

**INS AND OFFICE OF SPECIAL COUNSEL
FOR IMMIGRATION RELATED
UNFAIR EMPLOYMENT PRACTICES**

HEARING
BEFORE THE
SUBCOMMITTEE ON
IMMIGRATION AND CLAIMS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
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INS AND OFFICE OF SPECIAL COUNSEL FOR IMMIGRATION RELATED UNFAIR EMPLOY- MENT PRACTICES

THURSDAY, MARCH 21, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9 a.m., in Room 2237, Rayburn House Office Building, Hon. George W. Gekas [Chairman of the Subcommittee] presiding.

Mr. GEKAS. The hour of 9 o'clock having arrived, the Committee will come to order. Because of the rules of House, which also flow down to the rules of the Committee, we cannot proceed until two Members of the Committee are here for a hearing. After I catch my breath, I will finish my dissertation.

We note that the gentleman from Georgia, at whose request this hearing is being held, is present, and we will hear from him shortly, but not until a second Member of the Subcommittee should appear. In the meantime, you have your choice of hearing Shakespearean sonnets or music from the "Music Man." [Laughter.]

Ms. Jackson Lee is present. She being the Ranking Minority Member of this Subcommittee, she, with the chair, now constitute a quorum for the purpose of this oversight hearing.

The hearing is for the purpose of examining some of the consequences of the Immigration Reform and Control Act of 1986, which was contemplated and actually debated and passed on the premise that employers had to do more to make sure that guestworkers were fully documented and properly placed in the workforce of a particular site.

What began to happen, we began to hear anecdotes, and even more than anecdotes, some empirical evidence to the effect that when the employer looks over the documents that if they appear on their face to be valid, that that was prima facie evidence that the alien was properly documented and that the employer did his level best to ascertain whether or not this individual was legally or illegally on his premises, but that led to other kinds of problems. Because if indeed the employer questioned further the alien's handful of documents and wanted to provide additions, wanted the alien to provide additional evidence of his status, then the employer could be charged with some kind of discrimination based on a perceived motive on his part or other kinds of evidence that he might be using this device of asking for more documents as a rationale

for not hiring this particular individual or not reporting the incident.

That's what this oversight hearing is about. The gentleman from Georgia, Mr. Barr, requested the hearing because he wishes to bring to the attention of the Congress certain factors in this large subject. The witnesses that we have before us who will be testifying in a short time will aid and abet the process of looking into what has happened to this particular situation and what is happening today as we meet here in this large oversight of this particular problem.

We now yield to the lady from Texas for an opening statement, and we note the presence of the lady from Pennsylvania, Congresswoman Hart, a Member of the Committee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman, for holding this hearing. You have captured the hearing appropriately, and I thank Mr. Barr for raising the issue before this Committee. It is an issue that falls heavily on many of our jurisdictions and certainly around the country no matter where you might live. Whether north or south, east or west, there are industries that utilize a large number of immigrants or new citizens in their particular workforce. These are important assets to America. These are individuals who have come, in most instances, to seek opportunity and equality. They are hardworking. They are taxpaying. They are the recipients, prospectively, of the legislation just passed in the United States House 2458I, where we are seeking to assist individuals, reunite with their families.

We realize, however, the intent behind the law, which was to ensure that employers were not abusive in taking advantage of those without documentation and as well that we did not encourage smuggling organizations to begin to fuel human resources for different industries. We think that is valid. We think it is valid that people come to this country, access legalization, and begin the appropriate process.

We likewise think it is valid to seek to restructure the INS so that we can assure that the procedures are readily available and that backlogs do not occur, but we have seen abuses. We have seen abuses to the extent that employers' places have been raided. In particular, in my home community in San Antonio, where a large tech firm with Indian American, Indo-American, from India, where they were working legitimately and were raided and hauled away and incarcerated before any further explanation could be given. That is wrong.

At the same time, we think it is appropriate for employers who abuse the circumstances to be penalized, but we do want to have a balance, and I am delighted to see Mr. Henderson, who understands balance and understands the laws, in conjunction with very able witnesses that will be here this morning, I will look forward to hearing them.

And, Mr. Chairman, I will simply conclude by saying a summary of some things. I always start by suggesting that we are a Nation of laws, but we are also a Nation of Immigrants, and we must find a way to balance the responsibility. Now, after the horrific acts of September 11th, I also say that immigration does not equate to terrorism, and so it is important that we hear from these witnesses

to ensure that we can provide some road map to effectively see how to address such employee-employer situations.

With respect to unfinished business, Mr. Chairman, I would like to put on the record my continued interest in the issue of INS restructuring that I believe is extremely important and appreciate that there have been some ongoing discussions, but I also put on the record my concern with Gao Zhan, the Chinese woman who has a husband as a citizen and a son as a citizen and to be able to address her circumstance.

Let me likewise put on the record the mother of Amadou Diallo, of which we have made a request for there to be a hearing on her status through a private citizen bill, and for the stretching of my imagination, I cannot examine the Democrats cannot secure the same kind of fair treatment in this Committee as those of the majority in asking for hearings on issues that they deem to be of great important. I make this request again publicly, in spite of letters that have been sent that have rejected the request. I think that in the spirit of comity, which lessens every day here, that we could have this matter reconsidered.

With that, I yield back the balance of my time.

Mr. GEKAS. We thank the lady.

With us the gentleman from Georgia, a Member of the Judiciary Committee. Although he is not a Member of this Subcommittee, he is the chief impulse for having this particular oversight hearing, and we could have put him at the witness table to present his set of facts, as he sees them, but now we ask him to ex officio present an opening statement.

Mr. BARR. Thank you very much, Mr. Chairman, and I thank you and the other Members of the Subcommittee for allowing me to be with you all here today to participate in a very important hearing.

I would also like to thank the staff of the Subcommittee for their hard working in developing and organizing the hearing and the materials relating thereto.

Mr. Chairman, as I think you have already indicated very appropriately, American employers are in the burdensome position of being both enforcer and target of immigration laws. The Immigration Reform and Control Act, or IRCA, of 1986 states that employers must hire only U.S. citizens and aliens who are authorized to work in the United States. Employers are required to verify the employment eligibility of each worker hired to avoid civil fines and penalties, criminal penalties, for a failure to comply with the laws recordkeeping requirements.

At the same time, the employer may not discriminate against foreign-born job applicants by requesting any other information beyond what is collected on the INS employment eligibility form or what is commonly referred to as the I-9 form. If an employer requests any further documentation based, for example, on reasonable suspicion to validate a candidate's legal status, the Office of Special Counsel for Immigration Related Unfair Employment Practices may initiate an investigation and/or prosecution on the grounds that the applicant's civil rights were violated by the company.

In short, the law seems to put American companies in a "Catch-22" situation by requiring employers to be vigilant to hire only

those job applicants authorized to work in the United States, yet prohibiting them from asking too many questions to ascertain legal status, lest the employer be investigated and charged with national origin and citizenship status discrimination.

It should come as no great shock that IRCA's employment verification process is easily thwarted by fraud and that large numbers of unauthorized aliens have used fraudulent documents to obtain employment in the United States. The GAO, for example, has testified before this Subcommittee on how large-scale counterfeiting has made employment eligibility documents widely available.

Employers seeking to comply with the law can, and are, easily deceived by fraudulent documentation used by unauthorized aliens, yet are not provided the flexibility to further ascertain the validity of those documents. Even more troubling is the INS and OSC enforcement strategy. There appears to be no rational framework INS and OSC follow when investigating and prosecuting civil rights violations in these laws. After multiple meetings and correspondence over a 2-year period with both INS and the OSC on this matter, we have not been able to clarify, they have not been able to clarify, one, if there exists a process to weed out false claims; two, how and why particular employers are targeted, while others are not; three, how employers may verify if a prospective employee is, in fact, a legal worker and avoid a civil rights violation; or, four, the frequency with which INS and OSC, that is, the Office of Special Counsel, pursue litigation against American businesses on civil rights grounds. In fact, the GAO has testified that the strategy does not describe the criteria INS will use to open investigations and the OSC to pursue claims against employers. I am hopeful the INS and OSC will further clarify for us today their respective roles and the procedures.

Mr. Chairman, immigration policy must assist, not penalize, the American business community. The hiring process under current immigration law is completely irrational and counterproductive. The employer must hire the worker before inquiring as to whether the employee has the proper authorization to work in the United States. If the inquiry begins before hiring occurs, the OSC can step in, slap the employee with a civil rights violation. This is patently unfair to American companies and, again, seems counterproductive to the purpose and intent of both this immigration law and immigration laws generally.

I do look forward to hearing from our witnesses, from both the private and the Government sector today, and look forward to continuing to work with them and with the Subcommittee which has, as always, provided leadership in this important area.

I yield back.

Mr. GEKAS. We thank the gentleman.

The witnesses who are with us today begin with the introduction of Juan Carlos Benitez, who was nominated by President Bush and confirmed by the Senate in 2001, to be Special Counsel for Immigration Related Unfair Employment Practices.

Prior to joining the Justice Department, Mr. Benitez was of counsel to the law firm of Long Aldridge and Norman. From 1995 to 1999, he was both Associate General Counsel and Legislative Director for the Puerto Rico Federal Affairs Administration in Wash-

ington, D.C. He also clerked for Federal District Court Judge Raymond L. Acosta. Mr. Benitez has a B.A. in judicial systems from Sacred Heart University in San Juan and received his J.D. from the Inter-American University Law School.

He is joined at the witness table by Joseph Greene, the Acting Deputy Executive Associate Commissioner for Field Operations with the Immigration and Naturalization Service. Mr. Greene began his career with the INS as an inspector at JFK Airport in New York in 1973. He has held numerous positions with the INS, including Criminal Investigator Examiner, Supervisory Special Agent, District Director in Denver and Assistant Commissioner for Investigations at INS headquarters. Mr. Greene has a master's degree in philosophy from Fordham University.

With them at the witness table is Otto Kuczynski, the founder of the Fairfield Textiles Corporation in Fairfield, New Jersey, which he organized in 1976. Mr. Kuczynski immigrated to the United States in the mid-1950's. He has spent his entire career in the textiles business in both Germany and the U.S. His company has been pursued by both the INS and the Office of Special Counsel.

And the final witness will be Wade Henderson, the Executive Director of the Leadership Conference on Civil Rights. Prior to this position, Mr. Henderson was the Washington Bureau director of the NAACP. He also served as the Associate Director of the Washington National Office of the ACLU and is Assistant Dean and Director of the Minority Student Program at Rutgers University School of Law. Mr. Henderson is a graduate of Howard University and Rutgers University School of Law.

With that we begin with the routine of advising our witnesses that their written statements will become a matter of record, without objection, and that we ask each to try to limit the oral presentation, review of their written testimony, to 5 minutes.

So we will begin in the order in which our witnesses were introduced.

Mr. Benitez?

**STATEMENT OF JUAN CARLOS BENITEZ, SPECIAL COUNSEL,
DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, OFFICE
OF SPECIAL COUNSEL FOR IMMIGRATION RELATED UNFAIR
EMPLOYMENT PRACTICES**

Mr. BENITEZ. Yes, thank you, Mr. Chairman and Members of the Subcommittee, for the opportunity to talk to you today.

My name is Juan Carlos Benitez, and since November 12th, 2001, the day the United States Senate approved my appointment, I became Special Counsel for Immigration Related Unfair Employment Practice at the Department of Justice.

Mr. GEKAS. Would you pull the microphone closer to you, please.

Mr. BENITEZ. As such, I head the Office of Special Counsel for Immigration Related Unfair Employment Practices, probably making me the public servant with the longest job title in the Administration or at least in the Department of Justice. If this Subcommittee were to decide to make any amendments to our enabling statute, I would strongly recommend to include as one of them the renaming of the office—just kidding.

Presently, the Office of Special Counsel is part of the Department of Justice, Civil Rights Division. Even though we protect all Americans from workplace discrimination, we are also the only office in the Federal Government specifically designed and empowered to protect the civil rights of immigrant workers.

With your permission, I will not read my prepared written testimony, but will briefly state what makes OSC unique and what Government agencies, our programs and the challenges we face in the future so that we may be able to have more time for questions.

The Office of Special Counsel enforces the anti-discrimination provisions of the Immigration and Nationality Act and will soon begin enforcement of the failure to select cause of action under the American Competitiveness and Workforce Improvement Act of 1998.

OSC, as commonly known, was established in 1986 to prevent discrimination under the Immigration Reform & Control Act, commonly known as IRCA. IRCA prohibited, for the first time, the knowing hiring of unauthorized workers in the United States. At that time, many felt employer sanctions would lead to discrimination against legal immigrants, Hispanic and Asian Americans and others that an employer might perceive as foreign. They were right.

Even today, 16 years after the law was passed, we see discriminatory treatment of U.S. citizens and lawful immigrants based upon whether they appear or sound foreign. One of OSC's major priorities and our number one challenge is to educate the general public, both employers and employees, about their rights and obligations under our statute. I am convinced that only through an aggressive education program will we finally be able to prevent this type of discrimination from occurring in the future.

In accordance with this, OSC has established an early intervention program which is unique among Government anti-discrimination enforcement agencies and is based upon the common-sense idea that prevention of discrimination and early intervention are more important than obtaining a remedy after the fact.

The early intervention program is made possible by OSC's two toll-free hotlines; one for employers and one for employees, through which we receive approximately 15,000 calls a year. Callers are not tied up in an endless computerized telephone tree. Rather, they speak directly to staff that are charged with resolving problems informally and quickly, without the need for an official charge, investigation or lawsuit. Our staff arranges for an immediate informal mediation session, in which we work with both the employer and the employee and attempt to resolve the problem so that the employer can hire the person it wants and the employee can work.

Employers benefit because we clear up any questions they may have about proper application of the law. They get to hire the person they always wanted to hire, and they have a Government agency working with them, rather than investigating them for wrongdoing. Employees and applicants benefit because they get to earn a living without delay. Our early intervention program reflects that we take seriously our statutory mandate to educate the public, both employers and workers, about our work and proper employment procedures.

We also put a premium on developing partnerships with business, labor and the immigrant community. Since my appointment, I have already met with the representatives of employment groups, employer groups and sought their advice on how to better communicate with employers. We plan to meet with State and local chambers of commerce, the Small Business Administration and other types of employer organizations.

We have renewed our effort to work comparatively with State and local Governments. We have met with representatives of a number of major cities with large immigrant populations and are negotiating agreements to engage in cooperative efforts to educate the employee and the employer communities on their rights and responsibilities under the anti-discrimination provision.

It is important to recognize that it is difficult earning the trust of one portion of our protected class, the lawful immigrant community. Many come from countries where governments and law enforcement agencies are not to be trusted. Indeed, many have escaped persecution in their own home countries. Others don't want to file a complaint and contact the Government, but simply move on to obtain a new job and support their family.

Outreach to this part of our protected class is a challenge, but OSC has taken many creative avenues to reach this portion of our constituency, including participating in radio interviews in various languages, such as Haitian-Creole and Spanish.

When education and early intervention are not successful, we prosecute entities that violate the law. OSC has obtained remedies for U.S. citizens, naturalized citizens and legal immigrants with employment authorization. The work we do is best described by the people we represent. We settled a case in New York City against a New York City law firm, on behalf of a naturalized U.S. citizen who saw an ad in the Sunday newspaper for a clerk typist position. She called the number Monday morning and was told the job was already filled. She was surprised, since the advertisement had just run the day before, and she asked her daughter to call an hour later. The daughter was given an interview.

What was the difference between the woman and her daughter? The mother was a United States citizen born in Uruguay and had a Spanish accent. The daughter was born in the United States and apparently had no accent. We filed a suit and settled her case by obtaining a \$15,000 back pay, and a \$1,500 civil penalty, and training for the employer so that this type of discrimination would never occur again in that firm.

We have a number of cases in which United States citizens of Hispanic origin and lawful immigrants were denied employment because their lawful documents were rejected by employers as "suspicious" even though a non-Hispanic U.S. citizen presented similar documents that were accepted.

In one case involving a fruit processor in Oregon, the company engaged in workplace discrimination by subjecting individuals who were seeking employment to different hiring procedures if they looked or sounded foreign. The company asked applicants, whom it believed were foreign, for their work papers before providing employment applications. People who appeared to be U.S. citizens were provided the application with no questions asked.

Mr. GEKAS. Will the witness try to draw it to a close, please.

Mr. BENITEZ. Sure. The events of September 11th created a new program challenge for the Office of Special Counsel. While it is clear that we all need to be more vigilant, we must also be careful not to assume that immigration status is the sole predictor of whether or not an individual poses a threat.

As the President has pointed out so often, America's quarrel is with terrorism, not with persons who wish to contribute peacefully to our American society. I am proud the OSC was one of the first components within the Government to distribute information to both employers and workers regarding concerns of discrimination following the World Trade Center and Pentagon attacks. This information was distributed to the employer associations, immigrant associations and has been posted on the OSC's website.

