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VIA ELECTRONIC MAIL

Director
Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Avenue, N.W., 2nd Floor
Washington, DC 20529

RE: DHS Docket No. ICEB-2006-0004 – Rulemaking Proceedings on Safe-Harbor Procedures for Employers Who Receive a No-Match Letter

Dear Director:

On behalf of the United States Chamber of Commerce (“Chamber”) and the other groups listed below we would like to submit the following comments on the proposed rule cited above. The Chamber is the world’s largest business federation, representing more than three million businesses of every size, sector, and region.

The proposed rule would change existing regulations on how employers are expected to respond to “no-match letters” from the Social Security Administration (“SSA”) or the Department of Homeland Security (“DHS”). This is being done at a time in which both houses of Congress have passed legislation that includes new employment eligibility systems and enforcement mechanisms. Thus, the Chamber requests that the regulation be withdrawn until Congress acts regarding comprehensive immigration reform. In the alternative, the Chamber asks for clarification regarding the substantive issues presented by the regulation as well as additional time for employers to conform to the new system and process. No-match letter and overall employment eligibility and verification standards include companies and organizations across a wide spectrum of businesses and industries.

The Chamber understands several of the concerns expressed by DHS, however, we think that the proposed rule is untimely because it undermines the current legislative process. It also does not properly consider the economic ramifications of acting outside the Administration’s own stated goal of enacting comprehensive immigration reform. This proposed rule only muddies the waters during this critical time of debate. The Chamber believes that new rules on employment verification should occur within the context of comprehensive immigration reform.

We should let these discussions continue without adding new bureaucratic burdens on well-intentioned employers or penalizing needed hardworking immigrants.

I. Issues Addressed by the Proposed Regulation Should be Part of Comprehensive Immigration Reform Legislation.

DHS should let Congress continue to move the immigration debate forward as a whole and not section out areas to regulate; a piecemeal approach is not prudent. Both the Senate (S. 2611) and House (H.R. 4437) bills currently pending include stringent employment eligibility and verification systems and strengthened interior enforcement procedures. They also significantly change an employer's responsibilities when verifying the identity and work authorization eligibility of its workforce. Each measure specifically addresses the case when an employer receives a no-match letter from the SSA or from DHS. It is important to let this ongoing, fruitful debate run its course without undermining it with regulations that may lead to duplicative and possibly contradictory proposals. The proposed regulation should only be enacted as part of comprehensive immigration reform. To advance an enforcement-only regulation independently—without a legalization program for current unauthorized workers and a guest worker program to address our future workforce needs—is short-sighted and not responsive to our nation's economic needs.

Should DHS go forward with the proposed regulation, we request that it takes into consideration the substantive issues presented below that are of great concern to the Chamber, its members, and the other groups listed at the end of these comments:

II. What constitutes receipt according to DHS? When Do Employers "Receive" No-Match Letters?

The regulation does not state what happens in the instance where an SSA no-match letter goes directly to an employee at the employer's place of business. Is the employer considered to be on notice and have constructive knowledge? For this particular instance please outline what an employer should do to take advantage of the safe-harbor provision.

III. Constructive Knowledge and the Time Granted to an Employer to Take Reasonable Steps in Response to SSA No-match Letters and Written Notifications from DHS.

A. Constructive Knowledge Standard

The proposed regulation would significantly increase the scope of constructive knowledge in certain circumstances. It states that "the employer's obligations under current law, which is that if the employer fails to take reasonable steps after receiving such information, and if the employee is in fact an unauthorized alien, the employer may be found to have had

constructive knowledge of that fact.”¹ The regulation defines what constitutes a “reasonable response” by an employer to a no-match letter and mandates specific steps to be taken by the employer within defined periods of time. The regulation’s preamble suggests that taking such measures may allow the employer to avoid liability and mitigate or eliminate potential penalties, but leaves much unanswered.

B. What Constitutes a Reasonable Response?

The proposal states that within 14 days of receipt of the no-match notice, an employer must attempt to resolve the discrepancy by checking its personnel and payroll records to determine whether the discrepancy results from a clerical error. If it is simply a clerical mistake, the employer is to contact SSA and administratively correct the information. If it is not clerical, the employer must approach the employee and confirm that the information that was provided by the employee to the employer is indeed accurate. If there was an inadvertent mistake when transmitting the information, the employer should correct immediately and inform SSA. If however, the employee says that initial information provided is accurate, the employer must direct the employee to the local SSA office where the employee has to resolve the issue.

