

Testimony of
James W. Ziglar

July 21, 2009

STATEMENT OF

JAMES W. ZIGLAR

BEFORE THE SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND BORDER
SECURITY

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

JULY 21, 2009

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I AM PLEASED TO BE APPEARING AT YOUR REQUEST TO DISCUSS THE E-VERIFY PROGRAM THAT IS BEING DEVELOPED, IMPLEMENTED AND ADMINISTERED BY THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES. IT HAS BEEN A NUMBER OF YEARS SINCE I LAST APPEARED BEFORE THIS SUBCOMMITTEE AND IT IS AN HONOR TO BE HERE AGAIN. I AM APPEARING HERE IN MY PERSONAL CAPACITY AND NOT AS A REPRESENTATIVE OF MY LAW FIRM, VAN NESS FELDMAN, OR ANY OF ITS CLIENTS.

THIRTEEN YEARS AGO, IN 1996, CONGRESS RECOGNIZED THE NEED TO DEVELOP AN ELECTRONIC EMPLOYMENT VERIFICATION SYSTEM (EEVS) AS A NECESSARY ELEMENT IN THE IMPLEMENTATION OF AN EFFECTIVE IMMIGRATION CONTROL SYSTEM. AT THAT TIME, AS IS STILL THE CASE, DOCUMENT FRAUD WAS UNDERMINING THE EFFORT TO ENFORCE OUR IMMIGRATION LAWS IN THE WORKPLACE. AS PART OF THE ILLEGAL IMMIGRATION AND IMMIGRANT RESPONSIBILITY ACT OF 1996, THE CONGRESS AUTHORIZED THREE ELECTRONIC EMPLOYMENT VERIFICATION PILOT PROGRAMS. IN 2003, ONE OF THOSE PILOTS, THE "BASIC PILOT," BECAME A NATIONAL VOLUNTARY PROGRAM. THE NAME OF THE PILOT WAS LATER CHANGED TO "E-VERIFY," THE SUBJECT OF TODAY'S HEARING.

I WANT TO MAKE IT CLEAR THAT, IN MY OPINION, MY FORMER COLLEAGUES AT THE DEPARTMENT OF HOMELAND SECURITY WHO HAVE BEEN RESPONSIBLE FOR THE IMPLEMENTATION OF E-VERIFY HAVE DONE AN EXTRAORDINARY JOB ON

BEHALF OF THE AMERICAN PEOPLE. ANY COMMENTS THAT I MAKE TODAY ARE NOT INTENDED TO BE A CRITICISM OF THEIR EFFORTS AND ONLY REFLECT MY PERSONAL THOUGHTS WITH RESPECT TO MATTERS ON WHICH THE SUBCOMMITTEE HAS REQUESTED THAT I PROVIDE COMMENTARY.

IN THE INTEREST OF FULL DISCLOSURE, I WANT THE RECORD TO SHOW THAT IN ADDITION TO HAVING SERVED AS COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE WHEN THE BASIC PILOT WAS BEING TESTED, I SUBSEQUENTLY SERVED AS PRESIDENT AND CEO OF CROSS MATCH TECHNOLOGIES, INC. UNTIL I RETIRED ONE YEAR AGO NEXT WEEK. SEVERAL MONTHS AGO, I LEFT THE BOARD OF DIRECTORS OF CROSS MATCH, BUT I STILL HOLD AN EQUITY POSITION IN THE COMPANY. CROSS MATCH IS A PRIVATELY-HELD BIOMETRICS COMPANY LOCATED IN FLORIDA. I ALSO WOULD LIKE TO DISCLOSE FOR THE RECORD THAT I OWN SMALL AMOUNTS OF STOCK IN TWO OTHER PUBLICLY TRADED COMPANIES THAT ARE IN THE BIOMETRICS BUSINESS.