In closing, I note that we take seriously our statutory responsibilities to enforce the law and are proud of the role we play in ensuring that our Nation's civil rights laws are fairly enforced.

Thank you for the opportunity to present this testimony. I would be happy to answer any questions that you may have.

[The prepared statement of Mr. Benitez follows:]

PREPARED STATEMENT OF JUAN CARLOS BENÍTEZ

Mr. Chairman and Members of the Subcommittee:

Thank you, Mr. Chairman, and Members of this Subcommittee, for the opportunity to talk with you today. I am Juan Carlos Benítez, the Special Counsel for Immigration Related Unfair Employment Practices. I hold a Presidentially Appointed/Senate Confirmed position. I assumed the position of Special Counsel after the Senate approved my nomination on November 13, 2001. Today I will tell you about the Office that I lead, the statutes that we enforce, the lawsuits that we file, and the special efforts we take to ensure that the statutory rights of U.S. citizens and documented aliens are protected and enforced.

I. THE OFFICE OF SPECIAL COUNSEL

I lead the Office of the Special Counsel for Immigration Related Unfair Employment Practices, or OSC for short. The OSC is part of the U.S. Department of Justice's Civil Rights Division. The OSC's mission is to protect United States citizens and work-authorized aliens from illegal employment discrimination, as defined by federal statutes.

The OSC relies on several means to achieve this mission. First, we undertake traditional methods that are familiar to most people: investigation and litigation. Second, we have a vigorous informational outreach program directed towards employers and potential victims of discrimination. Third, we use a unique early intervention program that enables us to resolve potential charges of discrimination early—before they result in formal charges.

II. OFFICE OF SPECIAL COUNSEL ENFORCEMENT OF 8 U.S.C. § 1324B

The Immigration Reform and Control Act of 1986 (known as IRCA) created OSC and the law it enforces, 8 U.S.C. § 1324b. Indeed, we owe our existence to a member of this Subcommittee, Congressman Frank of Massachusetts, the author of the amendment that would become Section 1324b.

Section 1324b prohibits certain types of employment discrimination. Put simply, Section 1324b prohibits employment discrimination on the basis of citizenship status or national origin, and also prohibits certain unfair document practices. Under IRCA, employers in the United States were, for the first time, required to verify the identity and work authorization of every new employee. IRCA also made it illegal for employers in the United States to knowingly hire undocumented aliens. An employer who failed to verify a new employee's identity and work authorization, or who knowingly hired an undocumented alien, could be subject to civil or criminal penalties.

When IRCA was under consideration, there was concern that employers would seek to avoid penalties for hiring undocumented aliens by refusing to hire anyone

who did not look or sound “American.” To address those concerns, IRCA identified and prohibited certain immigration-related unfair employment practices in an effort to prevent employers from discriminating against U.S. citizens and work-authorized aliens. IRCA created a new legal cause of action for citizenship status discrimination, extended the jurisdiction of existing federal laws prohibiting national origin discrimination to employers of 4 to 14 employees, directed that cases alleging violations of Section 1324b be heard by specially trained Administrative Law Judges with the U.S. Department of Justice, Office of the Chief Administrative Hearing Officer (“OCAHO”), and created the position that I hold and the Office that I lead. IRCA also mandated an outreach and education program that has proven to be a mainstay in our efforts to prevent unlawful discrimination against U.S. citizens and work-authorized aliens.

A. Investigation of Charges

Section 1324b provides that the Special Counsel shall investigate charges of discrimination and, where there is reasonable cause to believe that the charge is true, prosecute employers accused of discrimination. Much of my Office’s time is devoted to the investigation of charges of discrimination. The conduct of our investigations is governed by statute and regulation. The statute provides that the Special Counsel ‘shall investigate each charge received . . .’ 8 U.S.C. § 1324b. Within 120 days of the receipt of a complete charge, the Special Counsel must determine whether there is reason to believe the charge is true and whether or not to bring a complaint based on the charge before OCAHO. 8 U.S.C. § 1324b(c)(2). OSC processes all charges received and made complete, and has no backlog of cases.

B. Independent Investigations

In addition to conducting charge-based investigations, the Special Counsel may conduct independent investigations to determine if a person or entity has engaged or is engaging in illegal discrimination as defined by the statute. 8 U.S.C. § 1324b(d)(1), 28 C.F.R. § 44.304. The Special Counsel may do so when there is “reason to believe that a person or entity has engaged in or is engaging in [illegal discrimination].” 28 C.F.R. § 44.304(a).

III. CAUSES OF ACTION UNDER 8 U.S.C. § 1324B.

The statute provides:

It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—(A) because of such individual’s national origin, or (B) in the case of a protected individual . . . because of such individual’s citizenship status.

8 U.S.C. § 1324b. The Statute also contains a broad prohibition against intimidation or retaliation and prohibits certain unfair documentary practices relating to the verification of an employee’s identity and work authorization. 8 U.S.C. § 1324b(a)(5),(6). I will discuss each in turn.

A. Citizenship Status Discrimination

Citizenship status discrimination is discrimination against an individual on the basis of his or her immigration or citizenship status. For example, an employer who refuses to hire an applicant who is a work-authorized immigrant simply because the applicant is an immigrant has engaged in citizenship status discrimination. The pre-IRCA case of *Espinoza v. Farah*, 414 U.S. 86 (1973) addressed the issue of citizenship status discrimination. In that case, Mr. and Mrs. Espinoza alleged that Farah Manufacturing’s U.S. citizens-only employment policy violated Title VII of the Civil Rights Act of 1964. Mr. and Mrs. Espinoza asserted that this policy was an act of national origin discrimination. Writing for the majority, Justice Thurgood Marshall held that Farah’s citizens-only policy was not national origin discrimination, but rather was discrimination on the basis of alienage. The Court stated that Espinoza’s national origin (Hispanic) was irrelevant, and in fact Farah hired overwhelming numbers of Hispanics at the factory in question. Instead, Farah’s distinction was based on citizenship status and the fact that Mrs. Espinoza was not a citizen of the United States. Since Title VII did not prohibit citizenship status discrimination, there was no remedy for this conduct under federal law.

IRCA’s enactment made illegal the behavior engaged in by Farah. Under IRCA, “protected individuals” can maintain a cause of action for citizenship status discrimination. Section 1324b defines “protected individuals” as persons who are lawful per-

manent residents, temporary residents admitted under IRCA's amnesty program, refugees and persons granted political asylum. In the case of permanent residents, individuals who fail to apply for naturalization within 6 months of becoming eligible, or who fail to complete the naturalization process within 2 years of having applied for naturalization, lose their status as protected individuals.

B. National Origin Discrimination

National origin discrimination is, as the phrase implies, discrimination against an individual because of the individual's place of birth or ancestry. For example, an employer's failure to hire an individual because she is from Mexico is national origin discrimination. Similarly, discrimination against a person because their parents are from a foreign country is national origin discrimination. The OSC's jurisdiction over national origin cases is limited to employers of between 4 and 14 individuals. Only a small percentage of the OSC's cases and matters involve national origin discrimination. However, they do occur. For example, the OSC recently had a case where a woman who is fluent in English but speaks with a thick accent called a small law firm in response to an advertisement for a legal technician. Within moments the woman was told that the position had been filled. Minutes later the woman's daughter, who speaks English with no accent whatsoever, called the same firm in response to the same advertisement. The daughter was invited in for an interview. This powerful evidence of national origin discrimination allowed OSC to obtain a prompt settlement in favor of the woman.

C. Unfair Documentary Practices (Document Abuse)

As I mentioned earlier, IRCA requires that employers verify the identity and work authorization of all new employees. As part of that process, the employee must complete and the employer must retain an Immigration and Naturalization Service form I-9, on which the employer records data from the documents presented by the new employee. Employees may present any of a number of documents, or combination of documents, to establish their identity and work authorization. It is up to the employee to decide what document or combination of legally accepted documents to provide to establish identity and work authorization. The I-9 form has sections that must be completed by employees and sections that must be completed by employers. The form must be retained by employers and made available to representatives of the INS or the OSC, if requested.

Document abuse cases arise when an employer demands more or different documents, or rejects valid documents, when verifying an employee's or applicant's identity and work authorization, and the demand or refusal to accept is made with the intent of discriminating against the employee or applicant on the basis of citizenship status or national origin. 8 U.S.C. § 1324b(a)(6). If, for example, an employer demands that Hispanics present "green cards" to the exclusion of all other documents, the employer is likely committing document abuse in violation of 8 U.S.C. § 1324b(a)(6).

In order to satisfy the intent standard, the OSC seeks evidence that the charging party was treated differently from others during the employment eligibility process as a result of citizenship status or national origin. This intent can be inferred through indirect evidence. For example, evidence that immigrants were required to present a specific form of identification for employment eligibility purposes, while persons who profess to be U.S. citizens were allowed to present any of the documents allowed by law for the same purpose, is evidence of an intent to discriminate on the basis of citizenship status. And evidence that Hispanics were held to higher standards than non-Hispanics during the employment eligibility process could be used to infer intent to discriminate on the basis of national origin.

The majority of the OSC's charge and litigation docket consists of cases and matters alleging document abuse. This results from several factors. First, document abuse is the area of the OSC's broadest jurisdiction. OSC's jurisdiction in document abuse cases extends over all employers in the United States with more than 4 employees. Second, all work authorized immigrants are protected against document abuse, in contrast to citizenship status claims, where a permanent resident's protection ends if they fail to apply for naturalization within 6 months of becoming eligible to do so. Third, the employer's behavior in a case alleging document abuse is overt and easily understood by the average person. In document abuse cases the employer usually engages in a single obvious act: either the rejection of valid work authorization documents or the request for more or specified documents. Most of the information a charging party needs to make an allegation of document abuse has been openly revealed. In contrast, many citizenship status and national origin claims involve more subtle activity or behavior that is open to interpretation.

Document abuse does not simply affect work-authorized immigrants. Indeed, one of the OSC's first cases was brought on behalf of a U.S. citizen who also happened to be from Puerto Rico. In her case, an employer demanded that she present a "green card" as part of the application process. In spite of her insistence that she was indeed a U.S. citizen, and the fact that she presented her Puerto Rican birth certificate, the employer refused to hire her. He assumed that she was an immigrant because she was Hispanic.

IV. AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT OF 1998

In addition to enforcing Section 1324b, the OSC has been charged with new responsibilities under the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"). ACWIA establishes additional protections for U.S. workers under the labor condition application process. Employers use the labor condition process to bring temporary foreign professionals into the United States on non-immigrant H-1B visas. ACWIA creates a new "failure to select" cause of action. This new action allows an aggrieved party to file a complaint against a covered employer when that employer seeks to hire an H-1B visa holder over an equally or better qualified U.S. worker.

On November 20, 2000, the Attorney General delegated to the OSC the authority to receive and review complaints filed under ACWIA, and initiate arbitration of those complaints before the Federal Mediation and Conciliation Service (FMCS). OCAHO was authorized to review decisions of the arbitrators and award relief. We are in the process of creating an outreach plan to educate covered employers on their responsibilities under ACWIA.

V. OUTREACH AND INTERVENTION

The OSC has always maintained a vigorous outreach program. In the past year, and particularly in the past several months, we have improved upon that program in four ways.

First, we have implemented a plan to create a more balanced outreach program. In the past, the OSC's outreach has been primarily directed towards the employee community. However, the statute imposing the outreach requirements call for an outreach program that increases the knowledge of both employers and employees. In order to meet that requirement, I have met with representatives of employer groups and sought their advice on how to better communicate with employers. We plan to meet with state and local chambers of commerce, and other types of employer organizations.

Second, we have tailored our employee outreach to better reach under-served portions of the worker community by using ethnic media outlets more efficiently. Specifically, OSC attorneys and staff will participate in foreign language radio programs. Recently, OSC staff appeared on Haitian (Creole language) radio programs in New York City and Florida. Large numbers of Haitian immigrants depend on these types of programs for their news and entertainment.

Third, we have renewed our efforts to work cooperatively with state and local governments. Since my arrival in November, we have met with representatives of two major cities with large immigrant populations. We are negotiating agreements with these cities to engage in cooperative efforts to educate the employee and employer communities on their rights and responsibilities under Section 1324b.

Finally, the events of September 11th created new program challenges for the OSC. While it is clear that we all need to be more vigilant, we must also be careful not to assume that immigration status is the sole predictor of whether or not an individual poses a threat. As the President has pointed out so often, America's quarrel is with terrorists, not with persons who wish to contribute peacefully to American society. The OSC was one of the first components within the Civil Rights Division to distribute information to employers and workers regarding concerns of discrimination following the World Trade Center and Pentagon attacks. This information was distributed to employer associations, immigrant associations, and has been posted on the OSC's website.

In addition to conducting outreach and prosecuting charges of discrimination, the OSC has facilitated a number of favorable pre-charge interventions. In these matters, OSC staff worked actively with both the employer and the aggrieved individual to resolve the dispute without formal government intervention. A typical example took place on February 6, 2002. A human resources manager at a Minneapolis-based company contacted the OSC with questions about the employment of a refugee from Somalia. At hiring, the refugee had presented photo identification, an unrestricted Social Security card, and a valid INS-issued work authorization document. The company had suspended the refugee believing that he had to present a new INS-issued

work authorization document to replace his original, and now expired, document. The OSC attorney who took the call explained to the company representative that asylees are authorized to work indefinitely incident to their asylee status, and that an unrestricted Social Security card was valid evidence of employment eligibility. The employer agreed to reinstate the refugee.

In the course of discussing the refugee's case, the human resources manager indicated that it was the company's practice to reverify the work-authorization status of every non-U.S. citizen who presented an INS-issued document, upon that documents' expiration. The OSC attorney advised that reverification of all non-U.S. citizens could result in the unnecessary reverification of immigrants who have indefinite work authorization incident to their status, such as lawful permanent residents, refugees and asylees. The human resources manager agreed to modify his practices accordingly.

VI. CONCLUSION

In closing I note that the OSC has important statutory responsibilities. We take our charge seriously to enforce these statutory responsibilities. All of the men and women of the OSC are proud of the role they play in ensuring that our nation's civil rights laws are fairly enforced. I thank you for the opportunity to present this testimony. I would be happy to answer any questions that you may have.

Mr. GEKAS. Thank you, and we turn to Mr. Greene.

STATEMENT OF JOSEPH R. GREENE, ACTING DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER FOR FIELD OPERATIONS, IMMIGRATION AND NATURALIZATION SERVICE

Mr. GREENE. Thank you, Mr. Chairman, and good morning. I appreciate the opportunity to be here today, and I thank you and the Members for the chance to discuss the INS's Work Site Enforcement Area. I have five quick points to make.

The first, as you know, is that since the IRCA legislation was passed in 1996 [sic], the INS has endeavored to determine the best way to use this important tool as one of a number to deter illegal migration into this country, and the long history of that endeavor is well known to this Committee.

During the last decade, there has been almost universal recognition for the need for a new and comprehensive strategic approach to INS law enforcement across the board, and this strategic effort, as you know, began in 1994 with the Border Control Strategy and was complemented in 1999 by the INS Interior Enforcement Strategy.

That Interior strategy, as you recall, was designed to identify and prioritize the harms to the United States associated with illegal migration and to address them systematically, recognizing the dilemmas posed by the expanding missions of the INS and its limited personnel.

Of the five strategic objectives identified in that strategy—criminal aliens, local law enforcement support, worksite enforcement, human smuggling and trafficking and immigration fraud—many recognized at the time that the worksite enforcement area posed the greatest challenge.

After the Interior Enforcement Strategy was established, the INS issued a policy with respect to Worksite Enforcement, including policy statements and revisions to the existing Worksite Enforcement field manual. These remain the general policy guidelines within which the Service operates today.

For the roughly 2-year period thereafter, INS concentrated its personnel and its resources on cases involving criminal violations

or widespread egregious industrywide civil violations. These efforts especially focused on cases where a nexus with human smuggling or human trafficking had been established or where there was evidence that worker exploitation has occurred.

You have seen the results of these in several major cases that have been reported by the media and discussed in testimony before this Committee in the past. The methodologies provided by the Employer Sanctions law were critical elements to our success in these instances, but we believed, and still believe, that criminal convictions and their accompanying sentences have proven to be a far greater deterrent.

Since the terrorist attack against the United States, this tool has assumed a far greater and critical importance in our war against terrorism. As you know, shortly after September 11th, INS directed its field offices to begin investigations initially at four and then at all major airports in the United States to ensure that jobs which involved access to secure areas of the airport were filled only by persons legally authorized to work under United States law.

The sheer scope of this effort is daunting. There are, between the airports of San Francisco and Los Angeles, 65,000 employees who have such access. To date, our investigations have involved over 800 employer locations and more than 200,000 employees. We have worked with a variety of other law enforcement agencies, including the FBI and the Office of the Inspector General, for the Departments of Transportation and Labor in this effort. Thus far, more than 100 individuals have been arrested and charged with a variety of crimes, including immigration violations.

