INS Enforcement of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation Period

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The Immigration and Nationality Act of 1952 (INA)\textsuperscript{1} forms the foundation of United States immigration policy.\textsuperscript{2} Intermittent amendments to the INA reflect changes in that policy.\textsuperscript{3} The Immigration Reform and Control Act of 1986 (the Act)\textsuperscript{4} makes broad changes in the INA.\textsuperscript{5} Among these amendments, one stands out as the most significant due to the sheer breadth of its reach. This provision makes it illegal for any employer to knowingly hire, or continue to employ, any alien the employer knows is not authorized to work in the United States.\textsuperscript{6} An employer who violates the prohibition is

\begin{itemize}
  \item [5.] The major amendments to the INA made by the IRCA add provisions to INA rather than change the existing language. IRCA, § 101(a) (adding new § 274A); \textit{id.} § 102(a) (adding new § 274B); \textit{id.} § 201(a) (adding new § 245A).
  \item [6.] 8 U.S.C. § 1324a(a) (Supp. IV 1986). The statute provides in relevant part:
    \begin{itemize}
      \item [(a)] making employment of unauthorized aliens unlawful
        \begin{itemize}
          \item [(1)] In general
            It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States—
            \begin{itemize}
              \item [(A)] an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or
              \item [(B)] an individual without complying with the requirements of subsection (b) of this section.
            \end{itemize}
          \end{itemize}
        \end{itemize}
      \item [(2)] Continuing employment
        It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.
    \end{itemize}
\end{itemize}
subject to civil and criminal penalties. The Act requires employers to verify the work authorization documents of all prospective employees, whether they appear to be United States citizens or not. The Act therefore affects not only employers, but all potential employees. Collectively, these provisions are known as "employer sanctions."

Since the predecessor of the current version of the employer sanctions was proposed in the early 1970's, employer sanctions have remained controversial. Congressional debate focused on the burdens the Act might impose on employers and the potential for discrimination against Hispanics and other minorities. Congress took several steps to alleviate these concerns. To give employers time to adjust to sanctions, Congress created a transition pe-

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Id.

The vocabulary of immigration issues often creates confusion for those unfamiliar with the topic. Terms such as "illegal alien" and "undocumented immigrants" frequently appear in the literature and discussions surrounding immigration questions, but are rarely defined. Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 226 (1985) (statement of Dr. Jeffrey S. Passel, Chief, Population and Analysis Staff, Bureau of the Census) [hereinafter 1985 House Immigration Hearings]. To maintain consistency with the statute, this Note refers only to unauthorized aliens.


8. Id. § 1324a(f).
9. Id. § 1324a(a)(1), (b). The Act does not, however, require verification of persons hired before November 6, 1986. Id. § 1324(a) note. Although fines cannot be imposed until after May 31, 1987, see infra notes 74-75 and accompanying text, employers are still liable for failing to verify employees hired after Nov. 6, 1986 and continuously employed beyond May 31, 1987. Control of Employment of Aliens, 52 Fed. Reg. 16,221 (1987) (to be codified at 8 C.F.R. § 274a.2(A)).
period of eighteen months, which is divided into an educational period of six months and a citation period of twelve months. To alleviate fear of discrimination, Congress included strict antidiscrimination measures in the legislation. As enforcement gets underway, the procedures adopted by the Immigration and Naturalization Service (INS) during the citation period appear to impose a greater burden on employers than would have resulted from immediate enforcement. Moreover, these procedures will increase the already significant pressure on employers to fire or avoid hiring individuals with questionable documentation.

This Note explains the enforcement provisions of the Immigration Reform and Control Act of 1986 and the impact of the citation period on those provisions. It then analyzes the enforcement practices of the INS during the citation period in light of the congressional intent. This analysis demonstrates that current enforcement policy conflicts with the policy established by Congress. The Note then explores the effects of this conflict and concludes that the INS approach undermines the purposes of the legislation and the effectiveness of employer sanctions as a means of controlling illegal immigration.

I. SANCTIONS IN THE STATUTE: PROHIBITING THE KNOWING EMPLOYMENT OF UNAUTHORIZED WORKERS

A. The Underlying Policy: Gaining Control of the Border

The impetus for immigration reform began to build in the 1960's as Congress reacted to the steady increase in illegal immigration. At that time, reform proponents based their arguments primarily on findings that unauthorized workers adversely affected the United States labor market. Additionally, the House Judiciary Committee informed Congress, on admittedly thin evidence, that unauthorized workers increased the cost of public assist-

14. Id. § 1324b.
15. The Immigration and Naturalization Service (INS) enforces the employer sanctions provisions of the Act, see id. § 1324a(e)(2), and other immigration laws under the authority of the Attorney General. 8 U.S.C. § 1103 (1982).
16. See infra notes 114-27 and accompanying text.
17. See infra notes 151-59 and accompanying text.
19. See id. at 7; see also 119 CONG. REC. 14,180 (1973) (statement of Rep. Matasunaga) ("The proposed legislation is designed to cope with the growing problem of job competition created by illegal aliens."). Some Congressmen, though opposed to sanctions as a solution, perceived a serious problem. See id. (statement of Rep. Latta) ("[S]ince [the end of the bracero program] we have had nothing but wetback trouble, and I say this bill is an after-the-fact attempt to solve the problem.").
ance programs. As a solution to these problems, Congress viewed employer sanctions as an alternative to increasing border control activities, which it considered both ineffective and increasingly expensive.

