

# Reform Still Needed to Secure U.S. Borders, Assure Means of Verifying Worker Eligibility

## Status of Federal Immigration Reform

With limited action in Congress, the Bush administration has implemented a number of policies related to immigration and states continue to enact a patchwork of laws related to immigration.

A continuing resolution that Congress passed during summer 2008 to keep the federal government functioning into March 2009 has a provision that gives a short-term extension to the Homeland Security Department's E-Verify program, until March 6, 2009. In July 2008, the U.S. House of Representatives approved a bill reauthorizing E-Verify for five years, but the bill was blocked in the Senate in an effort to add a provision making hundreds of thousands of unused family visas dating back to 1992 available for use.

## Bush Administration Actions

Over the last year, a number of administrative actions have been undertaken. It is unclear whether these actions will continue under the Obama administration.

## No-Match Letters

On October 23, 2008, the Depart-

ment of Homeland Security (DHS) issued the "Supplemental Final Rule" on providing guidance for employers who receive Social Security "No-Match" letters. The DHS issued the rule in 2007, but the U.S. District Court for the Northern District of California issued a preliminary injunction. This latest rule attempts to address the issues raised by the court through explanation, not revision of the rule. DHS was expected to submit the supplemental final rule to the court sometime in November.

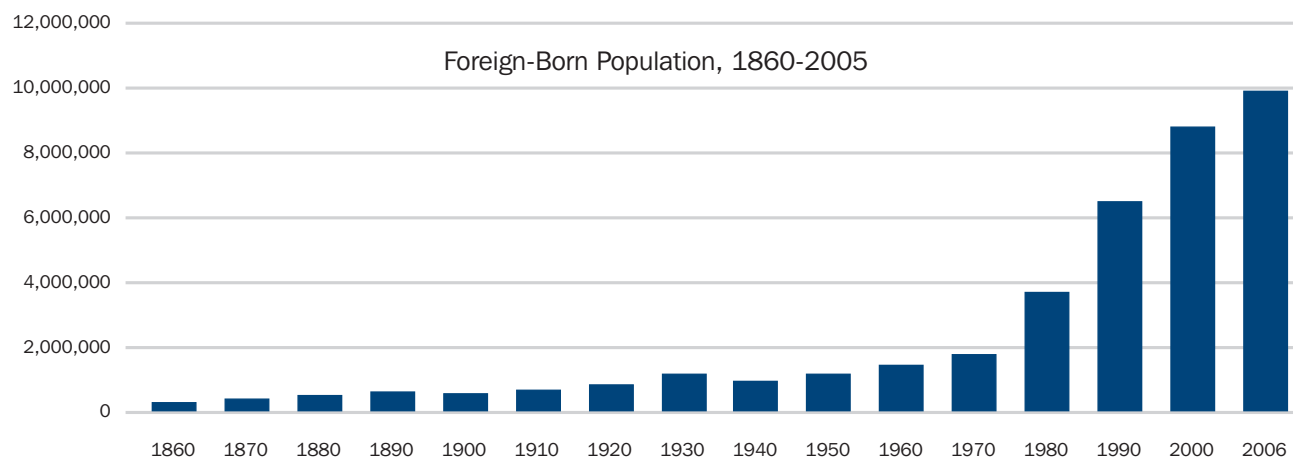
As the *Guide* went to print, there was no word on how the court would rule. Despite the many concerns raised by those who commented on the regulation, DHS did not alter the language of the proposed rule published earlier in 2008.

## New Requirements for Federal Contractors and Subcontractors

The Federal Acquisition Regulatory Council adopted a rule requiring federal contractors to use a new modified version of E-Verify (for example, requiring re-verification of some workers and creating some vicarious liability for subcontractors).