I am pleased to report that the vast majority of employers have been found to be in substantial compliance with their employment eligibility verification obligations. Nevertheless, this is a crucial area of vulnerability that the INS and its other law enforcement partners in the Federal Government are continuing to address.

In closing, just let me say that while the INS recognizes that it has no authority to enforce the provisions of the act covering unfair immigration-related employment practices, we do have a role to play in employer education, and we do take those responsibilities seriously.

The 1999 policy guidance devoted a significant section to this topic, and it has remained a part of the Employer Sanctions Training Program currently being provided to special agents in the INS. To date, up till the attacks on the United States, we had trained 400 agents in that regard. In addition, the documents that we provide to employers as part of our law enforcement efforts are the materials that are provided to us by the OSC. In fact, the policy guidance that was formulated in 1999 was based, in part, on recommendations that the Office of the Special Counsel passed to us and coordinated with them prior to release.

Again, Mr. Chairman, I thank you for the opportunity to testify, and I stand ready to answer your questions.

[The prepared statement of Mr. Greene follows:]

PREPARED STATEMENT OF JOSEPH R. GREENE

Mr. Chairman, and Members of the Subcommittee, I am pleased to have the opportunity to talk to you today about the Immigration and Naturalization Service's (INS) role in enforcement of our immigration laws.

The INS is continuing its strategy to gain increasing control of the border, deter and disrupt illegal employment, combat smuggling and other alien-related crime, and remove greater numbers of criminal and other deportable and inadmissible aliens. Additionally, the INS has undertaken an initiative to identify, locate, and remove persons who have been ordered removed, but have subsequently failed to appear for removal or depart as ordered.

Our Interior Enforcement Strategy is a complement to a border control strategy put in place in 1994. The underlying principles and goals of this strategy are designed to respond to the changing migration environment in the United States in all its complexity. It includes the following strategic priorities.

- Identify and remove alien criminals and terrorists
- Deter and diminish smuggling and trafficking of aliens
- Respond to community reports and complaints about illegal immigration and build partnerships to solve local problems
- Minimize immigration benefit fraud and other document abuse
- Deter and limit employment opportunities for aliens not authorized to work

The tragic events of September 11th are a sharp reminder of how important effective immigration control and enforcement is to protecting our national security and the health and safety of our citizens. The complexity and challenges of our mission have never been more stark.

You have asked that my testimony focus on what the INS refers to as worksite enforcement. Our worksite enforcement activity is one facet of our enforcement strategy. As you know, the Immigration and Nationality Act was revised in 1986 to establish employment controls that restrict the availability of work for illegal aliens. The goal, of course, was to deter illegal immigration by removing the employment opportunity magnet.

In this regard, the hiring practices of employers is critical as an effective and credible deterrent to illegal immigration. Most employers know that a legal workforce is a stable workforce and do not have individuals who are not authorized to work in the United States. Nevertheless, we are aware that some employers, in order to secure an imagined short-term economic gain, will hire unauthorized workers, exploit and even abuse them, with utter disregard for their human dignity and civil rights.

By working with employers to improve their process for verifying that individuals who have been selected for employment are authorized to work in the United States, the INS assists employers to develop a stable and legal work force and minimize the disruptive effects of large-scale arrests and investigations. At the same time, the INS works with employers and other federal agencies, including the Office of Special Counsel (OSC), to ensure that hiring practices do not discriminate against authorized workers, or otherwise violate civil rights laws. This collaboration with OSC was particularly important when we were developing the employment verification pilot projects and developing the evaluation designs.

Our strategy emphasizes cooperation with responsible employers and prosecution of unscrupulous employers. This does not reduce our commitment to removing unauthorized workers when necessary, but rather enables us to focus on and aggressively prosecute employers who engage in illegal activity to sustain an undocumented and exploitable labor pool. Fines and jail time for employers who engage in illegal activity send a clear message to all that these behaviors are not acceptable employment practices. The vast majority of employers comply with the law and are good citizens that meaningfully contribute to the community. The few who do not act responsibly endanger individual workers and their communities.

Under this strategy, we specifically target employers who are abusive to their workers and violate other federal and state laws, regardless of industry or geography. The nexus between smuggling activity and employment is direct. Likewise, the demand for fraudulent documents extends the connection between smuggling and employment. Without documents indicating work authorization, the smuggled alien cannot find work under our current statutory scheme.

The INS has been able to achieve considerable success using this approach. For example, two men were recently convicted in Norfolk, Virginia in a scheme that involved the organized smuggling of Eastern Europeans to work as janitors in several retailers and supermarkets.

Five restaurant managers in the Denver area were recently indicted for harboring dozens of illegal alien employees. The scheme appears to involve sophisticated smuggling from China and the use of employment agency referrals from other parts of the country.

A former manager of an Iowa egg-processing plant has pleaded guilty to harboring illegal immigrants. Additional charges are pending in related cases. Local prosecutors and the Equal Employment Opportunity Commission are also investigating allegations of discrimination and sexual assault against illegal alien workers.

The INS has 2,246 special agents authorized. An additional 100 positions were authorized for Joint Terrorism Task Forces in the FY 2002 Counter-terrorism Supplemental. Recently, given the large-scale effort to support the PENTTBOMB and national security-related investigations, there has been a decline in other investigations' activity. However, Service-wide there has been a 21 percent increase in employer case completions as a result of an emphasis on worksite enforcement targeting national interest industries.

Specifically, since the terrorist attack of September 11, INS headquarters has directed its field offices to initiate worksite investigations into the hiring practices of companies employing individuals who work at airports and who have direct access to commercial aircraft and other secure areas to ensure that these individuals are authorized to work and that employers are complying with the employment eligibility verification requirements. Particular attention is devoted to companies that provide security at major airports throughout the United States. The operations have included prosecution of individuals who violated criminal immigration statutes, removal of unauthorized aliens from airport worksites, and provision of fraudulent document training to security officials responsible for granting access badges to secure areas.

The primary objective of this initiative is to ensure that travelers and the American people have confidence in their safety and security while traveling. Accordingly, the first group examined under the initiative comprised employers and employees who perform security screening and those having direct or indirect access to aircraft, ramp and baggage handling or any other areas that would make the facility vulnerable to compromise. The second group involved employers and employees who have access to boarding areas such as vendors and building services personnel.

The effort has been undertaken in cooperation with a variety of Federal agencies as well as airport authority management officials. Participating Federal agencies have included the Federal Bureau of Investigation, and Offices of the Inspector General for the Departments of Labor and Transportation.

The importance of this cooperative effort cannot be over-emphasized. Each agency has its own enforcement and oversight responsibilities and it is extremely important that our efforts be closely coordinated to limit disruption and duplication of effort. We are pleased to report that this cooperative effort has worked well.

This is a huge undertaking. For example, the Los Angeles and San Francisco airports alone account for more than 150 employers and more than 65,000 employees.

The INS effort to date has involved more than 800 employers with more than 200,000 employees. More than 250 cases have been completed. Many investigations are still ongoing and more are expected to begin over the next several months. The inquiries have involved employers from a wide range of industries.

The common denominator is that they employ persons at or near aviation terminals and at least some of these employees have access to secure areas. The employers have included airlines, security firms, food service providers, maintenance/cleaning companies, construction, messenger services, flight services and airport vendors. Special attention is being given to ensuring that airport personnel overseeing secure area badge issuance are trained in how to identify unauthorized and undocumented workers.

The vast majority of employers have been found to be in substantial compliance with their obligations related to employment eligibility verification. We do however expect that some culpable employers will ultimately be fined for hiring individuals not authorized to work in the United States, and the unlawful hiring practices and employment will terminate as a result of the sanctions.

Locations to date have involved most major airports as well as regional and local airports including, but not limited to, Atlanta Hartsfield, BWI, Boston Logan, Dulles, Newark, Detroit, Denver, San Francisco, Oakland, San Diego, Los Angeles, Phoenix, Salt Lake City and Dallas-Fort Worth.

Given the number of employers and employees involved, comparatively few arrests of unauthorized aliens have taken place at work sites. There have been a number of arrests for individuals employed at airports that made false statements related to employment and/or acquiring identification documents. Where appropriate, these cases are being referred to and prosecuted by the local United States Attorneys office.

More than 100 persons have been arrested for a variety of offenses as a result of our worksite enforcement initiative. Some of them have been illegal aliens; others

have been charged with offenses related to false statements on applications or fraudulent use of identification documents, social security cards or numbers.

I wish to be clear that none of these arrests has indicated terrorist activity. This enforcement initiative itself, however, is an important preventive step designed to eliminate vulnerabilities in our national transportation system. Similar reviews involving other infrastructure industries will be undertaken as well.

The challenges we face are daunting. But we must stand firm against illegal immigration and smugglers who exploit and profit from human hopes and dreams.

Thank you for the opportunity to present this testimony. I'd be happy to answer questions.

Mr. GEKAS. Thank you.

We turn to Mr. Kuczynski.

STATEMENT OF OTTO KUCZYNSKI, PRESIDENT, FAIRFIELD TEXTILES CORPORATION

Mr. KUCZYNSKI. I wish to thank the Members of the Subcommittee for inviting me to testify at today's hearing. I am the owner of Fairfield Textiles Corporation, which is a company engaged in the knitting, dying and finishing of fabric. Prior to the downturn in the American textiles industry, my company operated on a 24-hour basis, 7 days per week, and employed as many as 400 people at one time.

The large majority of our workforce has always consisted of immigrants. I, too, am an immigrant to this country, and as such I have always made clear to those who work for me that my company does not and will not discriminate against immigrants. Having said that, I would like to tell you about an experience that I had.

In 1991, the Immigration and Naturalization Service conducted what can only be described as a raid upon the facilities in which my companies operate. This was, to my knowledge, a random raid. In that raid, the INS literally surrounded our two plants and took into custody employees who appeared, by their physical characteristics, to be immigrants to this country. Each of them was asked to verify his identity and legal residency status.

A number of employees questioned were ultimately determined to be illegal aliens. However, since my company was in possession of the appropriate and necessary documentation on those employees, not one summons, not one notice of violation was issued by the INS to my company.

However, the incident occurred at the height of our company's busy season. As such, it caused a serious interference with my company's ability to meet its contractual requirements. With no prior notice, we lost a portion of our workforce, which we simply were unable to promptly replace. As a result, we were unable to meet certain key productions and delivery deadlines, causing some of our longstanding clients to move their business to our competitors.

I determined that I needed to ensure that we would do all we could in the future to never hire an illegal alien, even unwittingly. My company simply could not afford any further traumatic disruptions to its business.

The difficulty, of course, in carrying out this policy is that so often illegal aliens seeking employment with us would present false or fraudulent documents which, in all respects, appeared valid on their face, but in actuality were not.

In October 1998, our company received a letter from the Civil Rights Division of the United States Justice Department concerning a charge which that division had received from someone who had sought a job at our company. This individual claimed that we discriminated against her by not hiring her because of the fact that she was a citizen of the United States. It was an absurd claim, but nonetheless I cooperated with the Government in its informal request for my company to produce many hundreds of documents for the Government's review. Most of these documents related not to this particular person, but to all others who were hired by my company during a particular period of time.

Additionally, the Government asked to take depositions from certain of my employees, and I consented to that because I had nothing to hide.

Shortly thereafter, the Government wrote my company and threatened suit against my company alleging that it had violated the law with respect to the individual who filed a charge against us. The Government in that letter said that if we did not want to be sued, we would have to agree to six terms, the most important of which were that we pay a civil penalty to the United States Government in the amount of \$2,000 and that we pay the charging party back pay of \$7,451.

Because my company never intentionally discriminates against anyone in the hiring process and because of my own background as an immigration to this country, I felt morally obligated not to buckle under a demand by our Government, which I felt was unreasonable. I said, "No." My "no" turned out to be very costly.

The Government instituted suit against my company in May 1999, and the case was not resolved until September 2001. In that settlement, my company paid a fine to the United States Treasury in the amount of \$1,100 and paid the charging party \$12,470. That is only part of the story, however, since the legal fees and related costs to defend these charge actually spent by my company exceeded \$93,000.

You should know that as this case developed, the demands on the part of the Government increased. For example, in February 2000, a settlement demand was made by the Government in which it wanted my company to pay the United States Treasury \$77,700 as a penalty and to pay the charging party \$16,300. At the same time, the Government demanded, and ultimately obtained by court order, copies of all payroll records covering my company's entire workforce for a period of 4 years; financial statements from my company; income tax returns and other financial documents which, as far as I was concerned, were confidential and absolutely irrelevant to the issues and the lawsuit.

I interpreted these efforts on the part of the Government to rise to the level of intimidation—nothing more, nothing less. My resolve only strengthened, and I determined not to buckle under these unreasonable demands.

As a result of this lawsuit, I have become painfully aware of the law on which it was based. I must confess that the law makes no business sense to me. My company was sued because of something called "document abuse." As I understand it, the law permits an applicant for employment to choose which document he wishes to

present to us from a list of acceptable documents shown on the back of the I-9 form, in order to prove his identity and work eligibility. However, we, as the employer, cannot request that the applicant present more or different documents than are required; and we must accept a document which, on its face, appears to be genuine and relates to the person who presents it.

Our failure to comply with this regulatory requirement can lead to the imposition of a fine of up to \$2,000 for each violation.

Compliance with these rigid requirements is a substantial problem for my company, as I assume it is to other American companies. Most of the applicants who seek employment at our company are unskilled. However, that employee must be trained to operate machinery ranging from state-of-the-art knitting machines to dying and finishing machines. Training takes time and effort which, of course, translates into money. If, after a person is hired and trained, our company learns that the documents submitted by that employee were, in fact, fraudulent, we must immediately terminate that person and start the process again.

As I understand it, we are not permitted to verify the validity of the documents presented by an applicant for employment until after we hire that person. Only after we hire and begin the costly process of training can we call the Social Security Administration to see if the Social Security card presented is valid and contact the INS to see if the INS-issued document presented is valid.

The process simply does not appear to make business sense. What does appear to make business sense, however, is to allow an employer to determine the employment eligibility status of a prospective employee before an employee is hired. However, to do so violates the law.

My company was sued, in essence, because my supervisory employees, in an effort not to violate the requirements of the law and mindful of the raid by the INS in 1991, consistently used the employment application process to obtain as many documents as possible, rather than as few documents as permissible, to prove employment eligibility.

I now know, however, that such conduct violates the law as written. We are caught on the horns of a dilemma. If we comply rigidly with the law, we may be hiring an illegal alien. If I violate the law, the Government can sue me.

I want you to know that compliance with the law is not as simple as the Government would have you believe. The Government has issued a handbook for employers, which is intended to instruct employers on the completion of the Form I-9. All the Members of this Committee have to do is read that document, as do my supervisory personnel and become as confused as I am afraid my supervisory personnel became. Those personnel are working people who have gained the skill sufficient to allow them to work as supervisors. They are not college-educated individuals. While I do not intend to demean their abilities, I know from experience that they do have a difficult time in understanding some of the directions in the booklet. Mistakes can occur, which may prevent the hiring of illegal immigrants based upon the mistaken belief by the supervisory personnel that the document submitted is insufficient. Mistakes can

also occur which may cause my company to unwittingly violate the law and expose itself to penalties and other costs.

At the time we settled our lawsuit with the Justice Department, one of the terms of the settlement was that I was required to have my supervisory personnel view an educational videotape prepared by the Office of Special Counsel. I was told that that videotape would assist my hiring personnel to understand the obligations with respect to hiring legal immigrants. I, personally, have viewed the tape, and confess that after viewing it, I became more thoroughly confused than ever before as to what my hiring personnel have to do.

I heartily recommend that this Committee obtain copies of the videotape to get a firsthand understanding of the complexities involved. My purpose in testifying before you this morning is not to bash our Government or its efforts to prevent discrimination; it is, however, to alert you to the fact that honest and patriotic American employers often find themselves in a "Catch-22" situation: either comply with the law and possibly hire illegal aliens; or don't comply with the law and ensure that that individual you hire is permitted to work, but become exposed to substantial fines as a result.

I am pleased that this Committee is reviewing this problem, and I will answer any questions that you may have of me.

[The prepared statement of Mr. Kuczynski follows:]

PREPARED STATEMENT OF OTTO KUCZYNSKI

Dear Congressman Sensenbrenner:

Thank you very much for inviting me to testify at the hearing on "The INS and Office of Special Counsel for Immigration-Related Unfair Employment Practices" before the Subcommittee on Immigration and Claims. I firmly believe that my testimony will provide a working example of the difficulties which American employers encounter in their efforts to comply with the rigid requirements imposed upon them for the hiring of legal immigrants. I will also provide a glimpse into the difficulties with which my Companies were faced as a result of long and arduous litigation instituted by the Office of Special Counsel against my Companies as a result of perceived violations of the Immigration Reform and Control Act of 1986.