During the 1970's and 1980's, the rate of illegal immigration rose steadily, adding to the public and legislative perception that the illegal immigration problem had reached crisis proportions. During this period, the rhetoric of the debates began to change. While job displacement and other factors cited in earlier years were still mentioned, immigration reform, and particularly control of the borders, became a goal in its own right, and employer sanctions remained the primary legislative vehicle for achieving that goal.

Employer sanctions proposals invariably met opposition on the grounds that they would cause discrimination against Hispanics and other minorities. Opponents raised the discrimination argument when sanctions were first proposed and continued to raise it throughout the debates on the bill that became the Immigration Reform and Control Act. Critics of sanctions, both in and out of Congress, feared that overly cautious employers would use race or foreign appearance as a shorthand means of identifying unauthorized workers.

20. H.R. REP. No. 108, supra note 18, at 7-8. The committee acknowledged that its conclusions were based on "a smattering of statistics and educated guesses." Id. at 7.
21. Id. at 6.
22. INS border apprehensions of aliens, which are used to measure the rate of illegal immigration, rose from 800,000 in fiscal year 1975 to over 1,300,000 in fiscal year 1985. H.R. REP. NO. 682, supra note 6, at 48, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5652.
24. See supra notes 19-20 and accompanying text.
25. See 1985 House Immigration Hearings, supra note 6, at 158-59 (testimony of Althea T.L. Simmons, Director, Washington Bureau, National Association for the Advancement of Colored People) (arguing that illegal aliens displace blacks in jobs at the lower end of the economic spectrum).
In response to these concerns, Congress included explicit antidiscrimination measures\textsuperscript{32} in the Immigration Reform and Control Act.\textsuperscript{33} The most significant of these provisions prohibits discrimination based on national origin or citizenship status as an unfair immigration-related employment practice.\textsuperscript{34} The result is a statute that couples sanctions with antidiscrimination measures, thereby balancing the values of law enforcement against the values of civil rights.\textsuperscript{35} Examination of the Act shows the competing nature of these values and the difficulty of balancing them.

\textbf{B. The Theory of Sanctions: Reducing the Incentive to Cross the Border}

The Immigration Reform and Control Act attempts to curb illegal immigration by withdrawing the magnet of economic opportunity that pulls aliens to the United States.\textsuperscript{36} The Act attempts to accomplish this by prohibiting employers from hiring aliens whom the employer knows are not authorized to work in the United States.\textsuperscript{37} Sanctions, Congress reasoned, will reduce the employers' incentive to hire illegal aliens and thereby limit the availability of employment for unauthorized aliens.\textsuperscript{38} As the incentive to employ unauthorized aliens decreases, so presumably does the incentive for unauthorized aliens to seek employment in the United States.\textsuperscript{39} Congress postulated that unauthorized aliens currently in the United States would be encouraged to depart and those that might normally come would be en-

\begin{itemize}
\item[31.] \textit{See} 1985 \textit{House Immigration Hearings, supra} note 6, at 134 (testimony of Joseph M. Trevino, Executive Director, League of United Latin American Citizens).
\item[32.] 8 U.S.C. § 1324b (Supp. IV 1986).
\item[34.] 8 U.S.C. § 1324b(a) (Supp. IV 1986).
\item[37.] 8 U.S.C. § 1324a(a) (Supp. IV 1986).
\end{itemize}
couraged to remain at home. Accordingly, Congress fashioned an enforcement mechanism that reaches employers as well as aliens.

To be effective, the Act must, and does, apply to all employers, regardless of whether such an employer is a business entity or a private individual. It also covers those who recruit or refer employees for a fee. The Act does not cover employees considered “casual hires,” but this exception encompasses only one specific situation. Similarly, the major sanctions provisions do not apply fully to seasonal agricultural employers, but only because the Act contains special provisions for such workers.

C. The Statutory Enforcement Mechanism: Four Plateaus of Punishment

The Immigration Reform and Control Act’s sanctions provisions penalize employers for two different types of action. The first is the knowing hire of unauthorized aliens. This offense takes two forms. Employers are liable if they either knowingly hire an alien not authorized to work at the time of the hire or continue to employ an alien who becomes unauthorized by virtue of

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40. See id. at 46, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5650.
42. Id. As applied to recruiters and referrers for a fee, the sanctions provisions of the statute present several practical enforcement difficulties. See Immigration Reform Act: Phase II—Regulations: Oversight Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 59-62 (1987) [hereinafter Oversight II] (statements of Reps. Frank, Mazzoli, Swindall, and INS Commissioner Nelson). These practical problems are beyond the scope of this Note.
43. The legislative history explains the exception. H.R. REP. NO. 682, supra note 6, at 57, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5561. The House Judiciary Report Committee defines “casual hires” rather loosely as “those that do not involve the existence of an employer/employee relationship.” Id., reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5561. The INS has defined casual hires as the hiring of those who “provide domestic service in a private home that is sporadic, irregular or intermittent.” 52 Fed. Reg. 16,221 (1987) (to be codified at 8 C.F.R. § 274a.1(h)).
44. 8 U.S.C. § 1324a(i)(3) (Supp. IV 1986).

