

**Advisory Memorandum**

**To:** The U.S. Commission on Civil Rights

**From:** The Nebraska Advisory Committee to the U.S. Commission on Civil Rights

**Date:** April 2016

**Subject:** Civil Rights and State-Level Immigration Enforcement in Nebraska

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On May 05, 2015, the Nebraska Advisory Committee to the U.S. Commission on Civil Rights (Committee) voted to undertake a study of state level immigration enforcement in Nebraska. Specifically, the Committee sought to examine the civil rights impact of Nebraska’s 2009 Legislative Bill 403 (LB 403). Codified in October of 2009 as Nebraska Rev. Stat. §§ 4-108 through 4-114, the law requires that State agencies and their political subdivisions verify the lawful presence of applicants before providing federal, state, or local public benefits. It also requires that State agencies and their political subdivisions verify the work eligibility status of new employees.<sup>1</sup> While the law explicitly states that it “shall be enforced without regard to race, religion, gender, ethnicity, or national origin,”<sup>2</sup> opponents argued that it would necessarily target persons of Hispanic origin in a discriminatory manner. As part of a 2010 public briefing on civil rights concerns in Nebraska, the Committee heard preliminary testimony regarding the potential for such discrimination.<sup>3</sup>

In the present study, the Committee sought to examine civil rights concerns that may have surfaced since the initial implementation of LB 403—particularly those related to disparate impact on the basis of race, color, or national origin; and to unequal protection under the law. The following advisory memo results from the testimony provided during two public meetings of the Nebraska Advisory Committee, which took place on July 29th and August 12th, 2015.<sup>4</sup> Also included is written testimony submitted to the Committee during the related period of public comment. This memo begins with a brief overview of LB 403, and the civil rights concerns in question. It then presents an overview of the testimony received, and concludes with findings and recommendations for addressing related civil rights concerns. This memo and the recommendations included within it were adopted by a majority of the Committee on March 21, 2016.

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<sup>1</sup> Neb Rev. Stat. §§ 4-108 – 4-114. More information at: <http://nebraskalegislature.gov/laws/browse-chapters.php?chapter=04> (last accessed March 30, 2015).

<sup>2</sup> Neb Rev. Stat. §§ 4-108 (2).

<sup>3</sup> Public briefing meeting before the Nebraska Advisory Committee to the U.S. Commission on Civil Rights, September 8, 2010. Transcript pp. 88-167. (Hereafter cited as *September 2010 Transcript*) Note: *Committee terms expired and 2015 hearing was led by a different group.*

<sup>4</sup> See Appendix A for public meeting agendas.

## **Background**

Introduced in April of 2009 by then State Senator Russ Karpisek on behalf of then governor Dave Heineman, LB 403 comprises two principal mandates. First, LB 403 requires State agencies and their political subdivisions to verify the lawful presence of noncitizen public benefits applicants prior to providing benefits or services. Under this law, a public benefit is defined as:

Any grant, contract, loan, professional license, commercial license, welfare benefit, health payment or financial assistance benefit, disability benefit, public or assisted housing benefit, postsecondary education benefit involving direct payment or financial assistance, food assistance benefit, or unemployment benefit, or any other similar benefit provided by or for which payments or assistance are provided to an individual, a household, or a family eligibility unit by an agency of the United States, the State of Nebraska, or a political subdivision of the State of Nebraska.<sup>5</sup>

There are limited exceptions in the law for some benefits such as emergency health care services, short term noncash disaster relief, and life safety services.<sup>6</sup> Second, LB 403 requires State agencies and their political subdivisions to verify the work eligibility status of all employees hired after October 1, 2009, through the use of the federal employment verification system known as “E-Verify.”<sup>7</sup> Private employers are not required to participate in E-Verify for new hires, though LB 403 created economic development tax incentives to encourage them to do so.

During the 2010 briefing on this topic, the Committee heard testimony of the following civil rights concerns related to the implementation of LB 403, particularly with respect to its first provision regarding public benefits applications:<sup>8</sup>

- Verification of immigration status is being applied to programs that are exempt from such eligibility restrictions under federal law. For example, the Nebraska Department of Health and Human Services (HHS) has required proof of authorized status for participants of programs provided under the National Breast and Cervical Cancer Screening Early Detection Programs, though under federal law these programs are exempted from immigration qualification requirements.<sup>9</sup> Such restriction has disproportionately excluded persons of Hispanic origin.
- LB 403 has resulted in residents’ fear of accessing public benefits, even when they are eligible. This is particularly true for noncitizen residents, who may fear that accessing

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<sup>5</sup> Neb Rev. Stat. §§ 4-108 – 4-114.

<sup>6</sup> *Id.*

<sup>7</sup> See U.S. Citizenship and Immigration Services, E-Verify for more information: <http://www.uscis.gov/e-verify> (last accessed December 31, 2015).

<sup>8</sup> The Nebraska Department of Health and Human Services submitted a written statement in July of 2015 in response to these concerns as they were raised in the Committee’s 2010 inquiry. See Appendix B.

<sup>9</sup> Gould testimony, *September 2010 Transcript*. pp. 105-106; pp.114-116.

benefits—even benefits to which they are entitled—may negatively impact their ability to become citizens later on. In Nebraska, such individuals are disproportionately of Hispanic origin.<sup>10</sup>

- Due to a lack of training regarding proper implementation of LB 403, and a lack of access to the necessary verification systems, some State agencies have delayed or stopped processing benefits applications from qualified aliens because they do not know what to do with them.<sup>11</sup> Again, because the majority of noncitizen residents in Nebraska are of Hispanic origin, such practices have had a disparate impact on this population.
- The required eligibility form under LB 403 does not allow parents to distinguish their children’s immigration status from their own. Therefore, U.S. citizen children of noncitizen parents may be disproportionately excluded from services to which they are entitled.<sup>12</sup>
- Although some public benefits such as emergency medical care are exempt from immigration status verification under LB 403, clients placed in civil or emergency protective custody who are unable to demonstrate eligible status may no longer receive related follow up services through the State regional network. For example, an individual admitted to an emergency facility for an acute mental health crisis is not eligible for the necessary follow up services unless he or she can demonstrate qualified status.<sup>13</sup> This will likely have a disproportionate impact on the State’s Hispanic population.
- LB 403 has resulted in noncitizens with lawful status being denied or delayed professional licensure, because the State Department of Health and Human Services was unclear as to what qualifies for proper documentation of lawful status. This issue has had a disproportionate impact on the State’s Hispanic residents.<sup>14</sup>

During the 2015 public hearings, the Committee sought to examine the impact of LB 403, six years after its initial implementation, to determine whether or not the above concerns had materialized and/or remained, and whether additional civil rights concerns may have surfaced. On July 29th, 2015, the Committee heard updated testimony from Rebecca Gould of the Appleseed Center for Law and the Public Interest, and Lazaro Spindola of the Latino American Commission. The Committee heard additional testimony from immigration Attorney Brian Blackford of Blackford Law LLC. Lynn Rex of the League of Nebraska Municipalities had been scheduled to participate, though on the day of the hearing she was unexpectedly unable to attend. On August 12th, 2015, the Committee heard further testimony from Law Professor Huyen Pham of Texas A&M University, Legal Director Charles Shane Ellison of Justice for Our Neighbors, and Outreach and Verification Chief Yvette LaGonterie of the U.S. Citizenship and Immigration Services.

The Committee approached this project from a neutral posture, and at the direction of a designated subcommittee, sought input from involved stakeholders representing all relevant

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<sup>10</sup> Gould testimony, *September 2010 Transcript*. pp. 103-104; 144-146.

<sup>11</sup> Gould testimony, *September 2010 Transcript*. pp. 106-107.

<sup>12</sup> Gould testimony, *September 2010 Transcript*. pp. 107-108; 131-133; 150-151; 154-158.

<sup>13</sup> Johnson testimony, *September 2010 Transcript*., pp. 92-96; 123-126; 134-135.