Fairfield Textiles Corporation, as well as a related company, Fairfield Jersey, Inc. (both owned principally by me) are engaged in the knitting and dyeing of fabric. Fairfield Textiles Corporation, has been in existence since 1976; and Fairfield Jersey, Inc. has been in existence since 1984.

The American textiles industry is presently suffering a severe economic downturn, caused by various factors including, but not being limited to, difficulties in competing with offshore competitors. Prior to the commencement of this downturn, and as late as 1995, my Companies operated on a 24-hour basis, 7 days per week, and employed as many as 400 people at one time. The large majority of my work force has always consisted of immigrants. The supervisory personnel working for my Companies, whose job duties include the hiring of new employees, have always been directed to hire only individuals who are authorized to work in the United States. This policy became even more important to me as a result of the following:

In or about 1991, the United States Immigration and Naturalization Service (INS) conducted what can only be described as a "raid" upon the facilities operated by Fairfield Textiles Corporation in Fairfield, New Jersey and Paterson, New Jersey. I have no reason to believe that this was anything but a random raid. In that raid, the INS literally surrounded the plants; entered the plants, and took into custody employees who appeared by physical characteristics to have been born outside of the United States. Each of those individuals was asked to verify his or her identity and legal residency status. At the same time, employment records maintained by Fairfield Textiles Corporation on each of the questioned employees were reviewed by the INS representatives.

While a number of the employees questioned were determined ultimately to be illegal aliens, the documentation which each of those illegal aliens had earlier presented to Fairfield Textiles Corporation appeared reasonably valid upon their face;

and for that reason, not one summons—not one notice of violation—was issued by the INS to Fairfield Textiles Corporation.

However, the raid occurred at the height of Fairfield Textiles Corporation's busy season. As such, it caused a precipitous and serious interference with my Company's ability to meet its contractual requirements for its customers. I immediately contacted my attorney, Dennis J. Smith, Esq., and asked him to intercede on my Company's behalf and to inquire why my Company was the subject of a raid. Mr. Smith advised that his inquiries on our behalf were met with nothing short of insults. For example, when Mr. Smith identified himself in a telephone conversation with the INS as the attorney for Fairfield Textiles Corporation, and asked as to the basis of the actions of the INS in conducting the raid, Mr. Smith was told simply that since he was an attorney, it was up to him to find out the answers himself.

Because of the traumatic impact caused by the INS raid upon my Companies (both in terms of their ability to meet their contractual obligations, as well as their inability to replace, on a moment's notice, the portion of their work force who were determined by the INS to be illegal aliens and who never return to work), I needed to ensure that we would do all that we could in the future to ensure that we never hired, even unwittingly, an illegal alien. My Companies simply could not afford any further disruption to their business.

Accordingly, I issued a verbal directive to my Plant Supervisor and to the other supervisory personnel whose job duties included the hiring of new employees. This directive required them to redouble their efforts at the hiring stage to ensure that my Companies did not, even unwittingly, hire illegal aliens. My intent in issuing this directive was to ensure that my Companies would never again suffer the traumatic impact of a loss of a portion of its work force as a result of unwitting violations of the law pertaining to the hiring of illegal aliens.

In October 1998, my Companies received a letter from the Civil Rights Division of the United States Justice Department. In that letter, my Companies were advised that the Civil Rights Division of the Justice Department had received a charge by an individual who alleged that she was discriminated against by Fairfield Jersey, Inc. and that she was "not hired based on her citizenship status, while the Company prefers to hire undocumented workers". The Government asked my Company to respond informally, indicating that if my Company refused to do so, subpoenas would follow. Accordingly, I directed the appropriate individuals at my Company to engage in an informal production of documents to the United States Government. These documents included a letter response to the charge; a copy of the partially completed employment application of the Complainant with related documents; and, as per the request of the Justice Department, copies of all employment eligibility verification forms (Forms I-9) collected and/or re-verified by the Company since January 1, 1998, together with copies of supporting documentation in which instances such photocopies were made. (January 1, 1998 was approximately 10 months prior to the date of the letter from the Justice Department.)

I asked my attorney to seek the right to interview the Complainant. I was advised by my attorney that his request was denied, since he was told that, at that stage of the investigation, a personal interview of the Complainant would not be granted.

After the informal discovery of documents by the Justice Department was completed, the Government asked to take the deposition of two employees at Fairfield Textiles Corporation. My attorney was advised that if this deposition was not agreed to, a formal complaint would be filed by the United States Government, pursuant to which these depositions would occur anyway. Therefore, I advised our attorney to permit the depositions on a consensual basis. I frankly was proud of the efforts which my Company was making to ensure that it did not hire illegal aliens; and therefore had nothing to fear from having my employees give depositions. The depositions took place on February of 1999.

Subsequently, in late March 1999, the Justice Department, in a letter to my attorney, advised that there was "reasonable cause to believe that Fairfield Jersey Company has violated [applicable Federal law] by engaging in an unfair immigration-related employment practice." The letter stated that, "specifically, this office has determined that Fairfield Jersey engaged in document abuse by rejecting the employment eligibility verification purposes the charging party's unrestricted Social Security card which reasonably appeared to be genuine on its face." The letter went on to say that the Justice Department "may file suit against Fairfield Jersey on [the charging party's behalf]; but solicited the cooperation of our Company to enter into "corrective action" without contested litigation. Accordingly, the Government demanded that our Company agree to the following terms:

1. That it would agree that henceforth its hiring practices shall not discriminate based upon citizenship status or constitute document abuse.

2. That it pay a civil penalty of \$2,000.00.
3. That it agree to hire the charging party.
4. That it would pay back pay to the charging party in the amount of \$7,451.00.
5. That it would send a notice and educate each of its hiring and recruitment personnel about the applicable law.
6. That it would post a notice concerning these facts in all of its personnel offices and distribute the notice to all employment applicants for a period of one year.

In response, I directed our attorney to advise the Justice Department that:

1. Our Company will agree that its hiring policies and practices shall be maintained in accordance with the law.
2. It will agree to educate its hiring personnel about the law.
3. It will post a copy of any written notice which it will provide to its hiring personnel about the law.
4. However, it would not admit any violation of the law.

I would like the Committee to note that my position with respect to the demand by the Justice Department was based upon several factors, the most important of which were:

1. My certainty that my Company never intentionally discriminated against anyone in the hiring process. Any fair-minded person who visited by Companies' plants would be struck by the large number of immigrant employees on our work force.
2. I was born in Europe and spent my childhood in Germany during World War II, my family having fled from the Russians into Germany. As such, I am personally and fully aware of the horrors of discrimination; and have ensured that my Companies have conducted themselves in such a manner as to ensure fair treatment to everyone, free of any discrimination. Based upon these principles, I felt that the Government was acting inappropriately. I felt morally obligated to stand up to the Government in this instance.

As an obvious result of my position, in May 1999, the Office of Special Counsel of the Civil Rights Division of the United States Department of Justice filed a complaint against Fairfield Textiles Corporation and Fairfield Jersey, Inc. with the Office of the Chief Administrative Hearing Officer, United States Department of Justice, Executive Office for Immigration Review. That complaint alleged that my Companies discriminated against the "charging party" based upon her perceived citizenship status, and committed "documentation abuses" against the charging party. The complaint also alleged that my Companies engaged in a "pattern or practice of citizenship status discrimination and document abuse against job applicants they perceived to be aliens." Specifically, the complaint alleged that my Companies improperly verified the Social Security Numbers of job applicants whom they perceived to be non-U.S. citizens.

As a result of this complaint, a long and arduous lawsuit followed. That lawsuit taxed not only the financial strength of my Companies; but attacked my personal pride in being an American citizen. That lawsuit continued until September 2001, when it was ultimately settled. Under the terms of the settlement, my Companies agreed to do everything they agreed to do at the time of the initial demand by the Justice Department in 1999; but, in addition, they agreed to pay the charging party the sum of \$12,470.40 and to pay a civil penalty to the United States Treasury in the amount of \$1,100.00.

Those sums of money are only part of the story. My pride in being an American, and my refusal to buckle under the demands of the Justice Department in this lawsuit cost my Companies approximately \$93,776.97 in legal fees and related costs.

As the lawsuit developed, and as the charges of the Justice Department became more apparent, it became clear that the remedies which the Government was seeking went far beyond the charging party's initial complaint. For example, the complaint sought an Order which would require my Company to "instate and make whole each and every other work authorized individual who may have been denied employment as a result of [my Companies'] illegal actions, including all back pay and retroactive employee benefits and seniority loss as a result of [my Companies'] illegal actions, including interest."

In the litigation, discovery demands were made by the United States Government, which demands showed clearly that the Government intended to proceed far beyond the actual charge; and to engage in what can only be called a fishing expedition

through my Companies' records; in an attempt to try to find some violation by my Companies which would render them subject to punishment. For example, one of the document demands required the production of "all documents relating or referring to Respondent's policies and/or procedures since November 30, 1994 completion of INS Form I-9." Another required blank copies of all documents disseminated or required to be completed by employment applicants from August 1, 1996 to the present. Another demand required a copy of our Company's most recent balance sheets, income statements, annual report to shareholders, and Federal Corporate Income Tax Returns—information which had nothing to do with the charges claimed.

As the case developed, the Government continued to raise its stakes. In fact, as of February 2000, the Government advised our Companies that, in order for the Government to dismiss its complaint, our Companies would have to pay the United States Treasury \$77,700.00, and would have to pay the charging party \$16,291.00. The penalty portion of this demand was based upon the Government's assertion that my Companies had committed document abuse in 111 instances; that the statutory fine permitted for each such violation was \$1,100.00; but that, as a measure of "compromise" the Government would demand only \$700.00 per violation.

At the same time that this demand was received, the Government issued subpoenas to seven current and former employees of my Companies, requiring their depositions. The Government further advised that it was intending to demand copies of all payroll records for my Companies' entire work force for a four-year period, so as to permit it to cross-check the I-9 forms which we had submitted to the Government with the Companies' entire payroll records. In addition, the Government advised our Companies that, from the review of the documents which we had given to the Government in response to its demands, the Government had determined that 65 workers who had either been hired, or who had applied for jobs and not been hired, had not been identified on I-9 forms which my Companies delivered to the Government. The Government in asserting its failure to obtain I-9 forms was a violation of law, threatened that if the matter were not settled, the Government intended to search for each of the 65 individuals, interrogate them, and determine what documents, if any, they gave to the Companies. Presumably, if the number and type of these documents violated the law, my Companies would be exposed to further fines.

I interpret these efforts on the part of the Government as intimidation—nothing more and nothing less. My resolve only strengthened and I determined not to buckle under these unreasonable demands.

The litigation continued in this vein, until it became apparent to the Government, that the economic downturn in the textiles industry, as well as the onset of a recession, rendered my Companies less attractive as a source of substantial fines. Only when that fact was understood by the Government, did this matter settle under the terms as described above.

As a result of the litigation, I have become painfully aware of the law on which litigation was based. My attorney has explained it to me over and over again, but, I must confess it makes no rational sense to me. It is my understanding that my Companies were sued, and forced to pay a penalty, as a result of something called "document abuse". As I understand it, the law permits a prospective employee to choose which document he or she wishes to present to a prospective employer from a list of acceptable documents shown on the back of the Form I-9. An employer is not permitted to request that a particular employee/applicant present more or different documents than are required. Further, the employer is not permitted to refuse to honor documents which, on their face, "reasonably appear to be genuine" and to relate to the person who presented them.

I have carefully reviewed the provisions of the Form I-9. As this Committee is clearly aware, the back of the I-9 Form has three columns: "List A"; "List B"; and "List C". List A identifies documents that establish both identity and employment eligibility. If a prospective employee presents one document from List A, it is my understanding that it is unlawful for the employer to then ask for any further documents. Any such request is a violation of Federal law, and is defined as discrimination under the law. It can lead to the imposition of a fine of up to \$2,000.00 for each such violation.

Compliance with these rigid requirements presents substantial problems to my Companies—and presumably to other American companies. In my business, most of the applicants who seek employment are unskilled. However, the operations of my plant involve the use of machinery ranging from state-of-the-art knitting machines to boilers to dyeing machines. As can be anticipated, each person who is hired by my Companies has to be trained for his/her position. Training takes time and effort—which, of course, translates into money. If after a person is hired, our Companies learn that that person is an illegal alien, or that the documents submitted by

that person to prove employment eligibility are in fact fraudulent, my Companies must immediately terminate that person or stand the risk of violating Federal law.

It would make perfect sense, therefore, for an employer to be able to determine with as much finality as possible, the employment eligibility status of a prospective employee before an employee is hired. However, as I understand the process, that is not permitted.

What conduct caused my Companies to run afoul of the law? In a nutshell, it was the following:

My supervisory employees, in an effort not to run afoul of INS' requirements—and mindful of the INS "raid" in 1991 upon our Companies, consistently use the employment application process to obtain as many documents as possible, rather than as few documents as permissible to prove employment eligibility.

I will give you an example:

If a prospective employee produced an alien registration card which, on its face, appeared valid, then, according to Federal law, the supervisor interviewing that prospective employee can ask for no further documents. However, the sad truth is that it is quite possible for someone to purchase another person's fraudulent documents. As a result, the supervisor interviewing a prospective employee who tendered, for example, an alien registration card during the I-9 process, would routinely ask for some other form of identification, such as a driver's license containing a photograph; or a Social Security card. Once that supervisor saw such documents which crosschecked with each other, he would feel reasonably satisfied that the person before him was indeed the person referred to on the documents; and the hiring would be permitted to occur.

That conduct, however, is evidently a violation of the law. This is because an alien registration card is on "List A" of the list of acceptable documents for I-9 purposes; and the driver's license with a photograph is on "List B". A Social Security card is on "List C". Once a "List A" document is provided, the mere request by the employer for either a "List B" document or a "List C" document results in a violation of the law.

Another example:

For an employee under the age of 18, a report card from his school is a "List B" document. If such a proposed employee submitted a report card as well as a Social Security card, my supervisory employees are suppose to accept those documents as proof of employment eligibility. However, it is routinely known that documents such as Social Security cards can be bought and sold on the street. There is no real basis on which my supervisory personnel can be satisfied that what appears to be a valid Social Security card indeed is valid. The Social Security Administration does maintain a telephone number which allows employers to inquire, by telephone, as to whether a Social Security card presented to the employer by an employee is valid. However, it is my understanding that such inquiry cannot be made to the Social Security Administration unless and until the prospective employee is actually hired. Only after that hiring occurs—with the result that my Company is already spending time, effort and money in training that employee—can an inquiry to the Social Security Administration be validly made. Another example:

On Section 1 of the I-9 Form, an applicant for employment may attest that he or she is an alien authorized to work in this country until a date certain and may identify himself or herself by an Alien Number or an Admission Number. That information refers to certain documents. If that person then produces, say, a school I.D. with a photograph (a "List B" document) and a U.S. Social Security card, it is my understanding that it is unlawful for my supervisory personnel to require the employee to present the documents referred to in Section 1. That is true even if the document referred to by the applicant in Section 1 is a "List A" document which, in and of itself, would prove both identity and employment eligibility. If my supervisory personnel does make a request for the production of that document, it is a violation of Federal law.

The above examples given by me, are intended to show the difficulties imposed upon American employers in the hiring of legal immigrants. The process, however, of hiring legal immigrants has been made so complicated by the law that, in effect, it has become an impediment to hiring legal immigrants. The INS has published a "Handbook for Employers" which is instructions for the completion of Form I-9. That document is approximately 35 pages in length, and contains instructions on the employment verification process which instructions are divided into eight separate parts. The document, while intended to be simple, is not. For example:

Page 14 of that document contains, in Question Number 15, an explanation as to how my supervisory personnel are suppose to be able to tell if an INS-issued document has expired. Here is the answer:

"Some INS-issued documents, such as previous versions of the Alien Registration Receipt Card (I-151 and I-551), do not have expiration dates and are valid indefinitely. However, the 1989 revised version of the Alien Registration Receipt Card (I-551), which is rose-colored with computer readable date on the back, features a 2-year or 10-year expiration date. Other INS issued documents, such as the Temporary Resident Card (I-688) and the Employment Authorization Card (I-688A or I-688B) also have expiration dates. These dates can be found either on the face of the document or on a sticker attached to the back of the document."

My supervisory personnel are not college-educated individuals. They are working people who have gained a skill sufficient to allow them to work as supervisors. Without intending to demean their abilities, I doubt whether they would be able to understand some of the alternative directions quoted above. Mistakes could occur, which could prevent the hiring of a legal immigrant based upon the mistake and belief by the supervisory personnel that the document submitted is insufficient.

Because of the problems that I have had with the litigation referred to in this statement, I have specifically told supervisory personnel that they are not permitted to ask an applicant for employment to produce documents other than those documents which the applicant voluntarily produces. However, quoting again from Page 14 of the Handbook, the following question and answer is given:

"Q. What should I do if persons present Social Security Cards marked "NOT VALID FOR EMPLOYMENT," but state they are now authorized to work?

