

Low-Wage Immigrant Worker Coalition

VIA ELECTRONIC MAIL

August 14, 2006

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

Re: DHS Docket No. ICEB-2006-0004, Comment Regarding “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter”

Dear Sir or Madam:

The National Immigration Law Center (NILC) submits the following comment on behalf of the Low-Wage Immigrant Worker (LWIW) Coalition in response to the request for public comment by the Department of Homeland Security (DHS), Bureau of Immigration and Customs Enforcement (ICE), on the proposed “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter,” 71 FR 34281 (June 14, 2006).

The LWIW Coalition is co-convened by NILC, the American Federation of Labor – Congress of Industrial Organizations (AFL-CIO), Change to Win (CtW), Interfaith Worker Justice (IWJ), Jobs with Justice, the National Council of La Raza (NCLR), the National Day Laborer Organizing Network (NDLON), and the National Employment Law Project (NELP).

The LWIW Coalition is our nation’s broadest collaborative of advocates and organizers working to improve the living and working conditions of low-income and low-wage immigrant workers. The mission of the LWIW is to support this community of advocates by sharing strategies and resources at the local, state, and national levels.

The signatories to these comments have ample experience in dealing with the adverse impact that Social Security Administration’s (SSA’s) no-match letters have had on all workers, immigrant and native-born alike. Through our legal assistance programs and organizing campaigns, we have interacted with tens of thousands of low-wage workers and their families on matters related to no-match letters and other Social Security number (SSN) verification matters. We have assisted individual employees in correcting no-match discrepancies and educated both employers and employees on their responsibilities in responding to no-match letters through written materials, trainings, and technical assistance to a broad range of groups in the country.

The LWIW Coalition has also worked closely with SSA through the years to improve language in no-match letters and to include warnings to employers against discriminatory and retaliatory conduct. Our advocacy includes ongoing monitoring of national origin and citizenship status discrimination cases as well as unfair labor practices arising from SSN verification and no-match matters reported to the U.S. Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), the Equal Employment Opportunity Commission (EEOC), and the National Labor Relations Board (NLRB). Some of the co-conveners of the LWIW have also been engaged in litigation involving employer misuses of no-match information to interfere with workers' rights to organize and exercise their labor rights. Throughout our work, we have remained steadfast in our commitment to safeguard and advance the rights and best interests of low-wage workers, their families, and their communities.

As a result of this work, the LWIW Coalition is alarmed by and strongly opposed to the implementation of the "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." Such a rule will magnify the adverse impact that no-match letters have had on workers' rights and trigger massive, potentially unlawful firings of low-wage workers across the nation. Overly cautious employers will fire listed workers before workers have a chance to show they are on the list mistakenly. But despite the disruption it will cause, the rule does nothing to solve our immigration problems.

DHS should not risk the livelihoods of hundreds of thousands—possibly millions—of workers in an isolated, punitive immigration "enforcement" scheme on the eve of enactment of comprehensive immigration reform intended to make our immigration system work again. In the absence of such reform, the proposed changes would only stir up dust.

The proposed rule is simply the wrong rule at the wrong time. Both the House and Senate have passed immigration bills that contain sweeping new worksite verification and enforcement regimes that impose a new electronic verification system on all employers. Implementing the rule before the conclusion of the immigration debate would add a new, unnecessary, and unhelpful set of major changes for employers to learn and implement on top of the ones that will be added just a short while later when the new legislated changes take effect.

Although the rule causes enormous upheavals in the workplace, the rule will have *no* impact on undocumented migration, which is the purported purpose of this proposal. Our experience with no-match firings and workplace audits is very clear: *the fired workers will not leave the country*. In the absence of comprehensive immigration reform that addresses the root causes of undocumented migration, they will simply find other more marginal jobs, most likely in the unregulated cash economy. Because of this, the proposed rule will result in growth of the underground economy, which in turn will result in substantial losses in state and federal tax revenues as well as unfair competition.

In addition to its enormous impact on workers and on our economy, this proposal should be withdrawn because the rule attempts to transform the SSA no-match program into an immigration enforcement tool when the SSA does not have the capacity to fulfill this objective through its database. Additionally, the rule erodes our privacy rights, raises due process concerns, and radically departs from existing case law and longstanding federal guidance in this

area. It provides no solution to the hiring and exploitation of undocumented workers and is far outweighed by the exorbitant implementation costs that will be borne by workers, taxpayers, and businesses. The LWIW Coalition therefore urges DHS to withdraw this rule in its entirety.

Our concerns are set forth in full below.

The Proposed Rule Harms All Workers Regardless of Immigration Status

Hundreds of Thousands—Possibly Millions—of Workers, Including U.S. Citizens and Work-Authorized Noncitizens, Will Face Massive Firings

As an initial matter, the notion that SSA no-match letters indicate that an individual is not authorized to work in the United States is simply incorrect. SSA no-match letters are *not* reliable indicators of work authorization or immigration status. Instead, these letters simply indicate that there is a discrepancy between a worker's SSN and/or name on file with the SSA based on information reported by employers on Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement). There are numerous reasons for the discrepancies, *none of which have anything to do with the immigration status or work authorization of workers*. Many of these mismatches are based, instead, on simple human error (such as clerical data entry mistakes and misspellings by the employee, employer, or SSA) or life changes (such as name changes, marriages, and divorces). The proposed rule, however, is based on the faulty premise that SSA no-match letters are foolproof indicators of work authorization. Because this premise is flawed, there are several, disastrous consequences that would flow from implementation of the rule.

This proposed rule will trigger massive firings across the nation. Based on our experience over the years but in particular with SSA's policy in 2002 where the agency sent the no-match letter to almost one million employers, the LWIW Coalition anticipates that the proposed rule will prompt similar panic and confusion among employers. This is likely to result in employers precipitously and indiscriminately firing workers who appear on a no-match list before workers have a chance to show that they are on the list because of the simple human error or life changes described above. As a result, these mass no-match firings may include the terminations of thousands of work-authorized employees who routinely receive SSA no-match letters.

U.S. citizens, lawful permanent residents, and other work-authorized employees were among the estimated 100,000 workers who lost their jobs as a result of the approximately 800,000 no-match letters sent by SSA in 2002.¹ Job losses were most acute in low-wage industries such as agriculture, cleaning, construction, food service, and health care. For example, no-match firings devastated the workforce at Stanford Medical Center in Palo Alto, California, where 83 percent of workers on a no-match list lost their jobs.² Based on the severity of the 2002 job losses, the U.S. Chamber of Commerce declared an official labor shortage and urged SSA to change its policy.³ Under pressure from the Chamber and employers, as well as enormous pressure from

¹ Mary Beth Sheridan, "Records Checks Displace Workers: Social Security Letters Cost Immigrants Jobs," *The Washington Post*, Aug. 2, 2002.

