DETERRENCE TO HIRING ILLEGAL IMMIGRANT WORKERS: WILL THE NEW EMPLOYER SANCTION PROVISIONS WORK?

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I. INTRODUCTION

As the world moved into the twenty-first century, both the United States and the United Kingdom experienced an influx of illegal immigrants. Estimates indicate that "the number of illegal immigrants in the United States has grown to as many as 12 million, and they now account for about one in every 20 workers." Since 2000, illegal immigrants have been entering the United States at an approximate rate of 850,000 per year. Of the 12 million illegal immigrants currently in the United States, about 7.2 million are undocumented workers. The United Kingdom has also faced the problem of illegal immigration. There are approximately 500,000 illegal immigrants in the United Kingdom.

Several possible explanations have emerged for the growing number of undocumented workers who are illegal immigrants in these countries. In the United States, some factors that "pull" illegal immigrants into the country are "employment opportunities, higher wages, improved working conditions, and a higher standard of living." Possible explanations for increased illegal immigration into the United Kingdom include the changing British immigration control environment concerning the gradual removal of border controls and the increasing "employer demand for labor migration at all skill levels." Coupled with "push" factors in the illegal immigrant's home country...

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3 Id.
4 Id.
5 David Leppard & Robert Winnett, 500,000 Illegal Migrants, Says Home Office, SUNDAY TIMES (U.K.), Apr. 17, 2005, available at http://www.timesonline.co.uk/tol/news/uk/article382035.ece. This figure "includes not only migrants who have illegally entered Britain to work in the black market but also failed asylum seekers who should have been deported." Id.
6 Id. This figure "includes not only migrants who have illegally entered Britain to work in the black market but also failed asylum seekers who should have been deported." Id.
8 Johnson, supra note 7, at 959.
9 Ryan, supra note 7, at 31.
such as "high unemployment, low wages, poor living conditions, and highly skewed income," these factors help to drive the immigrants into the more attractive labor markets of the United States and the United Kingdom.\\footnote{Johnson, supra note 7, at 959.}

Immigration has become a hot issue in recent years for several reasons. First, "with terrorism currently the chief policy concern of the United States, immigration issues play an increasingly important role on the American national security agenda."\\footnote{Jeffrey L. Ehrenpreis, Note, Controlling Our Borders Through Enhanced Employer Sanctions, 79 S. CAL. L. REV. 1203, 1203 (2006).} Further, citizens increasingly view illegal immigration as a cause of crime and job displacement.\\footnote{Michael J. Mayerle, Comment, Proposed Guest Worker Statutes: An Unsatisfactory Answer to a Difficult, If Not Impossible, Question, 6 J. SMALL & EMERGING BUS. L. 559, 560 (2002).} Illegal immigration leads to job displacement by providing "a cheap labor pool for employers, which discourages employers from improving working conditions."\\footnote{Cecelia M. Espenoza, The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986, 8 GEO. IMMIGR. L.J. 343, 350 (1994).} Finally, in the United Kingdom, the "evidence both of unauthorized work . . . and of its taking place in exploitative conditions" has resulted in "unauthorized work" being the focus of recent attention.\\footnote{Ryan, supra note 7, at 27.}

In response to the growing concern over the hiring of illegal immigrants, both the United States and the United Kingdom passed immigration reform legislation.\\footnote{Ehrenpreis, supra note 11, at 1205–07 (addressing U.S. efforts through the Immigration Reform and Control Act of 1986, which authorized civil sanctions and criminal penalties for knowingly hiring unauthorized workers); Ryan, supra note 7, at 35 (addressing the UK efforts through the Asylum and Immigration Act 1996, which introduced criminal offenses for employers of unauthorized workers).} In 1986, the United States passed the Immigration Reform and Control Act (IRCA).\\footnote{Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).} The primary goal of this legislation was to slow the influx of illegal immigrants into the country based on the theory that if employment is no longer available, illegal immigrants "will be less likely to enter."\\footnote{Samuel Der-Yeghiayan, Employer Sanctions: INS Enforcement Policies and Procedures, 515 PRACTISING L. INST. 437, 447 (Nov. 1994).} Thus, the main provision in this Act addresses the control of the unlawful employment of aliens.\\footnote{8 U.S.C. § 1324a (2000 & Supp. 2004).} This provision states that "[i]t is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for
employment in the United States an alien knowing the alien is an unauthorized alien."  

In 1996, the United Kingdom passed the Asylum and Immigration Act (Asylum Act). The main purpose of this legislation was also to curb the entry of illegal immigrants seeking work in the United Kingdom. The main provision of the Act, noted in section eight, states that "if any person ("the employer") employs a person subject to immigration control ("the employee") who has attained the age of 16, the employer shall be guilty of an offence. . . ."  

Following the passage of these acts, employers, for the first time, were subject to sanctions for hiring illegal immigrants. The governments of both countries saw the implementation of sanctions as a deterrent to businesses hiring unauthorized workers. An immigration study concluded that "strong enforcement of immigration laws and tough sanctions can effectively reduce illegal immigration." In that study, six countries were compared and analyzed to determine what effect their current immigration policies had on minimizing the flow of illegal immigrants. Japan punished employers of illegal immigrants the most severely with a maximum prison penalty of three years and as a result, has had one of the smallest illegal immigration problems of all the countries surveyed. Japan, which views illegal immigration as

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19 Id. § 1324a(1)(A).
20 Ryan, supra note 7, at 35.
21 Id.; see The Lawyer: Asylum Act: Checks and Balances for Workers, Feb. 18, 1997, http://www.thelawyer.com/cgi-bin/item.cgi?id=92776 [hereinafter Asylum Act]. This Act is "regarded by many as a cynical attempt by the Government to turn employers into immigration officers by placing employers under a statutory duty to check the status of all job applicants." Id.
22 Asylum and Immigration Act, 1996, c. 49, § 8 (Eng.), available at http://www.opsi.gov.uk/acts/acts1996/1996049.htm; Asylum Act, supra note 21. "Subject to immigration control" . . . means any person who does not have to leave to live or work in the UK." Id.
23 Ryan, supra note 7, at 35.
24 Der-Yeghiayan, supra note 17, at 445–47; Ryan, supra note 7, at 35–37.
27 Id. at 2.
harmful, also has a substantial level of enforcement which has contributed to a large decrease in illegal immigration over the past decade.\textsuperscript{28} This study illustrates the importance of employer sanctions.\textsuperscript{29} Due to the failure of previous immigration legislation passed in the United States and the United Kingdom, both countries have introduced new legislation containing stiffer penalties as a means to curb the number of illegal immigrants employed in both countries.\textsuperscript{30}

In recent years, both houses of Congress have passed legislation in response to the continuing influx of illegal immigrants into the United States.\textsuperscript{31} The House of Representatives passed reform bill H.R. 4437, entitled the "Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005."\textsuperscript{32} This bill was passed on December 16, 2005, by a vote of 239 to 182.\textsuperscript{33} The Senate passed reform bill S. 2611, entitled the "Comprehensive Immigration Reform Act of 2006" and is considering reform bill S. 1348, entitled the "Comprehensive Immigration Reform Act of 2007."\textsuperscript{34} The first Senate bill was passed on May 25, 2006 by a vote of sixty-two to thirty-six.\textsuperscript{35} The second bill failed to come to the full Senate for a vote.\textsuperscript{36}

\textsuperscript{28} Id. at 3.
\textsuperscript{29} See generally id.
\textsuperscript{31} See Henry, supra note 30.
The United Kingdom has also recently strengthened its immigration laws. Parliament passed the Immigration, Asylum, and Nationality Act 2006 in an attempt to more adequately address the problem of businesses hiring illegal immigrants.\(^{37}\)

Both the United States and the United Kingdom have taken active measures to try to address illegal immigration through recent legislation. This Note will show that increasing employer sanctions through enhanced civil sanctions and criminal penalties is a necessary tactic to reduce the influx of illegal immigrants working in the United States. Employer sanctions must be severe enough so that the risk of the employer being caught outweighs the benefit of hiring illegal immigrants. In order for new immigration reform legislation to be successful and to meet the goal of reducing unauthorized work, it is critical that the penalties be steep and the laws strictly enforced.