MUCH HAS BEEN WRITTEN ABOUT E-VERIFY AND THERE HAS BEEN NO LACK OF IDEAS ON WAYS TO IMPROVE THE SYSTEM. INDEED, ONLY YESTERDAY, THE MIGRATION POLICY INSTITUTE RELEASED AN IMPORTANT STUDY ON E-VERIFY IN WHICH IT SUGGESTS SEVERAL POSSIBLE WAYS TO IMPROVE THE SYSTEM. I WILL REFER TO THIS STUDY LATER IN MY TESTIMONY AND I WOULD REQUEST THAT THE STUDY BE INCLUDED IN THE RECORD OF THIS HEARING. ONCE AGAIN, AS A MATTER OF FULL DISCLOSURE, I WANT TO NOTE THAT I AM AN UNPAID SENIOR FELLOW AND ADVISOR TO THE BOARD OF THE MIGRATION POLICY INSTITUTE. HOWEVER, I AM NOT HERE AS A REPRESENTATIVE OF THE MIGRATION POLICY INSTITUTE.

MY REMARKS TODAY ARE FOCUSED ON ONE ELEMENT OF E-VERIFY THAT HAS BEEN THE SUBJECT OF MUCH DISCUSSION, INCLUDING SPECIFIC MENTION BY THE CHAIRMAN OF THIS SUBCOMMITTEE. E-VERIFY HAS A SIGNIFICANT WEAKNESS IN ITS INABILITY TO DETECT AND PREVENT IDENTITY FRAUD. IT HAS HAD GOOD SUCCESS IN DEALING WITH CERTAIN TYPES OF FRAUDULENT DOCUMENTS THAT ARE PRESENTED AS PART OF THE I-9 PROCESS. BUT IF SOMEONE HAS STOLEN AN IDENTITY AND PRESENTS LEGITIMATE DOCUMENTS CONNECTED TO THAT IDENTITY, OR PRESENTS FRAUDULENT DOCUMENTS WHICH MAKE USE OF STOLEN IDENTITY DATA, THE PURPOSE OF THE EMPLOYMENT ELIGIBILITY VERIFICATION EXERCISE CAN BE DEFEATED. IN APRIL 2007, FORMER COMMISSIONER OF THE INS, DORIS MEISSNER, AND I PUBLISHED AN OP-ED PIECE IN THE NEW YORK TIMES DISCUSSING THIS ISSUE AND ADVOCATING THE USE OF A BIOMETRICALLY-ENABLED SOCIAL SECURITY CARD TO DEFEAT IDENTITY FRAUD. I AM SUBMITTING A COPY OF THAT OP-ED WITH MY WRITTEN TESTIMONY.

ALTHOUGH THE ADDITION OF PHOTOGRAPHS IN E-VERIFY RECORDS, WHERE AVAILABLE, HAS NO DOUBT HAD SOME POSITIVE IMPACT IN PREVENING IDENTITY FRAUD, THE ABILITY TO BE ABLE TO DEFINITELY PROVE THAT THE

PERSONS IN FRONT OF YOU ARE WHO THEY SAY THEY ARE IS CRITICAL TO THE EFFECTIVENESS OF A PROGRAM TO PREVENT UNAUTHORIZED WORKERS FROM BEING HIRED. THE PHOTO SCREENING TOOL IS USEFUL, BUT IT IS LIMITED IN ITS APPLICATION AND RELIABILITY, AND SHOULD WE HAVE A MANDATORY VERIFICATION REQUIREMENT IN THE FUTURE, AS WELL AS ENHANCED PENALTIES FOR HIRING UNAUTHORIZED WORKERS, IT WILL IMPOSE A BURDEN ON EMPLOYERS THAT IS FUNDAMENTALLY UNFAIR. ANY EEVS SHOULD GIVE EMPLOYERS UNAMBIGUOUS DIRECTIONS ABOUT WORKERS' AUTHORIZATION WHILE MINIMIZING THE REQUIREMENT THAT EMPLOYERS EXERCISE DISCRETION DURING THE VERIFICATION PROCESS.