² "A Crackdown on Workers," *The San Francisco Chronicle*, Aug. 12, 2002.

³ "The Immigration Crisis," Cox News Service, Aug. 14, 2002.

civil, immigrant, and worker rights advocates across the country, SSA agreed to decrease the number of no-match letters.⁴

No-match firings across the nation continued into 2003, however. In August, Peco Foods, Inc. of Canton, Mississippi terminated about 200 workers in response to no-match letters.⁵ That same year, Suncast, Inc., a Chicago-area outdoor garden product manufacturer, terminated over 100 employees in response to no-match letters.⁶ By the end of 2003, a national survey conducted by the University of Illinois at Chicago's Center for Urban Economic Development determined that approximately 53.6 percent of employers responding to no-match letters terminated the listed workers.⁷ Despite strong warnings to employers that appeared on the face of the letter, the study found that workers were summarily fired, often without any opportunity to correct the no-match discrepancies or any explanation of the no-match process.⁸

Documented examples of adverse employment actions against U.S. citizens and other work-authorized noncitizens include:

- Mr. Samuel Harris. In late summer of 2003, Mr. Samuel Harris,⁹ an African American man in Virginia, was fired from his job because his employer received an SSA no-match letter regarding a discrepancy with respect to Mr. Harris's SSN. Mr. Harris, who is a U.S. citizen, went to the local SSA office to correct his information. Apparently, SSA had issued Mr. Harris a duplicate SSN that belonged to a deceased person. Although Mr. Harris was able to correct his information with SSA, his employer refused to continue to employ him, thinking that Mr. Harris was engaging in identity theft or similar wrongdoing. He was fired and out of work for several months and had to file an arbitration case to get his job back.¹⁰
- Mrs. Noelle Lopez. In July 2002, Mrs. Lopez, a worker from North Carolina, was injured on the job. While she was on leave, her employer notified her that it had received an SSA no-match letter for her. She corrected the discrepancy, which was based on a typographical error in the W-2 that her employer had filed with SSA. Weeks later, while still on leave for her injury, the employer asked Mrs. Lopez to reverify that she continued to be eligible to work in the United States because her work authorization had expired. She had employment authorization based on Temporary Status Program (TPS), and had already applied for a renewal, but the Immigration and Naturalization Service (INS) sent her an Employment

⁴ Chirag Mehta, et al., *Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights* (Center for Urban Economic Development, University of Illinois at Chicago, Nov. 2003) at 7, available at <http://www.uic.edu/cuppa/uicued/npublications/recent/SSAnomatchreport.pdf> (hereinafter "Mehta"); *Basic Information Brief: SSA "No-Match" Letters* (NILC, Feb. 2005) (hereinafter "NILC Brief") at 2, available at http://www.nilc.org/immsemplymnt/SSA-NM_Pack/Basic_Info_Brief_No-Match_Ltrs-2-15-05.pdf.

⁵ Peggy Matthews, "Plan to Round Up, Deport Illegals Angers Activists," *The Clarion-Ledger*, Aug. 12, 2003.

⁶ Stephanie Blozen, "Latinos Start Boycott Against Batavia Firms," *The Chicago Tribune*, Aug. 12, 2003.

⁷ Mehta, *supra* note 4, at 13.

⁸ *Id.* at 15.

⁹ All individual worker names have been changed to protect their identities, but the names of workers and employers drawn from media sources are reproduced here as published.

¹⁰ NILC Brief, *supra* note 4, at 4.

Authorization Document (EAD) with someone else's picture. Although she was able to straighten this problem out, when her doctor told her she could go back to work, the employer denied her a job because she had "too many immigration problems."¹¹

The proposed rule only exacerbates this risk of unnecessary and unjust firings. Past experience indicates that, rather than navigating a complex series of steps and timetables to a "safe-harbor," panicked and confused employers will simply fire all workers whose names appear on the no-match list. The employer confusion across U.S. worksites is already detectable.

- Mr. James Heggen. Shortly after DHS issued the proposed rule, an employer in Massachusetts refused to hire Mr. Heggen, a lawful permanent resident of the United States, for a permanent clerical position due to a typographical error on his Social Security card. Mr. Heggen's name appears as "Heggen" on his alien registration card or "green card," but on his Social Security card, his name is spelled "Hegen"—with one less "g." Based on this missing "g," the employer denied Mr. Heggen a permanent position, claiming that it had to be *more careful in these times*. Mr. Heggen is Black and was born in the United Kingdom. His parents immigrated to the U.K. from the Caribbean. Together, the family immigrated to the United States when Mr. Heggen was a child. Because he and his parents received their permanent immigration documents decades ago, Mr. Heggen cannot file for a correction of his Social Security card locally, and, therefore, not quickly. Correcting this minor Social Security discrepancy could take several months. Frustrated after being denied this permanent position, Mr. Heggen contacted a local community-based legal services organization for assistance. This organization immediately sent a letter to the employer, setting forth the potential illegality of the employer's actions. Subsequently, the employer hired Mr. Heggen on a temporary basis. The week of August 7, 2006, after additional consultation with the organization, the employer hired Mr. Heggen for the permanent position.¹²

Recent media accounts of the proposed rule reveal that employers are already contemplating massive no-match firings as a response to the new rule. A construction company president told the *Tampa Tribune*, after attending a seminar for employers on the proposed rule, that some of his company's workers "won't be working for us in the future" if the rule is implemented and that he had great concern about "filling those spots."¹³ *The Ledger* of Lakeland, Florida, reported that while the proposed rule may lead to penalties for employers, "workers, in turn, would lose their jobs," an effect which for Florida's largest growers' organization amounts to a "threat to national security."¹⁴ An employment attorney representing several large employers reported to the *Washington Post* that, "From a practical standpoint, [the proposed rule] will have the effect [of employers] having to terminate employees. It will be devastating to many

¹¹ *Id.*

¹² Telephone interviews with Ingrid Nava, Employment Unit, Greater Boston Legal Services, Boston, Mass., July 28, 2006, and Aug. 10, 2006.

¹³ Lindsay Peterson, "Proposal Targets Illegal Immigration," *The Tampa Tribune*, June 15, 2006.

