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THE DISCRIMINATORY IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

I. INTRODUCTION

The purpose of this paper is to examine the discriminatory effect of the Immigration Reform and Control Act of 1986,¹ which attempts to resolve the present immigration "crisis" through the use of employer sanctions. This note addresses the validity of IRCA opponents' fears that increased discrimination would result from IRCA's employer sanctions provision.² The analysis begins with an examination of the historical context in which IRCA was enacted. A critique of the employer sanctions³ and anti-discrimination⁴ provisions of IRCA follows, demonstrating their inadequacy in dealing with discrimination. Finally, statistics regarding incidents of discrimination from IRCA are examined, and the General Accounting Office's ("GAO") conclusions based on these statistics are criticized.

II. IMMIGRATION REFORM: A HISTORICAL PERSPECTIVE

Immigration policies have gone through many changes since the establishment of the United States as an independent nation. The discernable theme running through the several reforms since the founding of the United States to present day is progressive restrictiveness (e.g., Alien Contract Labor Law of 1885, National Origins Act of 1924, and Immigration and Nationality Acts of 1952 and 1965).⁵ The increased restrictions manifested by consecutive immigration policies have transformed the American "open arms policy," symbolized by the Statue of Liberty, into a fantasy of the past.

The increasing restrictions inhibiting immigration can be explained in part by "... the existing political environment, domestic

1. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified in 8 U.S.C. § 1101 et seq.).

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

3. *Id.*

4. 8 U.S.C. § 1324b (Supp. IV 1986).

5. For a discussion of United States immigration policies, see generally, V. BRIGGS, JR., IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE (1984) (providing a helpful historical overview of immigration policies from 1787 to 1984.)

economic conditions—particularly the unavailability of jobs—and the American public's perception of the need for immigration reforms."⁶ In order to meet these perceived problems, Congress developed a regulatory system mandating that all ". . . aliens must obtain the appropriate documentation for entry"⁷ into the United States.

Regardless of the ever-increasing limitations faced by those who wish to immigrate to the United States in search of a better life, the so-called "push-pull" factors provide the necessary incentive for immigrants to risk breaking the United States immigration laws and live the clandestine lifestyle of the undocumented.⁸ "The 'push' factors that encourage aliens to leave their home countries include unemployment, low wages, poor living and working conditions, a depressed or unstable economy, and internal political strife. The 'pull' factors drawing them to the United States are employment opportunities, higher wages, and better working and living conditions."⁹ These factors, in conjunction with the fear of deportation, have made the undocumented an easy target for exploitation, inevitably accepting substandard wages and working conditions.

Before the enactment of IRCA, federal immigration laws did not make it illegal to hire an undocumented alien.¹⁰ On the contrary, the immigration laws provided employers with an incentive to employ the undocumented through the so-called Texas Proviso, which exempted employers from being charged with committing a felony for "harboring" an undocumented alien.¹¹

The incentive to employ undocumented laborers, in addition to a rise in the unemployment rate, created the basis for many Americans to blame the country's economic ills on a source of cheap labor: the undocumented. The complaint is primarily based on the notion that undocumented workers take jobs away from United States citizens, and thereby cause economic difficulties. It is premised on the faulty assumption that a causal relationship exists be-

6. Note, "*The Antidiscrimination Provision of the Immigration Reform and Control Act*," 62 TUL. L. REV. 1059, 1062 (1988) (authored by Linda S. Johnson) [hereinafter Johnson].

7. *Id.* at 1062.

8. The term "undocumented", as used throughout this paper, refers to immigrant aliens which have been unable to legalize their residential status within the United States. Therefore, they lack the requisite documents (e.g., resident alien card, citizenship certificate, social security card) to live and work within the United States without the fear of deportation.

9. Johnson, note 6, at 1062-63.

10. UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO CONGRESS: Immigration Reform-Status of Implementing Employer Sanctions After Second Year, 11 (1988) [hereinafter GAO (1988)].

11. 8 U.S.C. § 1324a (a)(3) (1982) (repealed 1986) (The Immigration and Nationality Act of 1952 made the importation and harboring of undocumented aliens a felony, but defined illegal harboring as excluding employment and related services provided by employers to employees).

tween the increase of employment of undocumented laborers and the increase in the rate of national unemployment.¹² Despite new studies showing that immigrants help economic growth through their "increased productivity and purchasing power",¹³ Americans continue to cling to this unjust misperception. The adherence to this misguided complaint illustrates a pervasive practice of blaming immigrants for national economic difficulties.¹⁴ However, the moving force behind this faulty argument and its false premise is a deeply rooted American tradition: racial and ethnic prejudice.

Congress began to view employer sanctions as a solution to the economic ills facing the United States labor market, in spite of vehement opposition.¹⁵ "[T]he rate of illegal immigration rose steadily, adding to the public and legislative perception that the illegal immigration problem had reached crisis proportions."¹⁶ Congress became convinced that immigration reform and control of the borders through employer sanctions was the best legislative vehicle to alleviate this "crisis."