A. You should ask them to provide another document to establish their employment eligibility, since such Social Security Cards do not establish this."

It is quite understandable that, based upon the directions that I had given to my supervisory personnel, an otherwise legal immigrant who presents a Social Security card marked "not valid for employment" would not be hired; even though, perhaps, that applicant would have another "List C" document available for presentation.

As a final example of how the procedures and guidelines of the INS and the Justice Department may hinder the hiring of legal immigrants, I offer the following:

At the time my Companies settled their lawsuit with the Justice Department, one of the terms of the settlement was that I had to require my hiring personnel to view an educational videotape prepared by the Office of Special Counsel. I was told that the purpose of the educational videotape was to assist my hiring personnel in understanding their obligations with respect to hiring legal immigrants. When the educational videotape arrived, I personally viewed it. I will confess that after viewing the videotape (which lasts about 20 minutes) I was more thoroughly confused than ever before as to what my hiring personnel have to do. The tape itself is the best evidence of the difficulties with which employers are met when they attempt to meet the rigid legal requirements for legally hiring immigrant workers. I heartily recommend that this Committee obtain copies of this videotape, to get a first-hand understanding of the complexities involved.

It is my fervent hope that this statement will assist the Committee in reviewing the practice and procedure of the Justice Department and the INS with respect to the hiring of legal immigrants. It is also my fervent hope that any abuses on the part of either the INS or the Justice Department in this statement will be the subject of scrutiny by this Committee in an effort to enact legislation to prevent such abuse.

I appreciate the opportunity to have appeared before this Committee and to have presented this statement.

Mr. GEKAS. We thank the gentleman, and we turn to Mr. Henderson.

STATEMENT OF WADE HENDERSON, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. HENDERSON. Thank you, Mr. Chairman. Good morning to you and the other Members of your Subcommittee. I am Wade Henderson, the executive director of the Leadership Conference on Civil Rights, and I want to thank you for the opportunity to present the views of the Leadership Conference regarding the operation of the Office of Special Counsel for Immigration Related Unfair Employment Practices.

The Leadership Conference on Civil Rights is the Nation's oldest and most diverse coalition of national organizations working on civil and human rights in the United States. The Leadership Conference seeks to further the goal of equality under law through legislation advocacy and public education.

Mr. Chairman, I will summarize my statement and thank you for including my complete statement in the record today.

Now let me say at the outset, Mr. Chairman, that the Leadership Conference strongly supports the mission and work of the Office of Special Counsel. It is not my intention to speak today regarding the merits of any individual case in which the OSC has been involved. However, it is quite obvious that some have raised concerns about overzealous enforcement by the Office of Special Counsel, and therefore I would like to address that issue, putting it in a broader context, both on behalf of the Leadership Conference, but also as an individual who worked in the advocacy community in support of the creation of this very important office.

First, I would like to place my concerns that have been raised by the OSC's handling of individual cases in their appropriate context; second, I want to explain why I believe the Office of Special Counsel continues to be important and why it, in fact, needs to be strengthened; and, finally, I will provide what I believe is a logical recommendation on how to address some of the concerns which have been raised here this morning by Mr. Kuczynski, for example.

While it is true that a number of cases litigated by the Office of Special Counsel and the overall amounts of civil penalties and back pay obtained have increased in recent years, they are still quite limited. Last year, for example, only 44 cases were settled or favorably decided, resulting in a total of only \$169,664 in back pay awarded to victims. There are several reasons for this result.

First, the Office of Special Counsel is woefully underfunded, operating on a budget of only about \$6 million a year and with a staff of approximately 30 employees.

Second, the laws themselves clearly limit the jurisdiction of the office, meaning, that a large number of what we believe are employment-related immigration discrimination cases are legally beyond the Agency's reach.

Third, the enforcement activity of the Office of Special Counsel is really constrained both by its limited resources, but also by its effort to adopt new and balanced approaches to enforcement and public education. And Mr. Benitez, this morning in his remarks, described some of those approaches, including his early intervention approach and other efforts which we support because we believe they make a difference.

Now, in addition, the Office of Special Counsel awards grants to nonprofit organizations, as well as business associations across the country and even trains other Federal agencies on how to adjust these issues. Clearly, we believe that what they are doing with respect to this public education effort makes a great deal of sense, but it does limit, we think, their ability to actually address effectively some of the cases that are brought to their attention. They simply don't have the full capacity to do so.

I say all of this to dispel any notion about whether the Office of Special Counsel is overzealous or overly litigious. It simply is not

the case. Over the past decade, there has been virtually no growth in the resources of this important office. At the same time, the population of newcomers to the United States has grown substantially, and it is growing in new areas where employers are less likely to have experience in dealing with immigration-related employment issues.

Add to this, of course, the circumstances, the tragic circumstances of September 11th. As we know, the attacks on the World Trade Center and the Pentagon have caused even greater distrust among some Americans, and employers in particular, against those who look foreign, and that distrust has spilled over into the workplace and intruded into the fair decision making about whether individuals legitimately are entitled to work in the United States.

The Equal Employment Opportunity Commission, for example, has received 165 complaints of employment discrimination in the few weeks following the attacks of September, and similar findings have been reported by groups like the Arab—the American Arab Anti-Discrimination Committee or the National Asian Pacific American Legal Consortium. Both organizations have monitored this kind of activity in the past.

Now because all of this activity from our perspective is important, we simply wanted to note that the hysteria which has been suggested about the role of the Office of Special Counsel is simply unwarranted.

I see that my time has ended. I'm going to conclude by saying the following, sir:

I think that the concerns which have been expressed by Mr. Kuczynski obviously reflect the dilemma that many employers feel they face when handling the twin pressures of, on the one hand, complying with Immigration Service requirements to hire effectively and on the other avoid discrimination.

We think if employers follow the 10-point program that has been outlined by the Office of Special Counsel in an effort to avoid employment discrimination, they would be more effective, but we also see that the kind of efforts, like the raid in 1991 that Mr. Kuczynski referred to, has created a chilling effect on many employers, where they feel the necessity of going beyond what the law requires to make subjective judgments based on records available to them about who indeed qualifies for work in the United States lawfully.

This is precisely the problem that many in the advocacy community identified with employer sanctions when it was first adopted. We predicted that there would be substantial increases in discrimination. That prediction has been borne out by the facts that have been readily available to this Subcommittee over the past decade, and we believe that if there is a genuine interest in trying to mitigate this problem, then take a look again at the utility of employer sanctions as an enforcement tool. It has not been as effective as its sponsors had originally hoped in deterring undocumented immigration, and yet it has precipitated more employment-related discrimination, not just involving persons who are from outside of the United States and authorized to work, but against American citizens as well.

So we would encourage a reexamination of some of those fundamental premises, even as you're examining the role of the Office of Special Counsel.

Thank you, Mr. Chairman. I appreciate it.

[The prepared statement of Mr. Henderson follows:]

PREPARED STATEMENT OF WADE HENDERSON

Chairman Gekas, Congresswoman Jackson Lee, and members of the Subcommittee: I am Wade Henderson, Executive Director of the Leadership Conference on Civil Rights (LCCR). I appreciate the opportunity to present to you the views of the Leadership Conference regarding the operations of the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC).

The LCCR is the nation's oldest and most diverse coalition of civil rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, the Leadership Conference seeks to further the goal of equality under law through legislative advocacy and public education. The LCCR consists of over 180 organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. I am privileged to represent the civil and human rights community in submitting testimony for the record to the Committee.

It is not my intention to speak regarding the merits of any individual case, discussed here or elsewhere, in which the OSC has worked to uphold the antidiscrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA). Because it is my understanding that some concerns have been raised that the OSC has acted overzealously in particular cases, however, I would like to address those concerns, not only on behalf of the civil rights community but also as a person who was involved in the efforts to establish the OSC and who has had the pleasure of working with the agency over the years since its creation.

My intention in speaking about the OSC today is threefold. First, I would like to place any concerns that may be raised about the OSC's handling of individual cases in their appropriate context, by providing the distinguished Members of this Subcommittee with a broader perspective on what is in fact a very small, limited agency working to enforce our antidiscrimination laws. Second, I will explain why I believe the OSC continues to be important in the efforts to fight discrimination on the basis of national origin and citizenship, and why the agency needs to be strengthened. Finally, I will provide my recommendation for how any concerns about how the OSC may function in individual cases can be best resolved in a way that fulfills, rather than undermines, our nation's commitment to protect civil rights in the workplace.

It is true that the number of cases litigated by the Office of Special Counsel for Immigration Related Unfair Employment Practices and the overall amounts in civil penalties and back pay obtained have increased in recent years. However, a closer look at the numbers of cases fought and won by the OSC reveals that the agency is still just barely scratching the surface when it comes to effectively combating immigration-related discrimination in the workplace:

	FY98	FY99	FY00	FY01
Back Pay Obtained	\$36,274	\$141,473	\$262,252	\$169,664
Civil Penalties	\$43,800	\$200,665	\$390,645	\$360,324
Settlements and Favorable Decisions	13	30	33	44

As these figures show, given the size of our economy and the American workforce, the results of the OSC's efforts to enforce the antidiscrimination provisions of the Immigration Reform and Control Act of 1986 through litigation have been very limited; in fact, many in the civil rights community including myself believe they are far too limited than is desirable. There are several reasons for this result. First, the OSC is badly underfunded, operating on a budget of only about \$6 million a year and on a staff of approximately 30 employees.

Second, in addition to the limited resources of the OSC, the laws themselves clearly limit the jurisdiction of the Office. A number of situations are legally beyond the reach of the OSC:

- Noncitizens who lack employment authorization cannot maintain claims for document abuse.
- Employers with 3 or fewer employees are exempt from the law's coverage.
- The law does not cover national origin discrimination situations that are already covered by Title VII.
- The law does not apply where citizenship-based discrimination is required by (1) law, regulation or executive order; (2) a federal, state or local contract; or (3) where the Attorney General determines that it is essential for an employer to do business with a federal, state or local government.
- The law does not prohibit citizenship-based discrimination where an employer chooses between a U.S. citizen and a noncitizen that are equally qualified for a position.
- The law limits the definition of "protected individual," for purposes of citizenship-based discrimination. Citizens and nationals of the United States are covered. However, legal permanent residents, refugees, asylees and temporary residents are not protected if they do not apply for citizenship within six months of becoming eligible, or if they have not become naturalized within two years of applying unless they are still actively pursuing it.
- Finally, the law only applies in cases where there has been a finding of discriminatory intent; disparate impact alone is not sufficient.

These limitations on who is protected by IRCA's antidiscrimination provisions mean that many victims of discriminatory practices are not able to file valid claims with the OSC. In those instances, the only way the OSC can remedy the unfair employment practices is through an independent investigation, the result of which is a civil penalty and changes in future practice. In such cases, however, the OSC is unable to obtain any compensation for the actual victim.

In addition to the above budgetary and legal constraints, the extent to which the Office of Special Counsel engages in litigation over unfair employment practices is limited for another reason, which is the Office has sought, since its inception, to find better alternatives. The OSC devotes a great deal of its limited resources to an outreach and education program that seeks to inform employers, employees and the general public about their rights and responsibilities under IRCA's antidiscrimination provisions and which seeks to help employers learn how to comply with employment eligibility verification requirements in ways that do not lead to unfair discrimination.

For example, the Office's outreach efforts include a national public awareness campaign known as "Look at the Facts . . . Not at the Faces," focusing in particular on newly arrived immigrants who are more likely to face discrimination due to employer sanctions as well as on small business employers who may otherwise lack the resources to easily learn and comply with IRCA's employer sanctions provisions in a fair manner. This campaign includes the wide distribution of educational materials and public service announcements on television, radio and in print. Perhaps the best evidence of the efforts of the OSC to make IRCA's antidiscrimination provisions easy to understand and follow can be seen through the distribution in its materials of a simple list of ten steps that an employer can take to avoid immigration-related employment discrimination. I believe they are worth reciting here:

1. Treat all people the same when announcing a job, taking applications, interviewing, offering a job, verifying eligibility to work, hiring, and firing.
2. Accept the document(s) the employee presents. As long as the documents prove identity and work authorization and are included in the list on the back of the I-9 form, they are acceptable.
3. Accept documents that appear to be genuine. Establishing the authenticity of a document is not your responsibility.
4. Avoid "citizen only" or "permanent resident only" hiring policies. In most cases, it is illegal to require job applicants to have a particular immigration status.
5. Give out the same job information over the telephone to all callers, and use the same application form for all applicants.
6. Base all decisions about firing on job performance and/or behavior, not on the appearance, accent, name, or citizenship status of your employees.
7. Complete the I-9 form and keep it on file for at least 3 years from the date of employment or for 1 year after the employee leaves the job, whichever is later. You must also make the forms available to government inspectors upon request.

8. On the I-9 form, verify that you have seen documents establishing identity and work authorization for all your new employees, U.S. citizens and non-citizens alike, hired after November 6, 1986.
9. Remember that many work authorization documents must be renewed on or before their expiration date, and the I-9 form must be updated. This process is called reverification. At this time, you must accept any valid documents your employee chooses to present, whether or not they are the same documents provided initially. (Note: you do not need to see an identity document when the I-9 form is updated.)
10. Be aware that U.S. citizenship, or nationality, belongs not only to persons born in the United States but also to all individuals born to a U.S. citizen, and those born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of Northern Mariana Islands, American Samoa, and Swains Island. Citizenship is granted to legal immigrants after they complete the naturalization process.

In addition, each year the OSC awards grants to organizations across the country to conduct local public education campaigns that can be targeted towards particular communities. Last July, for example, the OSC awarded \$700,000 in grants to eleven nonprofit organizations, covering thirteen states, for public education programs. Business associations receive OSC grants as well, including the American Council on International Personnel, the Greater Miami Chamber of Commerce and the National Restaurant Association in the past few years. Since 1990, the OSC has awarded approximately \$15 million in grants for outreach and education programs, in the hopes that IRCA-related employment discrimination—and the litigation made necessary when violations do occur—can be prevented. Unfortunately, the OSC's resources for outreach have been cut since the beginning, so the Office has had to reach out to more newcomers with less money.

Even once it is too late to prevent individual instances of immigration-related discrimination, the OSC seeks to avoid resorting to litigation when it is possible to do so. To this end, the Office established an "Early Interventions" program in which OSC staff determines that a case can be resolved quickly and without filing formal charges and, where a specific employee is involved, bringing him or her together with the employer to prevent a discriminatory act from taking place, or quickly remedying or undoing its effects. Early Interventions are made possible through the use of a toll-free telephone hotline that allows employers and employees alike to call, regardless of the caller's language, with a complaint or a question about what to do in a specific situation. The hotline, which receives an average of 1500–2000 calls per month, has resulted in approximately 140–150 successful Early Interventions per year.

Finally, the OSC also works through cross-governmental cooperation, having Memoranda of Understanding with numerous federal and state/local civil rights agencies. The OSC trains other civil rights agencies so that they, too, can carry out the mission of immigration-related job discrimination locally and receive cases which can be forwarded to the OSC in Washington.

I realize that there is nothing I have said so far that cannot be said in even greater detail by Special Counsel Juan Carlos Benítez himself. I say it all, however, because I believe it is important to drive home the point that the Office of Special Counsel is not some sort of overzealous or even "lawsuit happy" agency that is out to "get" businesses or anyone else. Hopefully I have succeeded in making this clear. Yet that does not mean that I have no complaints of my own about the agency. In fact, if everything else remains the same, I believe that the OSC needs to do far, far more to eradicate immigration-related discrimination.

Over the past decade, there has been virtually no growth in the resources of the OSC. At the same time, the population of newcomers to the United States has grown substantially. As immigrants and refugees arrive, more education and more enforcement of antidiscrimination laws is becoming necessary. At the same time that the population of immigrants is increasing, immigrant communities are also developing in newer areas. More and more workers and employers are now facing immigration-related employment issues in places like Georgia, Iowa, Nebraska and Delaware, places where people did not have to face such issues in the past. And while IRCA's antidiscrimination provisions have now been in place for nearly 16 years, many businesses have not been in existence all that time, and many are still unfamiliar with the law's requirements.

Finally, the difficult documentation issues that employers now face did not exist in 1986. As Congressman Conyers, for instance, and many other immigration and civil rights advocates predicted would happen at the time of IRCA's passage, the use of fraudulent documents has grown as a result of employer sanctions. Many employ-

ers, mistakenly believing that it is their responsibility to be certain that documents proving identity and work authorization are genuine in order to comply with IRCA, are naturally going to feel pressure to place extra scrutiny on workers, scrutiny that is bound, intentionally or unintentionally, to unfairly single out greater numbers of potential employees who look or sound “foreign.” The events of September 11, undoubtedly, have added to this by making immigrants even greater targets of suspicion.