¹⁴ Kevin Bouffard, "Proposal May Pinch Growers," *The [Lakeland, FL] Ledger*, July 11, 2006, available at <http://www.theledger.com/apps/pbcs.dll/article?AID=/20060711/NEWS/607110399/1004>.

industries if people comply with it.”¹⁵ The proposed rule thus has placed the livelihoods of hundreds of thousands—possibly millions—of workers and their families on the line.

The Proposed Rule Will Result in Increased Citizenship Status, National Origin, and Racial Discrimination

The proposed rule creates two sets of potential employment discrimination: discriminatory firings and discriminatory refusal to hire. A disproportionate number of names on no-match lists are “foreign-sounding” names of newcomers to the United States, and many SSA letters are sent to employers with large numbers of newcomers in their workforces. Employers who believe they will face business disruption due to the letters have an incentive to prefer employees they think are less likely to receive the letters. Employers may also choose to simply dismiss employees who appear or sound foreign. These discriminatory employment actions would run afoul of federal and state antidiscrimination laws and other worker protections and lead to costly and protracted wrongful termination litigation.

Employment discrimination against authorized noncitizen workers—particularly against Latinos, Latinas, and Asians—was rampant after the passage of the 1986 Immigration Reform and Control Act (IRCA). A 1990 U.S. General Accounting Office (GAO) study reported a pattern of discrimination that resulted solely from employer sanctions, including discrimination on the basis of foreign accents or appearance and preferences of certain authorized workers over others. In fact, the GAO estimated that an average of 19 percent of employers—almost one in five—participated in one or more discriminatory practices as a result of the 1986 law. These results were confirmed by nearly a dozen studies conducted locally during the 1990s by human rights commissions and other organizations, which also found significant discrimination resulting from the implementation of employer sanctions.¹⁶

Employment discrimination has also increased since SSA began sending close to a million no-match letters in 2002. The number of immigration-related unfair employment referrals and investigations fielded by OSC has risen dramatically. From 1994 to 2000, OSC conducted only 20 investigations into firings stemming from employers that fired workers based on SSN verification matters. From 2001 to 2003, OSC opened 29 investigations. Three of the investigations opened after 2001 resulted in settlements favorable to workers, and ten investigations were open as of 2003.¹⁷ Although recent statistics are unavailable, OSC recognized in its April 2005 quarterly newsletter that OSC “staff members frequently provide assistance to workers” who face adverse employment actions by employers based on the no-match letters.¹⁸

¹⁵ Cindy Skrycki, “DHS Wants Workers, Papers to Match,” *The Washington Post*, July 11, 2006 (quoting Monte B. Lake, an employment and immigration attorney).

¹⁶ *Immigration Reform: Employer Sanctions and the Question of Discrimination*, GGD-90-62 (GAO, Mar. 29, 1990), available at <http://archive.gao.gov/d24t8/140974.pdf>.

¹⁷ Mehta, *supra* note 4, at 25.

¹⁸ *OSC Update* (OSC, U.S. Department of Justice, Civil Rights Division, Apr. 2004) at 2.

The Proposed Rule Will Result in Increased Employer Retaliation Against Workers Who Exercise Their Workplace Rights

The proposed rule also places all workers at a higher risk of employer retaliation for labor organizing and raising complaints about worksite conditions. Unscrupulous employers already use the SSA no-match letter to stymie organizing campaigns and to retaliate against workers who have been injured on the job or complain of unpaid wages or other labor violations. In documented cases (including arbitration decisions) from across the country, employers initially ignored SSA no-match letters and then decided to use them as a pretext to fire workers who participated in efforts to improve working conditions and wages. The proposed rule would only exacerbate this problem.

- North Carolina. In July 2006, during a heated legal battle over recent union election results, at least 24 Latino immigrant workers at a modular building construction company were suspended without pay because they were listed on a no-match letter. All 24 had voted to unionize. Many of the 24 have also initiated race and sex-based discrimination charges against their employer with the EEOC. A former supervisor at the company reported to the press: “These workers have been used and abused. As supervisors, we were told we needed production and to crack the whip to get it. We were told not to worry because these workers are just wetbacks and have no legal rights.” A large group of African American workers have also filed complaints against this company with the EEOC. To protest the no-match firings, workers walked out on the day the firings took place. The workers and their union are also contemplating race and sex-based discrimination class action lawsuits.¹⁹
- California. In 2006, after months of intensive organizing, a group of nursing home workers, mainly immigrant Latina workers, marched to their manager’s office to announce that they had joined together as a union in order to improve wages and working conditions and would seek formal recognition for their union under federal labor law. That afternoon, a head manager called one of leaders of the march into the office, pulled out a photocopy of that worker’s Social Security card, wrote “NO GOOD” in bold letters across the photocopy, and suspended the leader without pay. Angered by management’s action, the workers from the morning march crowded back into the manager’s office and demanded reinstatement for their suspended colleague, denouncing management’s action as a blatant anti-union tactic. Caught off guard, the manager immediately reinstated the suspended union leader. While these workers were successful, other workers have not been able to mobilize as effectively against manipulation of SSN verification issues by employers.²⁰
- Oregon. In 2006, a Latina immigrant worker had been working as a housekeeper at an assisted living center. When it came time for her to qualify for health insurance and other benefits, the employer produced an SSA no-match letter. The worker suspects that the

¹⁹ Telephone interview with Homer Marmalejo, United Brotherhood of Carpenters and Joiners of America, organizer, Aug. 8, 2006; see also Bob Shiles, “Roger Carter Suspends More Than 20 Undocumented Workers,” *Kinston [NC] Free Press*, July 19, 2006.

²⁰ Interview with Guadalupe Palma, Service Employees International Union, Long Term Care Division, Coordinator III, in Los Angeles, CA, Aug. 1, 2006.

employer had received the letter earlier, but held it just before the benefits would have kicked in.²¹

- Oregon. In 2003, an employer in Oregon approached a group of workers who had complained about violations of their minimum wage and overtime rights, alleging that it had just received an SSA no-match list. The employer was requiring the workers to reverify their immigration status, and would not provide a copy of the letter to workers. Interestingly, this was *before* SSA began sending no-match letters to employers in March 2003.²²
- New York. In 2002, a group of immigrant workers in New York went on strike to protest against poor working conditions. After receiving a no-match letter that the employer had initially ignored, the employer decided to use the no-match letter as a basis to reverify the immigration status of workers involved in the strike.²³

If immigrant workers cannot enforce labor laws or organize under existing labor laws, it is less likely that native workers can assert these rights. The proposed rule thus poses enormous challenges for all low-wage workers. All workers face an increased risk of firings, retaliation, and abuse. U.S. citizens and authorized noncitizen workers could lose their jobs in discriminatory firings. Hundreds of thousands—possibly millions—of working families could be harmed, and therefore DHS should suspend this proposed rule immediately.

