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VERIFYING THE RIGHT TO WORK:

The Paper Chase Comes To The Farm

— by Howard R. Rosenberg
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Employers of unauthorized workers in seasonal agricultural services are no longer exempt from penalties under the Immigration Reform and Control Act of 1986 (IRCA). Expiration of the statutory grace period on December 1, 1988, brought the immigration law's full force to agriculture, and IRCA began to take a big bite out of the farm labor supply. Or did it? Without vigorous, resourceful enforcement by the Immigration and Naturalization Service (INS), the verification of employment eligibility may end up to be no more than a wasteful charade.

The Theory and the Practice

Employers have a crucial role in controlling illegal immigration. The 1986 law requires that they verify the legal right to work of every new hire by checking documents and completing an "I-9" form. As employers refuse to hire workers who cannot prove their eligibility, fewer people are supposed to enter or stay in the U.S. illegally. But it is a safe bet that possession of documents indicating work authorization will not be confined to citizens and lawfully admitted aliens.

Widespread use of bogus papers in farm worker legalization has been reported. The INS suspects fraud in about half of the pending applications for legal residence under the special agricultural worker (SAW) program. Vastly greater earnings opportunity on the U.S. side of the border provided plenty of motivation for aliens to apply for SAW status, even if they had not worked the qualifying 90 days in seasonal agricultural services between May 1985 and May 1986. South of the border, workers generally earn in one day what they would in one hour at the U.S. minimum wage.

Unqualified SAW applicants who successfully bamboozle the INS get the big prize, temporary legal resident status (convertible to permanent by December 1990). With it comes an alien registration card that can be used to establish eligibility for employment in virtually any job, in or out of agriculture. The November 30, 1988, closing of the SAW application period by no means ended the use of phony papers. Rather, it shifted the main arena of fraud from the INS legalization office to the workplace. The game is not entirely new.

A manager recently told us of the peculiar dilemma he faced in trying to duly maintain his file of I-9 forms. One of his employees, who had previously shown an Alien Registration Receipt Card (form I-551, the permanent "green card") to prove employment eligibility, came back to the office months later proudly sporting a new Temporary Resident Card (I-688). Only the new card had actually been issued by the INS, but both looked convincing enough to the employer. Ironically, the fake

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green card provided "eligibility" for an indefinite time. In contrast, the valid I-688 had an expiration date (beyond which the worker could not remain employed without showing evidence of continued legal authorization).

In this case the fraud had ended. In many other situations, involving workers who could not obtain legal resident status, it is just beginning. Imitation green cards, social security cards, birth certificates, and other seemingly legal documents have long been for sale. Now they are more valuable. They can help ineligible workers to land a job.

The Employer Perspective

What will farmers do when shown fraudulent eligibility papers by prospective employees? For most it depends on what they can discern about the papers, the availability of legal labor, and the chance of incurring sanctions for violating IRCA.

The government cannot—and does not—expect growers to be legal documentation experts. Employers meet their main IRCA documentation obligation by certifying on the I-9 that eligibility papers presented by workers "appear to be genuine." An INS official described a reasonable standard of genuine appearance, "the 100-foot rule": If a document is not obviously fake from 100 feet away, you cannot be expected to tell it from the real thing. Proper completion of I-9s, even on the basis of fraudulent documents that appear genuine, generally shields the employer from charges of wrongdoing. It does not, however, keep workers so hired from being apprehended by the INS.

Some farmers will examine work papers with extra care, to avoid operational disruptions resulting from INS detection and removal of ineligible alien employees. But their best efforts may not get the job done. The challenge of ascertaining genuineness is complicated by the variety of documents (29 types listed in the INS Handbook for Employers) that workers may present as evidence of their identity and/or employment eligibility. Counterfeiters are turning out phony forms that conscientious, law abiding employers would not doubt from even 100 millimeters.

Still other growers will not want to examine documents any more closely than the law requires. Many will tend to check carefully only if the law is being strongly enforced. They will be understandably reluctant to limit the labor pool from which they recruit if others are hiring ineligible workers without penalty.

The Challenge of Enforcement

While not revealing detailed plans, INS officials have made clear their intention to inspire voluntary compliance through strategic enforcement. Staff from the INS and the Department of Labor audit employer I-9 files, examine forms for proper completion, check the validity of identification numbers on them, and interview selected workers. On March 1, 1989, INS announced the first sanction of an agricultural employer for violating IRCA. A Madera, California, farm labor contractor was fined \$153,250 for 337 counts of failing to verify employment eligibility (not for knowingly hiring ineligible workers).

Despite the substantial penalties provided by IRCA and recent increases in INS staffing, agents will be able to cover but a fraction of farms and other workplaces. On at least a first occurrence it will be hard to hold an employer with complete I-9s responsible for hiring ineligible aliens, even if done deliberately. Discovering the fraudulence of documents used by workers in short-term farm jobs may be of particularly little consequence. By the time an inspector peruses a peach picker's papers in California, the worker could easily be harvesting apples in Washington.

It is possible that a combination of patriotism, good will, and enforcement vigor will yield enough painstaking scrutiny of documents in grower hiring offices to greatly curtail the employment of ineligible workers. Perhaps, however, agricultural employers will not be able to stop the circumvention of IRCA unless the law is modified.

Showing What's Important

Measures have been suggested to reduce the use counterfeit documents and thereby improve the chance of IRCA serving its main purpose—to limit unauthorized immigration. One is to reduce the range of employment eligibility documents to a single tamper-resistant identification card that could be checked through an on-line data system accessible throughout the

nation. This idea raises political and philosophical as well as the obvious technological issues.

Critics argue that a national ID card is inconsistent with American ideals, that it would represent a certain threat to personal liberty. Big Brother, better equipped, would loom even bigger. As a grower meeting participant recently observed, however, we already carry many cards and numbers that identify us in private and public data bases.

Civilized nations have long faced tradeoffs between individual freedom and social order. Effective control of unauthorized immigration to the United States today may involve more costs and risks than the drafters and supporters of IRCA contemplated. The implementation of such major public policies as immigration reform, even more than the design, can force a society to come to grips with its values. 