Definition of unauthorized alien. As used in this section, the term “unauthorized alien” means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

Id. § 1324a(h)(3).
47. Id. § 1324a(a)(1)(A).
a change in his or her immigration status, if the employer is aware of the change in status.48

Employers violating the employment prohibitions are subject to a series of three increasingly severe civil penalties.49 A cease and desist order requiring the employer to discontinue the prohibited practice accompanies each tier of penalties.50 A first offense carries a fine no lower than $250 and no higher than $2000 for each unauthorized alien hired.51 Second tier fines begin at $2000 per alien and are capped at $5000.52 The third tier of fines, which applies to a third offense, runs from $3000 to $10,000 per unauthorized employee.53

Repeated, extensive violations of the prohibition also expose the employer to criminal liability.54 Criminal sanctions only apply to pattern or practice violations.55 The maximum criminal penalty is a fine of not more than $3000 and a prison term of not more than six months for each unauthorized alien.56 An employer, however, need not have tallied the full complement of civil violations before becoming liable for criminal violations.57

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48. Id. § 1324a(a)(2).
49. Id. § 1324a(e)(4)(A)(i)-(iii).
50. Id. § 1324a(e)(4)(A).
51. Id. § 1324a(e)(4)(A)(i). The Act establishes penalties on the basis of numbers of aliens employed. Id. Violations, however, are counted on a per incident basis. A first violation may consist of illegally hiring several aliens, and a second violation may consist of illegally hiring a single alien. H.R. Rep. No. 682, supra note 6, at 60, reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5664. In cases involving large business organizations, the tabulation of violations can become quite complex. See id., reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5664.
53. Id. § 1324a(e)(4)(iii).
54. Id. § 1324a(f).
ney General may also seek to enjoin pattern and practice violations. 58

The second offense created by section 1324a is failing to verify the work authorization of prospective employees in accordance with subsection (b) of section 1324a. 59 Known as the paperwork requirement, this provision requires the employer to fill out a form provided by the INS. 60 On the form, employers must affirm, under penalty of perjury, that they have examined the documents verifying an employee's work authorization. 61 Both the employer and the employee must sign the form to indicate compliance with the law's requirements. 62

Employers must keep the form on file for a set period of time 63 and allow the INS or Department of Labor 64 to inspect the form upon reasonable notice. 65 As with the hiring prohibition, violation of the paperwork require-

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59 Id. § 1324a(b)(1)(B).
60 INS Form I-9, reprinted in Oversight II, supra note 42, at 52-53.
61 8 U.S.C. § 1324a(b)(1)(A) (Supp. IV 1986). The statute divides the documents employers must examine to verify employees' work authorization into three categories. Id. § 1324a(b)(1)(B)-(D). The first category of documents establishes both the employee's identity and work authorization. Id. § 1324a(b)(1)(B). Standing alone, these documents are sufficient to establish work authorization. Id. § 1324a(b)(1)(A)(i). Documents in the second and third categories serve as evidence of the employee's authorization to work, id. § 1324a(b)(1)(C), and proof of the employee's identity. Id. § 1324a(b)(1)(D). The employer must examine these documents in conjunction with one another. Id. § 1324a(b)(1)(A)(ii). Thus, an employer who examines a social security card, which establishes authorization, and a driver's license with a photograph, which establishes identity, fulfills his obligation to verify the authorization of the employee. Id. § 1324a(b)(1)(A). The employer who has examined the requisite documentation need not require the employee to provide any further proof of authorization, so long as the proffered documentation reasonably appears to be genuine. Id. Congress intended the "reasonable man" standard to apply to the employer's acceptance of documentation. H.R. REP. NO. 682, supra note 6, at 62, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5666.

The regulations issued pursuant to this provision contain a more complete list of acceptable documentation. 52 Fed. Reg. 16,222 (1987) (to be codified at 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C)).
63 Id. § 1324a(b)(3). The time period varies with the circumstances of the hiring situation. Recruiters and referrers for a fee must keep the form on file for a period of three years from the date of the recruitment or referral. Id. § 1324a(b)(3)(A). Direct employers must keep the form for either three years, or until one year after the employee ceases work, whichever is later. Id. § 1324a(b)(3)(B).
64 The Department of Labor's role in the enforcement of employer sanctions extends only to the inspection of verification documents and does not include enforcement as such. See Oversight II, supra note 42, at 2-3. The Department's investigations are incorporated into its existing compliance activities under other statutes. Id.
65 8 U.S.C. § 1324a(b)(3) (Supp. IV 1986). Under the regulations, the INS must provide...
ment subjects the employer to civil penalties. The penalties for paperwork violations, ranging from a minimum fine of $100 to a maximum of $1000, are not as severe as those for hiring violations.