<sup>14</sup> Spindola testimony, *September 2010 Transcript*., pp. 111-112; 140-142.

perspectives. Notably, despite several outreach attempts, Nebraska Governor Pete Ricketts, who has publicly supported many of the bill's provisions;<sup>15</sup> former Senator Russ Karpisek, the bill's introducer; and current Senator Mike Gloor, a supporter, all declined the Committee's invitation to testify. The Nebraska Department of Health and Human Services also declined to participate; however, they submitted a written statement in response to the concerns raised during the Committee's 2010 inquiry.<sup>16</sup> The Committee extended additional invitations to other community groups, individuals, and researchers who have been supportive of state level efforts to enforce immigration policy, though none were available to participate. Regrettably, this lack of participation from those in support of LB 403, and limited participation from State agencies charged with its implementation, prevented the Committee from obtaining the intended range of perspectives. The Committee notes that there were two opportunities for these individuals/groups to testify, and that panelists were invited to testify via web conference, thereby eliminating the need for travel and maximizing opportunity to participate. Where appropriate, the Committee also requested that invited parties who were unable to attend personally send a delegate, or, at a minimum, submit a written statement offering their perspective on the civil rights concerns raised by other panelists. The U.S. Citizenship and Immigration Services was able to provide some objective information regarding concerns related to the use of their SAVE and E-Verify databases, and the Nebraska Department of Health and Human Services answered some questions regarding verification implementation through their written statement. However, none of the parties invited to provide testimony in support of LB 403's implementation chose to submit a response in any of the aforementioned formats. It is within this context that the Committee presents the findings and recommendations in the following sections of this report.

### **Overview of Testimony**

The Committee recognizes that the current topic of immigration in the United States, and specifically in Nebraska, is a complex matter which raises many concerns, and involves many important details to understand — a number of which were raised during testimony related to this project. For the purposes of this report, the Committee chose to focus exclusively on those concerns relating directly to the implementation of Nebraska's 2009 LB 403 and its relevant statutes. While a number of other worthy topics were raised, those matters that may have fallen outside of this specific scope are left for another discussion.

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<sup>15</sup> Governor Ricketts, though he was not in office at the time of the bill's initial introduction and passage, has supported many of its provisions—including banning recipients of federal deferred action status from obtaining driver's licenses. See <https://governor.nebraska.gov/press/gov-ricketts-statement-legislatures-decision-give-driver-licenses-illegal-immigrants>. (last accessed December 30, 2015).

<sup>16</sup> See Appendix B for complete text of written statement. Hereafter cited as: *Phillips Statement, July 2015*. Note: The Nebraska Department of Health and Human Services is responsible for delivering many of the services requiring verification under LB 403.

*E-Verify*

The Federal Employment Verification system “E-Verify” is an internet-based data source managed by the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS). Participating employers use the system to verify the U.S. work authorization of newly hired employees.<sup>17</sup> By comparing information included in an employee’s federal employment eligibility verification form, I-9, to other records such as passport and visa information; driver’s license and state identification records; immigration and naturalization records; and Social Security Administration records; the database is designed to authenticate the eligibility documentation submitted by employees.<sup>18</sup> If an employee’s documents match, the system will almost immediately indicate that the employee is authorized to work in the U.S. If the documents do not match, the employee will be issued what is known as a “tentative non-confirmation,” or “TNC.” In such cases, the individual must be given the opportunity to contest the verification results, and to submit additional documentation or correct his or her records if they are found to be erroneous.<sup>19</sup> Under current Nebraska law, all state agencies and their political subdivisions must use E-Verify to verify the work eligibility status of all employees hired after October 1, 2009.

*Accuracy.* Studies have found E-Verify to have a relatively low incidence of non-confirmation.<sup>20</sup> However, serious consequences can result for those affected by non-confirmation, including employment termination and difficulty obtaining new employment. Throughout the course of this project, the Committee heard testimony that errors in E-Verify have demonstrated a disproportionate impact on the basis of race, color, and national origin. Erroneous non-confirmations in E-Verify are primarily related to data entry errors, such as name misspellings. According to panelist Huyen Pham, Law Professor at Texas A&M University, cultural differences such as hyphenated last names can increase the frequency of these errors, which primarily impact immigrant groups and citizens with “foreign” sounding names.<sup>21</sup> Professor Pham cited a GAO report which found E-Verify error rates of up to thirty times higher than average for naturalized citizens and fifty times higher for temporary workers.<sup>22</sup> A 2013

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<sup>17</sup> See U.S. Citizenship and Immigration Services, E-Verify for more information: <http://www.uscis.gov/e-verify> (last accessed December 31, 2015).

<sup>18</sup> U.S. Citizenship and Immigration Services, How E-Verify Works. Available at <https://www.uscis.gov/e-verify/what-e-verify/how-e-verify-works> (last accessed February 11, 2016).

<sup>19</sup> U.S. Citizenship and Immigration Services, E-Verify: Employee Rights and Responsibilities. Available at <https://www.uscis.gov/e-verify/employees/employee-rights-and-responsibilities> (last accessed February 08, 2016).

<sup>20</sup> According to panelist Yvette LaGonterie of the U.S. Citizenship and Immigration Services, only 1.04% of E-Verify inquiries result in what is known as a “Tentative Non-Confirmation” or TNC. *See*: Transcript: Public meeting of the Nebraska Advisory Committee to the U.S. Commission on Civil Rights, August 12, 2015. LaGonterie testimony, p. 14 lines 08-17. Hereafter cited as *August 2015 Transcript*.

<sup>21</sup> Pham testimony, *August 2015 Transcript*, p. 08 lines 05-09.

<sup>22</sup> Pham testimony, *August 2015 Transcript*, p. 07 lines 09-16; p. 08 lines 05-09.

publication of the American Civil Liberties Union raises similar concerns regarding disparate impact.<sup>23</sup>

*Misuse.* Federal law prohibits the use of E-Verify to discriminate against any job applicant or employee on the basis of his or her national origin, citizenship, or immigration status.<sup>24</sup> For example, employers are prohibited from using E-Verify to screen job applicants or prospective employees prior to hire. Employers also may not selectively verify the employment eligibility of newly hired employees, or use E-Verify to check the eligibility of employees hired before the employer began using E-Verify. Instead, participating employers are required to verify *all new* hires after they have enrolled in the system (and, with the exception of a few federal contractors, *only new hires*).<sup>25</sup> Panelist Yvette LaGonterie, of the U.S. Citizenship and Immigration Services, described several safeguards in place to ensure that E-Verify is not used in a discriminatory manner. These include a monitoring and compliance division within USCIS to ensure users are in compliance with the program rules; mandatory training before users gain access to the system and any time there is a significant rule change; and maintenance of a hotline employees can call for technical support, to ask questions, or to file a complaint if they feel they have been unfairly discriminated against.<sup>26</sup>

Despite these safeguards, the Committee heard testimony that E-Verify may still be plagued by misuse. Panelist Lazaro Spindola, Executive Director of the Latino American Commission, described concerns regarding contractors, most frequently in commercial construction and landscaping businesses, failing to consistently apply E-Verify for new hires. Such contractors may use selective verification to threaten to report workers to immigration authorities if they raise labor, health, or safety concerns.<sup>27</sup> Panelist Huyen Pham also testified that some employers may seek to circumvent E-Verify requirements all together by hiring their employees as subcontractors.<sup>28</sup> In addition, she cited evidence that some employers may simply fire employees when they receive a non-confirmation in E-Verify, rather than telling the employee about the problem and giving them the opportunity to correct their records. Other employers may illegally use E-Verify to pre-screen prospective workers: “the result is that an erroneous result...can be used to prevent an authorized worker from even getting a job offer in the first place.”<sup>29</sup>

<sup>23</sup> Prove Yourself to Work: The 10 Big Problems with E-Verify, *American Civil Liberties Union*, May 2013. p. 07. Available at [https://www.aclu.org/files/assets/everify\\_white\\_paper.pdf](https://www.aclu.org/files/assets/everify_white_paper.pdf) (last accessed February 05, 2016).

<sup>24</sup> U.S. Citizenship and Immigration Services, E-Verify: Employee Rights and Responsibilities. Available at <https://www.uscis.gov/e-verify/employees/employee-rights-and-responsibilities> (last accessed February 08, 2016).

<sup>25</sup> U.S. Citizenship and Immigration Services, E-Verify: Employee Rights and Responsibilities. Available at <https://www.uscis.gov/e-verify/employees/employee-rights-and-responsibilities> (last accessed February 08, 2016).

<sup>26</sup> LaGonterie testimony, *August 2015 Transcript*, p. 15 line 36 through p. 16 line 05; p. 17 lines 13-28; p. 17 line 34 through p. 18 line 05.

