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Aaron Schwabach†

INTRODUCTION

The employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA) impose fines on employers who hire undocumented aliens.¹ The provisions were enacted in an effort to discourage illegal immigration to the United States. The sanctions have succeeded in achieving this goal, at the cost of widespread employment discrimination against the millions of authorized workers in this country who appear or sound "foreign."

Section I of this article briefly discusses the employer sanctions provisions, as a background for an understanding of the discriminatory impact of sanctions.

A serious side effect of the employer sanctions provisions has been widespread discrimination against workers and job seekers who appear foreign, particularly Latinos and Asians. Section II of this article discusses the discrimination which resulted from employer sanctions. In

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particular, the third report of the General Accounting Office (GAO) on employer sanctions is discussed, because of its importance to the possible repeal of the sanctions provisions.

Section III of this article discusses possible cures for the discrimination problem. This article then concludes by examining the assumptions underlying employer sanctions and analyzing the merits of possible remedies for IRCA-related discrimination.

I. BACKGROUND

A. Legislative History of IRCA

The Immigration Reform and Control Act of 1986 (IRCA)\(^2\) is a patchwork of political compromises. The employer sanctions provisions were first introduced by then-House Judiciary Committee Chairman Peter Rodino (D-NJ) in 1972, fourteen years before they were finally enacted.\(^3\) In 1981, the Select Commission on Refugee Policy recommended employer sanctions in order to "demagnetize the magnet" which attracts undocumented workers to the United States.\(^4\)

Opponents of employer sanctions argued that sanctions would result in discrimination against foreign-appearing applicants, particularly those of Hispanic or Asian origin.\(^5\) In an attempt to allay fears of such discrimination, Congress enacted section 274B of the Immigration and Nationality Act (INA), 8 U.S.C. sec. 1324b, prohibiting discrimination against foreign-appearing individuals authorized to work in the United States, at the same time as the employer sanctions provisions.\(^6\) As an additional safeguard, IRCA contains a built-in review provision allowing Congress to terminate employer sanctions after three years if they result in widespread discrimination.\(^7\)

B. The Employer Sanctions Provisions of IRCA

Although the sanctions provisions are adequately discussed elsewhere,\(^8\) a brief description of the specific provisions and the mechan-

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2. 8 U.S.C. sec. 1151 et seq.
4. Id.
5. Id. at 31-32, 46-47.
7. 8 U.S.C. sec. 1324a(1).
8. See, e.g., MONTWIELER, supra note 3, at 31-45. The background of IRCA and problems encountered in implementing the employer sanctions provisions are discussed in a report published jointly by the RAND Corporation and the Urban Institute, M. FIX and P. HILL, ENFORCING EMPLOYER SANCTIONS: CHALLENGES AND STRATEGIES (1990). A bibliography listing legislative histories of IRCA can be found at Id. at 43 n. 1.
ics of their operation will aid in understanding sanctions-related discrimination.

1. Scope

The employer sanctions provisions of IRCA apply to all employers who employ workers in the United States, as well as persons or entities who recruit such workers or refer them for a fee. All government entities, as well as all private employers, regardless of size, are covered.

2. Content

The employer sanctions provisions of IRCA make it illegal for employers to knowingly hire, recruit, or refer for a fee persons unauthorized to work in the United States, or to continue to employ any person hired after the enactment of IRCA knowing that that person is unauthorized to work in the United States.

During a six-month “public information period” beginning on December 1, 1986, penalties were not enforced. During that period, the INS made a half-hearted effort to disseminate information on the sanctions provisions to employers. This effort generally took the form of mailing a “Handbook for Employers,” describing the requirements of IRCA.

During the year following the six-month public information period, employers were entitled to receive a warning citation for a first offense, rather than incurring a monetary penalty. Following this one-year grace-period, employers violating IRCA became subject to the statutorily prescribed penalties.

8 U.S.C. sec. 1324a(e)(4) [Section 274A(e)(4) of the INA] establishes the following schedule of penalties for violations of sections 1324a(a)(1)(A) and 1324a(a)(2):

First offense: Civil money penalty of $250 to $2,000 for each alien illegally employed.

Second offense: Civil money penalty of $2,000 to $5,000 for each alien illegally employed.

Third offense: Civil money penalty of $3,000 to $10,000 for each alien illegally employed.

Pattern of practice violations: Criminal penalties of up to six months imprisonment and/or a $3,000 fine.

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10. 8 U.S.C. sec. 1324a(2).
11. 8 U.S.C. sec. 1324a(i)(1).
12. The GAO report, infra note 42, at 87, found that the INS had carried out its educational duties “satisfactorily.”
13. 8 U.S.C. sec. 1324a(i)(2).
Although the intent of the law was to target enforcement against repeat violators,\textsuperscript{14} in practice nearly all sanctions imposed have been for first offenses.\textsuperscript{15} While this might seem to indicate that sanctions have been effective in deterring repeat violations, it is far more likely that the INS simply lacks the resources to check up on past offenders.