D. Employer Defenses: Good Faith and Reasonably Genuine Documents

Along with creating offenses subjecting employers to liability, Congress created a defense for employers to raise. The good faith defense established under section 1324a(a)(3) allows the employer to establish an affirmative defense to charges of violating the hiring prohibition by demonstrating compliance with the paperwork requirement. Under the paperwork provision, an employer need only attest that the documents reasonably appeared to be valid. This relieves the employer of the burden of becoming an expert in forged documents in order to avoid liability under the Act. The good faith presumption is rebuttable by evidence that the documents did not reasonably appear to be facially valid, that the employer and employee colluded to avoid the requirements of the Act, or that the verification procedure was a sham.

E. Antidiscrimination Provisions: Controlling the Side Effects of Sanctions

The Immigration Reform and Control Act includes provisions designed to minimize the possibility that sanctions will result in discrimination against Hispanics and other minorities applying for jobs. This provision establishes discrimination based on citizenship, citizenship status, or national origin as an unfair immigration-related employment practice. The employer at least three days notice of an impending inspection of the verification forms. 52 Fed. Reg. 16,223 (1987) (to be codified at 8 C.F.R. § 274a.2(b)(2)(ii)).

67. Id. There is no tiered penalty structure for paperwork violations. Rather, Congress left the size of the penalty to the Attorney General's discretion, to be determined based on the facts of the given case. Id. The Act directs the Attorney General to weigh several factors in determining the penalty, including the size of the employer, the employer's good faith, and whether the individual employee with respect to whom the violation occurred was in fact an unauthorized alien. Id.
68. Id. § 1324a(b)(1) (Supp. IV 1986).
antidiscrimination provisions also establish an Office of Special Counsel within the Justice Department with responsibility for investigating discrimination complaints and enforcing the antidiscrimination provisions.  

The system created by Congress attempts to balance the needs of the government, employers, and employees in trying to solve the growing illegal immigration problem. If Congress had created the system without further embellishment, employer sanctions would not differ noticeably from other statutes authorizing penalties for prohibited behavior. Congress, however, added a complication to the enforcement procedures. That complication, and the enforcement policy adopted under it by the INS, threaten the efficacy of early enforcement efforts under the Act.

II. CitaTions Under the Statute: Adding an Adjustment Period and Confusing Enforcement

Rather than making employer sanctions effective immediately, Congress created two intermediate stages of enforcement applicable before the sanctions become fully operational.  The first is a six month educational period, which expired on May 31, 1987.  The second is the citation period, which ran from June 1, 1987 through May 31, 1988.  During the second phase,


73. 8 U.S.C. § 1324a(i)(2) (Supp. IV 1986).

74. Id. § 1324a(i)(1). During the purely educational period, the Act required the Department of Justice, along with other departments, to wage a public information campaign explaining the existence and requirements of the new law. Id. § 1324a(i)(1)(A). For a list of the activities undertaken during the campaign, see Oversight II, supra note 42, at 135-37. The Act specifically prohibited any enforcement action during the educational period. 8 U.S.C. § 1324a(i)(1)(B) (Supp. IV 1986).

75. Section 1324a(i)(2) provides:

(2) 12-month first citation period.

In the case of a person or entity, in the first instance in which the Attorney General has reason to believe that the person or entity may have violated subsection (a) of this section during the subsequent 12-month period, the Attorney General shall provide a citation to the person or entity indicating that such a violation or violations may have occurred and shall not conduct any proceeding, nor issue any order, under this section on the basis of such alleged violation or violations.

Id.
the Act required the Attorney General to issue a citation, or written warning, to employers who may have violated the hiring prohibitions. Under the statute, no fines or penalties attached to a first violation during the citation period. Employers were subject, however, to penalties for a second violation during the citation period. Such a second violation was treated as if it were a first violation in the strict enforcement period. Thus, the citation was a hybrid between an educational device and an enforcement tool.

The interposition of the citation period between the purely educational period and the strict enforcement period raises the question of what purpose Congress intended citations to serve. While the congressional intent is not wholly clear, close examination of the statute and its legislative history indicates that Congress intended citations to serve a largely educational function. The INS, however, used the citation as an enforcement tool. A thorough analysis of how INS used the citation, as compared to the intent of Congress in creating it, leads to the conclusion that the INS enforcement policy could undermine the effectiveness of employer sanctions in preventing illegal immigration and could conceivably trigger the Act's sunset provisions.

