NATIONAL RESTAURANT ASSOCIATION®

REPRESENTING THE RESTAURANT INDUSTRY
The Cornerstone of the Economy, Career Opportunities and Community Involvement

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

August 11, 2006

Reference: DHS Docket No. ICEB—2006—0004

Dear Sir or Madam:

Pursuant to the notice in the Federal Register dated June 14, 2006, the National Restaurant Association ("NRA") respectfully submits comments on the proposed regulations in Docket No. ICEB—2006—0004 issued by the Bureau of Immigration and Custom Enforcement, Department of Homeland Security ("DHS").

The National Restaurant Association is an Internal Revenue Code section 501 (c)(6) trade association, incorporated under Illinois Not-for-Profit law, with its principal headquarters in Washington, DC. NRA is the leading national trade association representing the food service industry in the United States, with over 375,000 member locations. It represents all segments of the food service industry, including quick service establishments, casual dining, and fine dining restaurants. NRA also provides personal memberships for persons actively engaged in the food service industry in a management or supervisor capacity; not-for-profit enterprise members engaged in the industry; educational memberships, including both students and faculty members; and allied corporate members who supply the industry with goods or services.

The restaurant industry is the largest private sector employer in the U.S., with over 12.5 million employees in some 925,000 locations. Restaurant industry sales for 2006 are forecast to increase 5.1%, and equal 4% of the U.S. gross domestic product. The overall economic impact of the industry is expected to exceed $1.3 trillion in 2006. The restaurant industry provides work for more than 9% of those employed in the U.S., with an anticipated growth increase of 1.9 million more jobs during 2006. Eating and drinking places are mostly small businesses with 70% having fewer than 20 employees. Research demonstrates that a typical employee in the foodservice industry is female (55%), under 30 years of age (54%), and works part-time (averaging 25 hours a week.)

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BACKGROUND

The proposed regulation concerns the legal obligations employers may have under immigration laws when they receive so-called "no-match" letters from DHS or the Social Security Administration ("SSA"). Employers annually send to SSA employee earning reports (W-2 Forms), which contain, among other things, each employee's name and social security number ("SSN"). When the Social Security Administration (SSA) checks the W-2 information against its records as to name and SSN, it may believe a discrepancy exists, i.e. the SSN number submitted with the name on the W-2 form may not match the SSA records. The SSA in turn may send the employer a letter that there appears to be a discrepancy between its records and the information submitted on the W-2 Form. A similar letter may be sent to the employer by DHS resulting from inspection of an employer's I-9 forms. Such letters are commonly referred to as "no-match" letters.

CURRENT LAW

The Immigration and Nationality Act ("INA"), 8 USC 1324 (a)(2), provides in relevant part that it is:

> Unlawful for [an employer]... after hiring an alien... to continue to employ the alien...knowing the alien is (or has become) an unauthorized [worker in the U.S] ... (Emphasis added)

While the statute does not explicitly define the word "knowing", the agency by regulation has construed the term to mean not only "actual knowledge" the employer may possess that a worker is unauthorized to work in the U.S., but also "constructive knowledge", i.e. knowledge that "may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 CFR 274 a.l.1 (1) (1). Neither the current regulation nor any court precedent, however, construes receipt of a no-match letter to itself imply constructive knowledge on an employer that a worker is unauthorized to work in the US.

PROPOSED RULE

The proposed rule would amend the current regulation codified at 8 CFR 274 a.1.1 (1) (1) by: (1) adding two new examples where "constructive knowledge" may be imputed to an employer; and (2) a "safe-harbor" provision outlining certain steps an employer may take as supposedly being "reasonable" after receiving a no-match letter in order to avoid a finding of "constructive knowledge."

NRA COMMENTS

1. Proposed Rule Should be Stayed Pending Congressional Action

Both the U.S. Senate and House of Representatives have passed significant immigration reform bills (S. 2611/H.R. 4437). Both bills propose important changes concerning employer responsi-

bilities in verifying work eligibility of its workforce, including new standards regarding employer verification of an employee's work authorization. Importantly, both bills also specifically address situations when an employer receives a no-match letter from SSA or DHS. See, e.g., Section 301-305 in S.2611; Sections 701-711 in H.R. 4437. Indeed, Section 707 in H.R. 4437, for example, specifically addresses social security card - based employment eligibility obligations of SSA and DHS.