For many minority (predominantly immigrant) community groups, employer sanctions provide a vivid reminder of past discrimination masked in the guise of immigration reforms. Employer sanctions are as offensive to the Latino community as the past Asian/Pacific exclusionary laws were to the Asian/Pacific community.¹⁷ Employer sanctions further remind the Latino community of grim memories of horrible misfortunes suffered under immigration laws and practices of the past.¹⁸

The labor shortages experienced during the Second World War influenced the enactment of the Bracero program.¹⁹ Under the Bracero program, Mexican immigrants were accepted for the narrow purpose of becoming laborers for United States farmers. Yet,

12. See Reubens, "Immigration Problems, Limited-Visa Programs, and Other Options," in *BORDER THAT JOINS: MEXICAN MIGRANTS AND U.S. RESPONSIBILITY* 189 (P. Brown and H. Shue 1983) (explaining how rates of unemployment and undocumented can be manipulated, showing a relationship between them).

13. Roberts, *The Hunt for New Americans*, U.S. News and World Report 35, 36, May 14, 1990.

14. See generally, V. BRIGGS, JR., *supra* note 5 (discussing Americans' historical tendency to find blame within the immigrant population for economic troubles).

15. Note, "INS Enforcement of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation Period," 37 CATH. U.L. REV. 829, 832 (1988) (authored by Michael X. Marinelli) [hereinafter Marinelli].

16. *Id.* at 832.

17. The Chinese Exclusion Act of 1882 (forbade entry of all Chinese until its repeal in 1943), the Gentlemen's Agreement of 1907 (excluded Japanese immigration), and the Tydings-McDuffie Act of 1934 (limited Filipino immigration to 50 per year during the height of the Depression).

18. During the Great Depression approximately 500,000 persons of Mexican descent were expelled from the U.S. (more than half being United States citizens) under the so-called "repatriation" campaign.

19. Mexican Labor Program of 1942, Pub. L. No. 45, 57 Stat. 70 (revived by Pub. L. No. 78, 65 Stat. 119 (1951)) (repealed 1964).

due to the contract that bound laborers to a specific farm, braceros became virtual slaves—not allowed to work legally for any other employer.²⁰ In the 1950's, this faint attempt towards an open arms policy drew to a close as a result of public panic over the increasing numbers of Mexican immigrants. As a consequence, "Operation Wetback" was implemented. This resulted in the expulsion of over one million people of Mexican descent, many of whom were American citizens. "To ensure the effectiveness of the expulsion process, many of those apprehended were denied a hearing to assert their constitutional rights or to present evidence that would have prevented their deportation."²¹

As apparent from this short description of past "economically-motivated" immigration practices and policies, opponents of employer sanctions have good reasons to fear the likely discriminatory effects of IRCA. The premise that immigrants take jobs away from U.S. citizens has been used as the purpose of past racist and discriminatory acts against Latinos in the guise of immigration reform and control.²² Therefore, it is not surprising that critics of employer sanctions feared the rise of discriminatory practices manifested by overly cautious employers who use race, foreign appearance, or accent as a means of identifying undocumented workers.

Despite the numerous pleas against further Congressional support for such negative tactics, Congress responded to the growing public anxiety over the distressed labor market by enacting the Immigration Reform and Control Act of 1986.

III. IRCA: AN OVERVIEW

A. *Background*

IRCA as enacted into law by Congress "encompass[es] a system of employer sanctions designed to destroy the employment incentive so that control of the borders could be regained, [in addition] to provid[ing] for certain illegal aliens to become lawful members of society."²³ In response to the many fears and objections raised against the employer sanctions provision, Congress included an anti-discrimination provision within IRCA.²⁴

20. Note, *Compromising Immigration Reform: The Creation of a Vulnerable Sub-Class*, 98 YALE L.J. 409, 420, (1988) (authored by Catherine L. Merino) [hereinafter Merino].

21. N. DIMES, JR., D. CHOU & P. FONG, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION, A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS*, at 11 (1980).

22. See *supra* notes 16, 17 and 18.

23. Johnson, *supra* note 5, at 1064.

24. 8 U.S.C. § 1324b (Supp. IV 1986).

B. *Employer Sanctions*

1. *Prelude*

The first and foremost provision of IRCA is a system of employer sanctions targeting those employers who hire undocumented workers.²⁵ The sanctions provision is based upon numerous assumptions: (1) the right to work is a privilege linked to citizenship; (2) a direct relationship exists between the wave of undocumented immigrants and jobs lost to others; (3) employers will voluntarily comply with the law; (4) the threat of sanctions will extinguish jobs for the undocumented; (5) the unavailability of jobs will persuade the remaining undocumented laborers to return to foreign countries; and (6) the decrease of available jobs will stop the flow of immigration from Mexico and other major sending countries.

In addition to some basic realities of the immigration problem (discussed, *infra*) which IRCA ignores, "[o]pponents [of IRCA] view these measures as evidence of the failure of the Immigration and Naturalization Service to control immigration. . .".²⁶ Opponents of IRCA take this position because the enforcement of IRCA has two prongs. The Immigration and Naturalization Service ("INS") has the major responsibility of direct enforcement of IRCA. Nonetheless, the law indirectly turns private employers into enforcement agents of the United States. The responsibility of indirect enforcement placed on private employers has the effect of, in essence, entrusting the employers as junior INS officers.²⁷

2. *In General*

IRCA states that "[i]t is unlawful for a person or other entity to hire, or to recruit, or refer for a fee, for employment in the United States—an alien knowing the alien is an unauthorized alien. . . with respect to such employment, or an individual without complying with the [verification requirements]."²⁸ It is further "unlawful for a person or other entity, after hiring an alien for employment. . . 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;" or to knowingly obtain the services of an unauthorized alien through a contract.²⁹

a. *Verification and Documentation*

In order to deter employers from hiring "unauthorized" aliens, IRCA contains a mandatory verification system requiring employ-

25. 8 U.S.C. § 1324a (a) (Supp. IV 1986).