After an employer has determined that a discrepancy is not from a clerical error on the part of the employer, the proposed regulation states that the “employer takes reasonable steps, within 14 days, to attempt to resolve the discrepancy; such steps may include: . . . if [the records] are correct according to the employee, requesting the employee to resolve the discrepancy with the Social Security Administration, such as by visiting a Social Security Administration office.”² The regulation then goes on to state that if the discrepancy has not been resolved within 60 days, and if the employee’s identity and work authorization cannot be verified at that time, then employers “must choose between taking action to terminate the employee or facing the risk that DHS may find that the employer had constructive knowledge the employee was an unauthorized alien.”³ There are two main issues that arise from the above:

1. These timeframes (14 days and 60 days) are not practical or fair. Both large and small employers will be faced with challenges to meet this standard. Large employers may receive several no-match letters at a time, which are likely to include hundreds of names. Particularly in decentralized operations, the necessary follow-up and personnel interviews will take significant man hours to accomplish. As a result, it will be very difficult to resolve all of the letters in the prescribed time period. Small businesses face even more hurdles to comply. They often do not have a full-time administrative staff to address these issues in a 14-day timeframe. Small business owners often have to run the business, oversee bookkeeping, supervise employees and perform multiple administrative duties. Adding this clerical review and follow up with each employee will only add to these tasks. The 14-day period is accordingly not reasonable and will be unduly

¹ See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,282 (2006) to be codified at 8 CFR 274a) (proposed June 14, 2006).

² *Id.* at 34,285.

³ *Id.* at 34,283.

burdensome for small employers as well. The allotted time by which an employer must respond to a no-match is not an adequate, nor a reasonable time-period for an employer to have to act. We therefore request that this be changed to a reasonable time frame standard, which would then acknowledge the difference in sophistication of the over seven million employers in the United States.

2. It is also unclear from the regulation as to what occurs between the 14-day and 60-day time period and request clarification on the issue. It is our assumption that the employer has 14-days to inform the employee of the discrepancy and determine whether it is a clerical mistake. Thereafter, the employer has 60-days, from the date of receipt of the letter or notice, to ensure and confirm that the discrepancy has been rectified. Thus, an employee has less than two months to work out a resolution if there is an error between themselves and the Social Security Administration, which might not be enough time. Finally, it is the Chamber's reading and understanding that as a matter of fairness and reasonableness, an employer can continue to employ an employee between the 14 and 60-day period, even if there is an unresolved discrepancy.

IV. Requirement to Fill Out New I-9 Forms.

As noted above, the proposed regulation requires that employers verify the employee's identity and work authorization within 60 days following notice of a discrepancy and that "the employer complete a new I-9 Form for the employee, using the same procedures as if the employee were newly hired."⁴ This provision needs to be clarified for employers. Based on the proposed regulation, it seems that if there was simply a clerical error that is found within the 14-day window, the employer needs only to record that they spoke with SSA and it was worked out, but the employer does not need to complete a new I-9 Form for the employee that received a no-match. Also according to the regulation, if an employee could not resolve his or her issue with SSA regarding the no-match within 60 days, an employer may complete a new I-9 Form for that employee and continue to hire him or her as long as they do not use the disputed no-match documents to verify work authorization.

What is unclear is what an employer is to do if the employee does indeed resolve the no-match issue within the 60-day time period. Does the employer have to do a new I-9 Form to record the resolved social security number? It is the Chamber and the signatories' belief that requiring a new I-9 Form every time there is a discrepancy that must be corrected with the SSA would be a burdensome process for our employers, both financially and administratively. Oftentimes, large employers are informed of hundreds of no-matches on a monthly basis. These no-match letters are often the product of name changes for newly married or divorced employees who have not yet applied for a new social security card to reflect their new name. Having to enforce a blanket requirement that requires an employer and employee to fill out and complete new I-9 Forms for nearly every no-match would be unduly burdensome on the employer with minimal benefit to the government's interest.