3. \textit{Verification Requirement}

In addition to penalizing the knowing employment of unauthorized aliens, IRCA requires employers to verify the eligibility for employment of all employees hired for employment in the United States after November 6, 1986.\textsuperscript{16} This requirement serves the dual purpose of preventing employers from arguing that they were unaware that an employee was unauthorized, and reducing the likelihood of discrimination by requiring inspection of the documents of all employees, not merely those of foreign appearance. The employer must complete an Employment Eligibility Verification Form (Form I-9) for each employee, and make the form available to the INS upon request.\textsuperscript{17} Every employee who is hired for employment in the United States after November 6, 1986, must attest, under penalty of perjury, that he or she is legally entitled to work in the United States. The employee must then present documents establishing his or her identity and right to work.\textsuperscript{18}

The employer is not required to become an expert in identifying forged documents. If that were the case, some employers might tend to scrutinize the documents of foreign-appearing applicants more closely than those of other applicants, or to require additional documentation from foreign-appearing applicants. In order to reduce the discriminatory impact of the verification requirement, IRCA provides that if the documents presented by an employee reasonably appear, on their face, to be genuine, the employer must accept them.\textsuperscript{19}

Employers must retain the Forms I-9 for three years after an individual is recruited, referred, or hired, or for one year after the individual's employment is terminated, whichever is later.\textsuperscript{20}

\begin{itemize}
  \item \textsuperscript{14} MONTWIELER, \textit{supra} note 3, at 34.
  \item \textsuperscript{15} Based on author's experience working at OCAHO for approximately one year.
  \item \textsuperscript{16} 8 U.S.C. sec. 1324a(1)(B); 8 U.S.C. sec. 1324a(b).
  \item \textsuperscript{17} 8 U.S.C. sec. 1324a(b).
  \item \textsuperscript{18} 8 U.S.C. sec. 1324a(b). The statute lists three types of documents: documents establishing identity, documents establishing right to work, and documents establishing both identity and right to work. The prospective employee must present either a document establishing both identity and right to work, such as a United States passport, or a document establishing identity (such as a state driver's license) \textit{and} a document establishing right to work (such as a United States birth certificate or an INS employment authorization form).
  \item \textsuperscript{19} 8 U.S.C. sec. 1324a(b)(1)(A).
  \item \textsuperscript{20} 8 U.S.C. sec. 1324a(b)(3).
\end{itemize}
EMPLOYER SANCTIONS AND DISCRIMINATION

a. Verification (Paperwork) Penalties

For each missing, incomplete, or improperly completed Form I-9, the employer is subject to a civil money penalty of $100 to $1,000. The statute specifies that in determining the amount of the penalty, "due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations."[22]

4. Procedure

The procedures used by INS Investigations and the Border Patrol to detect section 1324a violations, and the priority given to section 1324a enforcement, vary greatly from region to region. Some offices deal with employers through a regulatory investigative process aimed at detection of section 1324a violations. Others make sanctions an extension of the traditional INS "workplace survey" (the INS' euphemistic term for an immigration raid) process, apprehending undocumented aliens at their place of employment and then fining the employers. Some INS offices make employers the primary target of sanctions enforcement, while others use sanctions enforcement as a way to identify undocumented workers for deportation.

Following a determination by INS Investigations or Border Patrol agents that an employer has violated IRCA, the INS issues a Notice of Intent to Fine to the employer. The Notice itemizes the violations and states the fine to be imposed for each.

The employer may then, within 30 days of receipt of the Notice, request a hearing with the Attorney General, to be conducted before an administrative law judge. The administrative law judges hearing employer sanctions cases are nominally employed by the Office of the Chief Administrative Hearing Officer (OCAHO) of the Executive Office for Immigration Review (EOIR), a division of the Department of Justice. Most of the administrative law judges are actually full-time employees of other agencies, particularly the National Labor Relations Board, and hear OCAHO cases on a part-time basis.

22. Id.; see also 28 C.F.R. sec. 68.50(c)(2)(iv).
23. Fix AND Hill, supra note 8, at 85.
24. Id.
25. Id.
27. 8 C.F.R. sec. 274a9(d).
28. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, EMPLOYEE ORIENTATION HANDBOOK 2, 6-7 (no date).
OCAHO proceedings are governed by the Administrative Procedure Act\(^ {29}\) and OCAHO's own rules.\(^ {30}\) The administrative law judges encourage the parties to settle the case rather than go through a formal adjudicatory hearing. In most cases, the parties reach a settlement whereby the INS agrees to accept a reduced fine and, in the case of knowing hire violations,\(^ {31}\) the employer agrees to cease and desist from such violations.