The rule applies to contracts if the

## California's Foreign-Born Population Growing Rapidly



Sources: Public Policy Institute of California, Migration Policy Institute, using decennial censuses or American Community Survey.

company is providing work on the “prime [federal] contract” only. The threshold is \$100,000, but if the contract is “to furnish supplies or services for performance of a prime contract or a subcontract,” it is \$3,000. It is unclear how much responsibility and liability the prime contractor or subcontractor would have for the use of E-Verify by its own subcontractors. The rule mandates re-verification through the E-Verify program to confirm the employment eligibility of all existing employees who are directly performing work under the covered contract. The existing Memorandum of Understanding and general interpretation of employment verification laws prohibits re-verification of existing employees.

The council argues that the prohibition against re-verification applies only to I-9 checks. The use of the E-Verify program must be companywide for all new employees, not just those for employees of the facilities working on the federal contract/subcontract. Currently, companies can voluntarily choose to phase in use of E-Verify one facility/area at a time.

#### **Illegal Workers and Penalties for Identify Theft**

On October 20, 2008, the Supreme Court agreed to hear a case on the current tactic being used by federal prosecutors to charge undocumented workers with aggravated identity theft — a criminal offense with a mandatory two-year prison sentence — instead of civil immigration violations.

The key issue in the case is knowledge, specifically, “whether workers

who use false Social Security and alien registration numbers must know that they belong to a real person to be subject to a two-year sentence extension.”

The Supreme Court’s decision in the case is likely to have a big impact because the federal government has used this as a tool in recent raid cases.

#### **Visa Waiver Program**

On October 17, 2008, President Bush announced the expansion of the Visa Waiver Program (VWP). Under the VWP, eligible citizens or nationals of participating countries can travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa. There are currently 27 low-risk countries allowed to participate in the VWP. In implementing the recommendations of the 9/11 Commission Act of 2007, a provision was included that increased the security of the VWP, while permitting more of the United States’ allies to apply to become members of the program once certain criteria were met.

Since the law was enacted, the United States has signed nine bilateral agreements with aspiring VWP countries, including: the Czech Republic, Estonia, Latvia, Slovakia, Lithuania, Hungary, Malta, Slovenia and South Korea. With the exception of Slovenia and Malta, the Department of Homeland Security announced that it was close to finalizing decisions to admit these countries into the VWP. DHS has acknowledged that U.S. security has already increased because of the 9/11 bill provisions, the incentives of VWP membership significantly increased

the new countries’ security measures and information sharing.

#### **Trade-NAFTA Maximum Stay Period Extension**

On October 14, 2008, the U.S. Citizenship and Immigration Services issued a final rule increasing the maximum allowable period of admission for Trade-NAFTA (TN) non-immigrants from Canada and Mexico from one year to three years.

#### **Obama on Immigration Reform Campaign Positions**

Barack Obama’s campaign website includes the following positions on immigration reform.

- **Create Secure Borders.** Preserve the integrity of our borders and support additional personnel, infrastructure and technology on the border and at our ports of entry.

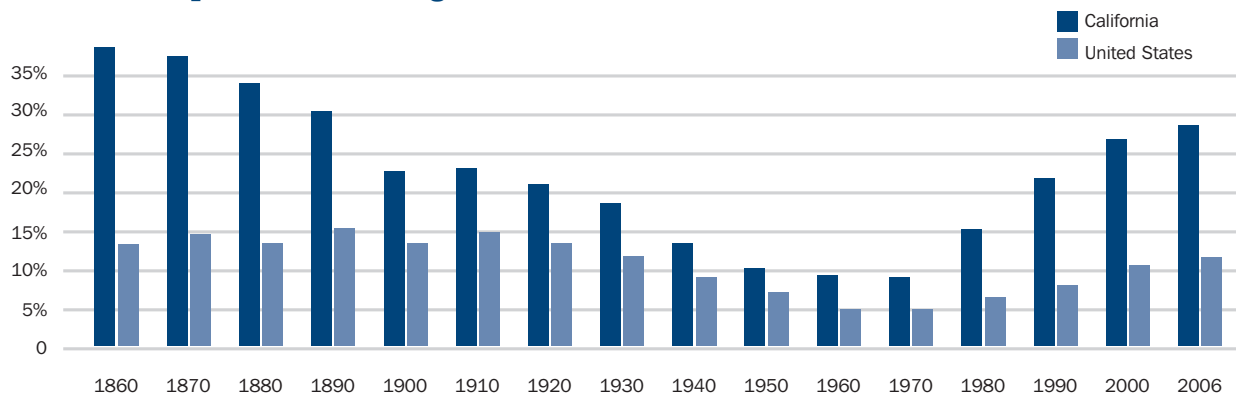
- **Improve Our Immigration System.** Fix the dysfunctional immigration bureaucracy and increase the number of legal immigrants to keep families together and meet the demand for jobs that employers cannot fill.