III. INS Policy During the Citation Period: Immediate Enforcement

As it relates to initiating investigations, INS enforcement during the citation period followed the path marked by Congress. As a first step, the INS received a complaint that a given employer was hiring or employing undocu-

76. Id.
77. Id.
79. H.R. Rep. No. 682, supra note 6, at 58, reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5662. Thus, first tier penalties, supra notes 49-51 and accompanying text, are applicable to a second violation in the citation period.
80. See infra notes 99-106 and accompanying text.
81. The INS does this in two ways. First, it uses the citation as evidence of a violation of the prohibition against continuing to employ an unauthorized alien established under 8 U.S.C. § 1324a(a)(2) (Supp. IV 1986). See infra notes 93-98 and accompanying text. Perhaps more seriously, the INS also uses the citation as a de facto cease and desist order. See infra notes 110-17 and accompanying text.
82. The statute calls for the Comptroller General of General Accounting Office (GAO) to submit annual reports to Congress on the Act's effectiveness. 8 U.S.C. § 1324a(j)(1)(A) (Supp. IV 1986). The GAO reports will include a determination as to whether the implementation of the Act has resulted in a pattern of discrimination. Id. § 1324a(j)(2). If GAO determines that employer sanctions have caused discrimination, Congress may terminate the sanctions provisions by passing a joint resolution under expedited procedures. Id. § 1324a(j)-(n).
mented aliens. Alternatively, the INS investigated violations on its own initiative. If, on the evidence available, the INS determined that a violation had occurred, it issued a citation to the employer. If a subsequent investigation revealed further violations, the employer was subject to the penalties that apply to a first tier violation. While judicial review of citations is not available, the statute calls for both judicial and administrative review of fines. In accordance with the requirements of the Act, the regulations establish the procedures for initiating administrative review of fines.

Congress also expected the INS to provide administrative review of citations. The INS, however, provides no such review. This single step marks a critical divergence from the congressional intent underlying citations. Without administrative review, the employer has no opportunity to challenge the citation unless and until the INS attempts to impose fines for the alleged violation. This allows the INS to use the citation as both evidence of a knowing violation and as a de facto cease and desist order. These practices accelerate the strict enforcement of sanctions into the citation period without the benefit of the procedural restraints Congress placed on the INS.

84. 52 Fed. Reg. 16,225 (1987) (to be codified at 8 C.F.R. § 274a.9(b)).
85. One of the problems with enforcement during the citation period was that the INS has not yet produced guidelines as to what standard it uses to determine whether evidence of a violation is reasonably valid. Congress expected the Attorney General to issue such guidelines, complete with examples. H.R. Rep. No. 682, supra note 6, at 58, reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5662. As a result, employers have less guidance than Congress intended in determining what evidence might be used against them.
86. 52 Fed. Reg. 16,225 (1987) (to be codified at 8 C.F.R. § 274a.9(c)). The language of the regulations differs from that of the statute, 8 U.S.C. § 1324a(i)(2) (Supp. IV 1986), in that the statute uses the phrase “may have violated,” id., while the INS regulations use “has violated.” 52 Fed. Reg. 16,225 (1987) (to be codified at 8 C.F.R. § 274a.9(c)). The distinction is significant. Under the congressional language, a citation can be issued where a practice is questionable, but not plainly a violation; this suggests the intent that citations serve primarily as notice of the existence of the law or of a violation. The regulatory focus on an absolute finding that a violation has occurred indicates INS intention to begin strict enforcement immediately.
87. Penalties for a first tier violation range from $250 to $2000 per unauthorized worker. Supra note 51 and accompanying text.
89. 8 U.S.C. § 1324a(e)(3), (6), (7) (Supp. IV 1986).
90. 52 Fed. Reg. 16,225 (1987) (to be codified at 8 C.F.R. § 274a.9(d)).
92. The form on which the INS issues citations declares that no review is available to the employer so cited. INS Form I-762.
A. Citations as Evidence of a Knowing Violation

There are two elements of the offense of knowingly employing an unauthorized worker. First, the employer must have hired or continued to employ an unauthorized worker. Second, the employer must have done so knowing that the employee was not authorized to work. The INS enforcement policy transforms the citation into evidence of the second element of the offense under the following scenario.

When, after having issued a citation to an employer, the INS alleges that the employer has violated the knowing employment prohibition, the process of assessing fines is begun by the issuance to the employer of a Notice of Intent to Fine. At this point, the Act entitles the employer to raise the good faith defense. The INS attempts to negate that defense by fining the employer for continuing to employ those aliens with respect to whom the employer received a citation. Under the INS practice, the employer can be said to have known of the employee's unauthorized status from the time the INS issued the citation. If courts accept this view, the INS can complete its case against an employer by demonstrating that the named employee or employees were not in fact authorized to work in the United States. While there is some superficial logic to the INS position, analysis of the statute and its legislative history demonstrates that Congress never intended the citation provisions to serve this purpose.

Section 1324a(i)(2) explicitly provides that the Attorney General shall not base any proceedings or orders on the allegations contained in a citation. If the citation is used as evidence of the violation, the proceedings are based on the citation, and therefore contrary to the plain meaning of the statutory language. Moreover, it is doubtful that Congress intended the continuing-to-employ violation to include the continued employment of an alien the INS has identified as unauthorized to work. That set of circumstances is addressed directly by the specific authorization to issue cease and desist orders. The continuing-to-employ language explicitly refers to aliens law-
fully hired, but subsequently rendered ineligible for employment due to a change in their immigration status. It covers nonimmigrant temporary workers and aliens, such as students, who are authorized to work incident to their primary reason for being admitted into the United States but whose authorization expires. Thus, the use of the continuing-to-employ provision to prosecute what is essentially a paragraph one violation requires considerable twisting of the statutory language.