Although the Proposed Rule Will Cause Enormous Upheavals in the Workplace, the Rule Has *No* Impact on Undocumented Immigration and Will Only Expand the Unregulated Underground Cash Economy

Our experience with SSA no-match firings and workplace audits in the context of our current broken immigration system is clear: *the fired workers will not leave the country*. They will simply find other more marginal jobs, most likely outside of the traditional economy and “off the books” in the unregulated underground cash economy. Moreover, although the proposed rule purports to provide employers with general guidance, DHS is in fact imposing a new set of legal obligations on millions of employers. These new obligations will increase pressure on “good” employers to take employees off the books, which also leads to growth of the underground economy. Expansion of the underground economy results in potentially billion-dollar losses in federal, state, and local tax revenues, unfair competition, and further exploitation and abuse of all workers by unscrupulous employers. This result is nearly inevitable for any “crackdown” on workers and employers that is not accompanied by serious and practical reforms of the underlying immigration system.

No-Match Firings Will Not Decrease the Number of Undocumented Workers in the United States

Based on our recent experience under the current broken immigration system, high levels of SSA no-match firings will *not* drive undocumented workers and their families away from the United

²¹ Brent Hunsberger, “Crackdown Coming on Bogus Papers,” *The Oregonian*, June 25, 2006.

²² NILC Brief, *supra* note 4, at 5.

²³ *Id.* at 4.

States. Instead, these workers immediately accept the next available low-wage job, even if it is off the books, out of sheer economic necessity, given the levels of poverty at which they and their families and communities must survive.²⁴ When poverty is combined with an employer demand for below-market wage rates and an absence of government enforcement of labor protections in low-wage industries, undocumented workers will almost certainly remain in the United States even after a no-match firing. The vast majority will reenter the labor force in unreported, cash-based employment relationships where they face further exploitation and abuse. Economists describe this effect as “churning” or unproductive turnover.²⁵ The SSA no-match program has been criticized for creating “policy-induced churning in local labor markets as workers are either fired or quit their jobs only to join the overcrowded pool of workers vying for positions in traditional immigrant occupations.”²⁶ Fired workers do *not* simply leave the United States.

Undocumented workers constitute a large and growing segment of the workforce in the nation as a whole. The share of these workers in industries such as agriculture, cleaning, construction, food service, and other low-wage occupations is approximately three times the share of native workers in these types of jobs.²⁷ On any given day in our nation, more than 250,000 undocumented immigrants work as janitors, 350,000 work as housekeepers and maids, and 300,000 are groundskeepers.²⁸ In the aggregate, such workers are an integral part of the U.S. economy, constituting a full 5 percent of the civilian labor force or 7.2 million workers.²⁹

Unscrupulous employers have long taken advantage of the availability and reduced cost of undocumented immigrant labor in both the traditional economy and in the underground economy. Undocumented workers are more likely to earn below minimum wage (two-thirds of undocumented workers earn below minimum wage compared to one-third of all workers).³⁰ IRCA’s failed employer sanctions regime, along with the lack of government enforcement of labor protections in low-wage industries, has given free rein to unscrupulous employers. Such

²⁴ It has been estimated that nearly half of all immigrant workers are low-income, defined as earning less than 200 percent of the minimum wage. Randy Capps, et al., *A Profile of the Low-Wage Immigrant Workforce* (The Urban Institute, Nov. 2003) at 2, available at http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf. Fifty-six percent of all young children of immigrants live in poverty; sixty-four percent of foreign-born children of immigrants live in low-income families. In immigrant families where both parents work, 24 percent of children live in poverty compared to 11 percent of the children of native workers. Randy Capps, et. al, *Health and Well-Being of Young Children of Immigrants* (The Urban Institute, Feb. 2005) at 2, available at http://www.urban.org/UploadedPDF/311182_immigrant_families_5.pdf.

²⁵ See Avner Ahituv and Robert I. Lerman, *Job Turnover, Wage Rates, and Marital Stability: How Are They Related?* (The Urban Institute, Nov. 2004) at 5, available at <http://www.urban.org/publications/411148.html> (distinguishing “churning” and unproductive turnover from worker mobility).

²⁶ Mehta, *supra* note 4, at 18.

²⁷ Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics: Basic Briefing Prepared for Task Force on Immigration and America’s Future* (Pew Hispanic Center, June 2005) at 26–28, available at <http://pewhispanic.org/reports/report.php?ReportID=46>.

²⁸ Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.* (Pew Hispanic Center, Mar. 2006) at 11–12 (hereinafter “Passel”), available at <http://pewhispanic.org/files/reports/61.pdf>.

²⁹ *Id.* at 9.

³⁰ Jeffrey S. Passel, et al., *Undocumented Immigrants: Facts and Figures* (The Urban Institute, Jan. 2004) at 2, available at <http://www.urban.org/url.cfm?ID=1000587>.

employers routinely manipulate immigration law into a tool that sharpens wage differentials between undocumented and documented low-wage workers and suppresses wages for all. Even legitimate employers have admitted to the temptation to engage in similar practices or risk going out of business.³¹ In recent years, Department of Justice (DOJ) and DHS officials have finally begun to recognize these wage differentials and the harm caused by an economic system that produces lower wages based on differences in immigration status.³²

Increasingly, there is evidence demonstrating that raising the wages and working conditions of low-wage workers will actually reduce undocumented immigration by making the existing workforce relatively more attractive to employers.³³ Closing the wage differentials between differently work-authorized individuals and ensuring that all low-wage workers—current and future, documented and undocumented—have similar levels of mobility and enjoy full labor protections are the more effective ways to prevent undocumented immigration to the United States and to hold exploitative corporations accountable. A structural demand for undocumented labor can be reduced only by building a strong floor underneath all workers.

Poorly-conceived, punitive enforcement-only schemes like the proposed rule will force millions into the underground economy. The proposed rule will not decrease the numbers of undocumented workers in the United States, nor will it decrease their levels of employment. It will only decrease wage levels and deepen wage differentials based on immigration status, creating even more economic incentive for employers to hire undocumented workers. Accordingly, DHS should suspend this proposed rule and work with Congress and the Administration to pass comprehensive immigration reform that will address the underlying issue of undocumented migration.

The Imposition of New Legal Obligations on Millions of Employers Will Push Them into the Underground Economy

Although the proposed rule purports to provide employers with general guidance, DHS is in fact imposing a new and onerous set of legal obligations on millions of employers. The rule essentially deputizes employers as *de facto* immigration enforcement officers.