THE EMPLOYMENT OF BIOMETRICS TO IDENTIFY INDIVIDUALS HAS BEEN USED IN THE LAW ENFORCEMENT ARENA FOR MANY YEARS. IN THE MID-TO-LATE 1990'S, THE POTENTIAL FOR USING BIOMETRICS IN NON-LAW ENFORCEMENT ENVIRONMENTS CAPTURED THE ATTENTION OF THE MARKET. TODAY, BIOMETRIC TECHNOLOGIES ARE DEPLOYED ACROSS THE GLOBE TO PROVIDE ACCESS TO OFFICES, HOMES, CARS, MEDICAL RECORDS, SECURITY VAULTS, VOTING BOOTHS AND A HOST OF OTHER CIVILIAN APPLICATIONS. IN THE UNITED STATES, A NUMBER OF INDUSTRIES REQUIRE THAT BIOMETRIC AND BIOGRAPHIC INFORMATION BE COLLECTED AND BACKGROUND CHECKS UNDERTAKEN IN ORDER TO BE EMPLOYED IN THAT INDUSTRY. EXAMPLES INCLUDE THE FINANCIAL SERVICES INDUSTRY, THE TRANSPORTATION INDUSTRY, THE EDUCATION INDUSTRY AND THE HEALTH CARE INDUSTRY. THE USE OF BIOMETRICS TO AUTHENTICATE AND VERIFY THE IDENTITY OF INDIVIDUALS IS NOT A NOVEL CONCEPT IN TODAY'S SOCIETY. I WOULD BE REMISS IF I DID NOT MENTION THAT ONE OF THE MOST VISIBLE AND SUCCESSFUL APPLICATIONS OF BIOMETRICS HAS BEEN IN THE DEPARTMENT OF HOMELAND SECURITY'S US VISIT PROGRAM.

EVERY INDIVIDUAL HAS CERTAIN PHYSIOLOGICAL CHARACTERISTICS THAT ARE UNIQUE AND CAN BE MEASURED TO DEFINITELY IDENTIFY THAT PERSON (A BIOMETRIC). THE MOST WELL-KNOWN BIOMETRIC IS THE FINGERPRINT AND ITS USE IS UBIQUITOUS. THE IRIS AND A PERSON'S DNA ARE ALSO UNIQUE PHYSIOLOGICAL CHARACTERISTIC, AS WELL AS FACIAL STRUCTURE (CAPTURED THROUGH A PHOTOGRAPH), HANDWRITING AND VOICE PATTERNS. IN TERMS OF RELIABILITY (i.e., THE ABILITY TO CAPTURE AND ACCURATELY MEASURE, AND THEN MATCH THIS PHYSIOLOGICAL CHARACTERISTIC TO AN ESTABLISHED RECORD), THE IRIS, FINGERPRINT AND DNA ARE CONSIDERED THE MOST RELIABLE BY EXPERTS IN THE FIELD.

THE USE OF BIOMETRICS FOR IDENTIFICATION AND VERIFICATION PURPOSES, IN LAW ENFORCEMENT AND NON-LAW ENFORCEMENT SETTINGS, CONTINUES TO EXPAND RAPIDLY AND THE TECHNOLOGY ALSO CONTINUES TO IMPROVE REGULARLY. HOWEVER, ALTHOUGH THE TECHNOLOGY WILL CONTINUE TO IMPROVE, THE STATE OF THE TECHNOLOGY TODAY, IN MY OPINION, IS SUCH THAT ITS USE IN THE CONTEXT OF E-VERIFY IS NOT ONLY FEASIBLE, BUT QUITE

ATTRACTIVE. IN MY OPINION, IT WOULD BORDER ON IRRESPONSIBLE NOT TO SERIOUSLY ANALYZE THE POSSIBILITY OF INCORPORATING A BIOMETRIC IDENTIFICATION AND VERIFICATION MODULE INTO THE E-VERIFY SYSTEM.