When comparing both of the U.S. bills against the UK act, the U.S. bills are better geared toward reducing the number of illegal immigrants working. The U.S. bills have instituted harsher civil sanctions and criminal penalties, and have addressed the growing problem of the use of fraudulent documents. The UK act is lacking in all of these areas.

This Note will analyze the current immigration reform legislation of the United States and the United Kingdom to determine which legislation would be the most effective in meeting the goal of reducing the number of illegal immigrants working for businesses. Part II of the Note will provide a brief overview of past immigration reform of both countries leading up to the passing of the IRCA of 1986 and the Asylum Act. Part III of this Note will analyze both countries initial attempts to control illegal immigrants working through the introduction of employer sanctions in the IRCA and the Asylum Act. Part IV of this Note will discuss why the previous legislation was not successful in curbing the number of illegal immigrants working. This part will also analyze two U.S. bills, H.R. 4377 and S. 1348, and the United Kingdom’s

immigration act, the Immigration, Asylum & Nationality Act 2006, to determine which legislation will be more successful. Part V of this Note will provide final conclusions on the effectiveness and potential success of both pieces of legislation.

II. BACKGROUND: IMMIGRATION—PAST LEGISLATIVE EFFORTS

A. The United States: Historical Perspective

The immigration policies of the United States can be grouped into three periods.\(^\text{38}\) The first is the period before 1875 when there were minimal restrictions on immigration.\(^\text{39}\) A major piece of legislation related to immigration was the Alien and Sedition Act of 1789, which provided the first federal statutory limitation on immigration.\(^\text{40}\)

The second is the period from 1875–1965 which, due to the dramatic increase in immigrants into the country, was “marked with anti-alien sentiment.”\(^\text{41}\) Therefore, during this period U.S. immigration policies involved restrictionist criteria.\(^\text{42}\)

The most considerable pieces of federal legislation passed during this period were the Chinese Exclusion Laws of 1882, 1884, and 1892.\(^\text{43}\) For the first time in U.S. history, the country tried to restrict an entire nationality from

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\(^{39}\) Id. at 266.

\(^{40}\) Id. “[T]he nation did not devote much attention to immigration until after the Civil War when three important events occurred”—the passing of the Civil Rights Act in 1870 that guaranteed equal protection under the law for aliens; the Supreme Court case of Minor v. Harpsett in 1874 which held that states had the right to permit aliens to vote; and the Supreme Court case of Henderson v. City of New York in 1875 which held that regulation of immigration was a federal prerogative under the Interstate Commerce Clause of the U.S. Constitution. Id. at 267.

\(^{41}\) Id. During this period various states attempted to pass laws to restrict immigration by providing for a tax on each immigrant. Id. However, the Supreme Court held that “these state head tax laws were unconstitutional in violation of the Commerce Clause of the U.S. Constitution” because “the passage of laws which concerned the admission of citizens and subjects of foreign nations belongs to Congress and not to the state.” Id.

\(^{42}\) Id. at 267. These laws were the first immigration statutes to be subjected to judicial scrutiny. See, e.g., Chae Chan Ping v. United States, 130 U.S. 581 (1889). This case established two important precedents; first, the practice was initiated whereby immigration laws were relaxed when it came to desirable immigrants; second, restrictive provisions were invoked when it was deemed necessary to exclude selective immigrants on a permanent basis. Morales, supra note 38, at 268.
entering the country. Later, in 1921, Congress passed the "Quota Law" which placed a restriction on the number of immigrants entering the country. The restrictions were based on national origin with a preference being given to nations that were well represented in the United States. In 1952, Congress passed the Immigration and Nationality Act that served as a major change to immigration law. Another major change was the abolishment of the national origin criterion in 1965 in favor of a system focused on employment skills and family reunification.

The third major immigration era is the period from 1965 to the present. In 1980, Congress enacted the "Refugee Act" as an "attempt to reestablish Congressional control over the number of refugees admitted every year." As a result of increasing pressure on the country to control the flow of illegal immigrants, Congress began discussing proposals that eventually led to the passage of the IRCA of 1986.

B. The United Kingdom: Historical Perspective

Prior to 1905, the United Kingdom was not overly concerned with the number of illegal immigrants that were entering the country. However, since then the United Kingdom has enacted legislation to try to control illegal immigration. The first major piece of legislation was the 1905 Immigration Act. This act required the illegal immigrant "to register their presence on...

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44 Morales, supra note 38, at 267.
45 Id. at 268.
47 Id.
48 Id.
49 Morales, supra note 38, at 269. "In 1964, there was a new wave of illegal aliens [which] was in part due to the termination of . . . the Western Hemisphere Quota." This quota placed a limit on the number of immigrants from countries such as Mexico. Id.
50 Id. at 269-70. "The refugee flow was exacerbated by other developments like the Cuban refugees of the 1970s, followed by the Indo Chinese in 1975 and in 1978 with the influx of the Vietnamese people." Id.
51 Id. at 270.
53 Id.
54 Id.; Aliens Act, 1905, 5 Edw. 7, c. 13 (Eng.).
arrival.” This law was “aimed at denying access to ‘undesirable’ foreigners from outside the British Empire...”

The next set of immigration legislation occurred in the 1960s with the passage of the Commonwealth Immigrant Act 1962. This Act was passed in response to Britain’s concern over possible large-scale immigration from former British colonies. Citizens whose passports were not directly issued by the United Kingdom government became subject to immigration control.

In the 1970s, the United Kingdom passed the Immigration Act 1971. This new Act “put in place a more comprehensive structure for immigrants generally.” The British Nationality Act 1981 attempted to further “narrow immigration by limiting the right of residency exclusively to those in possession of British citizenship.” Finally, the United Kingdom enacted the Asylum and Immigration Appeals Act of 1993. This Act granted a refugee the right of appeal.

III. INTRODUCTION OF EMPLOYER SANCTIONS

A. The United States’s and United Kingdom’s Perspectives

1. Statutes

The main purpose of the United States’s IRCA of 1986 was to “stem the flow of illegal immigration into the United States.” The main purpose of the

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57 Id.
58 Id.
59 Id. This Act introduced “a new legal distinction between the rights of UK-born and UK passport-holders, and the rights of those who held passports issued by former British colonies.” Id.
60 Care, supra note 55, at 1430.
61 Id.; see also Sriskindarajah & Road, supra note 56. This act favored individuals of “British stock” including immigrants from Canada, South Africa, New Zealand and Australia. It “also limited admission of certain family members of UK citizens.” Id.
62 See Sriskindarajah & Road, supra note 56.
63 Care, supra note 55, at 1431.
64 Id.
65 Der-Yeghiayan, supra note 17, at 447.
United Kingdom's Asylum Act was "not solely to control political asylum applicants" but rather was as an attempt to control all immigrants coming into the United Kingdom.\textsuperscript{66}

Both of these acts were different from previous legislation in two respects. First, this was the first time that either country had introduced employer sanctions for hiring illegal immigrants.\textsuperscript{67} Second, in addition to providing for civil sanctions, both acts provided for criminal penalties.\textsuperscript{68}

The use of employer sanctions in both the United States and the United Kingdom has drawn public discourse from both supporters and critics.