26. Johnson, *supra* note 6, at 1064.

27. *Id.* at 1065.

28. 8 U.S.C. § 1234a (a)(1) (Supp. IV 1986).

29. 8 U.S.C. § 1324a (a)(2) and (4) (Supp. IV 1986).

ers to determine the eligibility of persons to work.³⁰ Specific documents are necessary to establish a person's identity and eligibility for work authorization.³¹ An employer may not require anything other than the provisional list of documents or any appropriate combination thereof "that reasonably appears on its face to be genuine."³² The employer must retain the documents for three years after the date of recruiting or referral, and in case of hiring, for three years after the date hired or one year after the employee is terminated, whichever period is longer.³³

b. *Penalties*

There are two different actions for which an employer may face penalties under IRCA. First, employers are liable for knowingly hiring an alien not authorized to work at the time of hire³⁴, or continuing the employ of an alien unauthorized to work because of change in immigration status, where the employer knows of the change of status.³⁵ Civil liabilities for these violations include: \$250 to \$2,000 per unauthorized alien for the first offense; \$2,000 to \$5,000 per unauthorized alien for the second offense; and \$3,000 to \$10,000 per unauthorized alien for any additional offense.³⁶ Furthermore, criminal sanctions may be levied against a person who has a "pattern or practice" of hiring unauthorized aliens.³⁷

The second type of violation occurs when the employer fails to verify the eligibility of prospective employees as required by section 1324 A(b). The employer is required to fill out an INS form I-9, affirming under penalty of perjury that the documents verifying an employee's work authorization have been examined.³⁸ Both the employer and employee are required to sign the form.³⁹ Penalties for this type of violation range from a \$100 to \$1,000 fine.⁴⁰

For both types of offenses described above, IRCA provides employers with a defense against penalties. Under Section 1324a (a)(3) an employer can claim a good faith defense if she can demonstrate

30. 8 U.S.C. § 1324a (b) (Supp. IV 1986).

31. 8 U.S.C. § 1324a (b)(1)(A) (Supp. IV 1986). (i.e., a United States passport, certificate of United States citizenship, certificate of naturalization, unexpired foreign passport with appropriate work authorization; or a combination of documents establishing work authorization: a United States birth certificate or social security account number card, and documents establishing identity-such as a driver's license).

32. *Id.*

33. Johnson, *supra* note 5, at 1066; See also 8 U.S.C. § 1324a (b)(3)(A), (B) (Supp. IV 1986).

34. 8 U.S.C. § 1324a (a)(1)(A) (Supp. IV 1986).

35. 8 U.S.C. § 1324a (a)(2) (Supp. IV 1986).

36. 8 U.S.C. § 1324a (e)(4)(iii) (Supp. IV 1986).

37. 8 U.S.C. § 1324a (f)(1) (Supp. IV 1986).

38. 8 U.S.C. § 1324a (b) (Supp. IV 1986).

39. *Id.* at subsections (1) and (2).

40. 8 U.S.C. § 1324a (e)(5) (Supp. IV 1986).

compliance with the verification requirements. The "employer need only attest that the documents reasonably appeared to be valid."⁴¹ This defense can be rebutted if evidence shows that the documents did not appear to be genuine on their face, that the verification process was fraudulent, or that the employer colluded with the employee in falsifying documents.⁴²

IV. ANTIDISCRIMINATION PROVISIONS

The primary reason for opposing the employer sanctions system is the valid concern of preventing an increase of discrimination against documented aliens and United States citizens (particularly of Latino or Asian descent) applying for jobs. As a result of the public perception that illegal aliens are of Mexican or Latino descent, "people who share a number of characteristics with this group, but who are in the United States legally have a potentially serious problem."⁴³

As a result of intense criticism over this potential discrimination time bomb, Congress enacted a provision under IRCA to supplement federal anti-discrimination laws and to complement employer sanctions⁴⁴ by barring discrimination based on citizenship, citizenship status, or national origin.⁴⁵ Because Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of national origin (covering both "intent" and "effect" discrimination), leaves several gaps open for discrimination under IRCA's employer sanctions scheme,⁴⁶ Congress enacted an antidiscrimination provision under IRCA.⁴⁷ Nonetheless, the protection afforded by IRCA's anti-discrimination scheme may be limited by its narrow language.

41. Marinelli, *supra* note 14, at 837.

42. Federal Publications Inc., *The Simpson Rodino Act Analyzed: Part I—Employer Sanctions*, 63 INTERPRETER RELEASES 991, 994 (November 3, 1986).

43. Johnson, *supra* note 5, at 1069.

44. As the Congressional Conference Committee stated:

The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context. The Bill broadens Title VII protections against national origin discrimination, while not broadening the other Title VII protections, because of the concern of some members that people of "foreign" appearance might be made more vulnerable by the imposition of sanctions. While the bill is not discriminatory, there is some concern that some employers may decide not to hire "foreign" appearing individuals to avoid sanctions.

Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 1000, 99th Cong. 2d Sess. (1986). See also, Statement of the House Judiciary Comm., H.R. Rep. No. 99-682, 99th Cong. 2d Sess. (1986) at 68-71.

45. 8 U.S.C. § 1324b (a)(1) (Supp. IV 1986).

46. See 42 U.S.C. §§ 2000(b) and 2000c-2(a) (Title VII does not protect discrimination by employers with less than fifteen employees, or discrimination against certain classes of non-citizens).

47. 8 U.S.C. § 1324b (Supp. IV 1986).

A. Scope

The anti-discrimination provision of section 102 of IRCA⁴⁸ is stated in fairly straight forward language. It provides for a broader coverage of Title VII's national origin discrimination and prohibits discrimination based on citizenship status. IRCA also creates a Special Counsel within the Justice Department to consider and prosecute alleged violations of this provision.⁴⁹ If Special Counsel does not file a complaint, private actions against the employer by a party may be filed through an administrative law judge.⁵⁰ "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, reinstate employees with back pay, and pay civil penalties up to \$2,000 for each individual discriminated against."⁵¹ Furthermore, IRCA creates a task force (Comptroller General) to monitor the effects of the law on discrimination for three years.⁵² If the task force finds discrimination as a result of employer sanctions, Congress can restrict the provision;⁵³ but if not discriminatory effect is found and the burdens are found to be too great on employers, then Congress may retract the anti-discrimination provision.⁵⁴

B. Exceptions

As mentioned above, IRCA's anti-discrimination scheme appears to be a sweeping prohibition against discrimination as a result of employer sanctions. As a result of various qualifications and limitations, the scope of the provision's benefits becomes questionable.⁵⁵ Furthermore, an abundant amount of debate exists about whether the section 1324b prohibition applies only to intentional discrimination or also to disparate impact discrimination. Most likely, future litigation will determine the applicability of section 1324b.⁵⁶

1. Discriminatory Practices Protected

Although section 1324b extends Title VII national origin protection to include citizenship status, the only employment practices covered are those involving recruitment, referral, hiring, and dis-

48. *Id.*

49. 8 U.S.C. § 1324b (c) (Supp. IV 1986).

50. 8 U.S.C. § 1324b (d)(2) (Supp. IV 1986).

51. Marinelli, *supra* note 14, at 846.

52. 8 U.S.C. § 1324a (j)(1) (Supp. IV 1986).

53. 8 U.S.C. § 1324a (l)-(n) (Supp. IV 1986).

54. 8 U.S.C. § 1324b (k)(2) (Supp. IV 1986).

55. *See generally*, section 274B (provision is narrowly limited to protect against discrimination in employment in the areas of recruitment, referral, hiring and discharge. It leaves promotions and benefits unprotected.)

56. Larson, *supra* note 44, at 8.

charge.⁵⁷ First, practices such as salary and benefit disparities, working conditions, and promotions are not explicitly protected under IRCA. Therefore, it has yet to be determined whether these important areas will be covered.⁵⁸

Second, under IRCA, discrimination based on national origin is allowed for a "bonafide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise"⁵⁹ as allowed under section 703 of the Civil Rights Act of 1964. One possible BFOQ that has a potential for discriminatory impact is language. "In an explanatory note, the congressional Conference Committee stated that 'nothing in this bill shall prevent the use of language as a Bonafide Occupational Qualification.'"⁶⁰ Therefore, any time fluency in English may be required as a BFOQ, the potential for discrimination exists.

Third, IRCA allows for discrimination on the basis of citizenship status under certain circumstances.⁶¹ Employers may discriminate against a non-citizen in favor of a citizen when this is "required in order to comply with the law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government."⁶² This exception allows the very discriminatory activity against which IRCA protects!

Fourth, under a narrow exception provided by IRCA, an employer may discriminate against aliens in favor of a citizen where the two are "equally qualified."⁶³ Although this exception applies only to hiring, recruiting and referral of employees, it is evident that "[t]he potential for abuse is high, and such abuse would destroy the purpose of the anti-discrimination section."⁶⁴

2. *Employer Benefits*

Because Title VII only covers employers with fifteen or more employees, IRCA's anti-discrimination provision attempts to fill the gap, significant loopholes remain due to two exceptions to its coverage.

First, although all employers are covered by IRCA's employer sanction scheme, discriminatory prohibitions only apply to employ-

57. 8 U.S.C. § 1324b (Supp. IV 1986).

58. Larson, *supra* note 44, at 11.

59. 42 U.S.C. §§ 2000c-2(c).

60. Johnson, *supra* note 5, at 1092.

61. 8 U.S.C. § 1324b (a)(2)(c) (Supp. IV 1986).

62. *Id.*

63. 8 U.S.C. § 1324b (a)(4) (Supp. IV 1986).

64. Johnson, *supra* note 5, at 1095.

ers with more than three employees.⁶⁵ This loophole totally exempts employers with fewer than three employees from the antidiscrimination provision, and allows blatantly discriminatory practices by these employers.