While the number of cases successfully handled by the Office of Special Counsel has increased in recent years, as the statistics I cited earlier show, the extent of the OSC’s enforcement efforts has still been woefully inadequate. It made a great deal of sense for the OSC to emphasize outreach and conciliation in the earliest stages following the enactment of IRCA, and this work remains crucial, but a tenet of enforcement in this area is that examples must be made of employers who flout the laws. Making an example of employers who engage in discrimination, I might add, also requires adequately publicizing the results of the OSC’s enforcement efforts, and this too is hindered by the agency’s limited resources—meaning that other employers not involved in OSC litigation are rarely if ever given enough encouragement to look at their own hiring practices. While most employers do indeed get it right when it comes to verifying employment eligibility in a fair manner, the need for a strong deterrent effect continues to exist, not only to make it clear to employers that antidiscrimination laws must be taken seriously but also to encourage victims of discrimination to come forward when their rights have been violated.

While I believe that the OSC has performed as efficiently and fairly as it can, given the size of and the constraints on the agency, if it lacks the proper resources to look for discrimination, it is not going to be able to find it and properly deal with it. Even with the many ways that the OSC tries to make it easy for employers to avoid being sued, there are still going to be those who need lawsuits to force them to comply with the law. It is particularly in the interests of the majority of employers, who carefully avoid cutting corners, that the OSC ensures that other employers do not. Since its inception, the ability of the OSC to do this has been hampered, and *if nothing else changes*, the budgetary and legal resources available to the OSC need to be vastly improved before it will ever become a truly effective force in protecting the civil rights of noncitizens in the workplace.

As you may have noticed, I have been arguing that the Office of Special Counsel needs to be strengthened if nothing else changes. The truth, however, is that something else can and ought to be changed. This brings me to my last point, what I and countless numbers of other immigration and civil rights advocates, not to mention both labor and business organizations, have been recommending for years. As the Subcommittee is aware, Congressman Frank proposed and Congress overwhelmingly supported the creation of the Office of Special Counsel in the hopes of addressing a very specific concern: the fear that the employer sanctions enacted as part of the Immigration Reform and Control Act would lead to increased discrimination in the workplace on the basis of citizenship and national origin. For a decade and a half now, the evidence has proven, overwhelmingly, that this fear was well-founded. IRCA’s employer sanctions have resulted in not just an increase but an explosion of immigration-related job discrimination, and I urge Congress to take the long-overdue step of bringing them to an end.

The scope of immigration-related discrimination since the enactment of IRCA has been substantial, and numerous studies, by not only immigration and civil rights organizations such as the Mexican American Legal Defense and Education Fund and the American Civil Liberties Union, but also by the General Accounting Office as well as the U.S. Commission on Civil Rights, have confirmed this. For example, in its third report on employer sanctions, issued in March 1990, the GAO found that IRCA had created a widespread pattern of discrimination throughout the country. Although this pattern was evident throughout the country, it was highest in areas with the greatest numbers of Latinos and Asians. The GAO estimated that ten percent of employers had responded to IRCA’s employer sanctions by engaging in discrimination on the basis of national origin, and an additional nine percent of employers had begun to engage in discrimination on the basis of citizenship. This, the GAO found, amounted to 891,000 employers who—by their own admission—adopted discriminatory hiring practices as a result of employer sanctions. Subsequent studies confirmed that the existence of discrimination was widespread, and in 1993, the National Council of La Raza found that even if every single potential flaw in the 1990 GAO study was accepted as a matter of fact, employer sanctions were still responsible for at least 111,375 new incidents of discrimination each year.

Evidence has also shown that IRCA has caused discrimination in areas other than employment. The City of New York Commission on Human Rights, for example, found that:

The concept of “eligibility” as defined by IRCA has had a strong, negative impact on the availability and delivery of services to the immigrant community. Landlords and service providers may select potential tenants on the basis of citizenship or immigrant status, with the ultimate goal of denying service to certain national origin groups . . . Testimony [before the Commission] also revealed discrimination in the provision of services and public accommodations, including insurance and banking services, even though the IRCA does not directly affect these areas.

Similarly, a study for the District of Columbia Latino Civil Rights Task Force found, in a particularly blatant example of IRCA-related discrimination that:

Banks have . . . become institutions that believe it is their right to screen Latinos and determine whether they are properly in this country . . . In Maryland . . . for example . . . in order to cash a check . . . a Maryland driver’s license or Maryland ID [is required], and the sign at the bank requiring such documents is written only in Spanish.

In addition to causing widespread discrimination, there is also compelling evidence that employer sanctions have simply failed to achieve their stated goal of discouraging illegal immigration. The current undocumented population in the United States now stands at 8.5 million people; millions more than were present in the U.S. when IRCA was enacted. Because of lax enforcement and loopholes present within the employer sanctions law, employers know that their chances of being penalized for knowingly hiring undocumented workers are slim to none. Undeterred, many employers who deliberately hire undocumented workers factor the cost of a penalty into their overall cost of doing business. At the same time, even though only three percent of employers in the United States hire undocumented workers, all employers must comply with the I-9 paperwork requirements. The INS has estimated that as a result, U.S. employers spend over 13 million hours each year filling out these forms.

In 1999, in response to overwhelming criticism, the Immigration and Naturalization Service announced that it was reducing its efforts to enforce the IRCA employer sanctions provisions. While the intent of this shift in priorities is laudable, the fact that the largely unenforced sanctions remain on the books has brought another problem to the surface: there is now even less of a disincentive for employers to hire undocumented workers, yet employers who want to get rid of particular employees, for example because of their union activities, can still justify their actions by claiming that they are merely doing it out of fear of employment sanctions. This problem, and the resulting abuses faced by employees in the workplace, was a major factor that led the AFL-CIO to reconsider its position on employer sanctions and call for their repeal.

Ultimately, the INS’s announcement that it is reducing its emphasis on the enforcement of employer sanctions is of little comfort to employees who are facing discrimination in the workplace based on national origin or citizenship. In the same way that the INS’s announcement in late 2000 that it would increase its use of “prosecutorial discretion” in pursuing removals under the mandatory deportation provisions of the 1996 immigration law reforms has done little to reduce the harsh impact of those laws, the decreased enforcement of the employer sanction provisions by the INS will do little to reduce the unfair consequences that exist, as long as the laws continue to remain on the books.

In closing, I would like to address specifically the concern that IRCA’s employer sanctions and antidiscrimination provisions, taken together, make some employers feel “stuck between a rock and a hard place.” I believe that the OSC has done what it can, through educational materials such as the ten-step list I described in my full statement, for example, to make it easier for employers to see that there need not be any such dilemma. But to the extent that the dilemma still does exist in the minds of those whom the OSC has not been able to reach, I would suggest this: if employers no longer faced the threat of sanctions, they would be far more comfortable with the antidiscrimination laws. Eliminate the “rock,” and the “hard place” is no longer so hard.

In fact, eliminating sanctions could ultimately prove to have another benefit for employers: they would no longer need to fear dealing with the Office of Special Counsel either, because the need for the agency would likely diminish. Congress, after all, created the OSC solely to deal with any discrimination that resulted from employer sanctions. Congressman Frank, whose amendment to IRCA created the Office, made this perfectly clear in 1986 during a discussion of the agency on the House floor: “If we get rid of sanctions, we get rid of this.” If Congress takes the long-overdue step of eliminating employer sanctions, it would go a very long way

towards eliminating the problem that has made the agency so very necessary in the first place. I look forward to the day when we no longer need the OSC. Until then, however, I will continue to strongly urge Congress to provide the Office with the resources it needs.

Mr. Chairman, Congresswoman Jackson Lee, and Members of the Subcommittee, thank you for providing me with the opportunity to testify today. I will now be happy to answer any questions that you may have.

Mr. GEKAS. And we thank the gentleman.

Let the record indicate that the gentleman from Michigan, Mr. Conyers, the Ranking Member of the full Committee on the Judiciary, is present, and we will accord him now a chance for an opening statement.

Mr. CONYERS. Thank you, Chairman Gekas, for permission to make a comment.

I would ask that my introductory statement be included in the record.

Mr. GEKAS. Without objection.

Mr. CONYERS. Might I just summarize my opening statement as follows: That when Barnie Frank and I, in 1986, learned that employer sanctions that were being legislated into the Immigration Act of that year, we predicted it would lead to widespread use of fraudulent documents and consequently result in more discrimination against immigrants seeking employment in the country.

Mr. Frank mitigated this problem, we thought, by offering the amendment that created the Office of Special Counsel to prevent and prosecute employment discrimination against immigrants.

Now, in the years past, we have seen substantial increases in the discrimination that we predicted. With decreasing and insufficient funding, the Office of Special Counsel has consistently done extremely important work by informing employees of their rights under the statute, advising employers on how to avoid violating the statute, helping to obtain important settlements for individuals who have been victims of discrimination under the statute, and prosecuting discriminatory employers who were unwilling to settle or adhere to the law.

Now, in the midst of all of this, the Office of Special Counsel budget has been decreased, and I think that's the first point of interest an action that this Committee may want a repair to. The need for their efforts has increased as immigration population have expanded to communities across the country that previously had only small immigrant populations. Now I have no doubt that addressing employment discrimination is critically important to all, particularly in the Arab American and Hispanic populations, which have grown considerably in my particular area. Yet the Office of Special Counsel is barely able to address the problem of discrimination in hiring and firing at all.

Now, in the first place, the statute exempts most cases of discrimination on national origin or citizenship against immigrants so that it only applies to and protects a small and narrow class of victims. That seems the second issue to which this Committee may want to examine, whether this should be allowed to continue. Though some nearly 900,000 employers have admitted to the GAO they engaged in behaviors amounting to illegal discrimination, the Office of Special Counsel is able to settle and prosecute roughly 50 cases a year with their insufficient budget and staff. We have not

enabled them to fulfill their mandate and their efforts that at least scratch the surfaces in what we are trying to do.

Now the case of our friend sitting next to Wade Henderson, Otto, and I cannot see his last name.

Mr. KUCZYNSKI. Kuczynski.

Mr. CONYERS. Kuczynski. We have a lot of your relatives in my area in Detroit.

Now you present yet another problem that challenges the Committee, that is, to what degree of scrutiny and inspection is an employer to be held in determining whether these documents are real or not? I think that's a real problem, notwithstanding lots of employers know darn well what's happening. Now we're in real time up here, so we don't need one employer parading before the Committee acting like he represents all of the businessmen that are involved with this, when most of them know what's going on and so do we.

Now the question is what is it that we're to do about it? And I'm happy to continue this discussion with the Committee and the witnesses, and I thank you for your time, Mr. Chairman.

Mr. GEKAS. We thank the gentleman. The chair will yield itself such time as it might consume up to 5 minutes.

It seems that in one way or another everyone has confirmed the inequity of what Mr. Kuczynski describes as the employer's dilemma to have to hire the person first and then determine whether the documentation was valid, et cetera, and then be subject to all of the claims and counterclaims that flow from there if he makes a different decision.

Mr. Greene, do you have comments on that?

Mr. GREENE. Well, sir, I think, as I mentioned, the INS has been working to find the right way to use this tool since it was first passed in 1986. And the dilemma that we realized early on, which has been alluded to by yourself, as well as the Members, is that the provisions of the 1986 act can be met by employers, and illegal aliens can still be found in the workforce, and that is either through a combination of document fraud or mostly through the documents that have been, you know, virtually expanded the market of counterfeit documents after the law was passed.

INS began, as you know, in 1987 with its efforts of employer education, but the tactic at that point and the strategy at that point was essentially removals of the illegal aliens who are in the workforce, recognizing that it was difficult to hold an employer accountable unless we could establish, by sworn testimony from the unauthorized workers, that the employer knew at the time that they were authorized—unauthorized, rather, and hired them anyway. That was, in fact, the strategy that was in place in 1991.

As I said, we've had to review that. We've had to look at that again. This Committee is well aware of the sort of public reaction and the lack of public support that that strategy evinced through the '90's, and we are now focusing on the kinds of offenders that Representative Conyers has mentioned here, employers who are knowingly violating the criminal provisions of the law, and that is the focus of our efforts with respect to the employer area.

Mr. GEKAS. Mr. Henderson, that same dilemma which we have described here, I don't see in the 10 points that you are describing

of what might be discrimination guidelines that should be followed, I don't see how any one of those 10—maybe I skipped something—would alleviate this dilemma problem that we're talking about, do you?

Mr. HENDERSON. Well, Mr. Chairman, the dilemma that you allude to begins, of course, with the congressional decision to impose sanctions as an enforcement tool of existing immigration law.

As you know, the provision has, in fact, required employers to play a law-enforcement role by reviewing these documents. It is a fairly straightforward process.

Mr. GEKAS. It is what?

Mr. HENDERSON. It is a fairly straightforward process in the sense that employers are told to examine certain specific documents, and they are to make judgments.

If the documents appear valid on their face, the employer is then permitted to go forward in hiring the individual who is presumed to be authorized to work. As Mr. Kuczynski has said, after the fact, of course, seeking additional verification, he may then determine that the documents were not valid, that the employee whom he has hired and trained is not a valid employee and that he is then required to terminate that employee, having invested resources in his or her training and making that decision a very painful one.

He has asked, therefore, that the verification process be done on the front end and that only those individuals who have been verified in advance would then be subject to hire. The problem, of course, is that that imposes an extraordinary burden on the individual and, of course, it is not just persons who are here in the United States as immigrants or as visitors, but it applies across the board to United States citizens as well, and that hardship is unreasonable and Congress did not seek to impose it.

But we said, on the other end of that, and Mr. Conyers, who was one of the authors of the anti-discrimination provision and who led the charge in this discussion, made it clear at the time, as he reiterated here today, that discrimination in employment decisions was an inevitable result, a byproduct of Congress's decision to impose sanctions in the manner that was adopted, and that has proven to be the case. And that assertion has been verified by the General Accounting Office independently of the advocacy community or the NGO community.

I suppose, from our perspective, what we have said is that persons in the United States who are lawfully entitled to work should be protected from decisions based on stereotypic assumptions about their eligibility for employment because some employer decides that, you know, you look too Hispanic to be a United States citizen or I'm going to ask for additional documentation, as Mr. Kuczynski himself said he believes is often a better approach than accepting with the INS says, and therein lies the dilemma.

On the one hand, trying to comply with Congress's mandates and on the other hand trying to avoid discrimination, it has proven to be very difficult for some employers. And what we have said is that examine them, the underlying premise behind the employer sanction strategy and reassess now that the sanctions have been in place over 15 years, whether in fact those provisions have achieved the enforcement goals that were originally behind their adoption.

The Immigration Service, it seems, is not really the policy arm in determining this. They are enforcing a statute given to them by Congress, and the Civil Rights Division of Justice is in the same posture. What we are looking to is guidance from Congress as to whether the sanctions that were originally adopted some 15 years ago need to be calibrated, recalibrated or eliminated because they no longer achieve their desired purpose and the side effect of discrimination seems to be an inevitable result, and therein lies the dilemma.

I think that the Department, the Immigration Service has made a reasonable effort to avoid that problem by presenting pretty straightforward instructions on how to fill out and execute the I-9 and other decisions in that regard, and the Office of Special Counsel has tried to provide guidance on how to avoid discrimination. I'm not certain how much more they can do to resolve the problem that it seems finds its initial genesis here in Congress.

Mr. GEKAS. The time of the chair has expired.

We turn to the lady from Texas.

Ms. JACKSON LEE. Mr. Conyers, do you want to take your questions—

Mr. CONYERS. I beg your pardon?

Ms. JACKSON LEE. Do you want to take your questions at this time?

Mr. CONYERS. I would yield to the gentlelady.

Ms. JACKSON LEE. I thank the Ranking Member and I thank the Chairman.

Mr. Kuczyński, can you just give me succinctly the facts of the 1990 and 1991 case that you were speaking of. What did you say exactly your staff did with respect to employees?

Did you hear me, Mister—is that his name?

Mr. GEKAS. Mr. Kuczyński. Did you hear the question, Mr. Kuczyński?

Mr. KUCZYŃSKI. No, I did not.

Ms. JACKSON LEE. Would you repeat the question, Mrs. Lee.

Ms. JACKSON LEE. Okay. I am asking you a question. Good morning.

Could you specifically indicate the actions that your employees took in the 1990 or 1991 case with respect to the workers. You hired them and you asked for documentation or what occurred?

Mr. KUCZYŃSKI. At that time, we would ask for documents. Green cards could be bought on any street corner in Patterson for 100 bucks. We did not have the knowledge of how to check them out, what to do. If you have a green card, you are hired.

Ms. JACKSON LEE. Correct.

Mr. KUCZYŃSKI. When the raid took place, literally every one of those that was found to be illegal had a green card, and one of the reasons that the INS never issued a summons was because they realized we could not determine if the card was good or bad.

Ms. JACKSON LEE. Right. Let me just stop you there.

Your sanctions were based upon what? You had an individual that you were required, ordered ultimately to pay back pay to. How did that generate?

Mr. KUCZYŃSKI. That was a different case altogether.

Ms. JACKSON LEE. That's what I'm trying to find out.