<sup>27</sup> Transcript: Public Meeting of the Nebraska Advisory Committee to the U.S. Commission on Civil Rights, July 29 2015. Spindola testimony, p. 09 lines 21-31. Hereafter cited as *July 2015 Transcript*.

<sup>28</sup> Pham testimony, *April 2015 Transcript*, p. 08 lines 16-18.

<sup>29</sup> Pham testimony, *August 2015 Transcript*, p. 07 lines 17-28.

USCIS clearly states that that initial non-confirmation does not necessarily indicate a person is unauthorized to work in the United States.<sup>30</sup> Yet, the burden of correcting any related errors rests entirely on the individual affected. Depending on the source of the error, correcting relevant records may require a physical visit to USCIS, an SSA field office, or to a U.S. Customs and Border Protection Port of Entry. In the State of Nebraska, these offices exist only in Omaha, which can be several hundred miles away depending on a person's home location. The Committee heard testimony that such barriers may be prohibitive for those seeking to correct erroneous records. Panelist Yvette LaGonterie of the USCIS noted that a majority of individuals receiving a TNC do not contest their results.<sup>31</sup> Panelist testimony as well as a 2010 GAO report on the topic questioned how many of these individuals may actually be eligible and yet either become discouraged or are unable to correct their records.<sup>32</sup> Though errors may be few, the severity of consequences for not correcting them; and current indications of a continued disparate impact on the basis of race, color, and national origin; raises civil rights concerns in need of further study.

### **SAVE**

In contrast to E-Verify, the SAVE database cannot make any determinations regarding an individual's eligibility for services. Instead, the system is intended only to verify an applicant's immigration status. It is then up to the administering agency to make a determination regarding eligibility based on that status.<sup>33</sup> Therefore, in order to achieve accurate results using SAVE verification; not only must all of the information contained within the database be complete, up to date, and accurate; but administering staff must also have the necessary background knowledge and training in order to correctly interpret an applicant's immigration status and subsequent benefits eligibility. Errors in the SAVE database or its administration may result in denial of very broadly defined state benefits; including health, disability, housing, and education benefits; driver's licenses; professional licenses; and more. Furthermore, unlike E-Verify, the USCIS does not receive or investigate complaints regarding the use or misuse of the SAVE database.<sup>34</sup>

*Attestation Form.* It should be noted that unlike E-Verify, verification in the SAVE database does not apply to everyone. SAVE verification is triggered when an applicant for public benefits

<sup>30</sup> U.S. Citizenship and Immigration Services, E-Verify: Employee Rights and Responsibilities. Available at <https://www.uscis.gov/e-verify/employees/employee-rights-and-responsibilities> (last accessed February 08, 2016).

<sup>31</sup> LaGonterie testimony, *August 2015 Transcript*, p. 14 lines 08-17.

<sup>32</sup> Pham testimony, *August 2015 Transcript*, p. 05 lines 21-30; p. 07 line 29 through p. 08 line 04; Ellison Testimony, p. 09 line 33 through p. 10 line 23. *See also:* Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain. GAO, December 2010, p. 34. Available at: <http://www.gao.gov/new.items/d11146.pdf> (last accessed January 26, 2016).

<sup>33</sup> LaGonterie testimony, *August 2015 Transcript*, p. 19 line 32 through p. 20 line 02; p. 13 lines 10-15. *See also:* USCIS: SAVE For Benefit Applicants: <https://www.uscis.gov/save/benefit-applicants> (last accessed January 13, 2016).

<sup>34</sup> LaGonterie testimony, *August 2015 Transcript*, p. 18 lines 22-25.

indicates on the required United States Citizenship Attestation Form that he or she is a “qualified alien under the federal Immigration and Nationality Act,”<sup>35</sup> and not a U.S. citizen. The Committee heard testimony that the content of this form itself may create confusion and unnecessarily restrict eligible Nebraskans from applying for or receiving benefits to which they are entitled. This is in part because the form does not allow mixed-status families to distinguish the status of individual family members (for example, U.S. born children of immigrant parents). Panelist Rebecca Gould, Attorney and Executive Director of the Nebraska Appleseed Center for Law in the Public Interest, explained:

in many public assistance programs, parents are allowed to apply for benefits just for their children. In those cases, only the children, who are the applicants, must verify their citizenship or immigration status. However, when the Nebraska Department of Administrative Services developed the universal attestation form, they neglected to take this situation into account...<sup>36</sup>

As a result, parents may be “forced to attest to something that is false in order to apply for their child.”<sup>37</sup> Ms. Gould testified that her agency had worked with families who decided not to apply—even for eligible family members—due to this flaw in the form. Additionally, Ms. Gould noted that the term “qualified alien,” which encompasses a number of immigration status, is not defined on this form. As a result, she raised concern that many people may be deterred from applying because they do not know whether or not they qualify, and they fear submitting false attestation.<sup>38</sup> The Nebraska Appleseed Center for Law in the Public Interest reported having brought both of these concerns to the Department of Administrative Services and the Department of Health and Human Services “numerous times,” though at the time of their testimony no changes to the form had been made.<sup>39</sup> In their written statement in response to the Committee’s inquiry, Courtney Phillips, Chief Executive Officer of the Nebraska Department of Health and Human Services stated, “Undocumented individuals may apply for services on behalf of their children. The application process allows a parent to attest, on behalf of their minor child, that the child is either a U.S. citizen or qualified alien.”<sup>40</sup> Ms. Phillips noted, for example, that when completing a Medicaid application, “anyone who is completing the application (parent, child, third party) can complete the citizenship/immigration status for each person included on the

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<sup>35</sup> See Appendix C for Attestation Form. *See also*: U.S. Citizenship and Immigration Services, Immigration and Nationality Act, available at: <https://www.uscis.gov/laws/immigration-and-nationality-act> (last accessed February 10, 2016).

<sup>36</sup> Gould Testimony, *July 2015*, p. 07 lines 10-23.

<sup>37</sup> Gould Testimony, *July 2015*, p. 07 lines 10-23.

<sup>38</sup> Gould Testimony, *July 2015*, p. 07 lines 10-23.

<sup>39</sup> Gould Testimony, *July 2015*, p. 07 lines 24-26.

<sup>40</sup> Phillips Statement, *July 2015*, pp. 04-05.

application.”<sup>41</sup> However, the Attestation form obtained by the Committee does not appear to indicate how one would complete the attestation on behalf of another person.<sup>42</sup>

*Database Accuracy.* Once SAVE verification is triggered, panelists raised similar concerns regarding its accuracy as they did with E-Verify—namely that errors in the database have a disparate impact on certain minority groups, often related to cultural differences and name misspellings.<sup>43</sup> However, the system itself presents a number of additional challenges. First, SAVE does not have the same rigorous auditing requirements as E-Verify, and less data is available regarding its accuracy.<sup>44</sup> Second, SAVE does not maintain its own records. Instead, it draws upon 100 million records maintained by many different offices within the Department of Homeland Security.<sup>45</sup> This decentralized structure has raised questions about the ability of USCIS to ensure that identified errors are corrected.<sup>46</sup> Third, SAVE may be missing important information: “immigration status is a fluid determination...documents don’t always accurately reflect a person’s immigration status.”<sup>47</sup> For example, Professor Pham noted that foreign born children who, under the Child Citizenship Act of 2000,<sup>48</sup> are automatically granted U.S. citizenship, are not required to file any documents to obtain their citizenship. As such, there would be no record in SAVE to indicate their correct status as citizens, and the system would likely yield inaccurate results for them.<sup>49</sup> She also noted that SAVE does not have access to the databases of Customs and Border Protection, which could lead to further gaps in critical information.<sup>50</sup> Finally, Professor Pham pointed out that because SAVE verification applies only to noncitizen benefits applicants, any delays or erroneous denials caused by inaccuracies in the system will necessarily have a disparate impact on this population.<sup>51</sup>

Like E-Verify, USCIS literature on SAVE explicitly states that an initial non-confirmation does not mean that a benefits applicant is ineligible for the benefit sought.<sup>52</sup> However, in the case of initial non-confirmation, it is the responsibility of the applicant to contest the determination and to correct his or her records as necessary. Also like E-Verify, such correction may require a

<sup>41</sup> Phillips Statement, July 2015, pp. 04-05.