This statutory reading is consistent with the legislative history. The House Judiciary Committee report that accompanied the legislation describes, in three paragraphs devoted to the citation period, the intended use of the citation: it notifies the employer of the existence of a federal law requiring the employer to refrain from hiring illegal aliens and informs the employer that further violations could result in the imposition of sanctions. These anticipated uses indicate that the citation period was not meant to be a part of the strict enforcement phase, but a part of the educational program. The juxtaposition of the educational and citation provisions, which appear in the same subsection, further supports the view that both provisions are meant to serve similar purposes.

This is not to suggest that a citation is wholly without significance in the enforcement program. Rather, it suggests that Congress did not intend for the citation to serve as evidence of a violation with regard to specific employees, but as evidence of the fact that specific employers knew of the law's existence and their responsibilities under it. Thus, the citation period, having served its educational role in reference to cited employers, ceases as far as those employers are concerned. In other words, receipt of the citation by an employer effectively ends the citation period as to that employer. This construction of the statute gives full effect to the Congressional intent.

102. Under those circumstances, the Act obligates the employer to discontinue the alien's employment. Id. § 1324a(a)(2). Subsection (2) states: "It is unlawful for a person or entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." Id. (emphasis added).


106. Cf. Bryant Dev. Assoc. v. Dagel, 166 Mont. 252, 258, 531 P.2d 1320, 1324 (1975) (the two sections' close proximity indicates a legislative intent that they be read together).


to have both a meaningful educational period and to prevent employers from receiving a free ride during the citation period.109

B. Citations as a De Facto Cease and Desist Order

The INS enforcement procedures have another, more serious impact beyond the use of citations as evidence of a continuing-to-employ violation. As now employed by the INS, the citation is a de facto cease and desist order, requiring the employer to correct alleged violations of the law or suffer further penalties.110 As these orders are not subject to either administrative or judicial review,111 they strip the employer of the good faith defense provided by the statute.112 They also deprive employees of the antidiscrimination protections which Congress enacted.113 This use of the citation seems clearly outside the scope of congressional intent.

1. Dismantling the Good Faith Defense

The form on which the INS issues citations states, in the final paragraph, that a Notice of Intent to Fine will be issued if the employer does not correct the listed violations prior to the agency's next visit.114 This seemingly simple statement requires employers cited for an unlawful hiring, as opposed to a paperwork violation,115 either to dismiss the employee or face a fine. The statement is effectively an INS order to the employer to cease and desist from employing a given individual or individuals.116 There is simply no other way for an employer to achieve compliance for a hiring violation.117

109. Read together, the educational and citation provisions serve the twin goals of voluntary compliance, id. at 56, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5660, and meaningful enforcement. Id. at 46-47, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5650-51.

110. INS Form I-762.

111. See supra notes 91-92 and accompanying text.


113. Id. § 1324b(a)(2).

114. INS Form I-762.

115. 8 U.S.C. § 1324a(b) (Supp. IV 1986). A paperwork violation can be corrected by filling out the proper forms.

116. Although not described as a cease and desist order, the citation operates in the same fashion as such orders. Compare INS Form I-762 with 12 U.S.C. § 1464(d)(2) (describing a cease and desist order under the Home Owner's Loan Act of 1933, 12 U.S.C. § 1464 (1982)).

117. If the employer could challenge the citation at the time he or she receives it, a factual defense could be raised based on the employee's status. See H.R. REP. NO. 682, supra note 6, at 57, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5661 (noting that even if employer chooses not to raise a good faith defense, the burden of proving a violation remains on the government). That is, the employer could argue that the employee was authorized to work and the INS erred in finding to the contrary. Without this opportunity to challenge the citation, the employer must abide by the INS' determination of the employee's status.
To the extent the individual employer acted in good faith in hiring the employee, this requirement has disturbing consequences for both employers and their current or potential employees. Understanding these consequences requires an examination of the mechanics of the verification program and the good faith defense. This examination strongly suggests that Congress did not intend to place the burden of discharging employees on the employer during the citation period.

Under the verification procedures outlined in the statute, as described in the House Judiciary Committee report, employers uncertain of a specific employee's documents are encouraged to hire the employee subject to verification of the employee's status. Congress included this provision to protect both employers and employees. The provision protects the employer by providing that employers may accept documents that reasonably appear to be facially genuine. The provision protects the employee by preventing the employer from requiring any more than the minimum documentation the statute mandates. In this way, Congress balanced the employer's concerns against the employee's concerns by minimizing the risk to both. The INS upsets the balance of the equation by using the citation to force employers to correct their alleged violations. Under this practice, the employer risks being fined; the employee risks being fired or simply not hired in the first place.