Clearly, it is premature for DHS to be issuing proposed regulations on specific matters now being addressed by Congress. Taking a new regulatory position when Congress has proposed alternative approaches may needlessly confuse employers on what to do when no-match notices are received and perhaps even be inconsistent with statutory directives.

2. New Proposal Amends Current Law By Increasing Potential Legal Liability of Employers

Neither case law nor the existing regulation indicates that receipt by an employer of a no-match letter itself could result in a finding of constructive knowledge that a worker is an alien unauthorized to work in the U.S. DHS should not amend the regulation codified at 8 CFR 274a.l (1)(1) to expand the potential liability under the statute of employers due to receipt of a no-match notice.

The current regulation defines "constructive knowledge" as knowledge that "may be fairly inferred" through notice of facts which would indicate, through the exercise of reasonable care, that an employer knew about a certain condition. Receipt of a no-match letter, however, does not "fairly infer" that a worker is unauthorized to work in the U.S. DHS' own proposal states in the "Background" portion of the notice that "there are many causes for such a no-match, including clerical error."

The National Restaurant Association respectfully suggests that the proposed approach by DHS concerning no-match letters not be elevated in the regulation as evidence of "constructive knowledge," but be used only as suggestive, non-mandatory guidelines as to possible steps employers may take upon receipt of a no-match letter. No-match notices should not be used to create a new basis for legal liability under the statute.

3. The Times Suggested for Steps Employers Should Initially Take Are Not Reasonable

The proposed regulatory amendment outlines times and the steps an employer should initially take after receiving a no-match letter. DHS considers the proposed times to be "reasonable." NRA disagrees.

The proposal states that within 14 days of receipt of the no-match letter, an employer should (1) check its personnel payroll records to see if there is a clerical error; (2) if there is no clerical error, the employer should approach the employee and confirm that the information provided by the employee is accurate; and (3), if the employee insists the information is accurate, the employee should be directed to the SSA (or DHS) to correct the matter. First, 14 days is unclear if this means 14 calendar days, including weekends, holidays, or 14 business days. It should be business days. Second, in the restaurant industry such a short time frame is inadequate, particularly since employment may be erratic, and not a consistent day-after-day work time for many employees. The typical employee in the food service industry, as NRA's research demonstrates,

works only part-time, i.e., 25 hours a week. Third, employers in the restaurant industry who have received no-match letters have informed NRA that many times the no-match list includes more than just one name. Indeed, our members have told us that many SSA letters contain multiple names, sometimes 8, 10 and even up to 15 names. To expect employers under such circumstances to complete the procedures outlined for multiple employees in just 14 days is neither practical nor reasonable.

NRA proposes that a more reasonable approach would be:

(1) that any amended standard should be flexible, such that employers may take the identified steps not within a specified time, but "within a reasonable time, considering the number of employees involved, the particular work requirements, etc."; and

(2) that 45 business days should be a suggested time period as normally being "reasonable" when only one name is identified on the no-match notice. The regulation should state that additional names or other particular employment situations may warrant greater time beyond 45 days.

4. 60 Day Time Period for Verification and Action Employer Should Take Are Not Reasonable

The proposal describes verification procedures that an employer may follow if the discrepancy in the no-match notice is not resolved within 60 days. The proposal also states that if the employee's identity and work authorization cannot be verified in that time frame, the "employer must choose between...terminating the employee or facing the risk that DHS may find the employer has constructive knowledge that the employee was an unauthorized alien."

First, NRA does not believe that a 60 day time period to resolve any discrepancy is either realistic or reasonable in the food service industry. As stated previously, a typical restaurant employee is part-time. Employment is also erratic, resulting many times in time gaps that exist between actual days worked by employees. The proposal also suggests flexibility up to 90 days. With the exigencies of the work schedules in the restaurant industry and the requirements to work with government agencies, 120 days would seem a more reasonable minimal time period for resolution. NRA has received numerous calls from restaurant employers over the past few years who have received "no-match" letters. After contacting the SSA, not one of those employers that discussed their situation with NRA indicated that the problem was resolved in anything less than 120 days, if at all.

Second, the proposal would require the employer, if the no-match notice is not resolved and the work authorization cannot otherwise be verified within that limited time frame, to either (1) fire the employee or (2) face the risk that DHS may find the employer had constructive knowledge that the employee was an unauthorized alien. DHS should not put employers in such a legal dilemma by essentially elevating the existence of a no-match notice into either a statutory violation or suggesting that employers terminate employees.