<sup>42</sup> See Appendix C

<sup>43</sup> Pham testimony, *August 2015 Transcript*, p. 05 lines 14-20.

<sup>44</sup> Pham testimony, *August 2015 Transcript*, p. 05 lines 08-13; p. 05 line 31 through p. 06 line 12.

<sup>45</sup> Pham testimony, *August 2015 Transcript*, p. 04 lines 12-18.

<sup>46</sup> Pham testimony, *August 2015 Transcript*, p.05 line 31 through p. 06 line 12.

<sup>47</sup> Pham testimony, *August 2015 Transcript*, p. 04 lines 19-28.

<sup>48</sup> Public Law 106-395. More at:

[https://www.uscis.gov/sites/default/files/files/pressrelease/ChildCitizenshipAct\\_120100.pdf](https://www.uscis.gov/sites/default/files/files/pressrelease/ChildCitizenshipAct_120100.pdf) (last accessed February 16, 2016).

<sup>49</sup> Pham testimony, *August 2015 Transcript*, p. 04 line 29 through p. 05 line 02.

<sup>50</sup> Pham testimony, *August 2015 Transcript*, p. 05 lines 03-07.

<sup>51</sup> Pham testimony, *August 2015 Transcript*, p. 05 lines 14-20.

<sup>52</sup> SAVE Systematic Alien Verification for Entitlements, Fact Sheet for Benefit Applicants. Available at: [http://www.uscis.gov/sites/default/files/USCIS/Verification/SAVE/SAVE\\_Native\\_Documents/SAVE\\_FACT\\_SHEET\\_for\\_Benefit\\_Applicants.pdf](http://www.uscis.gov/sites/default/files/USCIS/Verification/SAVE/SAVE_Native_Documents/SAVE_FACT_SHEET_for_Benefit_Applicants.pdf) (last accessed December 31, 2015). See also: Gould testimony, *July 2015 Transcript*, p 04 line 32 through p. 05 line 07.

physical trip to USCIS, an SSA field office, or to a U.S. Customs and Border Protection Port of Entry, which in Nebraska exist only in Omaha. Testimony indicated that such a burden is likely prohibitive for many seeking services.<sup>53</sup>

*Administrative Error.* As noted previously, SAVE administration requires significant discretion on the part of the user in order to achieve accurate implementation. This is because SAVE is designed only to verify an applicant's immigration status—it is then up to the administering agency to make a determination regarding the individual's eligibility for benefits or services.<sup>54</sup> The Committee heard testimony that making such a determination is a complex task which requires a significant amount of knowledge and legal training regarding both immigration and public benefits law.<sup>55</sup> As panelist Rebecca Gould described, "It should be noted the intersection of immigration law and public benefits law is very complex and requires an intricate understanding of two extremely complicated systems all on their own. LB 403 added an additional level of complexity when it chose to adopt a definition of public benefits that is extremely broad and while similar, did not mirror the definition found in federal law."<sup>56</sup> Ms. Gould went on to testify that that in Nebraska there has been little to no effective training or direction for state agencies and local governments regarding what programs are subject to verification and when and how such verification should occur.<sup>57</sup>

As a result, panelists described several situations in which families who should be eligible for services have either been denied or deterred from applying.<sup>58</sup> For example, Dr. Lazaro Spindola, Executive Director of the Latino American Commission, described multiple cases involving individuals with transitional immigration status, such as refugees and those with deferred action under the Violence Against Women Act (VAWA), who had been denied professional licensure by the Nebraska Department of Health and Human Services because the agency did not properly define their status.<sup>59</sup> These individuals should have been eligible for licensure, and were wrongly denied due to improper or insufficient staff training. Attorney Charles Shane Ellison, Legal Director with Justice for Our Neighbors, also described his work with a client who had deferred action under VAWA. This client applied for a cosmetology license, and was denied on the grounds that under LB 403 she had shown "insufficient proof of lawful status."<sup>60</sup> With the help

<sup>53</sup> Pham testimony, *August 2015 Transcript*, p. 05 lines 21-30; p. 07 line 29 through p. 08 line 04; Ellison Testimony, p. 09 line 33 through p. 10 line 23.

<sup>54</sup> LaGonterie testimony, *August 2015 Transcript*, p. 19 line 32 through p. 20 line 02. *See also*: USCIS: SAVE For Benefit Applicants: <https://www.uscis.gov/save/benefit-applicants> (last accessed January 13, 2016).

<sup>55</sup> Gould Testimony, *July 2015 Transcript*, p. 05 line 28 through p. 06 line 10; Ellison Testimony, *August 2015 Transcript*, p. 09 lines 08-32; p. 09 line 33 through p.10 line 05; Pham testimony, *August 2015 Transcript*, p. line 19 through p. 05 line 07. *See also*: LaGonterie Testimony, *July Transcript 2015*, p. 15 lines 29-35.

<sup>56</sup> Gould Testimony, *July 2015 Transcript*, p. 05 lines 28-35. *See also*: p. 04 lines 08-18.

<sup>57</sup> Gould Testimony, *July 2015 Transcript*, p. 05 lines 35 through p. 06 line 06.

<sup>58</sup> Gould Testimony, *July 2015 Transcript*, p. 06 lines 06-39.

<sup>59</sup> Spindola Testimony, *July 2015 Transcript*, p. 09 lines 09-20; *Note: Professional licensure is defined as a public benefit under LB 403.*

<sup>60</sup> Ellison Testimony, *August 2015 Transcript*, p. 09 line 33 through p. 10 line 05.

of pro-bono counsel, she was eventually able to obtain her license. However, Mr. Ellison testified that without such legal assistance, the outcome would likely have been very different. He noted, “It’s difficult to know how many more people have been deterred from seeking such licenses because of the sort of confusion this case demonstrates.”<sup>61</sup>

In response to the Committee’s inquiry, Courtney Phillips of the Nebraska Department of Health and Human Services stated that in 2011, changes to the Uniform Credentialing Act (UCA) simplified eligibility requirements for nonimmigrants, allowing Licensure to issue a credential to “nonimmigrant applicants who hold a valid, current visa,” such as nursing students who hold an F1 student visa. Ms. Phillips wrote, “it should be noted that even before the UCA was amended, only a very small number of applicants were denied a credential because of immigration status. Since 2011, I do not believe any credentialing applicants have been denied a license because of immigration status.”<sup>62</sup> Questions remain however, regarding the Department’s response to credentialing applications of those with deferred action who may be “lawfully present” yet not hold such a current, valid visa.<sup>63</sup>

*Defining Qualifying Status.* In addition to misapplication of the law due to improper or insufficient training, inconsistencies may also result due to difficulties in defining the term “qualified alien.” Under Neb. Rev. Stat. §§ 4-108 (1), state agencies and their political subdivisions are prohibited from providing public benefits “to a person not *lawfully present* in the United States” [emphasis added]. However, in order to receive benefits, Section 4-111 (2) requires the applicant to attest that “he or she is a *qualified alien* under the federal Immigration and Nationality Act...*and is lawfully present* in the United States”<sup>64</sup> [emphasis added]. Attorney Charles Shane Ellison, Legal Director with Justice for Our Neighbors explained that there is a significant legal distinction between the terms “lawful presence” and “qualified alien.” He noted that under federal law, “qualified alien” is a much narrower requirement than “lawful presence,” yet the Nebraska legislature has tied these two terms together for the purposes of LB 403.<sup>65</sup> He provided the examples of several groups, such as undocumented children under the age of 18, certain individuals with pending asylum applications, and individuals with deferred action, who could be affected by this discrepancy. He noted that these individuals are “not deemed to be ‘unlawfully present’ under Federal immigration law, yet they are not considered to be ‘lawfully present’ for purposes of LB 403.”<sup>66</sup>

<sup>61</sup> Ellison Testimony, *August 2015 Transcript*, p. 09 line 33 through p. 10 line 23.

<sup>62</sup> Phillips Statement, July 2015. pp. 05-06.

<sup>63</sup> See following section for discussion on the professional licensure of those with Deferred Action for Childhood Arrival (DACA) status.

<sup>64</sup> Neb Rev. Stat. §§ 4-108 – 4-114. More information at: <http://nebraskalegislature.gov/laws/browse-chapters.php?chapter=04> (last accessed March 30, 2015).