Second, IRCA discrimination prohibitions do not apply to employers covered by Title VII's national origin prohibitions.⁶⁶

C. *Problems With IRCA's Protection*

Although IRCA's anti-discrimination provision was enacted in response to the potential discrimination as a result of employer sanctions, IRCA's protection does not cover all persons who may be discriminated against as a result of this law.⁶⁷ IRCA's narrow protection applies only to American citizens or those aliens intending to become American citizens.

1. *National Origin Protection*

National origin protection is provided for by both IRCA and Title VII. IRCA protects employees working for employers with more than three employees, and Title VII protects employees working for employers with more than 15 employees in twenty calendar weeks of the year.⁶⁸ This creates a situation in which two government entities enforce the same prohibition without addressing potential conflicts arising from this situation.⁶⁹ Furthermore, dual coverage for entities employing four to fourteen people can lead to confusion in the application of pertinent law. While different agencies are covering the same law, currently there has been no major crisis in interpretation of this dual coverage by the courts.

2. *Citizenship Status*

IRCA also protects against discrimination based on citizenship status. Since such protection applies only to United States citizens or those intending to become United States citizens, many problems may arise.

IRCA narrowly defines "intending citizen" to include: 1) individuals who are lawful permanent residents, 2) aliens lawfully admitted for temporary residence under IRCA's general amnesty program (INA § 245A), 3) refugees, and 4) asylees.⁷⁰ Other requirements for an "intending citizen" include a completed form de-

65. 8 U.S.C. § 1324b (a)(2)(A) (Supp. IV 1986).

66. 8 U.S.C. § 1324b (a)(2)(B) (Supp. IV 1986).

67. Johnson, *supra* note 5, at 1084.

68. *Id.*

69. 42 U.S.C. §§ 2000c (a), (b).

70. I.N.A. § 274B (a)(3)(B)(i), 8 U.S.C. § 1324b (a)(3)(B)(i) (Supp. IV 1986).

claring intention to become a United States citizen⁷¹ and a completed application for naturalization within six months of eligibility.⁷²

Individuals who become temporary resident aliens under IRCA's Special Agriculture Workers (SAW) provisions⁷³ are not included as intending citizens and thus presently have no protection from citizenship discrimination.⁷⁴ Another unprotected class are the thousands of work-authorization aliens who are not intending citizens, such as asylum applicants.⁷⁵

a. *Lawful Resident Aliens*

IRCA's requirements clearly exclude several lawful resident aliens from IRCA's protection, such as any alien who fails to fit the definition of an "intending citizen."⁷⁶ The exclusion of certain classes of aliens creates a significant minority with no protection under IRCA. These excluded classes are targets of abuse under the employer sanctions system. If the public policy behind IRCA was to deter employers from hiring the undocumented, no justification would exist for allowing discrimination against lawful aliens. Clearly, this policy goes against one of the central purposes of the antidiscrimination provision. "Since Congress allowed these aliens to enter the United States and gave them work authorization, Congress should not deny them the opportunity to work because of discrimination by private employers."⁷⁷ This discrepancy between IRCA's purpose and policies is just one of the valid examples of how this piece of legislation is seriously flawed.

b. *Unlawful Aliens—IRCA's Sub-Class*

The purpose of employer sanctions is to deter the hiring of undocumented workers in the hopes that they will return to their homelands and prevent other from entering the United States. This purpose clearly ignores the reality that most of the undocumented workers excluded by the legislation process will remain in the

71. I.N.A. § 274B (a)(3)(B)(ii), 8 U.S.C. § 1324b (a)(3)(B)(ii) (Supp. IV 1986).

72. I.N.A. § 274B (a)(3), 8 U.S.C. § 1324b (a)(3)(Supp. IV 1986).

73. *Immigration Control and Legalization Amendments: Hearings on H.R. 1510 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 123-24 (1985).

74. I.N.A. 210, 8 U.S.C. § 1160 (Supp. IV 1986).

75. The exclusion of SAWs from the antidiscrimination protections has been harshly criticized by the California Fair Employment and Housing Commission in its "Report and Recommendations of the California Fair Employment and Housing Commission: Public Hearings on the Impact and Effectiveness in California of the Employer Sanctions and Antidiscrimination Provisions of the Immigration Reform and Control Act of 1986," at 23, 49 (January 11, 1990).

76. Andrade, V., *Employment Rights*, in IMMIGRANTS RIGHTS MANUAL 12-1 (anticipated date of publication September 1990) [hereinafter Andrade].

77. Johnson, *supra* note 5, at 1090.

United States.⁷⁸ The result of this situation has been the creation and growth of "a class of exploitable, clandestine and unorganized cheap labor for unscrupulous employers in the U.S."⁷⁹

The most obvious example of the extent of potential discrimination due to enforcing IRCA is the creation of "grandfathered" employee status. Grandfathered employees are those hired on or before November 6, 1986, whose employment is not subject to IRCA's employer sanction system.⁸⁰ These workers are particularly vulnerable to abuse. Their inability to provide necessary documentation for new jobs discourages them from improving their economic position by leaving their present jobs for better jobs. The resulting employee immobility makes grandfathered employees great targets of abuse by unscrupulous employers who take advantage of the unlawful alien's fear of deportation. The abuses may range from imposing longer work weeks to refusing to pay the worker for months of work.⁸¹ If these employee are fired because of IRCA's verification requirement, these workers are virtually barred from finding another job.⁸²

Evidently, IRCA has failed both at its intended purpose and at preventing a backlash of discrimination. IRCA's policies have not been able to significantly reduce the amount of undocumented labor.⁸³ On the contrary, IRCA has forced thousands of undocumented workers underground, creating a clandestine network of cheap labor that seeds day work on street corners. In addition, IRCA has increased the potential for abuse by employers by compelling workers to remain at their current place of employment, regardless of conditions, concurrently barring others from employment.