The decision of the administrative law judge becomes final unless, within 30 days, it is modified or vacated by the Attorney General, in which case the Attorney General's decision becomes the final order.\(^ {32}\) The final order may then be appealed, within 45 days, to a U.S. Court of Appeals.\(^ {33}\)

5. Termination of Sanctions

Fears of widespread discrimination as a result of employer sanctions led to the inclusion of a termination provision in the employer sanctions provisions of IRCA.\(^ {34}\) The General Accounting Office (GAO) is required to compile an annual report for three years following the enactment of IRCA, investigating whether employer sanctions have resulted in a pattern of employment discrimination based on national origin.\(^ {35}\) Each report is to include a specific determination\(^ {36}\) and any GAO recommendations to remedy the situation.\(^ {37}\)

Each GAO report is to be reviewed by a joint task force, consisting of the Attorney General, the Chairman of the Commission on Civil Rights and the Chairman of the Equal Employment Opportunity Commission.\(^ {38}\) If the report contains a determination that employer sanctions have resulted in discrimination, the task force is to make legislative recommendations on the report to Congress.\(^ {39}\) The House and Senate Judiciary Committees are required to hold hearings on any report of the joint task force within 60 days after the receipt of such report.\(^ {40}\)

The employer sanctions termination provision of IRCA states that, if the third GAO report finds that a widespread pattern of discrimination

\(^{29}\) 5 U.S.C. sec. 1001 et seq.


\(^{34}\) 8 U.S.C. sec. 1324a(1)(1988).


\(^{36}\) 8 U.S.C. sec. 1324a(j)(2).


\(^{38}\) 8 U.S.C. sec. 1324a(k)(1).

\(^{39}\) 8 U.S.C. sec. 1324a(k)(2).

\(^{40}\) 8 U.S.C. sec. 1324a(k)(3).
has resulted from employer sanctions, and, if within 30 days of receipt of
the report, Congress approves the findings of the report by a joint resolu-
tion, the employer sanctions provisions will terminate.41

The third GAO report did, in fact, find that employer sanctions
have resulted in widespread discrimination.42 However, the thirty-day
period has long since elapsed. Although resolutions to approve the re-
port and thus repeal sanctions were introduced, none of them passed.43
The joint task force has met, but as of the time of this writing it has
issued no report.

C. Anti-Discrimination Provisions

Since the first employer sanctions legislation was introduced, Latino
organizations have argued that sanctions would result in discrimination,
as employers would be reluctant to risk sanctions by hiring foreign-ap-
pearing individuals.44 The requirement that the authorization docu-
ments of all new employees be inspected was deemed insufficient
protection, and INA section 274B was added.45

Section 1324b prohibits employers with four or more employees
from discriminating against individuals on the basis of national origin or
citizenship status.46 Protection under the citizenship clause is limited to
citizens and “intending citizens,” that is, aliens legally present in the
United States who “evidence an intent to become citizens.”47

Section 1324b establishes a Special Counsel for Immigration-Rel-
lated Unfair Employment Practices, to be appointed by the President
within the Department of Justice.48 An individual who believes that he
or she has been a victim of discrimination may file a complaint with the
Office of the Special Counsel (OSC) within 180 days of the alleged dis-
criminatory action.49 The Special Counsel is directed to investigate each
complaint within 120 days of its receipt. If the Special Counsel deter-
mines that there is reasonable cause to believe the complaint to be true,
he or she will then bring it before an OCAHO administrative law judge.50

41. 8 U.S.C. sec. 1324a(1).
42. UNITED STATES GENERAL ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER
43. See, e.g., H.J.Res. 534, H.J.Res. 536. H.J.Res. 534 survived, and at the time of this writing
has become the primary vehicle for total repeal of the employer sanctions provisions.
44. See, e.g., Fix and Hill, supra note 8, at 28-29, 32; Montwiler, supra note 3, at 31-32,
46-47.
45. 8 U.S.C. sec. 1324b.
46. 8 U.S.C. sec. 1324b(a)(1).
47. 8 U.S.C. sec. 1324b(a)(1)(B); 8 U.S.C. sec. 1324(a)(3) [definition of “citizen or intending
citizen”].
48. 8 U.S.C. sec. 1324b(c).
49. 8 U.S.C. sec. 1324b(d)(3).
50. 8 U.S.C. sec. 1324b(d)(1).
In cases alleging "knowing and intentional discriminatory activity or a pattern or practice" of discrimination, if the Special Counsel fails to file a complaint with OCAHO within 120 days, the person alleging discrimination may bring a private action before OCAHO.\(^{51}\)

Procedure before and appeals from OCAHO follow the same pattern as employer sanctions actions.\(^{52}\) If the administrative law judge adjudicates the matter after a hearing, he or she may award up to two years back pay, as well as a civil money penalty of up to $1,000 per individual discriminated against for first violations and up to $2,000 per individual for subsequent violations.\(^{53}\) Attorney's fees can be awarded, but only in cases where the losing party's suit was frivolous.\(^{54}\)

The anti-discrimination provisions of IRCA are linked to the employer sanctions provisions. If employer sanctions had been repealed by joint Congressional approval of the GAO report, such action would have simultaneously repealed the anti-discrimination provisions.\(^{55}\) Since section 1324b is intended to prevent only that discrimination which occurs as a result of fear of sanctions, passage of any measure to repeal sanctions will probably require a repeal of the anti-discrimination provisions as well.

