



NATIONAL
IMMIGRATION
LAW CENTER
www.nilc.org

BOARD OF DIRECTORS

Allen Erenbaum
Chair
Mayer, Brown,
Rowe & Maw

Cynthia Lange
Secretary
Fragomen, Del Rey,
Bernsen & Loewy, PC

Lucas Guttentag
Treasurer
American Civil
Liberties Union,
Immigrants'
Rights Project

Della Bahan
Bahan & Associates

Richard Boswell
University of California
Hastings College of Law

Muzaffar Chishti
Immigration Policy
Institute at
New York University
School of Law

Iris Gomez
Massachusetts Law
Reform Institute

Lin-Hua Wu
Kekst and Company

*Organizations listed
for identification
purposes only*

EXECUTIVE DIRECTOR
Marielena Hincapié

LOS ANGELES
HEADQUARTERS
3435 Wilshire Boulevard
Suite 2850
Los Angeles, CA 90010
213 639-3900
fax 213 639-3911

WASHINGTON, DC
1444 Eye Street, NW
Suite 1110
Washington, DC 20005
202 216-0261
fax 202 216-0266

January 12, 2009

Hugh Teufel III
Chief Privacy Officer
Department of Homeland Security
Washington, DC 20528

***Re: Comments on Docket Number DHS-2008-0089 Privacy Act of 1974;
USCIS-004 Verification Information System (VIS) Systems of Record
Notice.***

Dear Mr. Teufel:

The National Immigration Law Center (NILC) submits the following comments in response to the request for public comment by the Department of Homeland Security to the Privacy Act of 1974; USCIS-004 Verification Information System (VIS) Systems of Record Notice, 73 Fed. Reg., No. 239, pages 75445-75452 (December 11, 2008)

In the System of Records Notice (SORN) DHS announces 1) “the expansion of the scope of the Systematic Alien Verification for Entitlements to include verification of citizenship and immigration status for any lawful purpose, not just for government benefit granting purposes as described in previous [Privacy Impact Assessments]” and 2) “the expansion of the scope of E-Verify to indicate that it is no longer solely voluntary in some cases and no longer solely for new employees.”¹ NILC opposes these expansions.

NILC protects and promotes the rights and opportunities of low-income immigrants and their family members. NILC specializes in immigration law and the employment and public benefits rights of immigrants. We conduct policy analysis and impact litigation and provide publications, technical advice, and trainings to a broad constituency of legal aid agencies, community groups, government agencies and *pro bono* attorneys.

NILC has extensive experience in dealing with the adverse impact of United States laws, policies, rules and procedures on immigrant communities in the United States. NILC also has developed specialized expertise in immigrant eligibility for public benefits and the use of SAVE, and electronic employment verification systems (EEVS).

**NO FEDERAL LAW SUPPORTS THE SORN’S EXPANSION OF SAVE’S
USE**

The SORN’s expansion of the use of SAVE has unmoored the program from the federal legislation which authorizes it. As set forth in the SORN:

¹ 73 FR 75445-75452, at 75446 <http://edocket.access.gpo.gov/2008/pdf/E8-29283.pdf>

Authority for having a system for verification of citizenship and immigration status of individuals seeking government benefits can be found in the Immigration Reform and Control Act of 1986 (IRCA), Public Law (Pub. L.) 99–603, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. 104–193, 110 Stat. 2168, and in Title IV, Subtitle A, of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104–208, 110 Stat. 3009...

USCIS implemented th[is] mandate[] through the Systematic Alien Verification for Entitlements (SAVE) program for government benefits...

Each of the above authorizing statutes lists specific programs and purposes for which SAVE may be used for citizenship and immigration verification. DHS' previous acknowledgement that "SAVE is used to verify limited citizenship and immigration status of individuals seeking government benefits, licensure, or credentials based on their citizenship and immigration status" tracks the statutory authorization.² Specific authorization to use SAVE also exists in the REAL ID Act, which allows its use for citizenship and immigration status verification in the issuance of driver's licenses and identification cards.³

In contrast, the present SORN does not cite any federal statute which authorizes the vastly expanded use of SAVE. DHS simply gives itself permission to use SAVE because section 642(c) of the Illegal and Immigrant Responsibility Act of 1996 (IIRIRA)⁴ requires USCIS to respond to inquiries "by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law." This self-delegation of authority is legally insufficient.

The only explanation DHS offers for this massive expansion in the use of SAVE is offered in its Privacy Impact Assessment: "...it must be noted that DHS is responsible for being able to determine immigration and citizenship

² Privacy Impact Assessment for the Verification Information System, September 4, 2007. http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_vis_update.pdf

³ Public Law 109-13, 119 Stat. 231, 302 (2005) (codified at 49 USC 30301 note).