V. DISCRIMINATION UNDER IRCA

A. *Background*

In order to evaluate IRCA related discrimination, Congress directed the GAO to monitor the effects of the legislation on em-

78. *Id.* at 1091.

79. The fact that many undocumented aliens have resided in the United States long enough to firmly establish family and social ties, make the likelihood of their willing departure very small.

80. *See generally*, Kelly, *El Mosco*, L.A. Times, Mar. 18, 1990, (Magazine)(describing the increase of a clandestine labor force, that patiently seeks temporary work on Los Angeles street corners).

81. GAO (1988), *supra* note 9, at 11.

82. Merino, *supra* note 19, at 421.

83. *See, e.g.*, COALITION FOR HUMANE IMMIGRATION RIGHTS, PRELIMINARY REPORT: THE EFFECTS OF EMPLOYER SANCTIONS 11 (Oct. 13, 1988)(providing statistics of employment discrimination against grandfathered employees) [hereinafter CHIRLA].

ployer related discrimination.⁸⁴ In accordance with this requirement, the GAO has had to produce three reports⁸⁵ (for a period of three years beginning in 1987), addressing whether IRCA has caused a "pattern of discrimination"⁸⁶ against U.S. citizens, nationals, or eligible workers seeking employment.⁸⁷

The potential impact of these reports is enormous. Congress has retained the power to restrict the sanctions provision,⁸⁸ dependent upon the GAO findings and the review of such findings by a federal agencies' task force.⁸⁹

B. *Analysis of the GAO's Discrimination Findings*

1. *First GAO Report (1987)*

In its first review of IRCA's discriminatory impact, the GAO report claimed the available evidence did not establish a pattern of discrimination or unreasonable regulatory burden on employers.⁹⁰ The GAO based this conclusion on the sixty-seven charges that had been filed with the Office of Special Counsel (OSC) and Equal Employment Opportunity Commission (EEOC).⁹¹

Of the sixty-seven filed complaints, forty-four were processed,⁹² one decided by a federal court,⁹³ and twenty-three closed. Considering the newness of IRCA and the problems that prevented discrimination victims from filing charges,⁹⁴ the fact that sixty-seven cases had already been reported is proof that the imple-

84. RAND CORPORATION, *THE EFFECTS OF EMPLOYER SANCTIONS ON THE FLOW OF UNDOCUMENTED IMMIGRANTS TO THE UNITED STATES* (April 1990)(finding through a labor market survey that the sanctions provisions has caused no decline in the supply of undocumented labor).

85. 8 U.S.C. § 1324a (l)-(n) (Supp. IV 1986).

86. *Id.*

87. *Id.*

88. Two other questions which the GAO was required to address include whether the sanctions provision have been enforced satisfactorily, and whether the provisions have been placed an unnecessary regulatory burden on employers. 8 U.S.C. § 1324a (j)(1) (Supp. IV 1986).

89. 8 U.S.C. § 1324a (k) (Supp. IV 1986)-The talk force is established by the Civil Rights Commission, the Attorney General, and the Equal Employment Opportunity Commission.

90. UNITED STATES GENERAL ACCOUNTING OFFICE, *IMMIGRATION REFORM: STATUS OF IMPLEMENTING EMPLOYER SANCTIONS AFTER ONE YEAR* 31 (1987)[hereinafter GAO (1987)].

91. *Id.* at 4.

92. *Id.*

93. *LULAC v. Pasadena Independent School District*, 662 F.Supp. 443 (S.D. Tex. 1987).

94. *See generally*, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND/AMERICAN CIVIL LIBERTIES UNION, *THE HUMAN COSTS OF EMPLOYER SANCTION* (1989) [hereinafter MALDEF/ACLU] (discussing problems preventing discrimination victims form filing charges; e.g. lack of publicity, lack of OSC regional offices, and victims' reluctance).

mentation of employer sanction has *immediately* led to discriminatory practices.

2. *Second GAO Report (1988)*

The GAO in its second report to Congress, stated that as of September 1988, 286 discrimination charges had been filed with the OSC and 148 charges under IRCA had been filed with the EEOC at about the same time.⁹⁵ Of these charges, 54 had been filed with both the OSC and EEOC. This evidences the confusion over dual coverage, of IRCA and Title VII.