<sup>65</sup> Ellison Testimony, *August 2015 Transcript*, p. 09 lines 08-32.

<sup>66</sup> Ellison Testimony, *August 2015 Transcript*, p. 09 lines 08-32.

Immigration Attorney Brian Blackford of Blackford Law LLC raised similar concerns.<sup>67</sup> He described his work with several clients who had received deferred action under the Deferred Action for Childhood Arrivals (DACA) program.<sup>68</sup> Under federal law, DACA recipients have permission, at least temporarily, to remain and to work in the United States. Yet despite their “lawful presence,” and work authorization, these individuals fall short of the definition of “qualified alien.” As a result, many of Mr. Blackford’s clients have been unable to attain the professional licenses they need to work in Nebraska because such licenses are considered to be a “public benefit.” Mr. Blackford shared the story of two clients who have full-ride private scholarships to nursing school. After completing their studies these women plan to leave Nebraska, because despite their federal work eligibility, the State will not issue nursing licenses to them.<sup>69</sup> These restrictions on the occupational and professional licenses of individuals *with* federal work authorization are exclusively applied to noncitizens, raising concerns regarding equal protection under the law, and necessarily demonstrating a disparate impact on the basis of national origin. Mr. Blackford testified, “What this means is, of course, people of Hispanic origin, they are the largest immigrant population in our state and they’re being disproportionately excluded from again, pursuing their dreams.”<sup>70</sup> Panelist Charles Ellison pointed out, these restrictions could also arguably sanction unlawful employment discrimination under the Immigration and Nationality Act.<sup>71</sup>

In addition to denying DACA recipients professional licenses, LB403 has reportedly resulted in 1,700 individuals being denied a Nebraska driver’s license.<sup>72</sup> In 2015, new legislation (LB 623) was passed specifically to allow drivers’ licenses for DACA recipients. At the time of the bill’s passage, Nebraska senator Jeremy Norquist of Omaha, the bill’s lead sponsor, was cited by NBC news as noting that the state had already been issuing driver’s licenses to immigrants who had other forms of deferred action prior to LB 623, and had been singling out DACA recipients by denying them the privilege.<sup>73</sup> Such differential interpretation of “qualified status” highlights the potential for equal protection and disparate impact concerns in state and local immigration

<sup>67</sup> Blackford Testimony, *July 2015 Transcript*, p. 10 lines 27-38; p.11 lines 01-36.

<sup>68</sup> More at U.S. Department of Homeland Security, Deferred Action for Childhood Arrivals (DACA): <http://www.dhs.gov/deferred-action-childhood-arrivals> (last accessed February 04, 2016).

<sup>69</sup> Blackford Testimony, *July 2015 Transcript*, p. 14 lines 14-19.

<sup>70</sup> Blackford Testimony, *July 2015 Transcript*, p. 14 lines 01-05.

<sup>71</sup> Ellison Testimony, *August 2015 Transcript*, p. 09 lines 05-07. *See also*: U.S. Citizenship and Immigration Services: Preventing Discrimination: <https://www.uscis.gov/i-9-central/employee-rights-discrimination/preventing-discrimination> (last accessed February 10, 2016).

<sup>72</sup> Spindola Testimony, *July 2015*, p. 09 lines 01-08; p. 09 line 39-p.10 line 03. *See also*: Ellison Testimony, *August 2015 Transcript*, p. 11 lines 12-25. *Note*: NBC news cited an estimated 2,700 DACA recipients in Nebraska in May of 2015. *See*: Nevarez, Griselda. Nebraska Ends Ban on Drivers’ Licenses for Young Immigrants. NBC News, May 28, 2015. Available at: <http://www.nbcnews.com/news/latino/nebraska-ends-ban-drivers-licenses-young-immigrants-n366136> (last accessed February 15, 2016).

<sup>73</sup> Nevarez, Griselda. Nebraska Ends Ban on Drivers’ Licenses for Young Immigrants. NBC News, May 28, 2015. Available at: <http://www.nbcnews.com/news/latino/nebraska-ends-ban-drivers-licenses-young-immigrants-n366136> (last accessed February 15, 2016).

enforcement. Panelist Lazaro Spindola concluded, “In 2015, LB [623] was passed granting DACA beneficiaries driver’s licenses, but not granting them all the years that they wasted in order to get access to this privilege.”<sup>74</sup>

*Defining Public Benefits.* Finally, in addition to administrative challenges stemming from improper training and inconsistencies in defining “qualified alien,” the Committee heard testimony raising concern regarding the expansive and potentially unclear definition of “public benefit” under LB 403.<sup>75</sup> For example, Mr. Ellison noted that the Nebraska Department of Health and Human Services has determined that they cannot provide any legal counsel to undocumented children in their custody, because “such legal assistance would constitute a public benefit.” Mr. Ellison explained the problematic nature of such a determination:

...many undocumented children are placed in foster care in Nebraska due to abuse, abandonment, or neglect, and most are legally eligible for special immigrant juvenile status,<sup>76</sup> a form of relief that leads to permanent residency and U.S. Citizenship. However, if the state refuses to advise these children of their rights under federal law, claiming that such advice is a public benefit, then these children are effectively stuck in a position of being undocumented even though federal law provides them a pathway out.<sup>77</sup>

Such a determination is particularly troubling because it puts the state in a position to simultaneously act as these children’s guardian, presumably acting in the children’s best interest, while at the same time denying them access to critical rights and services to which they are entitled under federal law. Mr. Ellison went on, “it is difficult to conceive of any justifiable policy rationale behind such an interpretation of LB 403, the effect of which is to prevent abandoned, abused, and neglected undocumented children who are in the custody of the state from accessing their rights under law.”<sup>78</sup> If other children in Nebraska’s foster care system are afforded legal advocacy services, this extension of LB 403 may raise additional concerns regarding equal protection.

In another example of the state’s arguably over-expansive definition of “public benefit,” some state agencies may have adopted definitions of “public benefits” which are in direct conflict with federal law. For example, panelist Rebecca Gould testified, “Nebraska has chosen to restrict access to the National Breast and Cervical Cancer Screening and Early Detection Program and to

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<sup>74</sup> Spindola Testimony, *July 2015 Transcript*, p. 09 line 39 through p. 10 line 03.

<sup>75</sup> See for example, Spindola Testimony, *July 2015 Transcript*, p. 08 lines 17-26; Ellison Testimony, *August 2015 Transcript*, p. 09 lines 03-07.

<sup>76</sup> More information on Special Immigrant Juveniles Available at: <https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status> (last accessed February 16, 2016).

<sup>77</sup> Ellison Testimony, *August 2015 Transcript*, p. 10 line 32 through p. 11 line 11. See also: U.S. Citizenship and Immigration Services: Special Immigrant Juvenile Status: Information for Juvenile Courts: [https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information for Juvenile Courts -FINAL.pdf](https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information%20for%20Juvenile%20Courts-FINAL.pdf) (last accessed February 04, 2016).

<sup>78</sup> Ellison Testimony, *August 2015 Transcript*, p.11 lines 07-11.

programs funded by the Maternal and Child Health block grant, both of which have been determined by federal agencies to be programs or services that are not public benefit.”<sup>79</sup> Ms. Gould noted that Nebraska Appleseed “worked with a couple of clients who tried to apply for these programs, but they ultimately were too reluctant to pursue raising the issue with the Department of Health and Human Services.”<sup>80</sup> Nebraska’s Department of Health and Human Services maintains that these programs are not exempted from verification under federal law.<sup>81</sup> Further, the department responded that claims of residents’ fear of accessing benefits are “speculative and unable to be verified.”<sup>82</sup>

### ***Data Reporting***

The Committee heard testimony from multiple panelists that in order to better assess the concerns outlined in this report, the state must make data collection and reporting regarding LB 403’s implementation more uniform and consistent.<sup>83</sup> Nebraska Rev. Stat. §4-113 requires that all state agencies which administer “any program of public benefits shall provide an annual report not later than January 31 for the prior year...the report shall include, but not be limited to, the total number of applicants for benefits and the number of applicants rejected pursuant to such sections [4-108 to 4-113].”<sup>84</sup> Annual reports from 2013-present are available on the clerk of the legislature’s website.<sup>85</sup> Reports from 2009-2012 were obtained by the Committee through an open records request. However, because these reports are independently produced from each state agency with few guidelines, the Committee found that agencies often use different titles and formats, making data difficult to identify and compare across years and agencies. The Committee found it notable that unlike a majority of state agencies, the Department of Motor Vehicles reports not only on the number of benefits applicants and the number of rejections, but also includes: (1) the number of applicants who marked “yes” to Qualified Alien status; (2) total applicants who initially failed SAVE; (3) total applicants who initially failed SAVE but were later verified through secondary SAVE processes; and (4) the total number of applicants who remained in failed status.