II. DISCRIMINATORY IMPACT OF EMPLOYER SANCTIONS

The GAO report found that "there was widespread discrimination ... as a result of IRCA,"\(^{56}\) and surveys conducted by independent organizations have reached the same conclusion.\(^{57}\)

A. Hiring Audits

The GAO and several local organizations conducted hiring audits in which pairs of testers with closely matched job qualifications applied for the same jobs.

\(^{51}\) 8 U.S.C. sec. 1324b(d)(2).
\(^{52}\) See supra notes 28-32 and accompanying text.
\(^{54}\) 8 U.S.C. sec. 1324b(h).
\(^{55}\) 8 U.S.C. sec. 1324b(k)(1).
\(^{56}\) GAO report, supra note 42, at 3.
I. The GAO Audit

In the GAO audit, each pair consisted of one Hispanic tester and one white non-Hispanic tester ("Anglo"). All of the testers had one to five years of work experience plus at least one year of college, and all were fluent in spoken and written English. When applying for jobs, all of the testers stated that they were United States citizens.

The GAO audited the hiring practice of 360 employers in San Diego and Chicago. In each case, the testers applied for the same entry-level position. The audit showed a significant difference in the percentages of Hispanic and non-Hispanic testers at three levels of the job search process: (1) reaching the job application stage, (2) receiving a job interview, and (3) receiving a job offer.

Overall, the non-Hispanic testers encountered unfavorable treatment in eleven percent of the cases. In thirty-one percent, the Hispanic tester was treated unfavorably; in fifty-eight percent, there was no difference in the treatment accorded the two testers. The GAO took the eleven percent of cases in which the non-Hispanic testers encountered unfavorable treatment to be the percentage due to random factors, such as an employer's bad mood, rather than to systematic discrimination. Another possible explanation, overlooked by the GAO, is that some employers prefer to hire Latinos; however, the difference in the percentage of unfavorable treatment is the same, regardless of its cause.

Subtracting that eleven percent gives the result that, in twenty percent of all cases, the Hispanic tester encountered unfavorable treatment not attributable to random factors; the Hispanic tester was three times as likely as the non-Hispanic tester to encounter unfavorable treatment.

The non-Hispanic testers had relatively little advantage at the first stage in their hiring process; they were only five percent more likely to complete the job application phase. However, the non-Hispanic testers were 33 percent more likely to receive an interview, and 52 percent more likely to receive a job offer.

Even though the audit showed a widespread pattern of discrimination against Hispanic applicants, it is not clear that the discrimination resulted from fear of employer sanctions. Only five percent fewer His-

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58. GAO report, supra note 42, at 46.
59. Id. at 50.
60. Id. at 47.
61. Id. There was no statistically significant difference between the two cities in the level of unfavorable treatment encountered by the Hispanic tester, who encountered unfavorable treatment in Chicago 33 percent of the time and in San Diego 29 percent of the time. Id. at 48.
62. Id. at 48.
63. Id.
64. Id.
panic testers completed job applications, and all of them stated on the application that they were United States citizens. However, the percentage of unfavorable treatment encountered by the Hispanic testers rose sharply at the interview and job offer stages, suggesting that factors other than fear of sanctions exacerbated existing discrimination.

2. The New York Human Rights Commission Audit

A similar audit was conducted by the City of New York Commission on Human Rights in June, 1989. Pairs of matched testers of the same sex, with similar qualifications and backgrounds, called employers in response to randomly selected “Help Wanted” advertisements from the four New York City daily newspapers. One tester in each pair spoke English with a foreign accent; the other had no accent.

Eighty-six employers were audited. The testers asked each employer whether the position was open, whether the tester could come for an interview, and what papers the tester should bring. In all, forty-one percent of the employers audited treated the accented testers less favorably. Sixteen percent of the employers contacted told the accented tester that the position was filled and later told the unaccented tester that the position was still open. Twelve percent scheduled interviews only with unaccented testers, and thirteen percent required significantly different documents from accented testers than from unaccented testers.

3. The CHIRLA Audit

Between November 7 and December 19, 1989, the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) conducted a hiring audit similar to the New York audit. Each pair consisted of a tester who spoke English without a foreign accent, and one who spoke English with a “noticeable, but clear and understandable” Spanish accent. In each pair the accented tester was slightly more qualified than the unaccented

65. Id. at 49.
66. Id. at 48.
67. The GAO report, supra note 42, does not take this view; it holds that the discrimination revealed by the hiring audit resulted from IRCA.
69. GAO report, supra note 42, at 82.
70. Id.
71. Id.
72. Id. at 83.
73. CHIRLA preliminary report, supra note 57, at 3.
tester for the jobs sought.\textsuperscript{74}

The advertisements replied to were selected at random from newspapers in the Los Angeles area. In each case the unaccented tester called after the accented tester. This was done because the accented tester was often told that the job was filled; by having the unaccented tester call second, the tester could verify whether the position was, in fact, filled.\textsuperscript{75}

Out of 199 pairs of calls completed by the testers, the accented tester received less favorable treatment 31.7 percent of the time. In 20.1 percent of the calls, the unaccented tester was considered for the position while the accented tester was not. In 11.5 percent of the calls, the accented tester was treated less favorably in some other way.\textsuperscript{76} In 5.5 percent of the calls, the unaccented tester was treated less favorably.\textsuperscript{77}

**B. Other Research Methods**

Even if the hiring audits conducted by the GAO and other organizations cannot conclusively demonstrate that discrimination resulted from the employer sanctions provisions of IRCA, there is ample other evidence that IRCA caused discrimination.