The GAO further obtained discrimination information through a survey of 104 state and local agencies enforcing discrimination laws.⁹⁶ Out of the 81 agencies that responded, 19 replied they were generally unfamiliar with IRCA's antidiscrimination provision, and 44 had not received information about the Office of Special Counsel forms used in filing a charge.⁹⁷

The GAO's employer survey results indicated a potential showing of unfair employment practices since the passage of IRCA.⁹⁸ The survey result indicated that since November, 1986, an estimated 528,000 out of the 3.3 million employers surveyed (16%) who were aware of the law, began or increased prohibited discriminatory practices or policies.⁹⁹ The three most relevant examples were: asking only foreign-looking or foreign-sounding job applicants for work authorization documents, asking only current foreign-looking or foreign-sounding workers for work authorization documents, and beginning a new policy of hiring only U.S. citizens.¹⁰⁰ The GAO report also stated that these statistics were too low to be projected to the population of U.S. employers.¹⁰¹

The GAO concluded that the number of charges filed with the OSC and EEOC of IRCA related discrimination data failed to show that the law has not created a pattern of discrimination. Although their employer survey showed that one out of six employers had begun or increased prohibited practices, the report stated that these results could not be relied upon to establish a pattern of discrimination caused by IRCA. The GAO report further found that the cases filed with the OSC and EEOC also did not establish that the antidiscrimination provision was an unreasonable burden to employers.¹⁰²

95. GAO (1988), *supra* note 9, at 39.

96. *Id.*

97. *Id.* at 55.

98. *Id.* at 46.

99. *Id.*

100. *Id.*

101. *Id.* at 47.

102. *Id.* at 59.

The above statistics show two things: the reluctance of the GAO to admit the seriousness of IRCA-related discrimination and the inability of the GAO to continue to ignore the dangers IRCA had created.

Other agencies have not failed to realize the extent and severity of IRCA-related discrimination. The Commission on Civil Rights found that "there is sufficient evidence in the GAO's second report to raise serious concerns about discrimination caused by IRCA and about the effectiveness (and thus necessity) of employer sanctions."¹⁰³ The agency further questioned the GAO's judgment in finding otherwise.¹⁰⁴ In addition, several other agencies which conducted their own research, had findings that conflicted with the GAO's conclusions.¹⁰⁵ For example, the California Fair Employment and Housing Commission found the extent of civil rights abuses resulting from IRCA so egregious, that it recommended the INS suspend enforcement of employer sanctions.¹⁰⁶ Furthermore, the Coalition for Humane Immigration Rights of Los Angeles (CHIRLA) found vast under-reporting of discrimination cases, especially for three categories of worker: grandfathered workers, worker who do not qualify as "intending citizens," and cases involving loss of seniority.¹⁰⁷

Despite the obvious evidence, the GAO in its first two reports avoided the crucial issue: Is the employer sanctions provision or the antidiscrimination provisions going to be repealed?

3. *Third GAO Report (1990)*

The negative precedent which the first two GAO reports set evidenced the agency's reluctance to make a recommendation urging Congress to repeal the employer sanctions provisions of IRCA. Such reluctance may in part be explained by Congress' hesitance to make any changes to IRCA upon the recommendation of the GAO and other agencies, "because of the emotionally charged debate that ensues any time the issue of immigration surfaces."¹⁰⁸

In its third report, the GAO recommended that despite widespread evidence that discrimination as a result of IRCA exists,¹⁰⁹

103. Commission on Civil Rights, *supra* note 85, at 19.

104. *Id.*

105. *See, e.g., MALDEF/ACLU, supra* note 90.

106. *See, CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION, supra* note 74.

107. CHIRLA, *supra* note 78, at 8.

108. Ramos, *Report Claims Immigration Reform Act has led to Bias*, L.A. Times, Jan. 11, 1990 at A3, col. 1.

109. UNITED STATES GENERAL ACCOUNTING OFFICE, IMMIGRATION REFORM AND THE QUESTION OF DISCRIMINATION, at 3 (1990) [hereinafter GAO (1990)].

Congress should not repeal employer sanctions.¹¹⁰ The GAO urged Congress to amend the verification system instead.

The GAO based these recommendations on its review of data based on complaints from federal agencies and groups representing aliens, and on a survey of over 9,400 U.S. employers.¹¹¹ The data compiled by the GAO indicated that 567 claims reported to local organizations, between July 1988 and June 1989, are related to employer sanctions.¹¹² In addition, 69 percent of the employers surveyed reported beginning discriminatory practices as a result of IRCA.

These findings solidly prove that the danger of IRCA-related discrimination, which was feared by IRCA opponents, has unfortunately become a terrible reality. This reality has become gravely serious in cities with large Latino and Asian populations. The extent of IRCA-related discrimination in these cities is unacceptably high.¹¹³ Los Angeles, for example, reported 29 percent of its employers beginning one or more discriminatory practices as a result of IRCA.¹¹⁴

a. *Methodological Problems With GAO's Report*

The GAO's recommendation to Congress, asking for a change in the verification system rather than the repeal of sanctions, is disconcerting for two reasons. First, it confirms the GAO's reluctance to adequately address the gravity of discrimination under IRCA, especially in those areas with large Latino and Asian populations. This unwillingness is manifested in the report's methodological deficiencies.

One of the most serious problems lies with the GAO's definition of a "widespread pattern of discrimination." The GAO analyzed the date under a definition of "widespread discrimination" that *only* included "discrimination in the hiring, or recruitment, or referral for a fee, and discharging of employees or job applicants."¹¹⁵ The GAO's definition did not include "conditions of employment, such as wages or promotions."¹¹⁶ Although the statutory language of IRCA¹¹⁷ appears to limit discrimination to the definition employed by the GAO, such a narrow definition unnecessarily excludes significant discriminatory practices.¹¹⁸ There

110. *Id.* at 9.

