SSN) and name combinations submitted as part of the wage reporting process, we offer various free online services to employers through our BSO. We highly recommend registering and using these services before, during, and after submitting wage reports. . . . Before you file your next annual wage report, please make sure your employment records and the Forms W-2 have your employees' correct names and SSNs. . . . SSA will begin mailing informational notifications to businesses and employers who submit wage and tax statements (Form W-2) that contain name and SSN combinations that do not match our records.*<sup>76</sup>

Unlike its predecessors, the new version does not include the names and SSNs of employees with mismatched SSNs, and employers must register online with the SSA’s BSO to find out which employees have mismatches.<sup>77</sup> The SSA’s new “no-match” program will in principle lead to the identification of many more unauthorized alien workers than even a mandatory E-Verify program, which would apply only to new hires.

<sup>74</sup> <https://www.ssa.gov/employer/notices.html>.

<sup>75</sup> <https://www.ssa.gov/employer/notices.html>.

<sup>76</sup> <https://www.ssa.gov/employer/notices/EDCOR.pdf>.

<sup>77</sup> *Id.*

On March 7, 2019, the SSA announced that, starting at the end of March, 2019 it would begin sending “no-match” letters to employers that filed their 2018 Forms W-2 electronically by the January 31, 2019 due date and, starting in the fall of 2019, it would begin sending them to employers who filed the 2018 Forms W-2 on paper or who filed them electronically after January 31, 2019.<sup>78</sup> In a response to an April 11, 2019 letter from Congressman Jim Costa, the SSA stated: “As of April 26, 2019, we have mailed 577,349 letters. Later this fall, we plan to mail the remaining letters generated from processing paper Forms W-2 that do not match our records for tax year 2018.”<sup>79</sup>

To date there have been two versions of the new “no-match” letter: an April 2019 version,<sup>80</sup> to which the Costa letter presumably refers, and an October 2019 version.<sup>81</sup> The principal difference between the April and October versions is that, in the April version, instructions on how to respond to the letter are included in a single paragraph while, in the October version, the procedures, including a series of “tips,” are spelled out in much greater detail in an “Attachment” to the letter.<sup>82</sup> The “tips” are only three in number and relatively simple: (1) check the employer’s own records for typographical errors, (2) ask the employee to check his Social Security card, and (3) ask the employee to seek assistance from the local Social Security office if the first two steps do not yield a solution.<sup>83</sup> The SSA’s EDCOR website adds to this guidance that the employer should “[d]ocument any action you take to obtain the correct name or SSN.”<sup>84</sup>

<sup>78</sup> <https://taxnews.ey.com/news/2019-0512-social-security-administration-to-send-employers-notices-about-social-security-number-errors>.

<sup>79</sup> <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/ssa-responds-ssa-no-match-letters>.

<sup>80</sup> <https://www.ssa.gov/employer/notices/EmployerCorrectionRequest.pdf>.

<sup>81</sup> <https://www.ssa.gov/employer/notices/EDCOR%20Letter%20-%20Final%209-16-19508.docx.pdf>.

<sup>82</sup> [https://www.ssa.gov/employer/notices/EDCOR%20Letter%20-%20Final%20-%20Attachment%20-%209-16-19\\_508.pdf](https://www.ssa.gov/employer/notices/EDCOR%20Letter%20-%20Final%20-%20Attachment%20-%209-16-19_508.pdf).

<sup>83</sup> *Id.*

<sup>84</sup> <https://www.ssa.gov/employer/critical.htm>.