Data across all agencies indicates a very low incidence of rejections due to LB 403 verification. In 2014, the Department of Motor Vehicles (DMV) reported serving a total of 446,746 individuals and rejecting a total of 276 due to unverified status—approximately 0.06%. A closer

<sup>79</sup> Gould Testimony, *July 2015 Transcript*, p. 06 lines 33-39; *See also*: National Breast and Cervical Cancer Early Detection Program: <http://www.cdc.gov/cancer/nbcedp/>; Health Resources and Services Administration: Maternal and Child Health: <http://mchb.hrsa.gov/programs/titlevgrants/> (last accessed February 02, 2016).

<sup>80</sup> Gould Testimony, *July 2015 Transcript*, p. 06 lines 37-39.

<sup>81</sup> Phillips Statement, July 2015, p. 04.

<sup>82</sup> Phillips Statement, July 2015, p. 04.

<sup>83</sup> Gould Testimony, *July 2015 Transcript*, p. 05 lines 08-27;

<sup>84</sup> Nebraska Revised Statute 4-113. Available at: <http://nebraskalegislature.gov/laws/browse-chapters.php?chapter=04> (last accessed February 15, 2016).

<sup>85</sup> Nebraska Legislature, View Agency Reports. Available at: <http://nebraskalegislature.gov/agencies/view.php> (last accessed February 15, 2016).

look at the additional data provided by the Department provides a much more detailed analysis of the bill's impact. In 2014, just 276 of the 5,484 individuals who initially failed SAVE verification remained in failed status after secondary verification.<sup>86</sup> This suggests that approximately 95% of those initially rejected by SAVE were rejected erroneously—a total of 5,208 individuals. To the Committee's knowledge, the Department of Motor Vehicles is the only state agency that reports this data in such detail, yet it represents a small fraction of benefits verifications in the state. Panelist Rebecca Gould of the Nebraska Appleseed Center for Law in the Public Interest suggested that in order to fully understand LB 403's impact, other state agencies should also be required to report on these categories. Ms. Gould further recommended that agencies be required to report on the processing time for the secondary verifications.<sup>87</sup> Such data would allow lawmakers and advocates alike to more accurately assess the burden placed on individuals who face initial erroneous verification failures. Finally, Ms. Gould recommended that state agencies be required to report on the costs incurred with verification using the SAVE database. "It does cost to run names through the SAVE system...and whether that expense is worth it or not, I think, should be a data driven decision."<sup>88</sup> Panelist Huyen Pham also recommended data collection and reporting on verification costs.<sup>89</sup>

### ***Disparate Impact***

Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.<sup>90</sup> According to the U.S. Department of Justice, "Under the disparate impact theory, a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification."<sup>91</sup> Although Neb. Rev. Stat. § 4-108(2) states the law "shall be enforced without regard to race, religion, gender, ethnicity, or national origin" testimony provided throughout the course of this inquiry raises a number of concerns regarding disparate impact.<sup>92</sup> The purported justification for this impact is that it is necessary in order to save the state from expending taxpayer funding on those unauthorized to receive public benefits. However, the Committee heard testimony that questions this justification. As panelist Rebecca Gould noted, "There has never been any evidence

<sup>86</sup> Clerk of the Legislature, State of Nebraska. Agency Reports, Department of Motor Vehicles (2014). Available at: <http://www.nebraskalegislature.gov/agencies/view.php> (last accessed February 15, 2016).

<sup>87</sup> Gould Testimony, *July 2015 Transcript*, p.05 lines 08-27. *Note: According to panelist Yvette LaGonterie of the USCIS, a secondary query should be processed within 3-5 federal working days. If a third query is necessary, it should be processed within 10-20 federal working days. See LaGonterie Testimony, August 2015 Transcript*, p. 15 lines 04-19.

<sup>88</sup> Gould Testimony, *July 2015 Transcript*, p.17 lines 01-06.

<sup>89</sup> Pham Testimony, *August 2015 Transcript*, p. 06 lines 13-30.

<sup>90</sup> 42 U.S.C. § 2000d et seq.

<sup>91</sup> See United States Department of Justice Title VI Legal Manual, available at <http://www.justice.gov/crt/title-vi-legal-manual#Disparate>. (last accessed October 09, 2015).

<sup>92</sup> See for example Ellison Testimony, *August 2015 Transcript*, p. 08 line 32 through p. 09 line 02; Pham Testimony, *August 2015 Transcript*, p. 06 lines 13-30.

presented that this law was necessary, that there was any level of abuse of our public benefits system by folks who were [not] eligible for it.”<sup>93</sup> Available data since the program’s implementation appears to support the claim that incidence of unauthorized applicants seeking benefits is negligible. In addition, Ms. Gould pointed out that state agencies incur costs for running names through the SAVE database, yet they do not report on those costs. As such, it is difficult to assess whether or not these verification requirements have achieved their stated purpose of saving taxpayer dollars.<sup>94</sup> If the program cannot be found to save taxpayer dollars, such a discrepancy may call into question the justification for any evidence of any disparate impact resulting from the legislation. To this end, Ms. Gould noted that the State of Colorado recently repealed a similar law, because they found “they were spending around two million dollars a year to implement a similar law and not identifying any abuse of public benefits as a result.”<sup>95</sup>

In addition to the prohibitions against discrimination in the Civil Rights Act, the Fourteenth Amendment to the U.S Constitution prohibits states from making or enforcing any laws which deny “any person within its jurisdiction equal protection of the laws.”<sup>96</sup> Panelists suggested that LB 403 may have been written and implemented with discriminatory intent, raising concerns of equal protection violations under this Amendment. For example, panelist Brian Blackford cited public comments of legislators involved with drafting and passing LB 403, to suggest that the law was specifically targeted at the state’s Hispanic residents.<sup>97</sup> After the bill’s passage, further actions of then Governor Heineman and current Governor Ricketts specifically targeted at denying driver’s licenses to DACA recipients, despite their lawful status in the U.S., was cited as additional evidence of discriminatory intent to deny equal protection to this group.<sup>98</sup> Mr. Blackford stated that a legislative fix would be necessary to correct such concerns, and recommended that: (1) the legislation be amended to require only affirmation of “lawful presence”; (2) a specific exemption be included for DACA recipients; and/or (3) state agencies be allowed to provide benefits regardless of immigration status under certain circumstances.<sup>99</sup>

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<sup>93</sup> Gould Testimony, *July 2015 Transcript*, p.04 lines 20-25.

<sup>94</sup> Gould Testimony, *July 2015 Transcript*, p.16 line 31 through p. 17 line 06.

<sup>95</sup> Gould Testimony, *July 2015 Transcript*, p.16 line 31 through p. 17 line 06; *See also* Pham Testimony, *August 2015 Transcript*, p. 06 lines 13-30.

<sup>96</sup> More at: <https://www.law.cornell.edu/constitution/amendmentxiv> (last accessed February 15, 2016).

<sup>97</sup> Blackford Testimony, *July 2015 Transcript*, p.12 lines 10-16; *See also*: p. 10 lines 11-16; p. 11 line 37 through p. 14 line 19.

<sup>98</sup> Blackford Testimony, *July 2015 Transcript*, p.12 lines 32-38.

<sup>99</sup> Blackford Testimony, *July 2015 Transcript*, p. 14 lines 20-33.