The proposed example of what constitutes “constructive knowledge,” at Section 274a.1(l)(1)(iii)(B) of the proposed rule, is not the employer’s *receipt* of a no-match letter, but

³¹ K. M. Donato, et al., “Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act,” *Demography* 29 (2005) at 139–58.

³² In the prosecution of Tyson Foods for the hiring of undocumented workers, assistant U.S. Attorney John P. MacCoon stated: “This trial is about corporate greed. . . . It’s about what happens when a corrupt corporate culture makes the bottom line the all-consuming priority.” Sherri Day, “Prosecutors in Smuggling Case against Tyson Contend Trial Is about Corporate Greed,” *The New York Times*, Feb. 6, 2003. In the Tyson Foods case, the government hinged its \$140 million pre-indictment settlement demand against defendant Tyson Foods on a novel “wage suppression” theory. The government claimed that Tyson Foods had reaped enormous profits by recruiting undocumented workers into its ranks and paying them at below-market wage rates. In his authorization of trial for the case, DHS Secretary Chertoff fully endorsed the DOJ’s attempts to recover “suppressed wages.” Thomas Green, et al., “Deputizing—and Then Prosecuting—America’s Businesses in the Fight against Illegal Immigration,” *Amer. Crim. L. R.*, June 22, 2006, at 5, 7.

³³ Ivan Light, “How L.A. Kept Out a Million Migrants,” *The Los Angeles Times*, Apr. 16, 2006.

the employer's *failure to act* after receiving a no-match letter. By defining the "failure to take reasonable steps" upon receipt of a no-match letter as creating constructive knowledge, the proposed regulation makes it necessary for a law-abiding employer to take some action in response to a no-match letter. Therefore, as set forth in Sections 274a.1(l)(2)(i) and 274a.1(1)(2)(iii) of the proposed rule, an employer who receives a no-match letter is essentially forced to apply due diligence to a series of complicated steps that demonstrate correction of each "no-match" discrepancy. If the employer fails to resolve the correction in the allotted time, the employer faces a finding that it had constructive knowledge of hiring an undocumented worker. This finding could be used against the employer in a federal prosecution that could result in civil and criminal penalties. This is a radical change from the longstanding position that the various federal agencies implicated in this SSA no-match issue have taken.

Employers who wish to avoid loss of profits and productivity while minimizing exposure to the heightened risk of federal immigration liability under the proposed rule will be forced into one of three no-match evasion strategies:

First, employers will take their businesses off the books and into the underground economy. For one thing, keeping workers off the books means avoiding government scrutiny and additional no-match letters. For another, there are immediate financial incentives for employers to keep workers off the books. The proposed rule thus has a perverse effect of targeting and punishing "good" employers who keep good records and want to stay on the books. These good employers will be put at a disadvantage compared with "bad" employers with whom they compete who pay in cash and do not keep records and who consequently will not be reached by the new rule.

Second, employers will intentionally misclassify their employees as "independent contractors" as a means of evading this responsibility.

Finally, employers will engage in subcontracting schemes by interposing intermediary labor contractors between themselves and their employees, pretending their workers are employees of these sham contractors and exposing workers to marginal, fly-by-night employment practices by middlemen.

Growth of the Underground Economy Results in Massive Losses to State and Federal Coffers and Unfair Competition

A policy that results in more employers choosing to keep their employees off the books or intentionally misclassifying employees is harmful to state and federal government coffers and creates unfair competition against "good" employers. Certain employers will see a clear and immediate economic advantage to taking their employees off the books. At a minimum, they will reduce their payroll costs by an average of 8 percent by ceasing to pay costs for federal legally required benefits, including Social Security, Medicare, unemployment insurance and workers' compensation.³⁴ For employers who, as a policy or due to a collective bargaining agreement, provide other benefits, such as life, health or disability insurance, paid leave, or retirement and savings benefits, the potential total savings could add up to an average of 29.9

³⁴ *Employer Costs for Employee Compensation* (U.S. Department of Labor Bureau of Labor Statistics, Mar. 2006), available at <http://www.bls.gov/news.release/ecec.nr0.htm>.

percent of total payroll costs.³⁵ This means massive losses to state and federal coffers and a competitive advantage over employers who are not cutting these costs.

The projected loss in federal tax revenues ranges from \$19 million to \$1.9 billion annually. This range is derived from the following figures: In June 2006, the total U.S. labor force was estimated at 144.4 million workers.³⁶ As set forth above, about 7.2 million undocumented workers were employed in March 2006, accounting for a full 5 percent of the civilian labor force.³⁷ International accounting and consulting firm Price Waterhouse Coopers has projected that over 5 million U.S. workers would be misclassified as independent contractors (to avoid paying legally required benefits) in 2005 and that the federal tax revenue losses due to misclassification in 2004 would be \$4.7 billion.³⁸

Based on this projection and these worker population estimates, if only one-third of all undocumented workers or at least two million workers, or 1.4 percent of all U.S. workers, were to be pushed off the books as a result of the proposed regulation, the loss to federal coffers would be approximately \$1.9 billion in one year. Alternatively, making a conservative assumption that 100,000 workers are pushed off the books as a result of the proposed regulation, the loss to federal coffers would be approximately \$19 million annually.

The losses to the Unemployment Insurance (UI) trust fund alone ranges from \$277 million to \$13.8 million per year. This range is derived from the following figures: A study for the U.S. Department of Labor estimating the impact of employee misclassification on the UI trust fund alone was computed for the period from 1990–1998.³⁹ Assuming a 1 percent level of misclassification, the study determined that the loss would be an annual average of \$198 million to the UI trust fund alone.

Based on this study for the DOL, assuming that at least 2 million workers were to be pushed off the books as a result of the proposed regulation, the impact on the UI trust fund alone would be an average of over \$277 million annually. Alternatively, assuming that only 100,000 workers, or .07 percent of the workforce, are pushed off the books (the estimated number that lost their jobs due to no-match letters in 2002), the impact on the UI trust fund alone would be \$13.8 million per year.

Employers who go off the books will experience an enormous net savings in taxes, which will create a competitive advantage for them over employers whose payroll-related expenses are

³⁵ *Id.*

³⁶ *Employment Situation Summary* (U.S. Department of Labor Bureau of Labor Statistics, July 2006), available at <http://www.bls.gov/news.release/empsit.nr0.htm>.

³⁷ Passel, *supra* note 28, at 11–12.