Perhaps out of concern that the revised “no-match” program might suffer the same fate as the “Safe Harbor Rule” discussed above, the revised letters go out of their way to avoid any implication that the purpose of the letters is immigration law enforcement. Thus, the October 2019 version of the letter states:

*This letter does not imply that you or your employee intentionally gave the government wrong information about the employee's name or SSN. This letter does not address your employee's work authorization or immigration status. You should not use this letter to take any adverse action against an employee, such as laying off, suspending, firing, or discriminating against that individual, just because his or her SSN or name does not match our records. Any of those actions could, in fact, violate State or Federal law and subject you to legal consequences.*<sup>85</sup>

In addition, the Attachment indicates that, if the three aforementioned “tips” do not yield a solution, “[t]here is no need to take any further action.”<sup>86</sup>

The wording of the letter and Attachment could be construed as relieving the employer of legal responsibility for addressing any concerns about the employee’s authorization to work even if the employee fails to cooperate, so long as the employer has documented that the employee was asked to do so. Arguably that was not the intention. In any event, relieving the employer of any positive duty to deal further with the SSA does not necessarily preclude the employee’s failure from giving rise to “constructive knowledge” that the employee is unauthorized. As noted above, other guidance makes clear that the employer may terminate a non-cooperating employee, and the

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at page 3.

SSA's EDCOR website does add to the guidance in the Attachment that the employer should "[d]ocument any action you take to obtain the correct name or SSN."<sup>87</sup>

## V. INTRODUCTION TO "G-VERIFY"

In a "Backgrounder" entitled *Mass Deportations vs. Mass Legalization: a False Choice*, published by the Center for Immigration Studies in March, 2017, the author of the present paper recommended several ways to "add teeth" to E-Verify, which I then named "G-Verify" (i.e., "Government-Verify").<sup>88</sup> The essential recommendation, that a "no-match" letter be sent to every employer that reported an invalid or mismatched SSN on the annual Forms W-2 for a given year,<sup>89</sup> has effectively been implemented in the Trump Administration's upgraded program, but other "G-Verify" recommendations, such as sending a copy of the letter to the employee, were not implemented and will be discussed in this section of the paper.

Because the information submitted on Form W-2 is collected for purposes of tax administration, the SSA is presumably permitted to share "no-match" letters, and presumably the response or nonresponse to such letters, with the IRS and, according to one eminent law firm, reportedly does so.<sup>90</sup> The remainder of this section of the paper assumes that the IRS receives, or can get, copies of the "no-match" letters and any responses.

### A. Perjury Investigations

As noted above, the name and SSN of an employee whose wages are reported on Form W-2 derive from the employee's reporting of that information on Form W-4, made under "penalties of perjury" that are imposed by section 7206 of the Internal Revenue Code (the "Code").

<sup>87</sup> <https://www.ssa.gov/emplouyer/critical.htm>.

<sup>88</sup> <https://cis.org/Report/Mass-Deportations-vs-Mass-Legalization-False-Choice>.

<sup>89</sup> *Id.* at page 5.

<sup>90</sup> <https://www.bipc.com/second-wave-of-ssa-no-match-letters-coming-this-fall>.

Similarly, the information concerning his or her work eligibility provided by an employee on Form I-9 is made under “penalties of perjury.”<sup>91</sup> The failure of an employer to respond to a “no-match” letter arguably raises a reasonable suspicion that the employee may have used a false SSN or otherwise perjured himself or herself on Form W-2 and/or Form I-9. Both the SSA and the IRS as well as USCIS have the authority to investigate perjury and a quite reasonable interest in doing so.

Perhaps in a bow to the Bush Administration’s Safe Harbor Rule, SSA could send a copy of the “no-match” letter to the employee (or require the employer to share a copy with the employee), pointing out in the letter that a failure to respond adequately to the letter could lead to a perjury investigation. The instigation of a perjury investigation or even the threat to do so, particularly coming from the IRS, would very likely motivate an authorized alien threatened by investigation to leave his employment. Further, if the agency’s own investigation of a “no-match” situation indicates that an employee has committed perjury, it may refer the case to the Justice Department for further investigation and prosecution. A Justice Department investigator may be free to pursue other legal violations, including violations of immigration law, that come to his or her attention during the perjury investigation.