CONCLUSION

NRA applauds DHS for setting forth proposed steps employers may take if they receive a no-match letter from DHS or SSA. Receipts of no-match notices have caused considerable confusion in the food service industry. However, NRA respectfully suggests that the proposals should not be finalized at this time until the Congress has an opportunity to complete the comprehensive immigration reform legislation currently under consideration. It makes little sense for regulations to outline approaches that are completely covered in provisions in both bills now being considered by Congress. NRA also suggests in the alternative that if DHS wants to move forward before Congress acts, the proposals should be finalized only in the form of non-mandatory guidelines. They should be precatory, and not used as a basis to impute constructive knowledge and potential legal liability on employers.

Respectfully Submitted,

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August 14, 2006

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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.

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[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,

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[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.

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[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

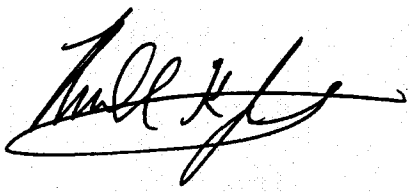
documents other than a Social Security card when completing the I-9 Form and there is subsequently a no-match letter issued. The employer then confronts the employee and request to see the Social Security card. Clearly, this would present an issue regarding anti-discrimination laws already in effect.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

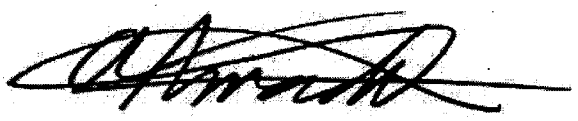
X. Conclusion

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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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

August 14, 2006

Director, Regulatory Management Division
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Department of Homeland Security
111 Massachusetts Avenue, NW, 2nd Floor
Washington, DC 20529

RE: DHS Docket No ICEB 2006-0004, 71 Fed. Reg. 34281 (June 14, 2006), Safe Harbor Procedures for Employers Who Receive a No-Match Letter

Dear Sir/Madam:

The Service Employees International Union (SEIU) has 1.6 million members in the United States (and an additional 200,000 members in Canada). Our members work in the property services and health care industries and in the public sector. Many of our members are immigrant workers who work in low wage occupations such as janitors, security guards, home care aids and nursing home workers. SEIU has been a leading advocate for improving the lives of low wage workers and for comprehensive immigration reform.

SEIU has often been called upon to assist our members in responding to employer demands following SSA no match letters. Because of our experience with these letters over the past several years, we oppose the proposed regulations to the extent they imposes additional obligations on employers upon receipt of SSA no match letters and can cause loss of employment by and discrimination against workers legally entitled to work in the United States. The letters often are erroneous and are not easily corrected, and they are frequently the excuse for employer discrimination and harassment of immigrant workers.

The most fundamental reason why the regulation is misguided is that it erroneously treats the Social Security number as a proxy for immigration status. The SSA itself, and even former INS General Counsels, agree that such is not the case, because there are many reasons why the computer records could be in error.[1] In fact, the SSA records usually contain no information about immigration status, or contain out of date information.[2] Despite this, the proposed regulation would effectively make the employer sanctions regime a

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[1] Martin, David, INS General Counsel, Letter to Larson (12/23/1997) *published at* 75 No.6 Int. Releases 203 (1998), Westlaw 75No.6INTERREL 203, attached hereto; and SSA 2005 No Match letter, attached hereto. Also attached are additional communications from IRS, INS, SSA and the EEOC setting forward this consistent and long-standing interpretation of no match letters.

[2] GAO, *Immigration Enforcement: Benefits and Limitations to Using Earnings Date to Identify Unauthorized Work*, July 11, 2006, GAO-06-814R at 8.

strict liability statute for the millions of employers who receive SSA no match letters, contrary to the plain language of the statute and the intent of Congress interpreted for the last 20 years. And the regulation would in effect make the I-9 process an annual process, rather than a one-time process, for millions of employers, which clearly was never intended by Congress when it established the I-9 process.