⁴ See Safe-Harbor, 71 Fed. Reg. at 34,283.

Additionally, this process would create inconsistent results. For example, some employees change their names for any number of reasons and properly report this to the SSA. Therefore, these employees would not have a no-match, but the employee's name would be different from that listed on the original I-9 Form. This would require some employees who had a name change to fill out a new I-9 Form (those who initially forgot to report it to the SSA) but not others (those who had immediately reported their name change to the SSA). It would seem inconsistent to only require new I-9 Forms for some name changes but not others. Finally, we would like to caution DHS regarding the potential fallout from the implementation of this policy. It will create further incentives for fraud and misreporting. Employees required to fill out a new I-9 Form can simply provide new false information and documentation.

In the alternative, the employee should be required to provide documentation to the employer within a reasonable period of time, such as 120 days, establishing that the employee has corrected the discrepancy with the SSA. This additional time will allow for more accurate reporting. Otherwise, an employee may simply present new false documentation to the employer when filling out the new I-9 Form. This would not meet the objective sought by this additional requirement.

Finally, the actions an employer must take under the proposed regulation, when re-verification does not produce a satisfactory result, are vague. DHS needs to clearly state if it wants employers to terminate the employment relationship under such circumstances. Furthermore, if so, it must also state that employers should be indemnified from possible liability arising from the employee's termination in accordance with new protocol outlined in the regulation. For example, the proposed regulation states that if the "employee's identity and work authorization" is verified "even if the employee is in fact an unauthorized alien, the employer will not be considered to have constructive knowledge."⁵ However, the proposed regulation is unclear as to what an employer should do when a potential United States citizen or work-authorized alien is not able to satisfy the verification requirements in the time periods allotted.

Again, the current legislative proposals specifically and clearly provide indemnification from liability to an employer who terminates an employee after following the appropriate protocol—another reason to wait for the legislative process to work. It is unclear whether a regulation could legally provide for such indemnification. Meanwhile, this proposed regulation definitely has the potential of catching even the best-intentioned employers in a new array of litigation due to a myriad of conflicting federal laws and regulations, such as those dealing with civil rights.

V. Totality of the Circumstances Standard.

One of the ways that an employer can be notified of a name discrepancy is through written notification from DHS. The proposed regulation explains that DHS will take into account the totality of relevant circumstances when making a determination whether the employer had constructive knowledge that the alien was unauthorized to work. It, therefore,

⁵ See Safe-Harbor, 71 Fed. Reg. at 34,283.

seems that receipt of notification alone is not absolutely determinative regarding whether an employer had constructive knowledge. Please provide clarification whether this reading is accurate.

Regarding the receipt of a SSA no-match letter, a comparable standard to that of the totality of the relevant circumstances is not applied. Determining whether an employer had constructive knowledge is not purely an objective finding and there should be a comparable standard included in the regulation. Imputation of constructive knowledge in all instances should depend on the totality of relevant circumstances. An example that highlights the importance of SSA taking into account the totality of the circumstances is as follows: It is common that after an immigrant enters the US they informally change their name so to "Americanize" it. More often than not the immigrant does not file for a legal name change and, as a result, this can trigger a no-match and the employee can be subsequently discharged by the employer. It is an instance like this when SSA should take into account the totality of the circumstances. That is what is reasonable and equitable and conforms to the standard used by DHS as noted in the proposed regulation.

VI. Accuracy and Effectiveness of the System.

As previously noted, one of the ways by which an employer can be put on notice is by receiving a written notification from DHS. Unlike SSA, DHS does not have a mechanism in place that regularly checks and reports mismatched immigration documents. Rather, DHS generally is made aware of mismatched immigration documents in the context of an I-9 Forms audit. As noted in the proposed regulation, if an employer receives a letter from DHS, s/he is expected to resolve the issue by "tak[ing] reasonable steps, within 14 days of receiving the notice, to attempt to resolve the question raised by DHS about the immigration status document or the employment authorization document."⁶ However, DHS provides no specific guidance as to what those steps should be and what an employer should do to rectify the situation. We request that this process be outlined and explained and that time be provided for further comment.