#### B. Identity Fraud

Apart from committing perjury, an unauthorized worker who “knowingly possesses” a “false identification document” with the intent to use the document “to defraud the United States” has committed a crime punishable by a fine or imprisonment.<sup>92</sup> It might be argued that an unauthorized worker who intends to pay the taxes imposed on his income is not seeking to “defraud” the United States. Even if that were the case, a separate provision of the same statute

<sup>91</sup> [https://www.uscis.gov/system/files\\_force/files/form/i-9-paper-version.pdf](https://www.uscis.gov/system/files_force/files/form/i-9-paper-version.pdf), at 1.

<sup>92</sup> 18 U.S.C. § 1028(a)(4).

criminalizes the knowing transfer, possession, or use without lawful authority of “a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law.”<sup>93</sup> Unauthorized workers who use stolen names and SSNs to secure unlawful employment would almost certainly fall under the latter provision.

### C. Internal Revenue Code Section 6103

In the “Safe Harbor Rule” litigation described above, DHS simply announced by regulation that it would take account of “no-match” letters in the enforcement of immigration law, and the SSA simply notified “no-match” letter recipients of that policy. There was no direct sharing of employee or employer information between DHS and SSA.

Direct sharing with other agencies of information gleaned from Form W-2, Form 1040, and other tax returns is severely limited by Code section 6103. Section 6013(a) expressly bars the IRS from sharing “return information” (which includes any information found in a return) and “taxpayer return information” (which includes the taxpayer’s identity and other information about the person on whose behalf the return was filed) with other federal agencies for most non-tax enforcement purposes. The SSA takes the position that it is similarly barred<sup>94</sup> (a position that could be questioned since it receives the Forms W-2, not from the IRS, but directly from the employers for a purpose unrelated to federal income tax).

Procedures for IRS officers with respect to identify theft are spelt out in great detail in AM2017-004, a July 8, 2016 memorandum from the IRS Associate Chief Counsel for Procedures and Administration.<sup>95</sup> In general, for purposes of following section 6103(a), a tax return filed by

<sup>93</sup> 18 U.S.C. § 1028(a)(7).

<sup>94</sup> <https://www.ssa.gov/dataexchange/privacyinfo.html>.

<sup>95</sup> <https://www.irs.gov/pub/irsoia/am-2017-004.pdf>.

an unauthorized alien worker that attempts to disclose the worker's actual income is a "return" and the alien is a "taxpayer" even if the alien uses a false name or SSN.<sup>96</sup> Under this interpretation, the most severe limits on disclosing information to other agencies apply to such a taxpayer notwithstanding his illegal status under immigration laws.

#### D. Cooperation with USCIS

There are three potentially relevant exceptions to the general rule that the IRS may not disclose a taxpayer's identity to another federal agency for a non-tax matter.

First, Code section 6103(i)(3)(A) authorizes the IRS (and presumably the SSA if it is subject to that section) to share "return information" that may constitute evidence of non-tax criminal law violations to the head of the agency that enforces that law, but it may not disclose "taxpayer return information." For example, if a return indicated wrongdoing by a third party, the IRS arguably could notify the responsible agency, so long as it did not share details about the taxpayer, such as his name, address, or income. On the other hand, wrongdoing by the taxpayer, whether or not related to his tax liability, is ordinarily not reportable to the responsible agency under the section 6103(i)(3)(A) exception.

Second, Code section 6103(i)(3)(A)(ii) provides that, if the IRS possesses "return information" other than "tax return information" that may constitute evidence of wrongdoing for which another agency is responsible, it may disclose the taxpayer's "identity" to the other agency. Section 6103(b)(2) defines "return information" very broadly to include information collected by the IRS in determining the possible existence of a tax offense, which arguably includes information collected in the "no-match" program. Given that less than 12 percent of employees with mismatches are found to be "authorized" to work,<sup>97</sup> the IRS might reasonably conclude that the

<sup>96</sup> *Id.* at p. 6.