The GAO employed five research methods in addition to the hiring audit. Three of these methods — an employer survey, a survey of job applicants, and analysis of complaints filed with the OSC — produced results supporting the GAO's conclusion that employer sanctions have resulted in widespread discrimination. Two other methods — “before and after IRCA” analyses of (1) job placement rates in state employment agencies and (2) discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) — did not detect a widespread pattern of discrimination. With these latter two methods, however, the GAO believes that various factors in the data masked the discrimination revealed by the other methods.\textsuperscript{78}

1. **Employer Survey**

In late April of 1989, the GAO mailed a questionnaire to 9,491 randomly selected employers. Those employers who did not respond were mailed a second questionnaire in June. In August, those employers who

\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 5. Note that these percentages do not add to the total (31.7 percent) because of overlap; some calls involved less favorable treatment for the accented tester in more than one category. Id. at 5, n. 7.

\textsuperscript{77} Id. at 5, n. 7; note that the unaccented caller was slightly less qualified than the accented caller. In addition, the possible causes of the unfavorable treatment received by the non-Hispanic tester in eleven percent of the cases in the GAO report (see note 62 and accompanying text) are equally applicable here.

\textsuperscript{78} GAO report, supra note 42, at 37.
had not yet responded were telephoned, and a third questionnaire was sent to those who agreed to respond.  

From the results, the GAO estimated that, of the population of 4.6 million employers from which the sample was drawn, 19 percent (891,000) began discriminatory practices because of IRCA.  

Ten percent (461,000) discriminated on the basis of an individual's foreign appearance or accent; this group reported hiring an estimated 2.9 million employees during 1988. Nine percent (430,000) discriminated solely on the basis of citizenship status; this group reported hiring an estimated 3.9 million employees during 1988.  

The percentage of employers who reported beginning one or more discriminatory practices in response to IRCA greatly exceeded the national average of 19 percent in two areas: Los Angeles (29 percent) and Texas (28 percent).  

An estimated five percent (227,000) of employers began a practice of not hiring persons who appeared foreign or had a foreign accent. Eight percent (346,000) reported that they applied IRCA's verification requirement only to foreign-looking or foreign-sounding individuals. Fourteen percent (666,000) began a practice of: (1) hiring only individuals born in the United States, or (2) not hiring persons with temporary work eligibility documents. In each category of discrimination, Los Angeles and/or Texas led the nation. The rate of discrimination in industries employing a high proportion of Latinos and Asians differed little from the rate in industries employing low or medium proportions of Latinos and Asians.  

Although the results clearly showed that employers began discriminatory practices as a result of IRCA, the survey provides no concrete information on the effect on Latino and Asian workers. However, among employers who stated that IRCA had caused them to begin hiring only U.S.-born persons, seventy-six percent had no Latino or Asian employees; among other employers, only 65 percent had no Latino or Asian employees. In areas with large Latino and Asian populations, the difference was even greater: 54 percent of employers hiring only U.S.-born

79. Id. at 27-28; an analysis of the questions as revealing certain types of discrimination (citizenship or national origin) is at Id. at 39; a detailed description of the survey results, including a copy of the questionnaire, can be found in Appendix III of the report, Id. at 115-22.

80. Id. at 38.

81. Id.

82. Id.

83. Id. at 40.

84. Id. at 41.

85. Id.

86. Id. at 43.

87. Id. at 41-43.

88. Id. at 44-45.
workers had no Latino or Asian employees, compared to 38 percent of other employers. Without information on the composition of the job applicant pool, however, the impact of the discrimination cannot be measured.

2. Survey of Job Applicants

In July and August, 1989, the GAO surveyed three hundred individuals who stated that they had applied for a job since January 1, 1989. One hundred and fifty of these persons had no foreign accent; all were U.S. citizens. The remaining one hundred and fifty had foreign accents. Of this second group of one hundred and fifty, one hundred and twenty-seven were temporary resident aliens, twenty-one were permanent resident aliens, one was a political asylee, and the immigration status of one was unknown. The persons surveyed were questioned only about the most recent job for which they had applied.

The GAO found that IRCA's verification requirements were applied unevenly. Of the one hundred and fifty foreign-sounding applicants, one hundred and forty-four (96 percent) reported that they were asked to show work authorization during the job application process, compared to sixty-six (44 percent) of the one hundred and fifty non-foreign-sounding applicants. The GAO concluded that, since the verification requirements did not exist before IRCA, uneven application of the requirement is a new form of discrimination resulting from IRCA.