I. The Regulations Will Not Achieve Their Intend Objective

SEIU does not believe that the proposed DHS regulations will achieve the intended objective of reducing the number of undocumented workers in the United States and will instead end up hurting American citizens and other authorized workers as well as legitimate employers who are trying to comply with the law. We believe that this objective can be obtained only through comprehensive immigration reform such as that currently pending in Congress, since the millions of jobs these workers hold and the importance of their labor to the U.S. economy will not disappear by adoption of enforcement oriented proposals. The proposed DHS regulations will simply make the situation worse, not better.

a. The Proposed DHS Regulations Will Simply "Churn" The Workforce While Not Reducing The Number Of Undocumented Workers.

We simply are not aware of evidence that workers who are terminated because their employer believes that they are undocumented have in the past or will in the future leave the United States or even leave the workforce. Immigrant workers largely work in low wage industries. Because of poor pay and working conditions, employment opportunities in these industries are plentiful and the turnover rate is very high (particularly among non-union workers), often exceeding 100% in a year. Thus, workers move freely from job to job. The proposed regulations will only increase that turnover rate, to the detriment of not only the workers, but also their employers and the economy generally.

Since jobs are plentiful in low wage industries, turnover is very high and little skills or training are required for the jobs, workers in these industries who are terminated by one employer can simply walk across the street and work for another employer. There is no reason to believe that workers who are terminated because their name appeared on a SSA no match letter will be any different. Thus, the likely result of the proposed regulations, if implemented, will be to simply churn the workforce. Workers whose names appear on a no-match letter sent to employer A will simply go to work for employer B. When their name shows up on a no-match letter sent to employer B (probably a year later), they will go to work for employer C. In the meantime, workers who initially worked for employer C and who show up on a no-match letter to that employer will simply go to work for employer A and so on.

Thus, the likely practical effect of the proposed DHS regulations will be to churn the workforce in the low wage industries populated by immigrant workers but not to decrease the overall size of the undocumented worker workforce. This, of course, will drive up employment costs in these industries because of the rapid turnover of employees. It will not in any way aid in

the enforcement of the immigration laws. This problem can be solved, but only through comprehensive immigration reform and not by the interim step proposed the DHS.

b. DHS Regulations Will Have The Effect Of Growing The Underground Economy At The Expense Of Legitimate Employers

In organizing low wages workers, we are often confronted with unscrupulous employers who erroneous classify their employees as independent contractors or who even treat their workers as sham franchisees. We even see situations were workers are paid "off the books" meaning that they are paid in cash with out any of the payroll taxes being paid or the tax withholdings being made that are required by law. By using these fraudulent schemes, employers avoid paying payroll taxes, unemployment insurance and social security payments on behalf of their workers. Since the workers have not been legally treated as "employees", these employers don't even need to go through the I-9 process with these workers, nor will they ever receive a no match letter from the SSA as they do not pay SSA taxes. These employers seek to employ undocumented workers because they are the workers who are less likely to speak up and demand that the employer comply with the law. These employers not only cheat their workers, but they cheat the government out of social security payments, unemployment taxes, wages withholdings and so forth. Ironically, the result of these proposed regulations will be a significant loss of revenue for the government, revenue which the government sorely needs for its operation, including the enforcement of the immigration laws.

Since no social security taxes are paid on these workers, these employers never receive SSA no match letters. Therefore, as a practical matter, the employers that operate illegally in the low wage industries that are served by the immigrant workforce are not effected by the DHS proposed regulations and can continue to employ undocumented workers without running the risks that legitimate employers would run under the DHS proposed regulations.

These illegitimate employers thrive in the low wage industries where most immigrants work. Legitimate employers who pay employment taxes and who try to comply with the immigration laws must compete with these employers. There is always the temptation to take up their illegal ways in order to complete against them in these often very competitive industries. By imposing administrative burdens on the legitimate employers and not on the illegitimate employers and by subjecting legitimate employers to additional risks under the immigration laws not faced by these illegitimate employers, the DHS proposed regulations will have the unintended effect of creating incentives for legitimate employers to go underground and to misclassify their workers. The ironic result of this will be to increase employment opportunities for undocumented workers and to deprive the government of payroll taxes which it is owned under law.

II. The Proposed Regulation Lacks Any Workable Mechanism To Insure Against Erroneous Termination, Or To Provide Remedies To The Substantial Number Of Workers Who Are Its Victims.

It is well established that SSA records are frequently erroneous. For immigrants *who are work authorized*, SSA records are automatically able to verify the status of less than 50% of work-authorized non-citizens, as compared to 99.8% of native born citizens.[3] These numbers are significant in that they demonstrate that large numbers of legally authorized workers will be the subjects of erroneous SSA no match letters, and their jobs at risk if the employers, employees, and SSA do not promptly take actions to comply with the proposed regulations.