- **Remove Incentives to Enter The Country Illegally.** Remove incentives to enter the country illegally by cracking down on employers who hire undocumented immigrants.

- **Bring People Out of the Shadows.** Support a system that allows undocumented immigrants who are in good standing to pay a fine, learn English and go to the back of the line for the opportunity to become citizens.

- **Work with Mexico.** Promote

## Percent of Population Foreign-Born, 1860-2006



Source: Public Policy Institute of California, using data from decennial censuses, American Community Survey, California Department of Finance.

economic development in Mexico to decrease illegal immigration.

#### **Obama's Record**

- **Crack Down on Employers:** Championed a proposal to create a system so employers can verify that their employees are legally eligible to work in the United States.

- **Fix the Bureaucracy:** Joined U.S. Representative Luis Gutierrez (D-IL) to introduce the Citizenship Promotion Act to ensure that immigration application fees are both reasonable and fair. Obama also introduced legislation that passed the U.S. Senate to improve the speed and accuracy of FBI background checks.

- **Respect Families:** Introduced amendments to put greater emphasis on keeping immigrant families together.

#### **The Fallout of No Federal Reform**

State legislatures continue to consider and enact a record number of immigration laws. The 2008 level of activity is comparable to that of 2007. A national patchwork of incongruous immigration laws is being created that some fear will make it far more difficult to enact any comprehensive federally mandated bill down the line.

The National Conference of State Legislators (NCSL) reported no fewer than 1,404 pieces of legislation related to immigrants and immigration had been introduced among the 50 state legislatures. According to NCSL, the top three areas of interest are: identification/driver license, employment and law enforcement.

#### **Employer Sanction Legislation**

Many of these laws provide for employer sanctions related to the hiring of unauthorized workers, employment eligibility verification requirements and penalties. These laws also include measures on unemployment benefits, and one state seeks a state-based guest worker program.

Enacting different laws in different states has economic consequences. For those states with significant employer sanctions, companies will shut down and relocate to other states.

#### **A Sampling of New Laws**

- **Arizona** enacted legislation in 2008 that makes changes to a law enacted in 2007. It adjusts the prohibitions against knowingly or intentionally hiring a worker who is an alien unauthorized to work in this country and eliminates indepen-

dent contractors from the definition of employee. After September 30, 2008, the law prohibits an agency from issuing a license to an individual who does not establish legal presence, and prohibits governmental entities from awarding a contract to any contractor/subcontractor that fails to use E-Verify. It establishes the crime of knowingly accepting the identity of another person or entity, and expands the definition of identity theft. It also proves that companies can be punished only for unauthorized workers they hired after January 1, 2008 and that a violation at one location of a company shuts down that location, not the entire corporation.

- **Colorado** created the Colorado Nonimmigrant Agricultural Seasonal Worker Pilot Program Act that provides for expedient recruitment, application and approval of workers through the federal H-2A visa (requiring a federal waiver). The law requires the labor, agricultural and economic development and international trade agencies in Colorado to seek agreements between Colorado and foreign countries to assist in the recruitment and selection of H-2A workers. The program will allow 1,000 workers in the first year, and require the country of origin of each worker to perform background checks and employers to provide transportation, housing, fair wages, workers' compensation and to withhold 20 percent of wages payable to the worker upon return to the country of origin.