2. Supporters

Supporters of employer sanctions typically argue that "if employers are allowed to employ unauthorized aliens with impunity, aliens will continue" to flow into the country.\textsuperscript{69} To effectively deter unauthorized entry, the goal of entry—employment—must be removed.\textsuperscript{70} Therefore, the way to deter unauthorized entry is to prohibit the employment of illegal immigrants and to sanction the employers who hire them.\textsuperscript{71}

3. Critics

Critics of employer sanctions typically raise three objections.\textsuperscript{72} The first is that job opportunities are not the sole reason for illegal immigration,\textsuperscript{73} and therefore, the influx of illegal immigrants will continue despite the use of employer sanctions.\textsuperscript{74} Second, "if illegal workers typically take the jobs that legal workers reject" then the use of sanctions poses a threat of eliminating a necessary work force.\textsuperscript{75} Lastly, the use of employer sanctions is too costly.\textsuperscript{76} The Immigration and Naturalization Service (INS) predicted that it would cost

\textsuperscript{67} Ryan, supra note 7, at 36.
\textsuperscript{68} Id.
\textsuperscript{69} Medina, supra note 1, at 678.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Johnson, supra note 7, at 964.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
U.S. employers approximately $182,250,000 per year to comply with the IRCA's provisions regarding verification forms and the storage of the completed documents.\footnote{Der-Yeghiayan, \textit{supra} note 17, at 449.}

Critics of the Asylum Act have three main arguments.\footnote{Ryan, \textit{supra} note 7, at 36.} First, the employer sanctions will have a negative impact upon ethnic minorities even though the majority of them are legal residents of the United Kingdom.\footnote{\textit{Id}.} Second, the new system risks employer discrimination in an attempt to avoid liability.\footnote{\textit{Id}.} Third, the employer sanctions excessively burden the employers.\footnote{\textit{Id}.}

B. Overview of United States Sanctions: IRCA of 1986

"The employer sanction provisions of IRCA apply to all employers who employ workers in the United States, as well as persons or [government and private] entities who recruit such workers or refer them for a fee."\footnote{Aaron Schwabach, \textit{Employer Sanctions and Discrimination: The Case for Repeal of the Employer Sanctions Provisions of the Immigration Reform and Control Act of 1986}, 4 \textit{LA RAZA L.J.} 1, 3 (1991).} With regard to employees, the Act "applies to every employee, whether full time, part time, casual, temporary or personal."\footnote{Id.}

The offenses under the Act are classified as either substantive or procedural offenses.\footnote{Mayerle, \textit{supra} note 12, at 567.} A substantive offense occurs when the employer either hires, or continues to employ an illegal alien with knowledge of the worker's unauthorized status.\footnote{M. Isabel Medina, \textit{Employer Sanctions in the United States, Canada, and Mexico: Exploring the Criminalization of Immigration Law}, 3 \textit{SW. J. L. & TRADE AM.} 333, 341 (1996); see Collins Foods Int'l v. INS, 948 F.2d 549, 555 (9th Cir. 1991) (stating the "knowing" requirement incorporates a constructive knowledge standard, which should be sparingly applied so that employers are not forced to avoid hiring a person with a foreign appearance).} A procedural offense is the result of failure to comply with the employee documentation verification process.\footnote{Medina, \textit{supra} note 85, at 341.}
The IRCA of 1986 has three main provisions dealing with the unlawful employment of aliens. These provisions make it: (1) unlawful to hire, recruit or refer for a fee an alien with the knowledge that the alien is unauthorized; (2) unlawful to continue to employ an alien knowing that the alien either is or has become unauthorized; and, (3) unlawful to fail to comply with document verification requirements during the hiring process. The knowledge requirement in the statute is defined as “knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.”

The IRCA establishes both civil and criminal penalties for violation of “any of [the] three prohibited activities.” Violators are also subject to cease and desist orders by the INS. For a first time violator, the civil penalties range from $250 to $2,000 for each unauthorized alien. For a second offense, the civil penalties range from to $2,000 to $5,000 for each unauthorized alien. For the third offense and any subsequent violations, the civil fines range from $3,000 to $10,000 for each unauthorized alien. The civil penalties for paperwork violations range from $100 to $1,000 per worker.

Criminal penalties cannot be greater than a $3,000 fine per worker, imprisonment for up to six months, or both. Employers can also be enjoined for a pattern or practice of employment of illegal workers. Pattern or practice is defined as “regular, repeated and intentional activities that do not include sporadic or accidental acts.”

To determine the amount of the civil penalties, five factors are considered. They are “the size of the employer’s business, the employer’s good faith, the violation’s seriousness, whether the employee in question is in fact an unauthorized alien, and the history of previous employer violations.”

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88 Mayerle, supra note 12, at 567.
89 Michael Crocenzi, IRCA-Related Discrimination: Is it Time to Repeal the Employer Sanctions?, 96 DICK. L. REV. 673, 677 (1992); Gabor, supra note 83, at 488 (both the employer and the employee are subject to penalties for perjury for false certification).
90 Crocenzi, supra note 89, at 677–78.
92 Id. § 1324a(e)(4)(A)(ii).
93 Id. § 1324a(e)(4)(A)(iii).
94 Id. § 1324a(e)(5).
95 Id. § 1324a(f)(1).
96 Id. § 1324a(f)(2).
97 Crocenzi, supra note 89, at 678.
98 Thomas C. Green & Ileana M. Ciobanu, Deputizing — and then Prosecuting — America’s
Under the IRCA, employers are required to verify the work eligibility of every employee. This requirement is satisfied through the preparation and maintenance of an I-9 form for each employee hired. On this verification form, the employer is confirming that the "relevant documents were physically examined and [that] the employee is not an undocumented alien."

Several different documents may be used to verify work authorization: "documents establishing work authorization, documents attesting to identity, and documents proving both work authorization and identity." They include a "(1) U.S. passport; (2) certificates of U.S. citizenship; (3) certificates of naturalization; (4) unexpired foreign passports endorsed for work authorization; [and] (5) permanent resident alien cards, which are photo identification cards." Once this information has been collected and recorded, the employer must then keep the completed I-9 form "for at least 'three years from the date of hire,' or 'one year after the date of termination, whichever date is later. ' During investigations of an employer's hiring of illegal aliens, the employer must readily present the I-9.

United States Immigration and Customs Enforcement (USICE) is the government agency that investigates and enforces employer sanctions. The procedures that are used by the agency vary from region to region. Some of the offices use a regulatory investigative process to detect violations while other offices use a "workplace survey" process in which undocumented

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100 Id.


102 Id.

103 Id.

104 Welin, supra note 99, at 256.

105 Id. at 256–57.


107 Schwabach, supra note 82, at 5.
workers are apprehended and the employers are fined. Some of the offices make employers the primary target of sanction enforcement while others use sanction enforcement to identify undocumented workers. Once a violation is detected, the agency issues a Notice of Intent to Fine. The employer has an opportunity to request a hearing within thirty days upon receipt of the notice. The final order given at this hearing may be appealed to a U.S. Court of Appeals within forty-five days.