In addition to the substantive issues addressed above, the proposed regulation would also adversely impact the U.S. economy and our country's national security.

VII. De-stabilizing Effect on the U.S. Economy.

It is estimated that annually 500,000 essential workers enter the U.S. to perform much needed labor without work authorization. Our economy not only absorbs these needed workers, but it depends on it for our current level of growth. There are currently an estimated 12 million unauthorized workers in the U.S. This proposed regulation will strip needed workers from employers without providing employers with an alternative legal channel by which to recruit to fill the gaps created by a combination of an aging workforce domestically, higher educational attainment by the domestic population, and a booming economy with full levels of employment.

⁶ See Safe-Harbor, 71 Fed. Reg. at 34,285.

It is well documented that about five percent of the total U.S. workforce has no work authorization. It could easily be deduced that an even smaller percentage of the total U.S. workforce is working with made up names and social security numbers. Nevertheless, this small percentage of essential workers is overrepresented in sectors of the economy and regions of the country where the gap between the availability of a domestic workforce and the jobs available is greater.

Increasing interior enforcement and strengthening the employment eligibility and verification system without a legalization program for current unauthorized workers and a guest worker program to address our future workforce needs would be detrimental to the U.S. economy and the stability of an essential workforce. This is precisely why the proposed regulation should be coupled with comprehensive immigration reform. Immigration reform must be comprehensive, not disjunctive.

VIII. Firing of Immigrant Workers and the Potential Growth of the Underground Economy.

Another reality of this proposal is that if an employer receives a no-match letter, many employees will simply be fired because employers will not want to risk liability by taking unnecessary steps to remedy the situation on behalf of the employee. If terminated, those who lack work authorization will not simply leave the U.S. Rather, they will likely enter the underground workforce. This is yet one more reason why this proposal should be part and parcel of comprehensive immigration reform. As stated, we request that the regulation be held until Congress negotiates a House and Senate compromise—given that both houses of Congress have spoken of their desire to legislate in this field by passing proposals, which are quite similar in the area of worker employment eligibility and verification.

Furthermore, this proposed regulation addresses the employers who are trying to comply with the law but it does not address those underground employers who are completely non-compliant and do not complete the required I-9 Form and instead pay workers under the table. These indeed are the bad actor employers, yet the regulation gives them a free pass. By not addressing this real and thriving underground economy and only proposing increased regulations on those employers trying to act in accordance with the law, this regulation acts as an incentive for employers and employees to enter the underground economy. Workers in the black-market economy do not pay taxes and remain in the shadows and employers are not held accountable. Creating further incentives to thrive only within the underground economy is neither sound economic policy nor in our country's national security interest.

IX. The Fine Line Between Compliance and Violation.

Out of fear of non-compliance with DHS's proposed regulation, employers might be extra vigilant in trying to verify an employee's identity and eligibility to work in the U.S. However, there is a fine line for the employer between ensuring that the workforce is legal and violating existing anti-discriminations laws. For example, should an employee present

documents other than a Social Security card when completing the I-9 Form and there is subsequently a no-match letter issued. The employer then confronts the employee and request to see the Social Security card. Clearly, this would present an issue regarding anti-discrimination laws already in effect. The Chamber requests that DHS provide clarification on how an employer should respond to such a situation.

X. Conclusion


As explained, the proposed regulations are misguided and will have an adverse effect on the nation's economy and its overall national security. For the reasons stated above, the Chamber urges DHS to withdraw this proposed regulation and to wait for Congress to finish its work on comprehensive immigration reform, as the Administration continues to insist.

We greatly appreciate the excellent relationship we have developed with the DHS and hope to continue to expand that relationship in the future as we work to address this important issue.

Respectfully submitted,



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Vice President
Labor, Immigration and Employee Benefits



Angelo I. Amador
Director
Immigration Policy

Also on behalf of:

Associated Builders and Contractors

Associated General Contractors of America

American Hotel & Lodging Association

American Seniors Housing Association

College and University Professional Association for Human Resources

Ingersoll Rand Company

National Association of Convenience Stores

Professional Landcare Network

Retail Industry Leaders Association

Tree Care Industry Association