- **Mississippi** requires every employer in the state to use the E-Verify program to verify the employment authorization status of all newly hired employees. No contract or subcontractor shall hire any employee unless registered and participating in the system.

#### **Other Actions**

Homeland Security continues the reforms announced on August 10, 2007, addressing border security and immigration challenges that can be accomplished with existing authority.

- **Border Security**
  - ✓ Strengthen security at the border with additional personnel and infrastructure.
  - ✓ Institute a "catch and return" for illegal aliens apprehended at the border.
  - ✓ Strengthen legal efforts to keep international gang members out of the United States.

- ✓ Expand exit requirements so persons who overstay limited-duration visits to the United States can be identified.

- ✓ Require all travelers to use passports or similar documents for the United States. Air travelers have been required to carry a passport for U.S. entry since January 2007. Effective January 31, 2008, the requirement has been applied to sea and land travelers.

#### ● **Interior Enforcement**

- ✓ Train hundreds of state and local law enforcement officers to address illegal immigration in their communities.

- ✓ Expand the U.S. Immigration and Customs Enforcement Teams devoted to removing fugitive aliens.

- ✓ Initiate regulatory action to close the "voluntary departure" loophole and set a presumptive \$3,000 civil penalty for failing to comply with a voluntary departure agreement.

#### ● **Worksite Enforcement**

- ✓ Publish a regulation that will reduce the number of documents which employers must accept to confirm the identity and work eligibility of their employees.

- ✓ Issue a new regulation that reduces the number of documents acceptable to confirm employees' identity and work eligibility.

- ✓ Raise the civil fines imposed on employers who knowingly hire illegal immigrants by approximately 25 percent.

- ✓ Expand criminal investigations against employers who knowingly hire large numbers of illegal aliens.

- ✓ Help states make greater use of E-Verify.

- ✓ Bolster E-Verify by expanding the data sources it can check.

- ✓ Seek voluntary state partners willing to share their Department of Motor Vehicles photos and records with E-Verify.

#### ● **Streamlining Existing Guest Worker Programs**

- ✓ Reform the H-2A agricultural seasonal worker program.

- ✓ Issue regulations streamlining the H-2B program for non-agricultural seasonal workers.

- ✓ Extend the visa term for professional workers from Canada and Mexico to attract more of these talented

workers to the United States.

✓ Study and report on potential administrative reforms to visa programs for highly skilled workers.

● *Improving Existing Immigration*

✓ Reform and expedite background checks for immigration.

✓ Study the technical and record-keeping reforms necessary to guarantee that illegal aliens do not earn credit in our Social Security system for illegal work.

● *Assimilation*

✓ Revise the naturalization test.

✓ Provide additional training for volunteers and adult educators who lead immigrants through the naturalization process.

✓ Launch a free, web-based portal to help immigrants learn English, and expand this model over time.

### Where We Go from Here

Immigration has a significant impact on California's economy, both in terms of the labor force and goods movement. The current system allows for a substantial level of illegal immigration, while the legal immigration levels are set far too low to meet the demand for labor in the U.S. economy. This flawed policy has significant implications for California's economy.

The need for workers at all skill levels remains an issue for employers as millions of baby boomers start their retirement. Outdated and overly restrictive visa policies are depriving employers of the ability to hire the intellectual talent they need. Although the uses of employment verification systems are becoming a requirement in many states, there is conflicting evidence that the systems will be an effective technology that is fair to employees and employers, and that actually works.

In the absence of comprehensive solutions from Washington, D.C., states and localities are filling the void with hundreds of their own rules and regulations, often contradictory, probably unconstitutional, and virtually impossible for businesses to follow. A lawful, rational and workable immigration system that secures the borders, protects the rights of businesses and immigrants, and addresses the urgent workforce needs of the nation must be implemented.