³⁸ *Projection of the Loss in Federal Tax Revenues Due to Misclassification of Workers* (Coopers and Lybrand, now Price Waterhouse Coopers, for Coalition for Fair Worker Classification, June 1994) at 5, available at [http://www.carpenters.org/misclassification/State and Other Research Studies/Coopers-Lybrand--Projection of Loss of Federal Rev Due to Missclassification.pdf](http://www.carpenters.org/misclassification/State%20and%20Other%20Research%20Studies/Coopers-Lybrand--Projection%20of%20Loss%20of%20Federal%20Rev%20Due%20to%20Missclassification.pdf).

³⁹ *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* (Planmatics, Inc. for U.S. Department of Labor Employment and Training Administration, Feb. 2000) at 87, available at <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

higher because they are playing by the rules. A report prepared for the U.S. Department of Labor observed: “[C]ost considerations and aggressive competition are twin pressures that induce an employer to engage in behavior that creates an inequitable playing field in the business community for employers who correctly classify their employees and pay taxes.”⁴⁰

The State of California even developed a joint-agency strike force to address abuses created in the underground economy. This strike force has observed the impact of this employer behavior on “good” employers: “[W]hen businesses operate in the underground economy, they gain an unfair competitive advantage over businesses that comply with various business laws. This causes unfair competition in the marketplace and forces law-abiding businesses to pay higher taxes and expenses.”⁴¹ When the desire to avoid government scrutiny is combined with the immediate economic savings from avoiding payment of taxes and employer-provided benefits, some employers will see a clear competitive advantage in taking their workforce underground. The implementation of this proposed rule thus disadvantages those employers who play by the rules.

DHS Should Suspend The Proposed Rule Because the SSA No-Match Program Is Ill-Suited As an Immigration Enforcement Tool

The SSA No-Match Program Cannot Meet the Needs and Objectives of Immigration Enforcement Because the SSA Database Is Not an Immigration Database

Each year employers send IRS Forms W-2 to SSA indicating their employees’ annual earnings. SSA matches each worker’s name and SSN to the Numerical Identification File (NUMIDENT), which is SSA’s primary database of SSN holders.⁴²

NUMIDENT is *not* an immigration database and is made up of information collected from applications for initial or replacement SSNs.⁴³ The database contains only limited and incomplete immigration information.⁴⁴

⁴⁰ *Id.*

⁴¹ *2003 Annual Report: California Joint Enforcement Strike Force on the Underground Economy* (Employment Development Department, State of California, June 30, 2004) at 3, available at <http://www.edd.ca.gov/taxrep/txueo03.pdf>; see also Francois Carerre, et al., *The Social and Economic Costs of Employee Misclassification in Construction* (Construction Policy Research Center at Harvard Law School and Harvard School of Public Health, Dec. 2004), at 7 (noting that “[m]isclassification creates challenges for compliant employers because it creates an uneven ‘playing field.’ Employers who respect the law and classify employees appropriately have a higher wage bill and can get underbid by contractors that do not comply and have lower costs.”).

⁴² *Report to Congress on the Basic Pilot Program* (U.S. Citizenship and Immigration Services, June 2004) (hereinafter “USCIS Report”) at 2.

⁴³ Kevin Jernigan, “Eligible to Work? Experiments in Verifying Work Authorization,” *Migration Policy Institute Insight*, Nov. 2005 (hereinafter “Jernigan”) at 3.

⁴⁴ The database “contains information on name, date of birth, and citizenship status of persons issued Social Security cards, which enables SSA to confirm work authorization for U.S. citizens and some noncitizens who are permanently work authorized.” USCIS Report, *supra* note 42, at 2. SSA collects immigration status information only on those persons who are work-authorized incident to status, such as lawful permanent residents, asylees, and refugees. *Id.* at 4.

Even the limited immigration status information in NUMIDENT regularly becomes inaccurate because it is *not* automatically updated when a worker's immigration status or work authorization changes.⁴⁵ NUMIDENT is particularly inaccurate with respect to work-authorized noncitizens in its use with the Basic Pilot Program. According to U.S. Citizenship and Immigration Services (USCIS), work authorization for more than 50 percent of the cases of noncitizens could not be electronically confirmed by NUMIDENT, compared with 0.2 percent for native-born citizens.⁴⁶

If there is a match of the SSN and the first seven letters of the surname between NUMIDENT and the W-2, the earnings are posted to the individual worker's Master Earnings Record. About 10 percent of submissions *cannot* be matched. SSA then does more than 20 "front-end validation routines," which are automated processes that manipulate names and SSNs to correct mistakes and find a correct match.⁴⁷ These "front-end validations" do *not* involve collection or use of immigration data.

If a valid record cannot be identified, SSA posts the earnings to its Earnings Suspense File (ESF). The ESF contains earnings reports with names and SSNs that do not match SSA records. SSA then performs "back-end" processes to try to match the earnings. SSA's "back-end" processes do not involve collection or use of immigration data.

The SSA back-end processes include using corrections generated through IRS processes. The back-end processes also include generating SSA no-match letters to employees and employers.⁴⁸ No-match letters are just one of the "back-end" processes that SSA regularly uses to ensure that earnings are properly attributed to workers. These letters are sent by SSA to inform employers and employees that the worker is not getting proper credit for their earnings due to a discrepancy.

Immigration Status or Lack of Immigration Status Cannot Be Presumed from Posting to the ESF

The ESF contains hundreds of millions of records, and a "significant number of earnings reports in the ESF still belong to U.S. citizens and work-authorized noncitizens."⁴⁹ The percentage of ESF records belonging to unauthorized workers is entirely unknown. The majority of reinstatements (matching to a worker's Master Earnings Record) are still made to U.S.-born citizens.⁵⁰ ESF records do not in any way indicate immigration status. The information in ESF

⁴⁴ The SSN application form itself focuses on noncitizens' work authorization rather than immigration status. See Form SS-5 (May 2005), available at <http://www.ssa.gov/online/ss-5.pdf>.

⁴⁵ Jernigan, *supra* note 43, at 12.

⁴⁶ USCIS Report, *supra* note 42, at 4–5.

⁴⁷ *Social Security, Better Coordination Among Federal Agencies Could Reduce Unidentified Earnings Reports*, GAO-05-154 (GAO, Feb. 2005) (hereinafter "GAO Feb. 2005") at 7–8.

⁴⁸ *Id.*

⁴⁹ *Immigration Enforcement: Benefits and Limitations to Using Earnings Data to Identify Unauthorized Work*, GAO-06-814R (GAO, July 11, 2006) (hereinafter "GAO July 2006") at 8.