However, the foreign-sounding applicants were more successful in actually obtaining jobs; one hundred and four (69 percent) received job offers, compared to sixty (40 percent) of the non-foreign-sounding applicants. The GAO attributed the disparity in part to the different sources from which the subjects were drawn. The foreign-sounding individuals were selected from organizations providing educational services to temporary resident aliens, while the persons with no foreign accent were selected from state employment agencies. The non-foreign sounding individuals were thus more likely to have had previous difficulty in obtaining a job.

3. Analysis of Discrimination Charges Filed with the OSC

Between the time of the enactment of IRCA and October 30, 1989, the OSC received seven hundred and eight charges of discrimination, at

89. Id. at 43-44.
90. Id. at 32. For detailed results and a copy of the questionnaire, see Id. at 151-53.
91. Id. at 153.
92. Id. at 51.
93. Id. at 154.
94. See Id. at 32.
least eighty-one of which were also filed with the EEOC.\textsuperscript{95} This number is absurdly low, considering the GAO's estimate that 861,000 employers began discriminatory practices during the same period. It reflects a failure on the part of the Justice Department to make the 1324b anti-discrimination process available to the public it is supposed to serve.

Of those seven hundred and eight charges, five hundred and eighteen have now been closed. In four hundred and thirty-five, the OSC determined that the charges were unfounded, filed too late, not within its jurisdiction, or that there was insufficient data to investigate the charge. In eighty-three cases, a settlement was reached; four of these settlements included civil monetary penalties against the employer.\textsuperscript{96}

Of the one hundred and ninety cases remaining open, the OSC stated that more information was needed in seventy-four. One hundred and five cases were under investigation, and complaints had been filed before an administrative law judge in eleven cases.\textsuperscript{97} Although relatively few of the many potential complainants filed complaints with the OSC, the number of charges is actually greater than the OSC initially expected to receive.\textsuperscript{98} Even the slight amount of action taken by the OSC indicates that it has found some discrimination to have resulted from IRCA.

The small number of complaints filed with the OSC is a result of several factors, including the nature of employment discrimination, the time and expense involved in administrative proceedings, and the obscurity of the OSC. Many victims of discrimination (such as job seekers who are told that a position has already been filled) may be unaware that they have been discriminated against. Even those who are aware of discrimination may be unaware of the existence of OSC. Those who realize that the OSC offers a remedy may lack the time, resources, or inclination to pursue a legal remedy.

4. \textit{Analysis of Job Placement Rates in State Employment Agencies Before and After IRCA}

The GAO examined the rates at which Latinos and other minorities found jobs through state employment agencies in Florida, Illinois, and Texas from 1982 to 1989 — before and after the passage of IRCA.\textsuperscript{99} There was no significant difference between the placement rates before and after the passage of IRCA.\textsuperscript{100}

\textsuperscript{95} Id. at 53.
\textsuperscript{96} Id. at 54.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 32-33.
\textsuperscript{100} Id. at 57.
The GAO attempted to explain the absence of any difference in pre- and post-IRCA placement rates by stating that employers who use state employment services expect to find a high percentage of minorities among those applicants, and thus may be less prone to discriminate.101 Another possibility, not mentioned by the GAO, is that employers rely on the screening processes of state employment agencies to ensure that job applicants referred by those agencies are authorized to work in the United States.

5. Analysis of Data on Discrimination Charges Filed With EEOC
Before and After IRCA

The EEOC provided the GAO with a list of one hundred and sixty-eight cases that the EEOC believed might be IRCA-related. As of September 15, 1989, the EEOC had closed one hundred and forty-six of these cases, fifty-eight of which (40 percent of the closed cases) had been settled.102

The number of IRCA-related complaints filed with the EEOC has generally declined during most quarters since the second quarter of 1987.103 The flow of national origin discrimination charges into the EEOC from 1979 to 1989 showed no significant increase following the passage of IRCA.104 However, the GAO did not consider the number of complaints filed with the EEOC to be a sensitive indicator of IRCA-caused discrimination. The GAO report expresses the opinion that the number of complaints filed with the EEOC depends on the job applicants' and employees' awareness of discrimination, and that it is unlikely that the passage of IRCA would have any effect on this awareness.105

C. Complaints Received by Immigrants' Rights Groups

Fourteen organizations collected data for the GAO on complaints about employment discrimination. Between July 1, 1988 and June 30, 1989, these organizations received 1,200 complaints.106

101. Id. at 59.
102. Id.
103. Id. at 57.
104. Id. at 59.
105. Id. at 58.
106. Id. at 80-81. The fourteen organizations reporting to the GAO were:
American Friends Service Committee/Newark
Center for Immigrant Rights, Inc./New York City
Central American Refugee Center/Los Angeles
Chicago Commission on Human Relations
Church Avenue Merchants Block Association, Inc./New York
CHIRLA
Community Task Force on Immigration Affairs/Houston
MALDEF/Chicago
Seventy-two percent of the complaints received came from aliens authorized to work in the United States. Four percent came from United States citizens, and the remainder from unauthorized aliens or persons whose immigration status was unknown. Of the nine hundred and thirteen complaints received from citizens or authorized aliens, five hundred and sixty-seven (62 percent) appeared to be related to the employer sanctions provisions of IRCA according to EEOC criteria. The most frequent allegation was that employers refused to accept valid work authorization documents. The majority (83 percent) of the authorized workers complaining of discrimination were Hispanic.