According to Census Data, there are roughly 145 million total workers in the U.S. workforce, of whom 125 million are native born citizens. There are approximately 7.8 million naturalized citizens in the work force, and 12 million non-citizen, immigrant workers. Approximately 7 million of those workers are unauthorized.

From these numbers, one can determine that approximately ***300,000*** native born workers (0.02%) will be ***annually*** subject to SSA no match letters, *even though they are native born citizens.* If they lose four hours of work to take care of this, and you assume an average wage of $14/hr, they will lose $16.8 million in wages. Of the approximately 5 million *work-authorized*, non-citizens, 50% will face problems clearing the SSA database, or ***2.5 million annually***. Again, assuming an average wage of $14/hr, these work- authorized workers would lose $140 million in wages, assuming that they ultimately succeed and are not terminated . Each of these workers will have to spend many hours trying to straighten out the SSA records, solely to satisfy DHS regulations. If SSA cannot complete the process in the time line suggested by these regulations, many will lose their jobs, causing hardship to their families. There will also be a substantial disrupt of the employers operations as employees take time off to correct the errors in SSA's data base. If you assume that one in ten of these workers will for one reason or another fail to resolve the no match problem within the time limits set, this means that 280,000 workers will unjustly lose their jobs because of these proposed regulations.

For those who do not successfully, and timely, complete this process, either through procrastination, frustration, agency delay/incompetence, they will have no effective remedy for their loss of employment, wages/benefits. Since these regulations are promulgated by the DHS, they cannot set out a procedure for SSA to remedy erroneous decisions or to provide compensation for agency error for the approximately one quarter million workers who will be unjustifiably terminated if the proposed regulations are implemented. The Federal Tort Claims Act does not provide a remedy for agency records errors, particularly where the agency would argue that it did not require the employer to terminate. Likewise, employees would not have a viable remedy against their employers for termination when the employer justifies its conduct on the new regulations together with the SSA notice.

III. The Proposal Shifts DHS Enforcement Costs And Burdens To Employers, Employees And The SSA, Rather Fixing The Broken System.

[3] *Report to Congress on the Basic Pilot Program,* U.S. Citizenship and Immigration Service, June 2004; *see also,* GAO, *Immigration Enforcement: Benefits and Limitations to Using Earnings Date to Identify Unauthorized Work,* July 11, 2006, GAO-06-814R at 1 (SSA data "has drawbacks since they contain some erroneous information and information about hundreds of thousands or even millions of U.S. citizens and work authorized aliens.")

At a time when Congress is considering making major changes to immigration laws, DHS is proposing a regulation that improperly treats the SSA no match letter as a proxy for an INS notice that the worker lacks worker authorization. As the SSA no match letters demonstrate, they are no such thing. They specifically warn employers that they do not "make any statement about an employee's immigration status." And they warn against taking any adverse action.

Congress is currently in the process of addressing immigration reform but instead of leaving it to Congress to determine what that appropriate reform would be, the proposed regulations hijack the SSA no match letter system, requiring millions of employers and employees to burden the SSA with inquiries and visits, and demanding timely documentation of same, in order to satisfy DHS's misguided regulation. No where in the regulation is there any effort by DHS to address the actual size of the attempted cost-shifting to the SSA. Nor does the regulation contemplate the substantial burden being placed on the SSA.

Because the no match letters are distributed only in April and May each year, SSA will require a substantial seasonal staffing increase to accommodate the surge in inquiries during this 2-3 month period. This seasonality will require a large number of temporary hires to enable the agency to respond. In 2002, the SSA sent out 800,000 no match letters, to employers with at least 10 no match employees, or 0.5% of the employer's workforce. It is unknown whether SSA will in future years use a different standard for sending these letters. If DHS adopts its proposed regulation, it would discourage SSA from sending the letters more broadly so as to improve its own management of the SSA Trust Fund, as doing so would impose substantial secondary staffing effects on the agency to respond to hundreds of thousands on visits.

The DHS regulations and comments fail to address this tremendous burden the proposed regulations are placing on SSA. It it is irresponsible in our view for DHS to contemplate issuing these proposed regulations without a full assessment of how SSA is going to meet the burden being placed on it by the proposed regulations.