The verification system is the basis for the statutorily provided good faith defense. The statute imposes no liability on an employer who makes an honest attempt to verify the employee's documents. However, the INS, by using the citation as it does, virtually eliminates the defense by denying the employer the opportunity to raise it.

According to the citation form, citations are not reviewable. Moreover, should the employer retain the employee(s), with respect to whom the INS issued a citation, and challenge a subsequent fine, a successful good faith defense may not fully protect the employer. If a court were to accept the

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118. 8 U.S.C. § 1324a(b)(1), (2) (Supp. IV 1986).
120. Id. at 61, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5665.
121. Id. at 62, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5666.
123. Id. The assertion that the provision protects employees as well as employers was not universally accepted by critics of the sanctions provisions. See 1985 House Immigration Hearings, supra note 6, at 126 (testimony of Richard P. Fajardo, Acting Assoc. Counsel, Mexican American Legal and Educational Defense Fund).
124. 8 U.S.C. § 1324a(c) (Supp. IV 1986); see supra notes 68-69 and accompanying text.
126. INS Form I-762.
INS' use of the citation as evidence of continuing to employ an unauthorized worker,\textsuperscript{127} the employer would still be liable for that violation. Beyond its direct effect on employers, evisceration of the good faith defense has an adverse impact on both current and potential employees.

2. Promoting Discrimination

The assumption that government pressure on the employer will modify employer hiring practices is at the very core of the sanctions provisions.\textsuperscript{128} Congress expected sanctions to induce employers to stop employing unauthorized workers.\textsuperscript{129} A necessary adjunct to this intent is the possibility that the behavior, as modified, will take the form of refusing to hire Hispanics or other individuals who appear foreign.\textsuperscript{130} Congress recognized this possibility and took several steps to preclude it. Among those steps is the protection afforded to employers by the good faith defense.\textsuperscript{131} Other provisions more explicitly reach the issue of discrimination.\textsuperscript{132} If one accepts the basic premise that some discrimination is likely to result from the imposition of sanctions, then one must also accept the corollary that the INS enforcement program will result in an increase in discrimination. From the statute and the legislative history, it is clear that Congress intended to avoid this result, even at the risk of doing away with sanctions.

\hspace{1em} a. Congressional Determination to Prevent Discrimination

Throughout the debate on immigration reform, congressional opponents of the sanctions provisions expressed concern that these provisions would result in job discrimination, particularly against Hispanics, based on alienage or simply a foreign appearance.\textsuperscript{133} Interested commentators and political activists echoed these concerns.\textsuperscript{134} In response,\textsuperscript{135} Congress adopted several measures specifically designed to alleviate the perceived problem. The major

\begin{footnotes}
\item 127. See supra notes 93-98 and accompanying text.
\item 128. See supra notes 36-40 and accompanying text.
\item 129. Id.
\item 130. Critics of the sanctions plan expressed this precise fear. See supra notes 28-31 and accompanying text. Anecdotal evidence supports the critics' contentions. See 1985 House Immigration Hearings, supra note 6, at 138-47.
\item 131. See supra notes 68-69 and accompanying text.
\item 132. See infra notes 137-50 and accompanying text.
\item 134. See 1985 House Immigration Hearings, supra note 6, at 116 (statement of Raul
\end{footnotes}
provision establishes discrimination on the basis of citizenship status or national origin as an unfair immigration-related employment practice.\footnote{136}

The antidiscrimination provisions prohibit employers from discriminating against individuals on the basis of national origin\footnote{137} or citizenship status,\footnote{138} unless, of course, the individual lacks the authorization necessary to work in the United States.\footnote{139} The provisions create a Special Counsel within the Justice Department to investigate and prosecute immigration-related discrimination cases.\footnote{140} The provisions also authorize the issuance of orders requiring the employer to retain the names and addresses of all job applicants for up to three years,\footnote{141} reinstate employees with back pay,\footnote{142} and pay civil penalties up to $2000 for each individual discriminated against.\footnote{143} The legislation further authorizes private actions against employers if the Special Counsel does not file a complaint.\footnote{144} The statute's antidiscrimination provisions are tied explicitly to the sanctions by the termination clauses of those provisions.\footnote{145} Those clauses provide that the protections will expire if Congress terminates employer sanctions pursuant to section 1324a(f)\footnote{146} or if the Comptroller General determines that no discrimination results from employer sanctions, and Congress approves the report by joint resolution.\footnote{147} Passage of the antidiscrimination provisions reflects both a recognition that sanctions provide a potential for discrimination and a determination to preclude that result.

The statute's other provisions also reflect this determination. Under a so-called "soft" sunset procedure, Congress can eliminate the sanctions provi-
sions altogether, either through a vote following the General Accounting
Office report on discrimination called for in the statute,\textsuperscript{148} or through a fast
track mechanism set out in the statute.\textsuperscript{149} As Congress has the power to
repeal any law that it has the power to make, the Act’s sunset provision can
be interpreted as an almost symbolic gesture designed to reflect congress-
ional concern about the discrimination problem inherent in employer
sanctions.\textsuperscript{150}

\textbf{b. Undermining the Congressional Commitment}

Use of the citation as a cease and desist order does not comport with the
congressional commitment to prevent discrimination under the sanctions
provisions. This assertion is supported by comparing the procedural protec-
tions afforded under the statutory authorization of cease and desist orders
with the lack of protection under the INS procedures.