IN A REPORT RELEASED ON JULY 8, 2009, AN INDEPENDENT TASK FORCE OF THE COUNCIL ON FOREIGN RELATIONS, CO-CHAIRLED BY JEB BUSH AND THOMAS F. (MAC) McLARTY III, RECOMMENDED THAT A "WORKABLE AND RELIABLE BIOMETRIC ELECTRONIC VERIFICATION SYSTEM" BE DEPLOYED. AS I MENTIONED EARLIER IN MY TESTIMONY, ONLY YESTERDAY, JULY 20, 2009, THE MIGRATION POLICY INSTITUTE RELEASED A COMPREHENSIVE REPORT ON THE E-VERIFY SYSTEM RECOMMENDING THAT THREE PILOTS BE UNDERTAKEN BY USCIS TO ENHANCE THE RELIABILITY AND ACCURACY OF THE E-VERIFY SYSTEM. TWO OF THOSE PILOTS WOULD EMPLOY BIOMETRICS--ONE WOULD USE A SECURE BIOMETRICALLY-ENABLED IDENTIFICATION CARD AND THE OTHER WOULD TEST A BIOMETRIC SCANNING SYSTEM THAT WOULD ALLOW OR REQUIRE EMPLOYERS TO CAPTURE BIOMETRICS DURING THE VERIFICATION PROCESS AND COMPARE THE COLLECTED BIOMETRIC DATA AGAINST A CENTRAL DATABASE OR A BIOMETRIC CARD.

IT IS MY BELIEF THAT A BIOMETRIC COMPONENT COULD BE EFFECTIVELY INCLUDED IN THE E-VERIFY PROGRAM. I DO NOT BELIEVE THAT THIS WOULD REQUIRE SCRAPPING THE PRESENT SYSTEM AND ALL OF THE HARD WORK THAT HAS BEEN DONE TO DATE. INSTEAD, CONGRESS HAS THE OPPORTUNITY TO ESTABLISH A STATUTORY FRAMEWORK WITHIN WHICH USCIS CAN BUILD ON E-VERIFY TO INCORPORATE BIOMETRICS. IT WILL REQUIRE MORE HARD WORK AND THERE WILL BE MANY DEBATES AND ISSUES ALONG THE PATH TO BUILDING AN EFFECTIVE EEVS. THOSE ISSUES INCLUDE CONCERNS ABOUT PRIVACY, THE FEAR THAT THE UNITED STATES IS ESTABLISHING A NATIONAL ID CARD, TECHNOLOGICAL GLITCHES THAT WILL HAVE TO BE ADDRESSED AND, OF COURSE, COST.

I DO NOT WANT TO SEEM POLYANNISH ABOUT THE CHALLENGES THAT WOULD BE FACED IN IMPLEMENTING AN EFFECTIVE ELECTRONIC EMPLOYMENT VERIFICATION SYSTEM THAT CAN PROVIDE FOR AUTHENTICATION OF THE IDENTITY OF INDIVIDUALS. ALTHOUGH THERE ARE MILLIONS OF EXISTING RECORDS THAT CONTAIN BIOMETRICS OF INDIVIDUALS AND CAN BE USED TO VERIFY IDENTITY, THE ENROLLMENT PROCESS THAT WOULD BE REQUIRED TO HAVE ALL WORKERS IN THE DATABASE, WOULD BE FINANCIALLY SIGNIFICANT AND POLITICALLY VOLATILE. THE LARGEST SHARE OF THIS BURDEN WOULD FALL ON U.S CITIZENS. THE SHEER MAGNITUDE OF THIS EFFORT WOULD SUGGEST THAT THE ONLY PRACTICAL WAY TO MANAGE THE DEVELOPMENT OF SUCH A SYSTEM WOULD BE THROUGH A PHASED PROCESS THAT INCLUDES SIGNIFICANT PUBLIC EDUCATION.

NOTWITHSTANDING ALL OF THE CHALLENGES I HAVE JUST MENTIONED, IT IS MY VIEW THAT IF WE DO NOT ADDRESS THE ISSUE OF THE USE OF BIOMETRICS

NOW, WE WILL HAVE TO REVISIT IT IN THE FUTURE AND THE COST INVOLVED WILL BE ORDERS OF MAGNITUDE HIGHER THAN THEY ARE TODAY.

MR. CHAIRMAN, THANK YOU AGAIN FOR THE OPPORTUNITY TO APPEAR BEFORE THE SUBCOMMITTEE AND I LOOK FORWARD TO YOUR QUESTIONS.

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