Employers may assert an affirmative defense against the claim that they knowingly hired an undocumented worker. According to the statute, “a person or entity that establishes that it has complied in good faith with the requirements . . . with respect to the hiring, recruiting, or referral for employment . . . has established an affirmative defense that the person or entity has not violated” the statute.

C. Overview of United Kingdom Sanctions: Asylum and Immigration Act 1996

The Asylum Act applies to all employers that use workers age sixteen or older unless “that person has current and valid permission to be in the United Kingdom and that permission does not prevent him or her from taking the job in question; or the person comes into the category specified by the Home Secretary where such employment is allowed.” This Act “applies equally

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108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
113 Medina, supra note 1, at 683; see Maka v. U.S. I.N.S., 904 F.2d 1351 (9th Cir. 1990) (stating good faith defense not available to employer who failed to complete the verification form for unauthorized alien, and reliance on counsel does not constitute a good faith defense).
115 Asylum and Immigration Act, 1996, c. 49, § 8(1) (Eng.).
116 Border & Immigration Agency, Law and Policy, http://www.ind.homeoffice.gov.uk/lawandpolicy/preventingillegalworking/codeofpractice/fullcode (last visited Nov. 12, 2007). This section does not apply to the employment of British citizens, commonwealth citizens with the right of abode in the UK and citizens of any country in the European Economic Area. Id. The Act is not retrospective and does not apply to any employees who commenced employment before January 27, 1997. National Council for Voluntary Organisations, Asylum and Immigration Act 1996, http://www.ncvo-vol.org.uk/askncvo/index.asp?id=286 (last visited Mar. 24, 2008) [hereinafter NCVO]. Employers should not carry out any checks on the status of these employees or ask them to produce any of the documents necessary to establish a defense. Asylum Act, supra note 21. However, the Act does apply to any previous employees who are re-employed after this date, regardless of their immigration status when first employed. Id.
to full and part-time workers whether they are employed on a permanent or casual basis, and regardless of their status within the employer’s business." However, this Act does not apply to volunteers.\textsuperscript{118}

Under this Act, it is lawful to employ “people awaiting the outcome of an immigration appeal who before their appeal had permission to work or people who were entitled to work and are awaiting the outcome of a request for an extension to that permission requested before it ran out.”\textsuperscript{119} If the employer is a company, the person responsible for the overall management of the company may be subject to prosecution.\textsuperscript{120}

The Asylum Act has two main provisions dealing with the hiring of illegal immigrants: “an [employer who employs a person, age sixteen or over, is] guilty of an offense if (1) the employee has not been granted leave to enter or remain in the United Kingdom; or (2) the employee’s leave is not valid . . . or is subject to a condition precluding employment.” An employer is required “to check [both] the identity and the work authorization of employees and new hires.”\textsuperscript{121}

This Act introduced the specific offense of hiring persons not authorized to work in the United Kingdom.\textsuperscript{122} Unlike the IRCA, the Asylum Act only provides for civil sanctions against employers.\textsuperscript{123} Under the Asylum Act, a person guilty of violation under section 8 “shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.” Factors that can be considered in determining the amount of the penalty are the “seriousness of the offense and the financial circumstances of the employer.”\textsuperscript{124}

\begin{thebibliography}{126}
\bibitem{117} Asylum Act, \textit{supra} note 21.
\bibitem{118} NCVO, \textit{supra} note 116.
\bibitem{119} Border & Immigration Agency, \textit{supra} note 116.
\bibitem{120} Employers Liabilities, \textit{supra} note 66; Asylum Act, \textit{supra} note 21, at 9. Individuals may be held liable if they are “at such a level within the company that they are regarded as being in overall management and if the offence was committed with their consent or knowledge or occurred as a result of their negligence.” \textit{Id.}
\bibitem{121} Asylum and Immigration Act, 1996, c. 49, § 8(1) (Eng.).
\bibitem{122} Batog, \textit{supra} note 106, at 122.
\bibitem{123} Employers Liabilities, \textit{supra} note 66.
\bibitem{124} Batog, \textit{supra} note 106, at 122.
\bibitem{125} Asylum and Immigration Act, § 8(4); \textit{see also} Batog, \textit{supra} note 106, at 122. An employer found guilty of a level five offense is subject to a civil fine of up to £5,000 or $9,405. \textit{Id.}
\bibitem{126} Asylum Act, \textit{supra} note 21, at 9.
\end{thebibliography}
Another difference between the Asylum Act and the IRCA is the lack of a knowledge requirement.\textsuperscript{127} Instead, it is an offense to employ an unauthorized worker even if the employer did not have knowledge of the worker’s status.\textsuperscript{128}

Employers were provided with a list of acceptable documents to verify that a worker was authorized to work in the United Kingdom.\textsuperscript{129} This list includes a UK passport or birth certificate, a certificate of registration as a British citizen, a work permit, or a letter issued by the Home Office confirming that the person has indefinite leave to enter or remain in the United Kingdom.\textsuperscript{130}

The Home Office is the government department responsible for enforcement of the Asylum Act.\textsuperscript{131} The Home Office has enforcement teams responsible “for a particular catchments areas in the UK.”\textsuperscript{132} While surprise raids are not used to detect violations of the Asylum Act, the Home Office does have a duty to investigate any breaches that are called to its attention.\textsuperscript{133} Employers brought to the attention of the Home Office “are in real and unnecessary risk of investigation by the Home Office.”\textsuperscript{134} If any violations are found, the employer is not only subject to possible prosecution but is also likely to receive “closer scrutiny of any future application for work permits and any further dealings with the Home Office.”\textsuperscript{135}

The Asylum Act provides for an employer defense to the claim that the employer hired an unauthorized worker.\textsuperscript{136} If a valid defense is established, the employer will not be convicted even if the employee, is in fact, working without permission and is subject to immigration control.\textsuperscript{137} According to the Act:

\textsuperscript{127} Ryan, supra note 7, at 42.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 36.
\textsuperscript{130} See Employers Liabilities, supra note 66. Other acceptable forms of documentation include: a document issued by a previous employer stating the named person’s National Insurance Number; a national identity card issued by a European Economic Area Agreement party-state (EEAA) describing the holder as a national of that state; “a UK residence permit issued to a national of an EEAA state”; or a letter issued by the Home Office verifying British citizenship or giving permission to take employment. Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} See Asylum and Immigration Act, 1996, c. 49, § 8(2) (Eng.).
\textsuperscript{137} See Border & Immigration Agency, supra note 116.
it shall be a defence to prove that before the employment began, there was produced to the employer a document which appeared to relate to the employee and to be of a description specified in an order made by the Secretary of State; and either the document was retained by the employer or a copy or other record of it was made by the employer, in a manner specified in the order in relation to documents of that description.  

This defense will apply if "before their employment commenced, the employer asked the employee to produce one of the specified documents." The "document must then have been inspected to ensure that it related to the person in question, copied and kept on the person's file until at least six months after their employment ended." However, this defense is not available where the employer knew that employing the worker would result in an offense under the Asylum Act. The burden of proof falls on the employer to establish the validity of the defense, rather than requiring the prosecution to establish the alleged offense occurred. This has resulted in employers becoming "Immigration Officers" because "in order to establish a defence, they have to show that before employment commenced a document was shown to the employer which: (1) appeared to the employer to relate to the employee; [and] (2) was one of those [listed] by the Secretary of State of the Home Office."  