⁵⁰ *Id.*; see also GAO Feb. 2005, *supra* note 47, at 18.

consists of the worker's name, SSN, employer's identification number, and the earnings amount.⁵¹

The ESF simply consists of information on workers whose records do not match SSA records, for reasons that include errors or obsolete data, lack of an SSN, missing first or last names, or use of nonalphabetic characters.⁵² The lack of an SSN is a particularly instructive example of an innocent basis for inclusion in the ESF that is frequently and wrongly cited as a basis for determining lack of work authorization. Both the SSA and the IRS advise employers to use all zeros or to write in "*applied for*" when the worker has applied for but not yet received an SSN.⁵³

SSA no-match letters are therefore *not* reliable indicators of work authorization or immigration status. There is no way to accurately determine whether a SSA no-match letter is the result of typographical error, out-of-date information, or some other legitimate reason, let alone to determine an illegitimate reason.⁵⁴ The SSA itself has repeatedly recognized that its no-match letter does not indicate immigration status or lack of authorization to work. The current no-match letter explicitly states that a worker's identification in the letter "makes no statement" about his or her immigration status.⁵⁵ The SSA database simply does not have the capacity to meet the needs and objectives of an immigration enforcement program. Because of these limitations, this proposal will only result in an adverse impact on workers and our economy, including the increased discrimination and abuse of workers described above. DHS should therefore suspend this rule.

The Rule Modification Would Give DHS Indirect Access to Tax Information It Cannot Access Directly

DHS should also suspend this proposed rule because it attempts to indirectly access sensitive tax information that is protected by federal law. Specifically, Section 6103 of the Internal Revenue Code protects the confidentiality of taxpayer returns and taxpayer information and provides only limited exceptions to the sharing of personal identifying data. This confidentiality is deemed essential to voluntary tax compliance. The GAO has explicitly recognized that the ESF includes "sensitive taxpayer information that is protected by various laws and regulations" and that statutory authority would be required to provide DHS access.⁵⁶

⁵¹ GAO July 2006, *supra* note 49, at 8.

⁵² *Id.*; see also GAO Feb. 2005, *supra* note 47, at 11–12.

⁵³ GAO Feb. 2005, *supra* note 47, at 11, n. 4.

⁵⁴ In testimony last month before the House Committee on Ways and Means, the Commissioner of Social Security emphasized that the source of SSA's database information is the Form W-2, and "there is no citizenship or immigration status information on that document." See Statement of The Honorable Jo Anne B. Barnhart, Commissioner, Social Security Administration, *Testimony Before the House Committee on Ways and Means* (July 26, 2006), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5172>.

⁵⁵ Letter, Hurt, Assoc. Comm. for Central Op. SSA (Oct. 9, 2004) (hereinafter "Hurt Letter").

⁵⁶ GAO July 2006, *supra* note 49, at 8.

No statutory authority currently exists to provide DHS with access to this information.⁵⁷ As a result, DHS cannot presently obtain no-match information directly from SSA.

SSA no-match letters to employers frequently include taxpayer identity and return information. This rule allows DHS to commandeer the information contained in no-match letters and therefore allows DHS to circumvent the tax code's confidentiality restrictions. DHS should not be permitted to do by rule change what it cannot do without additional statutory authority.

Breaching the confidentiality of tax records would have the counterproductive result of discouraging tax compliance. Moreover, it would encourage employers and workers alike to enter the underground economy and not pay into our tax and Social Security systems.

The Proposed Rule Dramatically Alters the Definition of “Constructive Knowledge” and Makes a Stark Departure from Existing Case Law and Longstanding Federal Guidance on No-Match Letters

As an evidentiary matter, an employer's receipt of an SSA no-match letter by itself does not constitute “constructive knowledge” of immigration status under current law. The proposed rule alters the definition of constructive knowledge and makes a stark departure from existing case law and longstanding federal guidance in this area.

In the seminal *Collins Food Intn'l v. I.N.S* case, the Ninth Circuit cautioned against the expansion of the doctrine of constructive knowledge: “IRCA . . . is delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens. The doctrine of constructive knowledge has great potential to upset that balance, and it should not be expansively applied.” 948 F.2d 549, 554-555 (9th Cir. 1991).

Accordingly, the court instructed that “[a] finding of constructive knowledge requires “willful blindness” and “to expand the concept of constructive knowledge . . . would not serve the intent of Congress, and is certainly not required by [IRCA].” *Id.* at 555.

Contrary to DHS's assertions in the supplemental text, the proposed regulation would extend the definition of “constructive knowledge” well beyond the holdings in *Collins* and in *Mester Manufacturing Co. v. INS*, 879 F.2d 561 (9th Cir. 1989), and other constructive knowledge cases arising under the employer sanctions provision of the Immigration and Nationality Act, 8 U.S.C. § 1324a.

Indeed, the supplemental text misrepresents *Mester* by stating that the employer in that case merely received some evidence that the employee was not authorized to work. This is simply incorrect, and significantly downplays the type of information received by the employer, and relied upon by the court in its decision. In *Mester*, the court held that an employer had constructive knowledge of a worker's unlawful status when it received information directly *from*

⁵⁷ In contrast, such authority exists with respect to the Nonwork Alien File, which includes information about workers who are working though they have been issued nonwork SSNs.

the INS that an employee was an “illegal alien” but did not terminate the employee for two weeks. *Id.* at 567–68.

Consistent with *Mester*, cases have found constructive knowledge only where the employer has been provided specific information from a source knowledgeable about a worker’s immigration status, where the employer failed to complete the Form I-9 (coupled with other suspicious circumstances), or in egregious circumstances. See *U.S. v. Jonel, Inc.* 1998 WL 804705 (OCAHO), *14 (Labor Department notice to employer that workers were unauthorized constituted constructive knowledge); *New El Ray Sausage Co. v. I.N.S.*, 925 F.2d 1153, 1157 (9th Cir. 1991) (INS gave employer “specific and detailed information” that it was employing undocumented workers); *U.S. v. American McNair*, 10CAHO 285 (1991) (employee failure to present any work authorization documents and notification of employer that he was ineligible for amnesty constituted constructive knowledge); *U.S. v. Fragale*, 1999 U.S. Dist. LEXIS 12616 (E.D. Pa. 1999) (constructive knowledge when human resources manager and foreperson in charge of hiring told employer that a large percentage of workforce was undocumented, and employer had received notice from INS that some workers were undocumented).