111. *Id.*

112. *Id.*

113. *Id.* at 3.

114. *Id.* at 81.

115. *Id.*

116. GAO (1990), at 23.

117. 8 U.S.C., *supra* note 104, § 1324b (Supp. IV 1986).

118. *E.g.*, the cancellation of employee benefits, the decrease of wages, and the taking away of earned seniority.

is ample evidence that employers have used IRCA as an excuse to discriminate against protected workers in the areas of wages, hours, promotions and other employment conditions.¹¹⁹ Because such discrimination has a clear "nexus to IRCA, [it] should be brought within the jurisdictional purview of OSC,"¹²⁰ and therefore be included in the GAO statistical analysis. At a minimum, the GAO has a responsibility to study the extent of this type of discrimination, and make such findings available to Congress. Congress can only grasp the true extent of IRCA-related discrimination, with fully accurate information.

Another serious methodological problem with the 1990 GAO report is the means by which the GAO measured employer discriminatory practices. The GAO intentionally evaluated the survey data in a manner so as to yield the lowest possible figure. If respondents left questions unanswered, such non-responses were assumed to indicate no discrimination. This was done to be "conservative in [the] estimates of discrimination practices."¹²¹ therefore, the result reached by the GAO does not genuinely verify the extent of discrimination under IRCA.

A third problem that flaws the accuracy of the GAO's report is the brevity of its concluding suggestions to Congress. The GAO briefly suggested that Congress revise IRCA's verification requirements, without repealing employer sanctions. This ignored the urging of local agencies, such as MALDEF, to recommend to Congress that it increase appropriations for OSC and amend IRCA's nondiscrimination provisions to eliminate technical limitations that frustrate Congressional intent.¹²²

b. *GAO's Third Report Has Decreased The Likelihood of IRCA's Sanctions Repeal*

Second and perhaps more significant than methodological deficiencies, the GAO's conclusions in its third report have decreased the likelihood that Congress will repeal IRCA's employer sanctions. Had the GAO report recommended the repeal of IRCA's employer sanctions due to widespread pattern of discrimination, the pressure on Congress to review such determination, as required by law,¹²³ might have been too heavy to ignore.

Notwithstanding such a recommendation by the GAO, Congress is reluctant to touch the sensitive immigration issue.¹²⁴ De-

119. MALDEF/ACLU, *supra* note 90, at 24.

120. *Id.* at 100.

121. GAO (1990), *supra* note 104, at 38.

122. MALDEF/ACLU, *supra* note 90, at 97.

123. 8 U.S.C. § 1324b (Supp. IV 1986).

124. L.A. Times, *supra* note 103.

spite the urging from several segments of the community,¹²⁵ Congress has balked at the repeal of the sanctions provision under a thirty day escape clause. Because Congress did not act to remove the sanctions by joint resolutions within 30 days of the GAO report (by April 30, 1990), sanctions cannot be removed without the passage of a bill.¹²⁶ An even stronger reason why Congress will not repeal employer sanctions is the fact that it took Congress ten long years just to pass the law and they are therefore unwilling to tamper with it.¹²⁷

The significance of Congress' inaction is that the battle against employer sanctions in the political arena is just beginning. The findings provided by the GAO and other agencies,¹²⁸ provide the ammunition with which to more adeptly fight the battle on Capitol Hill.

VI. CONCLUSION

Congress enacted the Immigration Reform and Control Act of 1986 in the hopes that this measure would help the United States labor crisis by bringing the underground network of clandestine labor above ground through the legalization process, preventing a further increase of undocumented workers through sanctions. Furthermore, IRCA's antidiscrimination provision was intended to deter any potential discrimination resulting from enforcing IRCA. Due to the number and severity of exceptions and exclusions, these goals have been undermined. The subclass of undocumented workers has been driven further underground, forced into a situation where discrimination is unavoidable. Furthermore, evidence points to the real possibility that employer sanctions have not significantly deterred the flow of undocumented workers in search of a better life.

Perhaps IRCA's ineffectual character is due to Congress' lack of foresight. It appears that two important considerations have been ignored: (1) the severe economic and political upheaval in third world countries, which contributes to the constant flow of immigration; and (2) that "immigrants provide more than special skills . . . that they also contribute the kind of energy and sophistication the United States needs to compete in global markets".¹²⁹ Instead, Congress' resulting legislation has played into the hands of

125. The Tidings-Los Angeles, Apr. 6, 1990, at 11, col. 1 (Los Angeles Archbishop Roger Mahoney joined other community leaders in urging the repeal of IRCA's employer sanctions).

126. Eaton, *Latino Panel Calls for Hiring-Sanction "Hit List."*, L.A. Times, Apr. 23, 1990, at A18, col. 1.

127. Andrade, *supra* note 74. See *supra* notes 78, 90.

128. See *supra* notes 78, 90.

129. U.S. News and World Report, *supra* note 12.

those with deep rooted prejudices and anti-foreigner sentiments, and has had a negative impact on ethnic workers, who are suffering from increased discrimination against them.

Despite of the GAO's inability to accurately portray the necessary remedies to the negative impact of IRCA's employer sanctions, it is painfully evident that a solution is badly needed. It is time to learn from our past mistakes and put an end to legislation that perpetuates exploitation and discrimination. After all, aren't we in America?

MABEL AGUILAR