<sup>97</sup> <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance>.

refusal of an employer or employee to cooperate with a “no-match” letter was evidence of a criminal violation of the immigration law by the employer and/or the employee, permitting disclosure of the “identity” of the noncooperating party to USCIS.

Third, Code section 6103(k)(6) grants the IRS broad authority to share taxpayer information with other persons as needed to enforce the tax laws, but “only in such situations and under such conditions as the Secretary [of the Treasury] may prescribe by regulation.” The Treasury has prescribed such regulations,<sup>98</sup> which expressly authorize a sharing of “taxpayer information” that an IRS agent “based on the facts and circumstances, at the time of the disclosure, reasonably believes is necessary [defined as “appropriate or helpful”] to obtain information,”<sup>99</sup> provided that “the information is not otherwise reasonably available.”<sup>100</sup> Significantly, one of the examples of “information not otherwise reasonably available” is information that is unavailable because of a “taxpayer’s refusal to cooperate.”<sup>101</sup> If an employee fails to cooperate with the SSA after receiving a “no-match” letter, then, under authority of section 6103(k)(6), the IRS appears authorized to share information about the taxpayer, such as his purported name and address and the identity of the employer, with other federal agencies such as USCIS as needed to ascertain the true identity of the individual who completed the Form W-2.

#### E. “Mass Deportations”

Assuming that an effective program for preventing long-term stays by visa-stayers and newly entering illegal immigrants were put in place, would “mass deportations,” as some have alleged or assumed, be needed to bring about the departure of the 11 million believed to be living here already? In the “Backgrounder” cited at the outset of this section, the author of this paper

<sup>98</sup> Treas. Reg. § 301.6103(k)(6).

<sup>99</sup> Treas. Reg. § 301.6103(k)(6)-1(c)(1).

<sup>100</sup> Treas. Reg. § 301.6103(k)(6)-1(a)(2).

<sup>101</sup> Treas. Reg. § 301.6103(k)(6)-1(c)(3): *Example 1*.

pointed out that during the eight years of the Obama Administration, over 3.1 million aliens were deported and approximately 3.6 million returned home voluntarily, indicating that approximately 4.2 million of the 11 million unauthorized aliens estimated to be living here when President Obama took office remained behind at the end of his second term.<sup>102</sup> Since it has been estimated that 78% of the illegally present alien population are in the labor force<sup>103</sup> (the rest mostly being the U.S.-based alien dependents of unauthorized workers and unauthorized immigrants temporarily out of a job), we may further estimate that approximately 3.3 million of the 4.3 million “remainers” were gainfully employed but unauthorized workers.

As pointed out above, the SSA’s “no-match” program is exposing approximately 490,000 unauthorized workers on an annual basis. Assume for argument’s sake that a combination of mandatory E-Verify and the Trump Administration’s new “no-match” program, supplemented as suggested in this paper, succeeded in minimizing illegal immigration and illegal visa overstays. If there then occurred a rate of deportations and voluntary departures comparable to the rate under the Obama Administration, the denial of employment opportunity to 490,000 of the 3.3 million unauthorized “remainers” each year, resulting in their voluntary departures, would theoretically reduce the unauthorized alien population to nearly zero in seven years, without any substantial increase in the Obama-era deportation rate.

The author of this paper understands that predicting future immigration numbers, let alone the effectiveness of any government program, is a perilous undertaking. Nevertheless, the foregoing hypothetical calculations should give pause to those who predict that only a broad-based legalization program will avoid the need for “mass deportations.” At the least, they should offer

<sup>102</sup> <https://cis.org/Report/Mass-Deportations-vs-Mass-Legalization-False-Choice>, pp. 2-3.

<sup>103</sup> <https://www.pewresearch.org/hispanic/2018/11/27/unauthorized-immigrant-workforce-is-smaller-but-with-more-women/>.

up persuasive, alternative calculations of how many unlawfully present aliens would actually need to be deported if effective barriers to new illegal immigration were erected.