D. Discriminatory Impact on Employers

A joint study by the Rand Corporation and the Urban Institute views the primary problem with employer sanctions enforcement as poor administration by the INS rather than lack of awareness of the verification requirements on the part of the employers. The report points out that "the enforcement effort — and the burden of coping with inspections and fines — falls heavily on small firms owned by ethnics." Random targeting of employers produces a low number of section 1324a enforcement actions. As a result, the INS has adopted a variety of "special emphasis" techniques for detecting section 1324a violators. Ethnic restaurants, and especially in New York, the garment industry, have been frequent targets of INS "special emphasis" enforcements. Some INS officials feel that the pattern of section 1324a enforcement

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MALDEF/San Francisco
MALDEF/Los Angeles
New York City Commission on Human Rights
Travelers Aid Services/New York
Archdioceses of Detroit
Maricopa County Organizing Project

In November 1989 the Mexican American Legal Defense and Education Fund (MALDEF) in conjunction with the American Civil Liberties Union (ACLU) issued a report entitled THE HUMAN COSTS OF EMPLOYER SANCTIONS: RECOMMENDATIONS FOR GAO'S THIRD REPORT TO CONGRESS UNDER THE IMMIGRATION REFORM AND CONTROL ACT OF 1986.

107. Id. at 81.
108. Id. at 81-82.
109. Id. at 82.
110. Fix and Hill, supra note 8, at 84-86.
111. Id. at 85.
112. Id. at 97-100. Among the most ethically questionable of these techniques is the use of Department of Labor records of petitions for labor certification. (Petitions for permission to hire a worker previously ineligible to work in the U.S.) The INS may investigate the employer to determine whether the person whom the employer wishes to hire is, in fact, already employed by that employer. This technique will inevitably discourage employers from applying for labor certification for either current or prospective employees.
113. Id. at 118.
114. Id. at 98.
raises the possibility of lawsuits for selective enforcement. INS agents, however, are driven by quotas. In the words of one INS official: "Sensible targeting is not done. We go after few certain cases. It's like shooting fish in a barrel." Thus, IRCA has resulted in discrimination not only against workers of color but against business owners of color.

E. Delays in Issuing Work Authorization Documents

The sluggishness of the INS bureaucracy in issuing work authorization documents to those who are entitled to them has also resulted in discrimination. In the New York metropolitan area alone, over 10,000 eligible workers have been denied employment because of INS delays in issuing documents. Similar delays exist nationwide, causing employers to fire or refuse to hire authorized workers who, because of INS delays, have not yet obtained their work authorization documents.

III. Possible Remedies for IRCA-Related Discrimination

The thirty-day period for automatic repeal of the employer sanctions provisions by Congressional approval of the third GAO report has now expired. There are currently three courses of action which Congress can take in response to the GAO's finding of widespread discrimination resulting from IRCA. First, Congress can do nothing, and leave the employer sanctions provisions in place. Second, Congress can amend IRCA to reduce the extent of discrimination. Such an amendment might take the form of strengthening the anti-discrimination provisions or simplifying the verification system. Finally, Congress could repeal the employer sanctions provisions.

A. Anti-Discrimination Provisions

INA section 274B has failed to provide adequate protection for the victims of IRCA-related discrimination. Only seven hundred and eight charges of discrimination were filed with the OSC during the three years following the enactment of IRCA. In contrast, the fourteen independ-

115. Id. at 118.
116. Id.
120. GAO report, supra note 42, at 52.
ent organizations reporting to the GAO reported receiving five hundred and sixty-seven IRCA-related complaints from authorized workers in a single year.\(^\text{121}\)

If sanctions are to be retained, the role of the OSC will have to be increased. Currently, the anti-discrimination provisions are no more than a token, without any real impact on IRCA-related discrimination.