When a worker shows up on a no match letter, the employer essentially has to reverify the worker's status, as they do at the being of employment with the I-9 process. DHS has made no assessment of the cost to employers in immigrant intensive industries of this new ***annual*** I-9 compliance obligation which will result from the proposed regulations. Instead of a one-time I-9 compliance burden, suddenly employers in immigrant dependent industries can expect to see I-9 compliance issues become an annual routine for a large segment of their workforce. Indeed, the regulation asserts that there will be no significant cost to small employers, but it is hard to see how anyone could contend that this administrative burden will be insubstantial for all employers, both small and large, in immigrant intensive industries.

The regulation also makes no effort to assess the costs imposed on legal workers of time away from work to try to straighten out SSA records, and obtain documentation that will satisfy their employers. As demonstrated above, the proposed regulations could easily cost employees legally entitled to work in the United States $156 million or more in lost wages and the substantial disruption to many employers' operations just to prove that there is an error in the SSA records.

Likewise, not addressed is the cost to the SSA in staff time and lost taxes, as well as the increase in unemployment compensation paid out to employees who are wrongly terminated. The cost to the government because of increased costs in responding to inquiries from legal employees who were placed in a no match letter because of an error as well as the loss of revenue from payroll taxes is likely to be very significant. Yet, DHS's proposed regulations fail to address these costs and lost revenue at all.

IV. The Proposed Regulations Will Encourage Discrimination Against Workers Legally Entitled To Work In The United States.

The proposed regulation will result in expanded discrimination against workers with a "foreign" appearance or accent, as well as those who seek to enforce their workplace rights to fair treatment and a living wage. Under existing laws and procedures, there is currently a high level of discrimination against immigrant workers, whether they are legally authorized for employment or not. Despite existing protections, SEIU and other unions have often had to assist workers whose employers deny them workers compensation, overtime pay, or interfere with their right to form or join a union. Such employers will often hide behind the excuse of immigration law compliance to accomplish these ends. This proposal will provide unscrupulous employers an ***annual*** excuse for harassing, suspending and or terminating workers who lawfully seek to enforce their rights.

V. The Proposed Regulations Are Contrary To Unchallenged Ninth Circuit Case law That Constructive Knowledge "Not Be Expansively Applied," In Order To Avoid Interfering With The Nondiscrimination Goals Of The INA.

The proposed regulation disrupt the proper balance struck by Congress in 1986 and recognized by the INS/ICE, SSA, the courts and OCAHO for the last twenty years. Because these proposed regulations are clearly contrary to Congress' intent, they are beyond the authority of DHS to issue.

The proposed regulations are founded on an expanded definition of constructive knowledge, that is contrary to the only circuit court case construing that term in the INA 274A context. When Congress passed the Immigration Reform and Control Act in 1986, it "delicately balanced" the employer sanctions provisions and protecting authorized workers from unlawful discrimination because of their "foreign" appearance or accent. "The doctrine of constructive knowledge has great potential to upset that balance, and it should not be expansively applied." Collins Foods International v. INS, 948 F.2d 549, 554-55 (9th Cir, 1991). There have been no relevant changes to this balance since 1986.

The law requires employers to accept documents proffered by the employee within three days of hire. There is no ongoing employer obligation to review the documents, unless a work authorization document (List C) expires. The employer must accept those documents that reasonably appear on their face to be valid. The statute does not require the employer to be a document expert. It is up to the employee to select the documents to submit, by selecting them

from the list on the back of the I-9 form. The employer violates the anti-discrimination provisions of the Act if it requires more or different documents than those required by the Act, or for example, insists that it will only accept certain documents.

The INS in Collins Foods had argued that the employer had constructive knowledge that the employee was not authorized in that the employee's Social Security card was not the example pictured in the INS Handbook for Employers. The Ninth Circuit however noted that the INS Employer Handbook only illustrated a few of the possible 16 iterations of SSA cards issued.

The Ninth Circuit expressly was concerned that "[w]hen the scope of liability is expanded by the doctrine of constructive knowledge" the employer may be subjected to penalties for undefined acts, and may avoid hiring anyone with an appearance of alienage." Id. The effect of the regulation would be to give unscrupulous employers but another justification for discriminatory conduct, and an annual one at that.