IV. ANALYSIS: NEW IMMIGRATION REFORM ACTS

A. Why the IRCA of 1986 Did Not Work

As previously mentioned, Congress instituted employer sanctions in an attempt to deter illegal entry into the United States for the purpose of employment. However, the "criminalization of the employment relationship... has not deterred illegal entry." Numerous reasons are given as to why the IRCA did not work.

138 Asylum and Immigration Act, § 8(2).
139 Asylum Act, supra note 21.
140 Id.
141 Asylum and Immigration Act, § 8(3).
142 See Employers Liabilities, supra note 66.
143 Id.
144 Medina, supra note 1, at 671.
145 Id.
1. Sanctions Not Substantial

One potential cause for the ineffectiveness of the legislation is that the sanctions were not substantial enough. The fines were too slight to cause concern for employers who hired undocumented workers. Due to the strong financial benefit of hiring illegal aliens, “employers would likely recoup the costs associated with any fines in a very short time due to the cost differential between hiring an undocumented worker and a documented worker.” Because the financial burden placed on employers for hiring undocumented workers was very mild, the employers did not have a monetary incentive to comply with the IRCA. In order to increase the success of the IRCA, it appears that it would be necessary to increase the civil fines and criminal penalties that were imposed on the employers.

2. Enforcement Issues

a. Lack of Enforcement

Another “problem” with the Act was the lack of enforcement of employer sanctions. Figures from the United States Government Accountability Office state that employers were only issued three citations of intent to fine in 2004. Compare that to 1999 when there were 417 such notices.

Various explanations have been offered as to why the law is so rarely enforced. Some of these include that the IRCA is a weak law because: (1) there have never been enough resources devoted to maintaining compliance

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147 Ehrenpreis, supra note 11, at 1221. A fine as high as $11,000 can easily be recovered by paying an undocumented worker a substandard salary. Id.

148 Id. at 1208.

149 Id.

150 Id. In 1998, the General Accounting Office (GAO) determined that the INS completed approximately 6,500 investigations of employers or about 3% of the country’s estimated number of employers of unauthorized aliens. In the same report, the GAO found that from 1994 to 1999, the INS devoted only about 2% of its enforcement workforce to its worksite enforcement program, which is designed to detect noncompliance with IRCA. Also, the majority of enforcement actions resulted in only a warning or citation. Actual fines, which typically were less than $2,500 per company, were levied against only 3,532 employers. Criminal prosecutions have been extremely rare. Id. at 1209.
with the law; (2) undocumented workers are a necessary component of certain industries in order for them to survive; and, (3) the possible harm "of civil sanctions and criminal penalties is outweighed by the benefit of lower salary expenses." As long as the INS rarely enforces the IRCA, employers have no incentive to comply with the Act because the chances of enforcement and prosecution are extremely slim.

b. Inefficiency in Enforcement

Another reason for the ineffectiveness of the Act was the fact that the process for detecting violations was inefficient. First, there was no automated system "for maintaining compliance data," which hindered "the initial inspection strategy deployed by the INS." Second, the employers that failed inspection did not have much to fear because they "could negotiate their fine and the initial inspection left them free to engage in prohibited employment practices because the INS reviews seldom include reinspection." Third, the INS strategy put a focus on large-scale employers or employers "with a history of hiring undocumented workers." Therefore, "employers who did not fit [into] one of these categories [faced] low probability of incurring sanctions."

c. Lack of Experience by the INS

A third problem with the IRCA pertained to the nature of the INS itself. The INS was given the responsibility of enforcing the IRCA. However, "historically [the INS] had little or no experience in regulating businesses or employer hiring or firing practices." Also, the INS was disadvantaged by "congressional guidelines, lack of [c]ongressional and internal INS political and fiscal prioritization, and low status in the Justice Department infrastructure." Having a government agency in charge of the enforcement

\[\text{\(151\) Id. at 1210.}\]
\[\text{\(152\) Espenoza, supra note 13, at 379.}\]
\[\text{\(153\) Id. at 380.}\]
\[\text{\(154\) Id.}\]
\[\text{\(155\) Id.}\]
\[\text{\(156\) Sarah M. Kendall, Comment, America's Minorities are Shown the "Back Door"... Again: The Discriminatory Impact of the Immigration Reform and Control Act, 18 Hous. J. Int'l L. 899, 917 (1996).}\]
\[\text{\(157\) Id.}\]
\[\text{\(158\) Id. at 917–18. "The INS has been described as one of the most beleaguered agencies in the federal government" because it is, as the House Judiciary Committee described, chronically}\]
of such important legislation without the necessary background or infrastructure to be successful in the task delegated to them is not an efficient way to promote compliance with the Act. In fact it shows that the government, by not putting an experienced department in charge of monitoring compliance with the Act, is not serious about enforcing this legislation.

d. Non-Uniformity of Enforcement

A major part of the inability to adequately monitor compliance with IRCA is structural. With regard to issuing sanctions, the INS did not effectively coordinate its IRCA policy throughout its national, regional and local offices. Therefore, there was not a centralized enforcement policy between the different offices. Without a centralized enforcement policy, different regions followed their own enforcement policy, leading to a lack of uniformity. As long as the various branch offices use different enforcement policies, the IRCA will continue to be ineffective.

3. Employer Issues

Another problem with the IRCA was employer confusion about INS expectations. The General Accounting Office concluded that "[b]oth education and enforcement are necessary for the development of voluntary

undermanned, ill-equipped, and generally overwhelmed.'” Id. at 918.

Id. at 919. “The INS is comprised of thirty-three district offices and twenty-two Border Patrol sectors.” Id.

Id.

Id.

Id.

Id.

[T]he western region of the INS uses a quota system for its agents [and] the number of violations the agents report is linked to performance evaluations and pay raises. As a result, the western region had a higher instance of paperwork violations as opposed to actual employment violations. The eastern region has a different policy, urging their officers to focus on employers in “knowing hire” violation[s]. Thus, in contrast [to the] western region, seventy-one percent of eastern [r]egion cases involved the actual hiring or continued employment of undocumented workers. Generally, there are great differences in the number and type of cases among the various regional offices. The western and southern regions produced greater numbers of smaller cases while the northern and eastern regions produced smaller numbers of larger cases.

Id. at 919–20.
compliance."\textsuperscript{163} Typically employers that received a visit from the INS had a higher rate of compliance than employers that were not visited.\textsuperscript{164} This illustrates that employer education about paperwork requirements of the IRCA results in greater compliance.\textsuperscript{165} Going forward, offering education to employers may increase compliance with the employer sanction provisions.

4. Complexity of the Problem

Additionally, IRCA did not meet its goal due to the complexity of the illegal immigration problem.\textsuperscript{166} The behavior criminalized by IRCA, employment, is highly valued by American society.\textsuperscript{167} Employment is not the typical type of behavior that Americans expect would result in the imposition of criminal sanctions.\textsuperscript{168} Therefore, due to the tension surrounding the employment prohibition “prosecutors are reluctant to devote scarce financial resources to prosecute those who engage in such behaviors, judges are reluctant to impose serious sanctions, and society is reluctant to support strong enforcement efforts.”\textsuperscript{169}

Also adding to the complexity of the problem is the inability to accurately assess any potential success of the Act.\textsuperscript{170} Two reasons for this—the difficulty gathering information on the size of the illegal population and the fact that different types of undocumented aliens—exist and each may be affected differently by IRCA.\textsuperscript{171}

Finally, IRCA only addresses the “pull” factors of migration.\textsuperscript{172} The continuing presence of undocumented workers supports the conclusion that the factors that “push” workers out of their home country may be more significant than the “pull” by the host country.\textsuperscript{173} Some examples of “push” factors are a desire for better employment, an increased standard of living, family

\textsuperscript{163} Espenoza, \textit{supra} note 13, at 377–78.
\textsuperscript{164} \textit{Id.} at 378. “The three percent of the employer population who received an INS visit since the enactment of IRCA reported knowing more about the I-9 requirements and had a higher rate of compliance than did employers who did not receive a visit.” \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} Medina, \textit{supra} note 1, at 671.
\textsuperscript{167} \textit{Id.} at 672.
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} Morales, \textit{supra} note 38, at 276.
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} Espenoza, \textit{supra} note 13, at 371.
\textsuperscript{173} \textit{Id.}
reunification, or to flee from tyranny or political oppression. Since the approach by the IRCA of using employer sanctions to reduce the flow of undocumented workers does not address or correct these “push” factors, failure of the Act was likely inevitable.