## **Findings**

On May 05th, 2015, the Nebraska Advisory Committee to the U.S. Commission on Civil Rights voted to conduct a study of state level immigration enforcement efforts in Nebraska. Testimony focused on the alleged disparate impact and discriminatory intent behind the State's 2009 legislation known as "LB 403." This study included hearing broad testimony during two public meetings from advocates, service providers, immigration attorneys, federal officials, and national experts in state and local immigration policy. In addition, the Committee accepted written testimony from the Nebraska Department of Health and Human Services and two members of the public. The Committee submits the following findings based on this testimony:

1. Despite efforts to improve the accuracy of E-Verify and safeguard against abuse, remaining discrepancies may have a disparate impact on the basis of race, color, and national origin. Errors in the system are difficult to correct, and the burden to do so lies entirely on the individual impacted. A lack of knowledge about rights and responsibilities may prevent those impacted from reporting abuses.
2. Testimony regarding use of the SAVE database suggested similar challenges with respect to accuracy; disparate impact on the basis of race, color, and national origin; and difficulties in correcting erroneous data. However, the discretion required to apply SAVE results may pose additional challenges if staff charged with interpreting the results are not properly trained in both immigration and public benefits law.
3. Data regarding SAVE verification in particular is inconsistent and insufficient to fully assess its impact. Only one state agency reports on the number of initial non-confirmations as it compares to the number of individuals ultimately denied services. No agency reports on the timeframes for secondary verification, and no agency reports on costs associated with utilizing the system.
4. Incomplete, missing, and inaccurate data makes it difficult to ascertain the extent to which civil rights deprivations may have resulted from LB 403. The expansive definition of "public benefits" adopted by the State under LB 403 may exclude some, such as those with deferred action, and children who are eligible for Special Immigrant Juvenile status, from accessing benefits to which they are entitled. Available data makes it impossible to draw tenable conclusions as to the impact of these determinations. The Committee finds this particularly troubling, especially in the case of children in state custody who rely on protection from the very agency with the authority to deny them services.
5. A lack of clarity regarding the distinction between "lawful presence" and "qualified alien" may contribute to confusion and unnecessary restriction of benefits to eligible populations. Such challenges may be particularly present for mixed-status families and individuals with deferred action.
6. Under the Civil Rights Act, neutral procedures and practices which demonstrate a disparate impact on the basis of race, color, or national origin must have a "substantial,

legitimate justification.” The purported justification for LB 403 is to ensure that the state taxpayers are not spending public money on individuals who are not eligible for services. Panelists raised concern that (1) there was no evidence to suggest that abuse of public benefits was problematic before LB403’s introduction, and (2) the state does not collect data on the costs of its implementation, and so cannot accurately assess whether or not the program is achieving a cost effective benefit for taxpayers.

7. Some panelists cited evidence to suggest that LB 403 may have been drafted with biased intent, raising concern regarding equal protection under the XIV Amendment to the Constitution of the United States.

### **Recommendations**

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws; and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.<sup>100</sup> In keeping with these responsibilities, and in consideration of the testimony heard on this topic, the Nebraska Advisory Committee submits the following recommendations to the Commission:

1. The U.S. Commission on Civil Rights (Commission) should investigate the civil rights impact of state and local immigration-related enforcement efforts across the country, including in areas of employment, education, and health services.
2. The Commission should issue a formal request to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration Related Unfair Employment Practices, to investigate the impact of Nebraska’s (2009) LB304 on equal employment opportunity in Nebraska.
3. The Commission should issue a formal request to the U.S. Department of Health and Human Services, Office for Civil Rights, to investigate the impact of Nebraska’s (2009) Legislative Bill 403 on access to federally supported health care services, and potential disparate impact on the basis of race, color, and national origin. Such an investigation should focus particularly on programs and services exempted from immigration status verification under federal law.
4. The Commission should issue a formal request to the U.S. Department of Education, Office for Civil Rights, to investigate the impact of Nebraska’s (2009) Legislative Bill 403 on access to federally supported education programs (such as financial aid and federal student loans); and potential disparate impact on the basis of race, color, and national origin.

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<sup>100</sup> 45 C.F.R. § 703.2.

5. The Commission should issue a formal recommendation to the USCIS, urging the agency to prohibit the use of its SAVE database to verify the immigration status of applicants for those public programs which are exempt from such verification under federal law. The Commission should also recommend that USCIS require all SAVE database users to submit clear written guidelines regarding how SAVE data will be used by each benefits issuing agency to ensure that its implementation is conducted in a uniform and nondiscriminatory manner.

**NEBRASKA ADVISORY COMMITTEE  
TO THE U.S. COMMISSION ON CIVIL RIGHTS**

*Public Meeting: Civil Rights and Nebraska Legislative Bill 403 (2009)*

July 29, 2015  
2:00PM Central Daylight Time

**Agenda**

**Welcome and Introductions (2:00-2:05pm)**

- Dr. Jonathan Benjamin-Alvarado, Chair

**Panel Presentations (2:05 – 2:45pm)**

- Rebecca Gould, Appleseed Center for Law in the Public Interest
- Lazaro Spindola, Latino American Commission
- Brian Blackford, Blackford Law LLC
- Lynn Rex, League of Nebraska Municipalities

**Committee Questions and Answers (2:45 – 3:15pm)**

- Dr. Jonathan Benjamin-Alvarado, Chair

**Open Forum (3:15 – 3:30pm)**

- Public participation

**NEBRASKA ADVISORY COMMITTEE  
TO THE U.S. COMMISSION ON CIVIL RIGHTS**

*Public Meeting: Civil Rights and Nebraska Legislative Bill 403 (2009)*

August 12, 2015  
2:00PM Central Daylight Time

**Agenda**

**Welcome and Introductions (2:00-2:05pm)**

- Dr. Jonathan Benjamin-Alvarado, Chair

**Panel Presentations (2:05 – 2:45pm)**

- Huyen Pham, Associate Dean and Professor of Law, Texas A&M University School of Law
- Charles Shane Ellison, Legal Director, Justice for Our Neighbors
- Yvette LaGonterie, Chief, Outreach and Verification Division of the U.S. Citizenship and Immigration Services

**Committee Questions and Answers (2:45 – 3:15pm)**

- Dr. Jonathan Benjamin-Alvarado, Chair

**Open Forum (3:15 – 3:30pm)**

- Public participation



July 24, 2015

Ms. Melissa Wojnaroski  
Civil Rights Analyst  
U.S. Commission on Civil Rights, Midwest Regional Office  
55 W. Monroe, Suite 410  
Chicago, IL 60602

Dear Ms. Wojnaroski:

Thank you for the invitations for the Nebraska Department of Health and Human Services to provide information and/or participate in an online panel regarding LB 403 (2009).

I am unable to participate in person, but am pleased to have this opportunity to provide information about the Department's implementation of LB 403 and questions that have been raised previously.

Neb. Rev. Stat. § 4-113 requires the Department to report annually on our compliance with this law.

For the most recent calendar year (January 1, 2014, to December 31, 2014), DHHS received 656,040 applications for programs subject to LB 403 requirements. Our program staff have access to the federal Systematic Alien Verification for Entitlements (SAVE) program and use the SAVE program to run the required verifications. SAVE verifications were conducted on 20,709 applications, and of these, 3,924 were rejected. This represents .0059 percent, or just over half of one percent, of the total benefit applications.

In carrying out the law, DHHS follows the definition of "public benefit" found in Neb. Rev. Stat. § 4-109, which is "any grant, contract, loan, professional license, commercial license, welfare benefit, health payment or financial assistance benefit, disability benefit, public or assisted housing benefit, postsecondary education benefit involving direct payment of financial assistance, food assistance benefit, or unemployment benefit or any other similar benefit provided by or for which payments or assistance are provided to an individual, a household, or a family eligible unit by an agency of the United States, the State of Nebraska, so a political subdivision of the State of Nebraska.

The definition of "public benefit" under LB 403 mirrors the definition of "public benefit" under federal law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and Title 8 U.S. Code § 1611. The Department's major programs were already required to follow the federal requirements prior to the enactment of LB 403.

A question has been raised previously about Nebraska's Every Woman Matters Breast and Cervical Cancer Screening program. This program falls under the definition of "public benefit" under LB 403, and there is no federal or state exemption law or regulation that exempts such a program from verification of lawful presence.

For DHHS programs, undocumented individuals may apply for services on behalf of their children. The application process allows a parent to attest, on behalf of their minor child, that the child is either a U.S. citizen or qualified alien. For example, for Medicaid eligibility, citizenship and immigration status is captured on the application (paper and online) and anyone who is completing the application (parent, child, third party) can complete the citizenship/immigration status for each person included on the application. They are not required to complete it for themselves if they are not applying for services for themselves.