The proposed regulations are contrary to the clear holding of the Ninth Circuit in Collins Foods. There are no Circuits contrary, and indeed, several OCAHO decisions have followed the holding. The agency is without authority to adopt a regulation contrary to the statute.

VI. The Proposed Regulation Improperly Eliminates The Good Faith Defense For Millions Of Employers, Absent Timely Compliance With The Burdensome Regulation.

The proposed regulations are also contrary to the law as it has been interpreted and applied because it effectively eliminates the good faith defense which as always been an essential element of the statute. The statute provides that so long as the employer and employee properly complete the I-9 form at the outset of employment, the employer has a good faith defense to a knowing hire violation. 8 U.S.C. §1324a(b)(6)(A). The employer is not strictly liable for employing unauthorized workers; knowledge is required. The good faith defense is rebutable if DHS can establish that the documents did not reasonably appear on their face to be valid or to relate to the individual. Collins Foods, supra at 552, n. 9.

Despite the clear language of the statute and controlling case law, DHS proposes to eliminate this presumption for millions of employers, unless the affected employers engage in an elaborate series of steps, within certain time frames, with the Social Security Administration.[4]

[4] The procedures and time frames are proposed without any evidence that the SSA has the staff available to serve the seasonal surge of calls and visits that would occur every spring after the issuance of no match letters. The seasonal character of the project would make timely response by SSA even more difficult given the need to provide extra staff during the spring when response would be due.

Nor is there any indication whether SSA plans to send out no match letters to every employer with even a single no match employee, or only to those with more than 10 or 0.5% as in 2002 when it sent 800,000. In other years, SSA has used a different threshold. The threshold used will substantially change the total numbers, raising or lowering the burden on employers/employees/SSA accordingly.

For the millions of employers who annually received an SSA no match letter, those employers would be denied the good faith defense unless they could carry a burden of showing that they had complied with all the aspects of this proposed regulation, including its timelines.

The proposed regulation erroneously treats letters from INS identifying unauthorized workers as the same as the SSA no match letters. In contrast to the INS notices to employers, the SSA no match letters explicitly tell the employer that there could be many innocent reasons why the individuals name is listed, and that the letter does not inform the employer that the worker is not authorized for employment. Indeed, the SSA no match letters also warn the employer against any adverse personnel action, as such actions might violate anti-discrimination laws.[5] Despite these significant differences with INS notices, which directly address whether the individual is work authorized, the proposed regulations treat the SSA letters as the functional equivalent.

The legal rationale proffered by the agency is that its regulation is consistent with Mester Mfg Co. v. INS, 879 F.2d 561 (9th Cir. 1989) and New El Rey Sausage Co. v. INS, 925 F.2d 1153 (9th Cir. 1991). Apparently taking the view that ignoring the case law will make it go away, DHS completely fails to mention Collins Foods even though it dealt with Social Security enumeration in the employer sanctions context. The regulation fails to note that in Mester, the employer had been told by INS that the certain employees were "suspected unauthorized aliens." Collins Foods at 555. The Collins court distinguished its prior decisions in Mester and New El Rey Sausage, noting that in both cases the employer had been informed by INS that particular employees were suspected of being unauthorized.

In contrast, here the proposed regulation treats dissimilar situations as if they were the same, i.e. an SSA letter telling employers that there is a no match in a person's Social Security number is treated the same as an INS letter that states that employees are not authorized for employment based on the immigration documents presented. Notably, the INS did not appeal the narrow, constructive knowledge standard of Collins Foods. Now fifteen years later, with no intervening statutory change, nor contrary circuit or OCAHO decisions, the agency proposes to ignore the precedent, and dramatically limit the good faith affirmative defense of the statute for millions of employers.

Collins Foods has been repeatedly followed by the ALJ's in employer sanctions cases. See, e.g. USA v. American Terrazzo Corp., 6 OCAHO 828, 1995 WL 848945 (1995) ("the Circuit court has given clear warning that the doctrine of constructive knowledge must be sparingly applied"); Getahun v. Dupont Merck Pharmaceutical, 6 OCAHO 880, 1996 WL 570515 (1996)(constructive knowledge must be sparingly applied in illegal hire cases to minimize the risk of liability and burden of compliance on employers); USA v. AID Maintenance Company, 7 OCAHO, 1997 WL 1051451 (1997)(same).