5. Document Fraud

The presence and use of fraudulent documents remains a significant limitation of the IRCA even though the Act specifies which documents are required for employer compliance. In fact, “many employers encourage or assist in the acceptance or procurement of fraudulent documents.” Also, the employer may inadvertently accept fraudulent documents. Employers often lack the training or resources necessary to identify false documents. Therefore, future legislation needs to address the increasing problem of fraudulent documentation for the IRCA to have even a moderate level of success.

6. Discrimination

A final problem with the IRCA of 1986 is its discriminatory effect. With the passage of the Act, “Congress feared that the employer sanctions provision would create a pattern of discrimination.” In response to this fear, Congress adopted the Frank Amendment, which created a special office to investigate and prove “charges of discrimination based on national origin or citizenship status.” In its third report on employer sanctions, the General Accounting

175 Espenoza, supra note 13, at 371.
176 Ehrenpreis, supra note 11, at 1210 (quoting Nightline: Illegal Immigrant Workers (ABC television broadcast Dec. 14, 2004)).
177 Espenoza, supra note 13, at 377.
178 Id. Many of the credentials that undocumented workers present are produced by obtaining a valid birth certificate or a social security card belonging to someone else. The undocumented workers use these documents to obtain a drivers license. Then the employee presents these documents as proof of work authorization or citizenship. Id.
179 Id.
180 Morales, supra note 38, at 273.
181 Id. at 273–74.
This amendment created an office of Special Counsel for Immigration Related Affair Employment Practices in the Department of Justice . . . . National origin is not defined by IRCA, although a significant body of case law and
Office "found that [the use of] employer sanctions 'had led to widespread discrimination based' on national origin." Discrimination caused by the IRCA is not an acceptable side effect of the legislation. Therefore, in future attempts, Congress should include stronger provisions protecting against discriminatory hiring practices.

B. Why the Asylum Act Did Not Work

The United Kingdom passed the Asylum Act in an attempt to deter the entry of undocumented workers into the country. However, the Asylum Act did not prove very successful for several reasons.

1. Lack of Enforcement

One problem surrounding the Asylum Act's implementation is that prosecution of employers rarely occurred. The low number of prosecutions is attributable to the fact that "the Immigration Service's focus in the employment context . . . [was] on the detection of unauthorized workers" rather than on prosecuting violators of the Act. Due to the low number of prosecutions for violations of the Act, employers had no strong incentive to comply with its provisions. As a result, employer compliance with the Act was low, rendering it unsuccessful.

2. Fraud

The Asylum Act presented another problem with the use of fraudulent documents. Since introducing employer sanctions, "it has become more
likely that unauthorized workers will commit criminal offenses by obtaining employment through the fraudulent use of documents."

Because the use of fraudulent documents has become so prevalent, the attempt to reduce the number of undocumented workers employed in the United Kingdom was increasingly more difficult. Therefore, the list of acceptable documents in future legislation should include documents for which forged copies are more difficult to obtain.

3. Discriminatory Effect

Like the IRCA, the use of employer sanctions may have had a discriminatory effect on ethnic minorities. To help ease the potential for discrimination the Asylum Act states that, "where employers decide to make checks on entitlement to take work, the same checks will need to be applied to all applicants whatever their background." Also, the government proposed guidelines that included "advice on how to carry out checks on applicants in ways which do not discriminate, or risk accusation of discrimination against any group." However, despite these actions by the government, it is not clear whether they were successful in curbing potential discrimination. Nevertheless, the Commission for Racial Equality opposed the use of employer sanctions due to its tendency toward discriminatory effects.

4. Broad List of Acceptable Documents

The Asylum Act provides for an expansive list of acceptable documents to prove legal worker status. One problem with the broad list is that it includes documents that do not require a photograph, making them particularly susceptible to forgery. Another problem with the list is that it includes

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187 Id. at 34. There are two different cases regarding the use of fraudulent documentation. One is the presentation of a valid document that relates to someone else. The second is the presentation of a forged document.
188 Id. at 36.
189 Id. at 37.
190 Id.
191 See generally id.
192 Id.
193 Id. at 36.
194 Id. This category included British and Irish birth certificates and letters from the immigration or employment authorities. Id. at 36–37.
documents having a national insurance number. However, these documents do not necessarily prove a current entitlement to work because the worker can obtain a number during a previous period of lawful employment. Therefore, as previously mentioned, future legislation needs to contain a list of acceptable documents that are not ineffective or easily forged.

5. Burden Upon Employers

Another problem with the Asylum Act is the potential burden placed on employers by the sanctions. In response to this problem, the government included a broad employer defense provision. Also, to alleviate concerns regarding potential impact on businesses, the Asylum Act now allows documents bearing the national insurance number to be sufficient for the employer defense. However, the Act did not fail because the sanctions were too onerous on the employers. Rather, other reasons such as low enforcement rates and the use of fraudulent documents led to the Act’s failure to meet its stated goals.

6. Lack of Adequate Data

Finally, the Act did not meet its goal because of the problems posed by undocumented workers. Adding to this problem is the difficulty of obtaining accurate data concerning undocumented workers. The Home Office also has some data source issues including a lack of specified data, limited data, inaccessible centrally held data, and limited data dissemination. Until the Home Office is better able to obtain accurate data, it will continue to be difficult to assess the success of the Asylum Act and any future legislation.

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195 Id. at 37. This category, in addition to including national insurance cards, permitted reliance upon any document issued by a previous employer that contained a national insurance number, such as a payslip or a document giving evidence of taxes collected by the employer. Id.

196 Id.
197 Id.
198 Id. at 38.
199 Id.
201 Id. at 31.
C. What Now—The United States and United Kingdom Introduce New Legislation

In response to the continuing problem of undocumented workers, both the United States and the United Kingdom have introduced new legislation.

1. United States—H.R. 4437 and S. 1348

In the United States, immigration reform legislation has been introduced in Congress. The House of Representative’s Bill, H.R. 4437, is tentatively titled “Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.”202 The Senate Bill, S. 1348, is tentatively titled “Comprehensive Immigration Reform Act of 2007.”203

Both of the bills contain major modifications to the original IRCA. However, the focus of this analysis will be the provisions relating to the employment verification process and the potential civil and criminal penalties facing employers who fail to comply with the bills.