Mr. KUCZYNSKI. What happened—what happened there, this lady applied for a job. We were, at that time, laying off people, not hiring people because our business is very seasonal.

Ms. JACKSON LEE. I understand.

Mr. KUCZYNSKI. Okay. She was asked, besides the Social Security card, for some other identification. She never came back. The next thing that we heard was we got this letter stating that a charge was filed that we were discriminating. All right? This is the way it happened.

I was adamant that we were not discriminating. We were not. As a matter of fact, the mere fact that her husband had worked for my company and was fired because he was a supervisor at night and would take off 5–6 hours during the night, and when we found out what he was doing, we fired him. Five weeks later she comes in, applies for a job, and then she files charges against us. To me, that was a perfect set-up how to get back at me.

Ms. JACKSON LEE. I thank you. That's what I wanted to—

Mr. KUCZYNSKI. That is the story about that case.

Ms. JACKSON LEE. That's what I wanted to clarify, and I do want to acknowledge and thank you for your testimony.

I want to raise then with Mr. Benitez in his position and contrast Mr. Henderson's recounting for us I think 10 very apt and very understandable instructions that I assume that you are still providing employers; is that correct?

Mr. BENITEZ. That is correct.

Ms. JACKSON LEE. And the one key—I think Mr. Henderson has made a very valid point with respect to staffing, with respect to the numbers of sanction dollars, which is \$169,000—is that per year, was that? And so it does not look as if you are recklessly going about the country. It may be that you have an overload that you can't get to.

But one in particular, and respond to this for me, says, "Accept documents that appear to be genuine. Establishing the authenticity of a document is not your responsibility." Is that accurate, Mr. Benitez?

Mr. BENITEZ. That's absolutely accurate.

Ms. JACKSON LEE. And is that still the instruction to employees around the country?

Mr. BENITEZ. Yes, it is.

Ms. JACKSON LEE. Then who is the ultimate determinator that makes a determination regarding the authenticity of the document? What's the next step after that?

Mr. BENITEZ. After you accept the document?

Ms. JACKSON LEE. The employer has hired the individual. Is there then some subsequent potential for penalty to the employer if you come and find out the documents were not authentic?

Mr. BENITEZ. Not if they look and appear valid on their face.

Ms. JACKSON LEE. So there sanctions do not ensue at that point.

Mr. BENITEZ. No.

Ms. JACKSON LEE. And the whole issue of your office is to ensure that we protect individuals against discrimination.

Mr. BENITEZ. Yes.

Ms. JACKSON LEE. And is a Social Security card considered an acceptable document?

Mr. BENITEZ. It is considered an acceptable document, and the employer—having said that—the employer has the right, if the card does not look valid on its face, to go and call the Social Security Administration and confirm the validity of the document.

Ms. JACKSON LEE. They have that right, but you still maintain that Provision 3, “Accept documents that appear to be genuine. Establishing the authenticity of a document is not your responsibility,” is still a guideline that can be covered by a company, and they would be in good stead.

Mr. BENITEZ. Yes.

Ms. JACKSON LEE. I think the point is important to both my colleagues and the witnesses because I, too, believe that individual cases should be addressed. I do understand the position taken by a business owner who was in a layoff period and had some other issues, but I think we have to be very, very careful in stepping on the basic premise of your office, that is, to protect against discrimination and that, in protecting against discrimination, you are not randomly sanctioning employers. I hesitate to remove sanctions.

I’d like them to be reasonable and responsible in how you address the question, but it is my understanding is if I, as an employer, can rely, can take a document, and I am hiring, and I have no legal obligation, I am not sanctioned for you coming and telling me, “You know what? You didn’t vet this document that looked real.” That is not where the sanction comes in. The sanction comes in on the pure premise of discrimination, and I don’t think that we can take one case, though there may be others, and maybe we should continue to question, one case out of the work of that office to suggest that the validity of the office and what you do preventing discrimination is not real, continuous and necessary.

So I will keep an open mind, and I certainly want to be responsible to small businesses, and I want to be responsible to the economy and the need for employees, but I am struck by this one provision, and I think if you put this in bold letters everywhere, and if you’re holding to your word that you’re not going on, and maybe I should say to Mr. Greene, as I understand the interpretation of Mr. Benitez, that is accurate. You are not going out taking fish nets to employers who legitimately look at documents, hire the individual and move on.

Mr. GREENE. Yes, ma’am, that’s correct. It was a very early appreciation by the INS after this act was passed that we could not expect nor, frankly, train employers to be forensic experts with respect to our documents.

Now, I do want to add to the record that under the law a Social Security card of itself does not satisfy the requirement, the obligations that the employer or the employee have under the act. There has to be an identity document that is attached to that, but it can be a valid driver’s license issued by a State. But it does have to have a photo ID. So it’s the combination of a document that establishes identity and a document that establishes authority to work. Under our statute, a driver’s license, a valid driver’s license, a valid Social Security document will do that.

The records that INS maintained in the early ’90’s with respect to Fairfield Textiles were purged as part of our routine purging process based on the instruction that says that if there are no addi-

tional complaints against this company, then you can purge those records. So it's difficult for us to reconstruct what happened in 1991. All of the work-site enforcement work that we do is lead-driven. It's based on something that we hear. But I think it is safe for us to conclude that, in the absence of any additional complaints, it was clear, from our point of view, at least, that Mr. Kuczynski's company was in compliance with the employer sanctions law at the time.

So we're—we recognize that employers—we don't expect them to be forensic document experts, and we don't penalize them if, in fact, they have made the good-faith effort, which our review of the I-9s demonstrates. And yet we still find illegal immigrants working in the workforce.

Ms. JACKSON LEE. Excuse me. You just said that he was in compliance. Are you saying that the rendering of the 1999 case or resolution that he was speaking of was—

Mr. GREENE. That's—what I was referring to, ma'am, was the compliance with the parts of that section of law that we enforce, which is that they have complied with the requirements to execute the I-9 and take the appropriate steps with respect to checking that they were maintaining an unauthorized workforce.

In my opening—and I want to be clear about this. In my opening statement, I emphasized that the INS has no responsibility with respect to enforcing the unfair immigration-related discrimination aspects.

Ms. JACKSON LEE. So you're not speaking to the individual case that was then handled by your office?

Mr. GREENE. I was not. I was referring only to the 1991 incident that was referred to in Mr. Kuczynski's testimony.

Ms. JACKSON LEE. Mr. Benitez looked like he wanted to answer.

Mr. BENITEZ. We're talking about the dilemma that the employer finds himself in. It's—the way I look at the statute and the—there is a dilemma, but I think it's a different one. It's a dilemma that the employer finds himself in is the same dilemma that we find ourselves when we go into a freeway or into a highway. There is a minimum speed that we need to observe, and there is a maximum speed that we cannot exceed. That is the same position that the employer finds himself. It is—you cannot ask for more than a certain amount of documents, but there's a minimum threshold that needs to be met.

Having said that, the real dilemma that they're finding themselves in is that nobody has told them that there is a maximum speed limit. So once they find themselves in a situation where they are informed that they were going too slow, they have a tendency to try to speed up and break the speed limit, and that's where we come in.

That's why in our opening statement we're saying the biggest concern and the biggest challenge that our office has is to let the people know, both employers and employees, the existence of this top ceiling and what their rights and obligations are.

Mr. GEKAS. The time of the—

Ms. JACKSON LEE. Mr. Chairman, your indulgence is kind. I saw Mr. Henderson's hand up, and I would ask—and I thank the gentleman, the Chairman for his indulgence.

Mr. HENDERSON. Thank you, Ms. Jackson Lee. Thank you, Mr. Chairman.

I simply wanted to add one additional point, and I would agree with Mr. Benitez, there is a dilemma but of a different character.

When Mr. Kuczynski described his experiences with the raid, what he said was, I thought, very important. One, he did try to follow the requirements of the law. He looked at the documents. He made intelligent judgments. And he accepted documents on their face that appeared to be valid by any reasonable standard.

Once it was discovered, however, that he had hired undocumented immigrants based on this presumably valid identification, he was sanctioned in one very important way. He lost a skilled staff that he had helped to train over a period of several days, presumably several weeks, that he would then have to immediately replace, in the middle of his most important season. And so he is an individual who's trying to meet the deadlines and requirements of small business, who has a workforce, by definition, a small business workforce. He then discovers that a portion of that workforce which he helped to train, to make skilled and accessible to do the work, has now been summarily removed at a time when he needs them most.

Now, what that has done to him is it's crippled his business, it drove some of his business to his competitors, and it made him hyper-sensitive about hiring any individuals who appear to be immigrant or perhaps to attract that kind of attention from the INS.

So then he turns around and asks for more documents than the law requires and ends up running into a wall around anti-discrimination because he did violate the statute, whether he accepts it or not. By asking for more than the document—that the statute requirements, he was technically in violation. So what is he supposed to do?

He hired according to the law. The INS concedes he didn't do anything wrong. Yet they penalized him implicitly by snatching a percentage of his workforce that he helped to train and that is absolutely essential to the completion of his task as a small employer. Then when he turns around and imposes stricter standards on future hiring prospects, he gets hit because he violated the anti-discrimination law. And that is a legitimate dilemma, but it goes back to my original point.

Mr. GEKAS. The time of the lady has expired.

Ms. JACKSON LEE. I thank the Chairman.

Mr. GEKAS. The gentleman from Michigan is recognized.

Mr. CONYERS. Thank you, Mr. Chairman.

I suppose we are indebted to my colleague, Mr. Barr, for this hearing because of his concern, and I share this concern with him. We find each other in the civil libertarian trenches shoulder to shoulder with increasing frequency. And I think that we are really on the horns of a much larger dilemma.

Now, Mr. Benitez, since you are a Bush appointee, a year or less in office, so the charity with which you are being treated this morning is not to be considered to be what you're going to face after you've been here working on this problem for 16 years, like Mr. Greene.

Now, Mr. Greene, apparently—approximately how long—how much more time will you need to fashion a solution to this problem? I mean, you should sleep very uncomfortably in your bed tonight to have the audacity to come before a Committee and tell us that for 16 years you've been struggling on a problem for which you have no answers. That was a question.

Mr. GREENE. Congressman, I think we have provided an answer. The——

Mr. CONYERS. What is it?

Mr. GREENE. The strategy that I outlined to you that we've had in place since 1999, which focuses on employer sanctions cases that have three characteristics, one of three characteristics——

Mr. CONYERS. Well, why don't you employ it?

Mr. GREENE. We are employing it, sir. As a matter of fact——

Mr. CONYERS. Well, it's not working.

Mr. GREENE. What it is doing is that it is eliminating criminal organizations that are supporting smuggling for the purpose of worker exploitation into this country. We have prosecuted over 125 cases after—in the year 2001——

Mr. CONYERS. That, sir, is a different but important problem, but does not speak to the reason that the Chairman of this Committee called the hearing. Now——

Mr. GREENE. If I may add——

Mr. CONYERS. No, you may not add. Now, Members of the Committee, the problem—the reason it's fair larger than the issue that Mr. Barr has brought us here to examine is that approximately 50 percent of all the workers in the harvesting industry in the United States of America, the poultry industry of the United States of America, the meat industry of the United States of America, are undocumented workers. Now, there's the problem.

And so when this little office comes up with 50 prosecutions in a year, that isn't what's causing the unrest. We have—I don't know what the percentage is in the other industries, the clothing industry and all those allied businesses. There's a large percentage of them as well working undocumented.

So for Mr. Greene to come before us this morning in broad daylight and tell us about another problem that's being taken care of while this huge problem, Mr. Benitez, goes unexamined and unaddressed is asking us to rearrange deck chairs on the Titanic. I mean, this is not the way to proceed at this problem because we have this larger problem to which I hope you will kindly give your attention as we move forward.

I would now like to yield to Mr. Henderson, if he has any comments that he would like to add.

Mr. HENDERSON. No, Mr. Conyers. I think that you have aptly described the dilemma and the problem that I think this Subcommittee has helped to raise today. So I appreciate it very much. Thank you.

Mr. CONYERS. Thank you, Mr. Chairman. I return my time.

Mr. GEKAS. Thank you.

The Chair will accord the privilege to Mr. Barr to ask any series of questions that he might have developed in conjunction with the request that he made to this Committee in the first place for the

purposes of this hearing. But before that, perhaps Mr. Greene wants to answer the unanswered question.

Mr. GREENE. Thank you, Mr. Chairman. I simply wanted to add to fill out the Committee's understanding of the challenge that we face in work-site enforcement, and that is that there are circumstances and conditions within the environment that affect the strategy. In the beginning of the 1990's, we were looking at a much higher unemployment rate, and so issues such as the displacement of authorized workers, United States citizens, and legal immigrants by illegal migration was a much stronger issue than it was in the late '90's, and those are some of the factors that we have to consider as we evolve our strategy. So we have taken the posture, and did with the interior enforcement strategy, that there is no single answer that works at all times in all places. The strategy is designed to address the harms that are created by illegal migration. In some cases, those harms involve smuggling, worker exploitation, or displacement of United States citizens and legal immigrants. And that's the focus of our strategy now, combined with a tactic to address those with criminal prosecutions. And I thank you, sir.

Mr. GEKAS. The Chair recognizes Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

What appears to be the absurdity of this whole matter I think can be summed up by looking at the back of an I-9 form in conjunction with other documentation and material that the Immigration Service and the Department of Justice put out.

According to the Guide to Fair Employment put out by the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration Related Unfair Employment Practices, an employer essentially has to accept the documents given to him; he cannot look behind them, regardless of what common sense tells him. You all are shaking your head. That's correct, right? He has to accept them even if they are different from the documents that the person, the prospective employee, original tendered—originally tendered. The employer has to let the employee or the prospective employee choose the documents.

And then you look at the back of the I-9 form, and you see that somebody has determined that as a legal burden on the employer, they would have to accept as both establishing identity of the prospective employee or the employee and the employment eligibility an expired U.S. passport.

Now, Mr. Benitez, you used an analogy to traffic offenses earlier in support of the way the Government operates here. Is it your understanding that police officers or sheriffs, if they stop somebody on the highway and have lawful cause to do so and are given an expired driver's license, that they give a tip of the hat to that person and accept that and ask them to be on their way?

Mr. BENITEZ. Well—

Mr. BARR. The answer is no, is it? I mean, clearly, you couldn't even defend that with a straight face. That's why you're smiling.

Mr. BENITEZ. Not being an expert in that field, I would assume that I would get a ticket.

Mr. BARR. Well, you'd assume correct, and one doesn't have to be an expert in that field to understand the absurdity of trying to say that a requirement placed on State police that they have to accept

as proof of a person's eligibility to drive the roadways of a particular State, that they have to accept an expired driver's license. That's absurd. Why in heaven's name you tell an employer who is attempting to comply with your law, with the law of this country, that they would have to accept—cannot look behind, cannot ask for additional documentation—a person that presents to them an expired U.S. passport. Mr. Benitez?

Mr. BENITEZ. The Office of Special Counsel, one of the limitations that we have is that there is—if there's a requirement placed by a State or Federal law or regulation, we could not challenge or question that document or the—that's required in this case. I have just arrived into my office come November 12 of 2001, and the documents that are in the I-9 form are the documents that have precedence in the regulation of the United States of America, and I have to give it good-faith value and follow those. That's what I'm entitled to enforce. Presently—

Mr. BARR. Does it make sense to you?

Mr. BENITEZ. I would—

Mr. BARR. I mean, a person with—what does it tell you as an attorney that a person presents an expired passport? That doesn't tell you anything at all about their current status, does it? It just tells you that at the point that they applied for that passport, which could have been a decade or 20 years before, because this says without limitation, they have to accept an expired passport as proof. But it doesn't tell you anything about that person's current status, does it?

Mr. BENITEZ. Well, it tells you that that person's a U.S. citizen.

Mr. BARR. No, it doesn't. It's an expired passport. Cannot a person renounce their U.S. citizenship or engage in some other activities such as serving in the armed forces of a foreign country that has the legal effect of removing their U.S. citizenship? Isn't that correct?

Mr. BENITEZ. That is correct.

Mr. BARR. So the expired passport doesn't tell you anything, doesn't prove to you anything about their current status at the time they tender that document, does it?

Mr. BENITEZ. It tells you that that person used to be a U.S. citizen.

Mr. BARR. But it doesn't tell you whether they are currently, does it?

Mr. BENITEZ. No.

Mr. BARR. Then why should an employer be forced to accept that as proof that it does? Doesn't that defy common sense?

Mr. BENITEZ. I would have to investigate more, further on this information.

Mr. BARR. To determine whether it defies common sense?

Mr. BENITEZ. It would take—it would tell me on common sense looking at it that if the picture of the person is—looks similar to the individual that I have there and it is a document that states the name of the individual, that that person was until recently a U.S. citizen.