### B. GAO Recommendations

The GAO found that much of the reported discrimination resulted from employer misunderstanding of IRCA's verification requirements.\(^\text{122}\) The GAO recommended reducing this form of discrimination by:

1. increasing employer understanding of the verification requirements through effective education efforts,
2. reducing the number of different types of work eligibility documents,
3. making the documents harder to counterfeit, and
4. requiring the new documents of all members of the workforce.\(^\text{123}\)

Although much lip-service is paid to increased education, little funding is available for the purpose. For the 1990 fiscal year, Congress appropriated a mere one million dollars to the OSC for anti-discrimination education activities.\(^\text{124}\)

The INS plans to reduce the number of types of different work authorization documents it issues (currently ten) to two by the mid-1990's. The new documents will be much more difficult to counterfeit. However, the change will be carried out only if sufficient funding and personnel are available.\(^\text{125}\) It is the GAO's fourth suggestion, requiring all workers to carry a standardized work authorization document, that is likely to provoke the greatest opposition. To many people, the type of document suggested by the GAO sounds too much like the "national identity card" long opposed by civil rights groups.\(^\text{126}\) In response to the concerns of these groups, IRCA includes a provision that it shall not "be construed to authorize, directly or indirectly, the issuance or use of national identi-
fication cards or the establishment of a national identification card." However, IRCA also anticipates the possibility of a specifically-designed work authorization card, and provides that no one may be required to carry such a card on his or her person, or to present such a card for any other purpose than proof of authorization to work. An option discussed by the GAO, and which has frequently been proposed, is enhancement of the existing Social Security number system. At the time of this writing, Representative Barney Frank is considering introducing a bill calling for an "enhanced Social Security card."

Expansion of the Social Security card, however convenient it might be administratively, seems closer to a "national identity card" system than to the type of work authorization card contemplated by IRCA.

C. Repeal of Employer Sanctions

Advocates of immigrants' and persons' of color rights tend to favor repeal of employer sanctions. CHIRLA calls employer sanctions "an experiment which has caused a great deal of suffering for many segments of our society — citizens and immigrants, workers and businesses" and concludes that "[i]t is time to declare employer sanctions a failed effort that should be ended now."

Manuel Romero, San Francisco regional counsel for the Mexican American Legal Defense and Education Fund (MALDEF), has also called for repeal of employer sanctions, saying that "fairness and common decency demand that Congress should no longer treat the Latino and Asian communities as guinea pigs for immigration policy."

MALDEF has been joined by the National Council of La Raza (NCLR) in calling for repeal of employer sanctions.

Several members of Congress have introduced legislation to repeal or modify the employer sanctions provisions of IRCA. These bills fall into two groups: total repeal of employer sanctions, and modification of employer sanctions by simplifying the verification process and/or by strengthening IRCA's anti-discrimination provisions.

127. 8 U.S.C. sec. 1324a(c).
129. GAO report, supra note 42, at 75.
131. CHIRLA report, supra note 57, at 4.
133. Reporting on pending legislation in an article of this nature is a somewhat futile exercise, given the evanescent nature of bills in committee. At the time of this writing, significant bills included H.R. 4421 (Bryant; strengthening of anti-discrimination provisions, plus education), H.J. Res. 534 (Roybal; total repeal), H.R. 4300 (Morrison; some strengthening of anti-discrimination provisions, plus removal of "intending citizen" requirement). Several others had already died in committee, while still others were rumored to be in the works.
Sponsors of total repeal bills include Representative Edward Roybal (D-CA), who has stated that repeal of employer sanctions “is going to be an uphill battle, but let me dream a little bit and say that I think it’s possible.”

IV.
CONCLUSION

IRCA’s employer sanctions provisions have succeeded in “demagnetizing the magnet,” that is, in reducing the flow of undocumented immigrants to the United States. At the same time, however, employer sanctions have resulted in widespread employment discrimination, particularly against individuals with Latino and Asian backgrounds.

Attempts to deal with the discrimination caused by IRCA can be classified as “repeal” or “reform.” Repeal of employer sanctions is the only complete remedy for IRCA-related discrimination, as it removes the cause of that discrimination. Any attempts at reform rather than repeal, acknowledge the underlying legitimacy of employer sanctions. Employer sanctions are legitimate only if the goal which they accomplish, “demagnetizing the magnet,” is legitimate. During the many discussions of employer sanctions, attention has generally been focused on either the effectiveness of sanctions or the likelihood of discrimination. There has been surprisingly little debate as to whether reducing the flow of immigrants to the United States is a desirable or morally legitimate goal.

There are two reasons why the United States might wish to reduce the flow of immigrants. The first is the belief that the flow of immigrants threatens the stability of the United States in some way, such as by threatening the jobs of workers already in the country. If true, this is a legitimate concern. The second reason is xenophobia; this is, of course, a morally reprehensible reason for reducing the flow of immigration. It is impossible to evaluate the extent to which the passage of the employer sanctions provisions was a product of the first concern, and to what extent it was a product of the second; however, both elements were surely present.

If “demagnetizing the magnet” is not a desirable or morally acceptable goal, there is no question that employer sanctions should be terminated. Even if one accepts the premise that decreasing the attractiveness of the United States to potential immigrants is an acceptable or desirable

134. Tuller, supra note 132.
goal, there is still the question of discrimination. The employer sanctions provisions of IRCA have caused discrimination against foreign-appearing workers; this discrimination can be reduced, but not entirely eliminated, by legislative and administrative reform measures. The discrimination outweighs any possible utility of employer sanctions. Rather than attempting to fix the problem by patching it over with still more legislation and regulation, the employer sanctions provisions of IRCA should be repealed.