Both H.R. 4437 and S. 1348 have an employment verification process requirement. Pursuant to H.R. 4437, the Secretary of Homeland Security will establish a verification system whereby staff will respond to inquiries made through a toll-free telephone number or other toll-free electronic media with respect to both an individual’s identity and his authorization to be employed.204 This system is designed to maximize reliability and ease of use by employers.205

According to S. 1348, the Secretary of Homeland Security must institute an electronic verification system to determine whether the information submitted by the employee matches the information maintained by the Secretary of Homeland Security and to verify that the employee is eligible to work in the United States.206

Both bills also increase employer civil sanctions and criminal penalties. In H.R. 4377, the civil penalties range from $5,000 to $40,000.207 The range for

204 H.R. 4437, § 701(a)(7)(A).
205 Id. § 701(a)(7)(D).
206 S. 1348, § 301(d)(1).
207 H.R. 4437, § 706(1).
the first violation is not less than $5,000 and not more than $7,500 for each alien.\textsuperscript{208} The range for a second violation is not less than $10,000 and not more than $15,000 for each alien.\textsuperscript{209} The range for three or more violations is not less than $25,000 and not more than $40,000 for each alien.\textsuperscript{210} The civil penalties for paperwork violations range from $1,000 to $25,000 for each individual.\textsuperscript{211}

The civil sanctions for hiring undocumented workers in S. 1348 ranges from $500 to $20,000.\textsuperscript{212} The penalty for a first offense should not be less than $500 nor more than $4,000 for each unauthorized alien.\textsuperscript{213} The civil penalty for a second offense ranges from not less than $4,000 to not more than $10,000 for each alien.\textsuperscript{214} The penalty for three or more offenses can not be less than $6,000 nor more than $20,000.\textsuperscript{215} The civil penalties for paperwork violations range from $200 to $6,000 for each violation.\textsuperscript{216}

Both bills also contain criminal penalty provisions. In H.R. 4437, any employer who has a pattern or practice of employing undocumented workers is subject to a fine of not more than $50,000 for each alien, imprisonment of not less than one year, or both.\textsuperscript{217} In S. 1348, any employer with a pattern or practice of employing undocumented workers shall be subject to a civil fine of not more than $20,000, imprisonment of not more than three years, or both.\textsuperscript{218}

2. United Kingdom—Immigration, Asylum, and Nationality Act 2006

The United Kingdom passed the Immigration, Asylum and Nationality Act 2006 (IANA) repealing section 8 of the original Asylum Act.\textsuperscript{219} The focus of this section will be the employer sanction provisions of the IANA, which include both civil fines and criminal penalties.

\textsuperscript{208} Id. § 706(1)(B).
\textsuperscript{209} Id. § 706(1)(C).
\textsuperscript{210} Id. § 706(1)(D).
\textsuperscript{211} Id. § 706(2)(B)–(C).
\textsuperscript{213} Id. § 301(e)(4)(A)(a)(i).
\textsuperscript{214} Id. § 301(e)(4)(A)(a)(ii).
\textsuperscript{215} Id. § 301(e)(4)(a)(iii).
\textsuperscript{216} Id. § 301(e)(4)(B)(i)–(iii).
\textsuperscript{218} S. 1348, § 301(f)(1).
Under the IANA, the Secretary of State is in charge of issuing penalties for violations of the Act.\textsuperscript{220} In regard to civil sanctions, if the employer fails to comply with the IANA, the Secretary of State may require the employer to pay a penalty that cannot exceed £2,000.\textsuperscript{221}

The IANA also contains a provision containing criminal penalties. An employer may be subject to criminal penalties for "knowingly" hiring an employee that is subject to immigration control.\textsuperscript{222} If an employer is guilty of an offense under this provision, they shall be liable – on conviction on indictment to imprisonment for a term not exceeding two years, to a fine, or to both, or on summary conviction to imprisonment for a term not exceeding 12 months in England and Wales or 6 months in Scotland or Northern Ireland, a fine not exceeding the statutory maximum, or to both.\textsuperscript{223}

\textbf{D. Which One Will Be More Successful?}

Both United States bills, H.R. 4437 and S. 1348, and the United Kingdom’s IANA include provisions that show some promise of success. However, both countries’ legislation also have provisions that appear to be detrimental to the goal of reducing the number of undocumented workers.

\textit{1. U.S. Bills}

\textit{a. H.R. 4437}

H.R. 4437 contains some provisions that will help to curb the hiring of illegal aliens. The most important change made to the new bill from the IRCA of 1986 is the increase in civil fines and criminal penalties. As previously mentioned, under the IRCA, employers did not have a strong incentive to comply because the sanctions did not have much power behind them and the benefits of hiring undocumented workers outweighed the detriment of the employer sanctions. Increasing employer sanctions is a positive step toward reducing the number of undocumented workers employed in the United States.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{220}] Immigration, Asylum and Nationality Act, § 15(2).
\item[\textsuperscript{221}] \textit{Id.}; Ryan, \textit{supra} note 7, at 41.
\item[\textsuperscript{222}] Immigration, Asylum and Nationality Act, § 21(1).
\item[\textsuperscript{223}] \textit{Id.} § 21(2).
\end{itemize}
\end{footnotesize}
Another positive attribute of H.R. 4437 is that it replaces the I-9 with an employer verification system. Setting up this electronic system is beneficial in two ways. First, it provides a means for employers to more accurately assess whether a potential employee may legally work in this country. The employer may not have enough education to know whether the documents presented by the potential employee are satisfactory, so the new verification system may prove invaluable to employers. Second, the electronic system will help cut down on the problem of fraudulent documents, therefore reducing one of the major problems with the IRCA of 1986.

However, there are also provisions that may prove detrimental to the success of the bill. One such provision is that "[i]f the person or other entity has received a final nonverification regarding an individual, the person or entity may terminate employment of the individual." The use of "may" instead of "shall" indicates that the employer has the choice of whether to terminate employment. This construction is an open invitation to non-enforcement of the Act. H.R. 4437 does not say that the employer must terminate the employee, yet it requires notification of the employer's decision be given to the Department of Homeland Security. This provision may weaken the enforcement of the Act.

Another potential weakness of H.R. 4437 is that employers will not be required to use the employee verification system until six years after the enactment of the bill. Therefore, if the bill is enacted, the problem of undocumented workers may still be prevalent for at least another six years until employers are forced to comply with the worker verification system.

Another issue with H.R. 4437 is the provision for mitigation of civil monetary penalties for smaller employers. The reduction of civil penalties may be up to as much as 60%. However, it is important to note that small businesses represent more than 99% of all employers and provide about 75% of all new net jobs. Therefore, most workers are employed by small businesses. By allowing small business to mitigate the civil penalties, therefore reducing the "cost" of hiring undocumented workers, the employers

225 H.R. 4437, § 702(5) (emphasis added).
226 Id.
227 Id. § 703(b).
228 Id. § 706(10).
229 Id.
who are potentially hiring the most illegal aliens face a lower cost than larger companies. By allowing smaller businesses to alleviate their costs, the true "bite" of H.R. 4437 is only affecting about 1% of businesses. This low percentage is likely to lesson H.R. 4437's impact on the hiring of illegal aliens.

A final issue with the H.R. 4437 is the "good faith" provision.\(^{231}\) Defining exactly what constitutes "acting in good faith" is difficult. "Good faith" is a vague term and without providing for a more concrete definition this provision allows too much discretion in the enforcement of the employer sanctions.

\[b. \text{ S. 1348}\]

S. 1348 also contains promising provisions. First, it increases the amount of employer sanctions from the previous IRCA. Increasing sanctions is an important step toward achieving more compliance by employers.

Second, S. 1348 also institutes an employer verification system.\(^{232}\) As previously mentioned, the use of this system will help more employers comply with the bill and will also help to cut down on the use of fraudulent documents.