Mr. BARR. If a Federal law enforcement official, let's say an INS agent, were investigating a case, they would be entitled not to have to accept that expired U.S. passport as proof of anything. For ex-

ample, the work-site enforcement policies put out by the Immigration and Naturalization Service and a letter from former Commissioner Meissner dated December 31, 1996, as Attachment A, establishes very appropriately that if the Government is seeking to enforce our immigration laws, they are entitled to exercise reasonable suspicion, basically common sense, and they can take into account so long as they can articulate them in a court of law when required, and if required to do so, nervousness of the subject or what they—what this document describes as “studied nonchalance of employees in the presence of Federal officers at the workplace,” foreign manners of dress or grooming, apparent inability to speak English. Yet these are the very same things that you’re telling the employer they cannot do under penalty of criminal and civil sanctions.

Does that make sense?

Mr. BENITEZ. Well, I would first want to address your first point of view on the documents that are acceptable on the I-9. The documents that are present in the I-9 are established by statute.

Mr. BARR. I asked you if it made common sense, and you said—you agreed with me that it really doesn’t.

Mr. BENITEZ. As far—as far as the statute’s concerned, I guess Congress and the President decided that it made sense to them.

Mr. BARR. If the point of all this is—if the intent of the statute and the intent of what you’re office is trying to do is to ensure compliance with the law—

Mr. BENITEZ. Correct.

Mr. BARR [continuing]. And not to discriminate against employers who are simply trying to do the same thing—

Mr. BENITEZ. Right.

Mr. BARR. Let’s not impute bad motives to them unless it can be established. Wouldn’t it make sense to come to the Congress and say, Congress, you put us in a ridiculous situation here; it’s absurd to tell us that we have to enforce sanctions against an employer because they refused to accept the document that wouldn’t even be acceptable to a law enforcement office, and that is an expired identity document. Would you do that, recommend that since this requirement doesn’t make any sense and it’s not reasonable, to ask Congress to change at least that portion of the law?

Mr. BENITEZ. Knowing that Congress would not put something in a document that would not make sense, I would first want to inquire and look back at exactly what—

Mr. BARR. Well, this—well, we’ve already established that this doesn’t make sense, accepting an expired U.S. passport, because it doesn’t tell you anything about that person’s status. But with regard to the employer themselves, why would the Government not want that employer to be able to exercise reasonable suspicion, common sense? Just this document which employers have available, Guide to Fair Employment, essentially tells them they cannot exercise any judgment whatsoever, and that includes reasonable or unreasonable; that if they have somebody that comes in there that—by the same reasonable suspicion standards that an INS agent or other Federal law enforcement officer could legitimately use as the basis to detain somebody or to inquire further, that they can’t do that? Why would not the Government want them to be

able to exercise common sense, reasonable suspicion, as long as they could articulate it?

Mr. BENITEZ. I think what the statute tries to do is to put everybody at the same level to——

Mr. BARR. And that same level being you cannot exercise common sense, you cannot use reasonable suspicion——

Mr. BENITEZ. No——

Mr. BARR [continuing]. You have no ability to do anything other than just accept what that person gives you blindly?

Mr. BENITEZ. No. I think that what the statute tries to make clear is that you should treat everybody the same way, regardless of how they look or sound. And if you're asking——

Mr. BARR. But if the Federal law enforcement officer is able to use reasonable suspicion, and as long as they do it across the board, why not offer the employer the same opportunity? Wouldn't that make sense? Isn't that what we want to do? We want to say that we are a Nation based on reasonableness and common sense, and we want you employers to exercise that. We're going to hold you to a high standard in your exercise of it.

Mr. BENITEZ. Sure.

Mr. BARR. But we're not going to require you to accept unexpired—to accept expired documentation. Wouldn't that make sense?

Mr. BENITEZ. I agree, and I think your point is well taken. We'll take it into consideration.

Mr. BARR. Thank you.

Mr. CONYERS. Mr. Chairman?

Mr. GEKAS. For what purpose does the gentleman——

Mr. CONYERS. Could I ask unanimous consent that I be permitted to speak 3 minutes to yield to Mr. Henderson?

Mr. GEKAS. Mr. Barr has the time. I have the prerogative. If Mr. Barr doesn't mind, I don't mind. Proceed, Mr. Henderson.

Mr. HENDERSON. Mr. Barr—thank you very much, Mr. Chairman, and, Congressman Barr, I simply wanted to respond to, I thought, the two questions that you posed to Mr. Benitez—first, about the use of expired documents as a form of documentation; and then, secondly, about whether employers should be entitled to exercise judgment and discretion in assessing whether an individual meets the standards behind the statute that Congress enacted.

First of all, an expired passport, as you say, does not establish an individual's identity, necessarily, nor does it establish citizenship. But the same argument could be made about a valid passport as well, sir, and that a valid passport is, in and of itself, not necessarily an answer to the fundamental question of whether an individual was entitled to work.

You cited in your example to Mr. Benitez the fact that an expired passport may not tell you whether an individual served in the armed forces of another country and thereby waived his right to a claim of U.S. citizenship. But I would assert neither does a valid passport. John Walker Lindh has a valid U.S. passport. Presumably, John Walker Lindh, under the example that you cited, might not be eligible for employment because of his service in a foreign army.

The valid passport in and of itself does not address it, but then, again, nor does an expired passport. It is a form of documentation, and in the hearings that Congress used to examine what documents to use for this purpose, a valid passport—rather, an expired passport, as well as a valid passport, was considered as one form of documentation that might be used. It was not the sole form of documentation. It had to be corroborated with other documents. And for some—

Mr. BARR. No. According to this form, it—that once a person presents to the employer an expired passport, that employer cannot—cannot—ask for any further documentation. They have to accept that.

Mr. HENDERSON. Well, I guess I would only say this, sir: Again, we have had now 15 years of enforcement of employer sanctions. Presumably, there is a body of data which analyzes and demonstrates the level of document fraud based on the use of expired passports. A determination, an ex post factor determination, of whether this kind of document and the resulting fraud that may have, you know, flowed from its use would determine whether, in fact, it creates a major problem. I would think that Mr. Greene and the Immigration Service can answer that question.

But in the absence of documentation that confirms the existence of a major problem, I would think that giving people an opportunity to establish their identity by use of a passport, whether it's a valid passport or an expired passport, may not in and of itself be a problem.

The second question I wanted to speak to was the issue of whether employers should be given the discretion to exercise what you termed to be "common sense" in determining whether to accept certain documents. And, again, in no way critical of Mr. Kuczynski, I think his example, however, was illustrative of the kind of problem that employers face.

First of all, I hold Federal law enforcement officials to a fairly high standard. The standards of employment that the Federal Government imposes requires that these are individuals with a high school diploma, that they meet certain standards of fitness and character, that they exercise judgment, that they be given certain training in the exercise of their responsibilities. None of those requirements are imposed on an employer. An employer has the ability to be an employer just by virtue of the nature of what he or she does.

Exercising discretion does require certain training and exposure to the underlying problems that the individual is intended to enforce. And certainly that standard cannot be held applicable to employers.

Mr. BARR. But would you presume that employers don't have common sense?

Mr. HENDERSON. Not at all, but I would not assume that every employer meets a universal standard of competence and effectiveness in analyzing documents—

Mr. BARR. But so long as you have Federal laws and effective, consistent enforcement of those Federal laws such that the Government has the power to come in and look behind those decisions and determine whether or not based on evidence the employer has

acted with discrimination, shouldn't that be the way the system operates, not to deny the employer, who is all—after all, out there basically trying to make a living, serve the portion of the public that they serve through their products or services, and let them just operate within the bounds of common sense.

Mr. HENDERSON. Well, it's a reasonable question, Mr. Barr. I guess that would have two effects, and I think Congress would then be the arbiter of determining whether this was fair.

First of all, the exercise of discretion in the manner that you're suggesting is likely to increase the level of employment discrimination related to immigration decisions. I don't think there is any doubt that some employers will not use common sense effectively; they will not be the, you know, the arbiters of fairness in these circumstances in a reasonable way. So I do think we can anticipate that that would result in greater discrimination.

Secondly—

Mr. BARR. I wouldn't necessarily agree. I don't think that giving people the opportunity to make good business judgments, knowing that there is going to be swift, effective, and consistent enforcement of the law if they do discriminate, would be necessarily something I would presume they—

Mr. HENDERSON. Well, I guess the issue, though, is this: whether you can achieve equal protection where you don't establish a universal standard that every employer is required to meet.

Mr. BARR. But we do.

Mr. HENDERSON. No, not if you say—

Mr. BARR. I'm not saying that you wouldn't have a universal standard. The standard would allow for the introduction of common sense and reasonableness, the same as it allows for the Government to use reasonableness and common sense.

Mr. HENDERSON. Well, for example, if an employer decides that because I am an African American that perhaps just because of my appearance I might be an American citizen or I might be a foreign national, I happen to live in a community in which Haitian nationals reside, I'm from Miami, Haitians are in Miami, I apply for a job, an employer makes a decision that because of my skin color, because of who I am or the nature of his or her industry, they want additional documentation from me that they may not ask from you, for the same nature of the job.

Now, you know, equal protection does require that there be some sort of, you know, universal standard or balance. If an employer says, well, wait, I'm only exercising discretion and judgment here, you know, you come to the job, I'm trying to make certain that you're not a foreign national, he exercises his judgment.

Now, in the event that I am lawfully authorized to work, this employer has violated the statute. And you can do two things: you can indemnify him from any additional penalties that might result from his discrimination against me, but at the same time, you've got a question of how do you make me whole. How do you avoid the pitfalls in the employment context that readily exist in the law enforcement context? Racial and ethnic profiling, as you know, sir, are a routine part of the existing law enforcement decision making. I am fearful that if you open up the door to the exercise of discre-

tion from employers, you're giving license to the ability of employers to use precisely those techniques.

Mr. BARR. Aren't we—if one presumes that the power would be abused, aren't we now by statute and by practice and policy, as I have read directly from the work site enforcement policies, giving that same discretion and ability to discriminate or profile to the Government?

Mr. HENDERSON. Well, the Government, you know—

Mr. BARR. Is the Government in a better position, with the ability to put somebody in jail and take their liberty away, to exercise that discrimination—

Mr. HENDERSON. No, I think—I think the underlying structure of the enforcement mechanism here is out of whack. But I don't believe that the solution is to transfer additional responsibility to employers who have no training, no expertise, and are already given an enormous responsibility—

Mr. BARR. They might tremendous expertise.

Mr. HENDERSON. Well—

Mr. BARR. I mean, they see a lot of people. They've seen a lot of false documentation. They may be in a much better position to do that.

Mr. GEKAS. The time of the gentleman has expired, and expired and expired.

Mr. CONYERS. Mr. Chairman? Mr. Chairman?

Mr. GEKAS. For what purpose does the gentleman seek recognition?

Mr. CONYERS. Mr. Chairman, I ask unanimous consent for 30 additional seconds.

Mr. GEKAS. To be granted to whom?

Mr. CONYERS. To one of the more favorable Members of the Judiciary Committee so—

Mr. GEKAS. I'm not speaking. I'm not going to be— [Laughter.]

The gentleman is recognized.

Mr. CONYERS. I thank the Chairman.

I think that the Committee should take cognizance of the fact that our friend from the Civil Rights Division is making his first appearance before Congress in testimony, and I don't know whether to tell him that things are going to get better from this kind of hearing or whether they're going to get worse. It probably depends a lot upon you, sir.

But one thing—and knowing that you are new to your position, I would like to disabuse you of the statement that you made here at this Committee that Congress wouldn't enact anything that doesn't make sense. [Laughter.]

Would you please take that under advisement in your future appearances before any Committee?

Mr. BENITEZ. I will take it under advisement.

Mr. CONYERS. Thank you very much.

Mr. GEKAS. We thank the witnesses for their candid presentations as part of the testimony for this hearing. We suggest that Mr. Barr and Mr. Conyers and other Members of the Committee review the atmosphere that was created by the questions and answers in this hearing and perhaps revisit the entire panoply of pro-

visions and case law that has flowed from that. And we in that way can assure you that this issue is ongoing.

But with the thanks of the Committee, we now declare this meeting closed, and we adjourn the Committee.

[Whereupon, at 10:50 a.m., the Subcommittee was adjourned.]

A P P E N D I X

STATEMENTS SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MICHIGAN

In 1986, my colleague from Massachusetts, Mr. Frank, and I warned that the employer sanctions that were being legislated in the Immigration Reform and Control Act of 1986 (IRCA) would lead to widespread use of fraudulent documents and would result in much more discrimination against immigrants seeking employment in the U.S. Mr. Frank helped to mitigate this problem by offering the amendment that created the Office of Special Counsel (OSC) to prevent and prosecute employment discrimination against immigrants.

In the years since passage of the IRCA, we have seen substantial increases in discrimination just as we predicted. With decreasing and insufficient funding the OSC has consistently done extremely important work by informing employees of their rights under the statute, advising employers on how to avoid violating the statute, helping to obtain important settlements for the individuals who have been victims of discrimination under the statute, and prosecuting discriminatory employers who were unwilling to settle or adhere to the law.

While the OSC budget has decreased recently, the need for their efforts has increased as immigrant populations have expanded to communities across the country that previously had small and insular immigrant populations. I have no doubt that addressing employment discrimination is critically important to members of the Arab and Latino populations that have grown considerably in my district and the Detroit area since this legislation was passed.

Yet, the OSC is barely able to address the problem of discrimination in hiring and firing at all. The statute exempts most cases of discrimination on national origin or citizenship against immigrants so that it only applies to and protects a small and narrow class of victims. Though some 900,000 employers admitted to the General Accounting Office that they engaged in behaviors amounting to illegal discrimination under IRCA, OSC is able to settle and prosecute only about 50 cases a year with their insufficient budget and staff. We have not enabled them to fulfill their mandate—but their efforts do at least scratch the surface and address the claims of some victims.

It is evident from the facts and the testimony that we will hear today that the OSC needs sufficient funding to tackle this important problem with the force and breadth that are needed. It remains the only office within the Department of Justice that is addressing this increasingly important and widespread problem. If employer sanctions are not working, we should strengthen them with a program that ensures that compliance with the anti-discrimination laws truly occurs.

MATERIAL SUBMITTED FOR THE HEARING RECORD

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April 15, 2002

Juan Carlos Benitez, Esq.
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Immigration and Claims

IN RE: Additional Questions for the Record

Dear Mr. Benitez:

I appreciate your candor in responding to the many questions raised at the oversight hearing convened by the Subcommittee on Immigration and Claims on March 21, 2002. Unfortunately, given the time constraints, we were unable to fully discuss a number of unresolved issues. To that end, please respond to the following questions for inclusion in the hearing record:

1. How is an employer lawfully able to determine citizenship status of a prospective employee if the employer has reason to believe the documents being presented are false or fraudulent?
2. How or why would allowing the employer to choose the verification documents constitute a discriminatory practice?
3. Does an *expired* passport establish an individual's identity or *current* citizenship status or demonstrate whether an individual is *currently* entitled to work?
4. To what degree is an employer legally able to exercise independent judgment and discretion, in assessing whether an individual meets standards required under Immigration Reform and Control Act?
5. How can the INS/OSC follow fundamental principles of *equal protection* when there is no universal standard every employer is required to meet?

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Juan Carlos Benitez, Esq.
April 15, 2002
Page 2

6. Employers are told they cannot prefer one document over another for purposes of completing the I-9 Form. Yet, as demonstrated at the hearing, fraudulent documents are easily obtained and frequently used. How is an employer to verify the status of an applicant if the employer believes documents, which may appear facially valid, are fraudulent?

As you know, under the Immigration Reform and Control Act of 1986 (IRCA), American employers may be sanctioned by the INS for knowingly hiring non-U.S. citizens who are not authorized to work in the United States. Under the same Act, employers may also be sanctioned by the Office of Special Counsel for Immigration Related Unfair Employment Practices for asking too many questions about an applicant's citizenship status.

The "anti-discrimination" provisions were included in IRCA to address the fear that employers would overreact to the threat of sanctions and discriminate against individuals who sound or appear "foreign." However, the manner in which this provision has been implemented has led to a restrictive and difficult work authorization/verification process. Fundamental fairness would provide that, if employers are liable for hiring illegal aliens, they should be provided the flexibility to ascertain whether an applicant is legally entitled to work in the United States.

7. Please provide your thoughts on how the I-9 Form provides equal protection and equal fairness to both the employer and the applicant? Please also explain how each document listed on the I-9 Form individually establishes an applicant's legal work status?

Thank you for your prompt attention to these follow-up questions. Please forward your responses to the Subcommittee on Immigration and Claims within two weeks for inclusion in the formal hearing record. I look forward to working with you on this issue.

Juan Carlos Benitez, Esq.
April 15, 2002
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With warm regards, I am,
very truly yours,

A handwritten signature in black ink, appearing to read "Bob Barr", with a long horizontal flourish extending to the right.

BOB BARR
Member of Congress
Seventh Congressional District of Georgia

BB:smm

cc: The Honorable George Gekas