The careful balancing by Congress of the statutory employer obligations are not subject to revision by the agency by regulation. This legislative balance was constructed in order to minimize the burden on the employer, as well as to protect employees from discriminatory documentation requirements. The substantial gutting of the good faith defense for employers

[5] A sample SSA no match letter from 2005 is attached.

will burden the process not only for employers, but necessarily for employees whose employers impose heightened and discriminatory documentation requirements. For this reason, the proposed regulations are contrary to law and therefore exceed the agency's authority in issuing regulations.

VI. DHS Should Defer To Congress Regarding Any Changes In The Immigration Laws

No one really disputes that the current immigration laws are outdated and in need of revision. Currently, Congress is considering a number of approaches that would significantly change the law. Rather than attempting to change the law through the administrative process, DHS should defer to Congress regarding how the law should be changed. Among the matters being considered by Congress is the manner in which employers are to verify the work status of their employees, the very area that DHS attempts to regulate through the proposed regulations. Changes in the immigration laws are under active consideration in Congress and significant changes are likely to be made in the very near future. Therefore, DHS should defer to Congress rather than to attempt to reform the current law through the administrative process, which, of course, we contend it does not have the authority to do.

CONCLUSION

SEIU strongly recommends that DHS not adopt the proposed regulation and defer to Congress to address the issue any changes in the immigration laws that are to be made. The proposed regulations are ill conceived and based on a fundamental misunderstanding of the limitations of the SSA no match letters.

They will be ineffective in reaching their objective and counterproductive in reducing illegal immigration. At the same time, they place a substantial burden on employers, lawful American workers and the SAA. They are likely to cause an increase in the turnover rate for immigrant dependent employers and will create incentives for employers to work immigrant workers "off the books" or to misclassify them as independent contractors so as to avoid the regulations, to the detriment of all workers and the economy. They will also encourage discrimination against lawful workers who are ethnic appearing or have foreign accents.

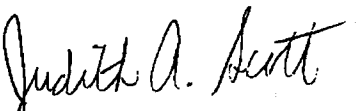
They likewise fail to take into account the burden placed on SSA and whether SSA can realistically meet that burden and the costs to employers and legal workers of compliance. The proposed regulations offer no remedy for the large number of legal employees who will likely to be terminated erroneously as a result of agency error or slow response. They will impose substantial costs on native born and authorized workers and their employers, as well as interfering with the SSA's fundamental mission.

Finally, the proposed regulations are contrary to the current immigration law as it has been interpreted and applied for 20 years. The proposed regulations attempt to upset the delicate balance intended by Congress in enforcing the law. They also effectively negate the good faith

defense, an integral part of the current law. Therefore, they are beyond the power of DHS in issuing regulations.

Accordingly, we request that the proposed regulations not be issued and that Congress be left to enact appropriate changes in the law.

Respectfully submitted,



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Social Security Administration
Retirement, Survivors and Disability Insurance
Employer Correction Request

CODE V

Office of Central Operations
300 N. Greene Street
Baltimore, MD 21290-0300

Date: March 24, 2005
EIN:

Establishment Number: MRN: 40

Why You Are Getting This Letter

Some employee names and Social Security numbers that you reported on the Wage and Tax Statements (Forms W-2) for tax year 2004 do not agree with our records. We need corrected information from you so that we can credit your employees' earnings to their Social Security records. It is important because these records can determine if someone is entitled to Social Security retirement, disability and survivors benefits, and how much he or she can receive. If the information you report to us is incorrect, your employee may not get benefits he or she is due.

There are several common reasons why the information reported to us does not agree with our records, including:

- Errors were made in spelling an employee's name or listing the Social Security number;
- An employee did not report a name change following a marriage or divorce; and
- The name or Social Security number was incomplete or left blank on the W-2 report sent to the Social Security Administration.

IMPORTANT: This letter does not imply that you or your employee intentionally gave the government wrong information about the employee's name or Social Security number. Nor does it make any statement about an employee's immigration status.

See Next Page

(2)

If You Have Any Questions

If you have any questions, please call us toll-free at 1-800-772-6270 between 7 a.m. and 7 p.m., Eastern time, Monday through Friday. We can answer most questions over the phone. You can also write us at the address shown on the first page of this letter. If you call, please have this letter with you. It will help us answer your questions. Also, general program information is available from our website at www.socialsecurity.gov/employer.

W Burnell Hurt

W. Burnell Hurt
Associate Commissioner for
Central Operations

The full document is available in the OIRA Docket Library