Third, unlike H.R. 4437, if the employee receives nonconfirmation of their ability to work legally in the United States, the employer must terminate the "employment, recruitment, or referral of the individual."\(^{233}\) Also, the employer must notify the Secretary of Homeland Defense.\(^{234}\) Therefore, this provision helps to promote enforcement of S. 1348 by making the termination of the employee mandatory rather than optional.

Another promising provision in S. 1348 is § 301(g) which allows the adjustment of penalties for inflation: "[A]ll penalties and limitations on recovery of costs and attorney's fees in this section shall be increased every 4 years beginning January 2010."\(^{235}\) This is an important provision because it will keep the bill current, with the penalties continually being adjusted upward.

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\(^{231}\) This provision states that:

In the case of imposition of a civil penalty . . . with respect to a violation . . . for hiring or continuation of employment or recruitment or referral by person or entity . . . and in the case of imposition of a civil penalty . . . for a violation . . . for hiring or recruitment or referral by a person or entity, the penalty otherwise imposed shall be waived if the violator establishes that it was the first such violation of such provision by the violator and the violator acted in good faith.

H.R. 4437, § 706(11) (emphasis added).


\(^{233}\) Id. § 301(d)(8)(D)(x).

\(^{234}\) Id.

\(^{235}\) Id. § 301(g).
due to inflation. Therefore, the penalties will not become less burdensome as time goes on.

Finally, unlike H.R. 4437, under S. 1348, the electronic employment verification system requirement becomes effective eighteen months after it is available to implement.236 Allowing employers eighteen months gives them sufficient time to update operations and prepare to use the electronic system, while simultaneously avoiding such a delay that the effectiveness of curbing undocumented workers is hampered.

Along with these positive provisions, there are also some provisions that may hinder the success of the bill. S. 1348 also contains a “good faith provision” stating that “an employer that establishes that the employer has complied [in good faith with the requirements] has established an affirmative defense . . . .”237 As previously mentioned, “good faith” is a very vague and subjective term. The bill does not specify exactly what actions constitute a “good faith” effort. Therefore, this aspect of the bill gives too much discretion to the Secretary of Homeland Security. An important part of the success of the bill is for it to be written as objectively as possible to allow for greater uniformity in enforcement. Allowing this much discretion to enter into the bill may lead to a lack of uniformity in the enforcement of S. 1348.

Another negative aspect of S. 1348 is that its penalties are less than H.R. 4437. In order for it to have a chance of success, the employer sanctions must be severe enough to deter employers from hiring illegal aliens. In other words, the penalties must be so high that the benefit of hiring illegal immigrants is less than the burden of the employer sanctions. The reduced sanctions of S. 1348 do not have the same impact as H.R. 4377 and therefore may not be sufficient to meet the goal of this legislation.

2. UK Act

Like H.R. 4377 and S. 1348, the IANA contains some provisions that show promise for success. Under the IANA, the Secretary of State is charged with compiling a list of factors that must be considered in determining the amount of the penalty.238 Included in these factors is the employer’s ability to pay the fine.239 This is an important provision because it allows the Secretary of State

236 Id. § 301(d)(2).
237 Id. § 301(a)(4)(A).
238 Immigration, Asylum, and Nationality Act, 2006, c. 13, § 19(1) (Eng.).
to tailor the amount of the fine based on the employer's circumstances. Therefore, companies with deep pockets that may not initially face a high financial burden by employing illegal aliens, may have that burden increased based on their ability to pay. Using a company's size to assess the appropriate penalty should aid the goal of deterring the hiring of illegal aliens.

Another promising provision in the IANA requires that the employer check the employee's worker status during the course of employment: it "require[s] action to be taken at specified intervals or on specified occasions during the course of employment." This is in contrast to the Asylum Act which only required an initial check before employment began. Requiring periodic checks of an employee's status should help to lessen the number of undocumented workers.

Another important aspect of the IANA is that it allows for the Home Office to create a helpline to help employers understand who may legally work and who may not. This is important to the goal of reducing the number of undocumented workers hired and working in the UK. Offering the employers this useful education will help reduce the number of working illegal aliens and also help lessen the effectiveness of the employer's defense that he did not knowingly employ an illegal alien.

There are, however, some weak provisions in the Act. The first states "the secretary of state may give an employer who acts contrary to this section a notice requiring him to pay a penalty of a specified amount not exceeding the prescribed maximum." Not making the imposition of a penalty mandatory implies that this law may not be strictly enforced. To give the IANA more strength, the penalty should be mandatory.

Second, the IANA still allows the same identification documents as the Asylum Act. Therefore, the IANA does not address the issue of the use of fraudulent documents. The IANA should have either a new verification system in place or include a list of acceptable documents which are more difficult to forge.

Finally, the IANA reduces the maximum amount of penalties. The Asylum Act allowed for civil fines of up to £5,000. However, the IANA only provides for civil fines of up to £2,000. Since the Asylum Act was not very

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240 Immigration, Asylum, and Nationality Act, § 15(7)(e).
241 Asylum and Immigration Act, 1996, c. 49, § 8(2)(a) (Eng.).
243 Immigration, Asylum, and Nationality Act, § 15(2) (emphasis added).
244 Asylum and Immigration Act, § 8(4); Immigration, Asylum, and Nationality Act, § 15(2);
successful with civil penalties ranging up to £5,000, it does not follow that the IANA will be any more successful with fines that are even more modest. Because the potential monetary burden on the employer is reduced, the employer has less incentive to comply with the IANA.

Although both countries’ new legislation, H.R. 4377 and S. 1348 in the United States and the IANA in the United Kingdom, have their respective strengths and weaknesses, the U.S. bills appear to be better suited to reducing the problem of undocumented workers being employed by businesses. The U.S. bills have harsher penalties both with regard to civil fines and criminal penalties. Also, in the U.S. bills, attempts have been made to reduce the use of fraudulent documents and to provide employers with more education to be able to detect illegal workers. Both of these issues were major problems with the previous IRCA of 1986.

V. CONCLUSION

This Note addressed attempts by both the United States and the United Kingdom to reduce the problem of illegal immigration through the introduction of new immigration reform acts. In conclusion, when comparing both the strengths and weaknesses of the new legislation, the U.S. bills will be more successful in solving the increasing problem of undocumented workers being employed by businesses.

Based on analysis of the main provisions of both countries’ legislation, the U.S. bills are better suited to meet the goal of reducing the number of illegal immigrants employed. The U.S. bills offer harsher penalties for noncompliance with the legislation and take affirmative steps towards reducing the use of fraudulent documents.

The future of immigration reform legislation in the United States is still somewhat uncertain. The country is still awaiting a comprehensive immigration reform law containing provisions relating to the imposition of employer sanctions for hiring illegal aliens. Therefore, in passing a new law dealing with employer sanctions, the United States should institute the higher penalties of H.R. 4377, the employment verification systems of both bills, a must-terminate provision that requires employers to terminate employees who are found to be illegal, and implement the verification requirements within eighteen months of the passage of the new Act. The new law should also delete the vague good faith defense and the penalty reduction for small businesses.

Immigration, Asylum, and Nationality Bill, H.L. Bill [74].
Although the IANA does make some important changes, such as having employers continually monitor their workers’ legal status and instituting imprisonment as a penalty in some situations for noncompliance, the reduction of the civil fine amount and the discretion given to the Secretary of State on whether to require a penalty are detrimental to the potential success of the bill. Therefore, when all of the major provisions, both good and bad are considered, the U.S. bills seem better poised to have the most impact in curbing the number of undocumented workers employed by businesses.