I understand there have been questions about persons unable to verify lawful presence placed in civil or emergency protective custody and possibly in need of follow-up services. Unless follow up services are necessary for protection of life or safety, or a court or Mental Health Board has ordered DHHS to provide those services, verification of lawful presence is required of all applicants pursuant to state and federal laws.

There have been questions, as well, about professional licensure. Prior to 2011, there was some confusion over eligibility requirements for nonimmigrants based on the requirements at the time. In 2011, the Uniform Credentialing Act was amended to simplify the credentialing process for nonimmigrants who are lawfully present in the United States, such as nursing students who hold an F1 student visa. Before the UCA was amended, only a small number of applicants were denied a credential because of immigration status. Following the enactment of the UCA, the agency's applications seem to reflect that no credential applicants have been denied a license based on immigration status

I hope this information is helpful in understanding the Department's compliance with LB 403. I have also included with my letter a more detailed response to the issues that were presented.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Courtney N. Phillips', with a long horizontal line extending to the right.

Courtney N. Phillips, MPA  
Chief Executive Officer  
Department of Health and Human Services

Enclosure

Question: LB 403 is being applied to programs that do not meet the definition of “public benefit.” Such application has disproportionately excluded persons of Hispanic origin from State programs. For example, HHS requires proof of authorized status for participants of programs provided under the National Breast and Cervical Cancer Screening Early Detection Programs, though under federal law these programs are exempted.

Response:

DHHS follows the definition of “public benefit” found in Neb. Rev. Stat. § 4-109, which is “any grant, contract, loan, professional license, commercial license, welfare benefit, health payment or financial assistance benefit, disability benefit, public or assisted housing benefit, postsecondary education benefit involving direct payment of financial assistance, food assistance benefit, or unemployment benefit or any other similar benefit provided by or for which payments or assistance are provided to an individual, a household, or a family eligibility unit by an agency of the United States, the State of Nebraska, or a political subdivision of the State of Nebraska.”

Neb. Rev. Stat. § 4-110 provides that verification of lawful presence is not required for:

- 1) Any purpose for which lawful presence in the United States is not restricted by law, ordinance, or regulation;
- 2) Assistance for health care services and products, not related to an organ transplant procedure, that are necessary for the treatment of an emergency medical condition, including emergency labor and delivery, manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in (a) placing the patient's health in serious jeopardy, (b) serious impairment to bodily functions, or (c) serious dysfunction of any bodily organ or part;
- 3) Short-term, noncash, in-kind emergency disaster relief;
- 4) Public health assistance for immunizations with respect to diseases and for testing and treatment of symptoms of communicable diseases, whether or not such symptoms are caused by a communicable disease; or
- 5) Programs, services, or assistance necessary for the protection of life or safety, such as soup kitchens, crisis counseling and intervention, and short-term shelter, which (a) deliver in-kind services at the community level, including those which deliver such services through public or private, nonprofit agencies and (b) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the income or resources of the recipient.

The definition of “public benefit” under LB 403 mirrors the definition of “public benefit” under federal law. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), P.L. 104-193, 110 Stat. 2168, defines a “federal public benefit” as “any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and any retirement, welfare, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United

States.” The state definitions and restrictions in LB 403 mirror the federal law restrictions in Title 8 U.S. Code § 1611.

Health services provided by DHHS through programs such as the Every Woman Matters Breast and Cervical Cancer Screening program, which are partially funded by federal and state funds, fall under the definition of “public benefit” under LB 403. Further, there is no federal or state law (or promulgated regulation) that exempts federal breast and cervical cancer screening programs from verification of lawful presence.

Question: LB 403 has resulted residents’ fear of accessing public benefits, even when they are eligible. This is particularly true for noncitizen residents, who are disproportionately of Hispanic origin.

Response:

DHHS cannot find any evidence to verify this assertion. The statement is speculative and unable to be verified.

Question: Due to a lack of clarity in LB 403 and a lack of access to the necessary verification systems, some State agencies have delayed or stopped processing applications from qualified aliens because they do not know what to do with them. Again, because the majority of noncitizen residents are of Hispanic origin, such practices are likely to have a disparate impact on this population.

Response:

DHHS programs have access to SAVE and are running the required verifications. The Department is not aware of applications for services or benefits that have been delayed or are not being processed due to a lack of clarity in LB 403 or in a lack of access to the SAVE verification system. DHHS submits an annual report to the Legislature, pursuant to Neb. Rev. Stat. § 4-113, which includes the total number of applicants for benefits and the number of applicants rejected pursuant LB 403. It should be noted that between January 1, 2014 and December 31, 2014, DHHS received a total of 656,040 applications for public benefits. Out of 656,040 applications, 20,709 SAVE verifications were conducted, resulting in 3,924 application rejections, which represents less than 1% of total applications.

Question: The required eligibility form under LB 403 does not allow parents to distinguish their children’s immigration status from their own. Therefore, children of undocumented, noncitizen parents will likely be disproportionately excluded from services they are actually eligible for.

Response:

Undocumented individuals may apply for services on behalf of their children. The application process allows a parent to attest, on behalf of their minor child, that the child is either a U.S. citizen or qualified alien. For example, for Medicaid eligibility, citizenship and immigration status is captured on the application (paper and online) and anyone who is completing the application

(parent, child, third party) can complete the citizenship/immigration status for each person included on the application.

Question: Clients placed in civil or emergency protective custody who are unable to demonstrate eligible status may no longer receive follow up services through the State regional network. This will likely have a disproportionate impact on the State's Hispanic population.

Response:

§ 4-110(5) provides that verification of lawful presence is not required for "Programs, services, or assistance necessary for the protection of life or safety, such as soup kitchens, crisis counseling and intervention, and short-term shelter, which (a) deliver in-kind services at the community level, including those which deliver such services through public or private, nonprofit agencies and (b) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the income or resources of the recipient."

Unless follow up services are necessary for protection of life or safety, or a court or Mental Health Board has ordered DHHS to provide those services, verification of lawful presence is required of all applicants pursuant to LB 403.

Question: LB 403 has resulted in noncitizens with lawful status being denied licenses and services for which they are eligible, because the State Department of Health and Human Services was unclear as to what qualifies for proper documentation of lawful status. This issue has had a disproportionate impact on the State's Hispanic residents.

Response:

As to the issuance of licenses, prior to changes to the Uniform Credentialing Act in 2011, there was some confusion over eligibility requirements for nonimmigrants. Prior to 2011, the Department could issue a credential to a (1) U.S. citizen, (2) a qualified alien, or (3) a "nonimmigrant whose visa for entry, or application for visa for entry, is related to such employment in the United States." The third eligibility category referred to an application for credentialing by a nonimmigrant whose visa for entry into the United States was related to his/her employment as a credential-holder. For example, an individual who was applying for a credential as a physician was eligible for credentialing if he/she had a valid visa that was related to employment as a physician, such as an H2b or J1 visa. This created some confusion among Licensure staff as to what visas could be considered to be visas "related to such employment." Considering over eighty different visas are issued, including more than twenty just for temporary nonimmigrant workers, this confusion was understandable.

In 2011, the Uniform Credentialing Act was amended to try to simplify the credentialing process for nonimmigrants who are lawfully present in the United States, such as nursing students who hold an F1 student visa. The language was changed to read, "a nonimmigrant who is lawfully present..." which allows Licensure to issue a credential to nonimmigrant applicants who hold a valid, current visa.

It should be noted that even before the UCA was amended, only a very small number of applicants were denied a credential because of immigration status. Since 2011, I do not believe any credentialing applicants have been denied a license based on immigration status.

# United States Citizenship Attestation Form

For the purpose of complying with Neb. Rev. Stat. §§ 4-108 through 4-114, I attest as follows:

<input type="checkbox"/> I am a citizen of the United States.
— OR —
<input type="checkbox"/> I am a qualified alien under the federal Immigration and Nationality Act, my immigration status and alien number are as follows: _____, and I agree to provide a copy of my USCIS documentation upon request.

**I hereby attest that my response and the information provided on this form and any related application for public benefits are true, complete, and accurate and I understand that this information may be used to verify my lawful presence in the United States.**

<b>PRINT NAME</b>	_____
	<u>(first, middle, last)</u>
<b>SIGNATURE</b>	_____
<b>DATE</b>	_____