Enforcement alone will not solve the problem. To the degree it works, it will

choke off a needed supply of foreign labor, slowing — perhaps significantly — U.S. economic growth.

In order to ensure California's continued prosperity, reforms need to be made to the nation's immigration policy. There should be one national program implementing immigration policy that pre-empts all state and local programs. Reform legislation should be comprehensive and adequately funded.

### CalChamber Position

#### 1. Provide greater border security.

● The federal government must invest adequate federal resources to identify true risks and help facilitate legitimate low-risk travel and commerce.

● Any new measures must be evaluated for their potential negative impact on legitimate commerce while maintaining the need for security.

● The use of technology should be maximized.

● A joint clearance process with countries should be in place to assist with security.

● Neighboring countries, Mexico and Canada, must take more responsibility to protect the borders.

● A comprehensive database should be created that interfaces with state, national and international criminal and terrorist databases with privacy protections.

● Adequate resources must be made available to detain and deport illegal aliens.

#### 2. Establish a guest worker program.

● A guest worker program should have time limits on the workers. The time limit should vary depending on the industry.

● The program should include all workers.

● The program must have market-based wage structures that reflect the job order.

● The immigration program and a guest worker program and their requirements should be kept separate.

● The program must be contingent on delineating the workforce needs for each industry.

● Employers who use the guest worker program should be required to pay for the program, including but not limited to, transportation in and out of the country and health care.

● The program should require documentation that the employer attempted

to employ U.S. workers.

● The program should be created whether or not the border is secured.

#### 3. Improve the VISA program.

● VISA program limits should be based on market demand.

● VISA programs should be streamlined for effective and timely use and adjusted to match workforce needs in a timely manner, keeping with the realities of a fast-paced economy.

● There should be *stricter enforcement* and greater oversight of the VISA programs.

● Require a tamper-proof identification card for U.S. residents.

● Penalties should be applied to employers and individuals who knowingly hire illegal immigrants (*this assumes the implementation of a tamper-proof identification card*).

● Resources must be available for border and interior enforcement.

#### 4. Combine stricter enforcement with 100 percent reliable employment eligibility.

● The verification system should be timely, efficient and accurate.

● Any verification system should have the capacity to respond to employers and individuals efficiently and accurately.

● Employers and individuals should have a safe harbor until the system operates efficiently and accurately.

● A tax credit should be provided to employers to offset the cost of installing a verification system.

#### 5. Address the status of the 12 million undocumented/illegal workers already in the country.

An earned pathway to legal status for undocumented/illegal workers should be created with the following qualifying criteria:

● Resided in the United States for at least five years (since April 5, 2001).

● Passed a national security and criminal background check.

● Worked a minimum of three years in the United States preceding the date of introduction, and six years after the date of enactment.

● Paid all federal and state taxes.

● Registered for Military Selective Service.

● Has a demonstrated knowledge of the English language and American civics requirements.

● Paid a fine, in addition to required application fees.

- Limited to inclusion of immediate family members only.
- No line jumping in front of current immigrant visa backlog.
- The processing of documented/legal immigration needs to occur simultaneously to avoid creating incentives for undocumented/illegal immigration.

#### Reasons for Position

- **Secure the borders:** All borders (land, air and sea) should be a line of defense against those who pose security threats to this country, but borders also must allow for legitimate commerce and travel and will not overcome the lure of jobs.
- **Establish a guest worker program:** Concerns have been raised that

the demand for workers is growing faster than the population of native-born workers.

- **Improve the visa program:** The visa programs are not meeting the labor needs of the employer community.

- **Combine stricter enforcement with 100 percent reliable employment:** Employers and individuals who knowingly hire undocumented workers should be punished, but the current system for verifying that applicants are legally eligible to work is inadequate.

- **Address undocumented/illegal workers:** The millions of undocumented/illegal workers already in the country are essential to the nation's economy. It is financially unrealistic and logistically impossible to deport them all.



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