⁴ 8 USC 1373(c). "Obligation to respond to inquiries. The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."

status, and if VIS⁵ were unavailable for this purpose, DHS would be required to develop an entirely new system with the exact same capabilities as VIS in order to comply with the statutory requirement in the INA that DHS respond to such requests.”⁶ This justification is disingenuous. What is required is not a new system, but federal statutory authorization of the use of the current system.

THE SORN TURNS THE FEDERAL IMMIGRATION SYSTEM ON ITS HEAD BY ALLOWING STATES AND LOCALITIES TO DECIDE WHEN AND HOW THEY MAY USE FEDERAL DATABASES AND THE IMMIGRATION VERIFICATION SYSTEM.

If the SORN’s expansion of the use of SAVE does not need to be authorized by federal law, states and localities would have virtually unfettered ability to decide when and how they wish to use a federal database and immigration verification system. The only limitation would be whether it is a “purpose authorized by law.”

The dangers of this unfettered authority are apparent. In recent years, states and localities have passed many laws requiring verification of citizenship or immigration status for a variety of purposes. These laws repeatedly have been struck down when federal or state courts found that they regulate immigration and are pre-empted by federal law, or that they deny due process of law, or that they violate state law.⁷

If the SORN purports to allow USCIS to decide when a purpose claimed by a state or local government agency is authorized by law, it does not suggest any standards for making this decision. Moreover, the SORN does not offer even a hint of due process or privacy protections in how the system is used by state and local government agencies. It does not require notice to affected individuals, consent for the system to be used regarding their citizenship or immigration status, access to records to correct information, redress if information is incorrect or a benefit is wrongly denied. Nor does it even require that information in the databases that are relied upon be accurate. Finally, it requires no evaluation of how the system is used or whether it is reliable.

The Privacy Impact Assessment, which accompanies the SORN, is woefully inadequate. It does not meaningfully address – when it mentions them at all --

⁵ According to the SORN, “VIS is the technical infrastructure that enables USCIS to operate SAVE and E-Verify. VIS is a nationally accessible database of selected immigration status information containing in excess of 100 million records.” 73 FR at 75446.

⁶ Privacy Impact Assessment for the Verification Information System, p. 5, November 20, 2008. http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cis_visupdate.pdf

⁷ See, e.g. *Lozano v. City of Hazleton*, 496 F. Supp.2d 477 (M.D. Pa. 2007).

any of the sharing, disclosure, notice, consent, access, redress and correction issues which the massive expansion of SAVE's use would implicate.

THE SORN'S CHANGE IN THE SCOPE OF E-VERIFY VIOLATES
FEDERAL LAW

The SORN states that the VIS is being expanded to indicate that E-Verify "is no longer solely voluntary in some cases and no longer solely for new employees in certain cases."⁸ The expansion of the VIS is based on Executive Order 13465, which requires that most federal contractors participate in the E-Verify program for new hires and for existing employees that are assigned to federal contracts.⁹ It is also based on a number of state laws that make E-Verify mandatory for some or all businesses in the state.

Federal law, however, prohibits the mandatory use of E-Verify, and does not allow E-Verify to be used to re-verify the employment eligibility of existing employees. The authorizing statute, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996¹⁰ explicitly establishes that the program is voluntary, and, except for certain limited statutory exceptions, prohibits the federal government from requiring employers to use the program. Specifically, IIRIRA states that, "the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program."¹¹

IIRIRA authorizes employers to use the program *only* to verify employees' employment eligibility within the first three days of hire.¹² Mandating that federal contractors re-verify existing employees who are assigned to a federal contract violates the express statutory limitation on the scope of the program.¹³ The SORN, therefore, expands the VIS without statutory authority.

For the foregoing reasons, the SORN must be rescinded.

⁸ 73 FR at 75447.

⁹ 73 FR 33285-287 (June 11, 2008). Executive Order (EO) 13465 amends EO 12989 (61 FR 6091 (Feb. 15, 1996)), which previously amended EO 13286 (68 FR 10619 (Feb. 28, 2003)).

¹⁰ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Defense Department Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009-659 (Sept. 30, 1996).

¹¹ Section 402(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. 104-208, 110 Stat. 309 (1996), codified at 8 U.S.C. § 1324a note.

¹² The 3-day time period may be extended in cases where an employer attempted to make an inquiry, but the confirmation system was unable to receive it. IIRIRA §403(a)(3)(B).

¹³ Section 404(h)(1) of IIRIRA prohibits the federal government from using "any information, data base, or other records" compiled for the operation of Basic Pilot/E-Verify "for any other purpose than as provided for under a pilot program."