Under the statute, orders pursuant to a violation of the employment
prohibitions\textsuperscript{151} must include both a cease and desist order and a Notice of
Intent to Fine.\textsuperscript{152} The employer is entitled to a hearing before an adminis-
trative law judge before either becomes final\textsuperscript{153} in accordance with the notice
and hearing provisions of 5 U.S.C. § 554, which is part of the Administrative
Procedure Act.\textsuperscript{154} Judicial review of the administrative law judge’s final or-
der is also available.\textsuperscript{155} This system inextricably links the employer’s inter-
ests to those of the employee. In order to challenge the civil penalty
imposed, the employer must challenge the cease and desist order. To protect
his or her interest, the employer must challenge the finding that the em-
ployee is not authorized to work. Thus, it is in the employer’s best interest
to retain the employee until the process of appeal is completed.

In contrast, the enforcement system established by the INS divorces the
cease and desist order, through the use of the citation, from the application
of penalties.\textsuperscript{156} In doing so, this enforcement system eliminates the em-

\begin{itemize}
\item \textsuperscript{148} Id. § 1324a(j)(2).
\item \textsuperscript{149} Id. § 1324a(f). Subsections (m) and (n) provide expedited procedures for the consid-
eration of terminating employer sanctions in the House of Representatives and the Senate. Id.
§ 1324b(m), (n).
\item \textsuperscript{150} As one of the sponsors of the legislation pointed out, the Act’s antidiscrimination
provisions are unique in that they address potential future discrimination, rather than redress
Rodino).
\item \textsuperscript{151} 8 U.S.C. § 1324a(a)(1)(A), (2) (Supp. IV 1986).
\item \textsuperscript{152} Id. § 1324a(e)(4)(A).
\item \textsuperscript{153} Id. § 1324a(e)(3).
\item \textsuperscript{154} Id. § 1324a(e)(3)(B).
\item \textsuperscript{155} Id. § 1324a(e)(7).
\item \textsuperscript{156} See supra notes 110-27 and accompanying text.
\end{itemize}
ployer's incentive to challenge the order, making the employer's interest antithetical to that of the employee. Given no more information than that which appears on the face of the citation, the employer must decide whether to retain an employee named in a citation and await further action, in the form of a Notice of Intent to Fine, or discharge the employee. A rational employer, in the absence of a compelling reason to retain such an employee, might well choose to discharge the employee. It is precisely this result that Congress intended to prevent when it enacted the Immigration Reform and Control Act.

IV. Conclusion

Uncontrolled immigration, legal or illegal, presents real problems for the United States. The Immigration Reform and Control Act may diminish the impact of those problems through employer sanctions, which are a credible deterrent to illegal immigration. Congress, however, chose to temper the means of controlling illegal immigration with provisions designed to prevent discrimination. The Act thus balances the competing values of sovereignty, as expressed by the need to secure the nation's borders, and civil rights, as expressed by the determination not to sacrifice those rights for the sake of immigration law enforcement.

The INS enforcement policy frequently ignores not only the Act's underlying equilibrium of values, but the more specific congressional mandates as well. By accelerating strict enforcement without procedural safeguards for employers, the INS increases the pressure on employers to deny employment to individuals who are, or appear to be, aliens. This clearly is not what Congress intended. The INS should restructure its policy to realign it with congressional intent. Failure to do so could undermine the Act's effectiveness.

If the INS pursues its present course, the courts should, and probably will, invalidate INS enforcement actions as contrary to the congressional intent. As this occurs, undocumented aliens, and those who employ them, will perceive sanctions as unenforceable. On the political level, the INS policy bol-

157. In fact, the INS scheme precludes review, thereby eliminating the opportunity, as well as the incentive, to challenge a citation. See supra notes 126-27 and accompanying text.

158. The size of the citation form, which is only 8 1/2" x 11", precludes the possibility that the INS will offer extensive evidence of a violation. INS Form I-762.

159. Very little hard evidence of discrimination resulting from the sanctions provisions exists. In the first suit filed under the antidiscrimination provisions, however, the Special Counsel alleged that an employer kept two lists of applicants for pilot positions, one of citizens and another of noncitizens. Wash. Post, Jan. 19, 1988, at A13, col. 1. If the allegations are true, the situation suggests that at least some employers will try to avoid sanctions by avoiding or firing employees who are aliens, or who are thought to be aliens.
sters the arguments of the sanctions program’s critics. While congressional opponents of sanctions may lack the votes to implement the Act’s sunset procedures, any sign of retreat from the employer sanctions program will send a signal that sanctions are not to be a permanent part of United States immigration policy. In either case, current INS policy generates uncertainty and ongoing controversy, both of which undermine the Immigration Reform and Control Act’s deterrent effect.

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