Moreover, in its attempt to convert the SSA no-match letter into a method of verifying immigration status or authorization to work, the proposed rule directly contravenes longstanding federal guidance from SSA, OSC, and former INS General Counsel.

SSA’s position on no-match letters and immigration enforcement is set forth in clear terms on the face of the letter itself. The letter provides the following warning to employers:

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 a statement about an employee’s immigration status.⁵⁸

For years, INS General Counsel has instructed employers along identical lines:

If the document or documents presented to verify work authorization appear on their face to be genuine and to reasonably relate to the individual, the subsequent receipt of the SSA letter mentioned above does *not* impose any affirmative duty upon the employer to investigate further into an employee’s eligibility to work in the United States. In addition, the receipt of this SSA letter by the employer, *without more*, would *not* be sufficient to establish constructive knowledge on the part of the employer regarding the employment eligibility of the named employee.⁵⁹

⁵⁸ Hurt Letter, *supra* note 55.

⁵⁹ Letter, Virtue, Acting Gen. Coun. INS, HQ 274A (Feb. 17, 1994) (emphasis added); for reference, the LWIW Coalition has attached this letter as Exhibit 1 to this comment.

OSC has also provided similar guidance:

The receipt of a no-match letter, standing alone, does not indicate to an employer that he or she need question the genuineness of documents or information previously presented to complete an INS Form I-9.⁶⁰

This proposed regulation thus turns established federal guidance on no-match letters on its head. At the very least, the proposal will result in conflicting guidance from multiple federal agencies and cause employer and employee confusion.

The Costs of Implementing the Proposed Rule are Prohibitive

If the proposed rule is to be carried out as envisioned, the government will need to make a massive investment in employer and worker education programs in order to combat the rampant panic and confusion that is almost certain to follow. Employer confusion is already evident from high number of questions submitted employers in their comments opposing the rule. In particular, many employers have submitted questions regarding the rule's unrealistic and unreasonable timetables for compliance.

Therefore, although this rule purports to make changes to how DHS interprets these letters, it has a significant impact on the way in which SSA ultimately has to respond to the inevitable increase in employer (and employee) inquiries about this confusing rule. The actual costs of the current SSA no-match letter program are already substantial.⁶¹ The actual costs of administrating a new program will be astronomical for SSA, an agency whose limited resources should go towards administering Social Security benefits rather than enforcing immigration law.

The Procedure to be Followed Under the Proposed Rule When an Employer Receives Notice from DHS Denies Employees Due Process of Law

Section 274a.1(l)(1)(iii)(C) of the proposed rule includes the following as a circumstance that would amount to constructive knowledge where the employer “[f]ails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized, such as . . . [w]ritten notice from the Department of Homeland Security that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 was assigned to another person, or that there is no agency record that the document was assigned to any person.”

⁶⁰ Letter, Sarah DeCosse, Sr. Tr. Atty OSC (Apr. 1, 2004).

⁶¹ See Mehta, *supra* note 4, at 7, n. 2 (noting that SSA's current attempts to reduce the ESF through no-match letters have cost U.S. taxpayers the following amounts: “\$5.4 million to send notices to every individual whose name and SSN do not match SSA's records; \$600,000 to send 944,000 notices to all employers who submitted wage reports with at least one item posted to the ESF; more than \$200,000 for system maintenance and cyclical changes; and an average of \$9.00 for each call to SSA's national toll free telephone number generated by the notices. SSA estimates that the agency received about 100,000 inquiries throughout 2002 regarding the TY 2001 letter.”).

Under Section 274a.1(l)(2)(iii), an employer who receives such a notice will not be deemed to have constructive knowledge of the employee's unauthorized status if the employer takes reasonable steps to resolve the question raised by DHS and, if the employer does not verify with DHS that the document was assigned to the employee, the employer completes a new I-9. The employee cannot use the alien registration number, or "A-number," that is the subject of the written notice from DHS.

While this procedure may protect the employer, it entirely leaves out any possibility for the *employee* to have access to his or her DHS immigration file and any opportunity to correct errors in the file that would lead to DHS providing erroneous information to the employer. This access and an assured opportunity to correct errors in immigration records are critical because immigrants do not have easy, automatic, timely access to their immigration records, and immigration records are error-prone.

For years, government agencies have criticized the quality and accuracy of immigration records.⁶² Problems with immigration records have continued even after the dissolution of the INS and the creation of new immigration agencies in DHS. The information technology environment at USCIS has been criticized as inefficient, and USCIS continues to rely on manual and paper-based processes.⁶³ As an example of how DHS records and processes go awry, in December 2005 DHS had to "recall more than 60,000 green cards because a computer glitch miscalculated immigrants' residency start dates."⁶⁴ USCIS sent letters instructing immigrants to mail their cards back. Unfortunately, USCIS sent the letters to many immigrants whose green card "resident since" dates were actually correct. USCIS then advised community-based organizations working with immigrants that its information technology staff was working to determine who received the mailing in error and that USCIS intended to send out a second letter to all individuals who received the initial letter in error.

Moreover, under current law, immigrants have access to their immigration files (both "alien files" and Border Patrol requests) only by filing Freedom of Information Act (FOIA) requests. FOIA requests for files must be made in writing and mailed to a central location, at the National Records Center in Missouri.⁶⁵ This means that immigrants who need access to their files to determine the nature of the erroneous information and then to correct this information as envisioned under Section 274a.1(l)(iii)(C) of the proposed rule are dependent on FOIA procedures which are not designed for this purpose. The lengthy and unpredictable timetables and cumbersome process for the FOIA process make it difficult for immigrants to both obtain their files and then correct mistaken information within Section 274a.1(2)(ii)'s compliance period.

The proposed rule thus raises critical due process concerns for immigrants. It fails to guarantee adequate access and an assured opportunity to immigrants who wish to correct errors in their

⁶² *INS Data: The Track Record* (NILC, 2003), available at http://www.nilc.org/immlawpolicy/misc/INS_data_accuracy.pdf.

⁶³ *USCIS Faces Challenges in Modernizing Information Technology*, OIG-04-41 (DHS, Office of Inspector General, Sept. 2005), available at http://www.dhs.gov/interweb/assetlibrary/OIG_05-41_Sep05.pdf.

⁶⁴ Solomon Moore, "Green Cards Recalled Because of Glitch," *The Los Angeles Times*, Dec. 6, 2005.

⁶⁵ See USCIS, *Freedom of Information and Privacy Acts*, <http://www.uscis.gov/graphics/aboutus/foia/index.htm>.

immigration records. It creates penalties for employees when their immigration status or documents cannot be confirmed. It does not, however, set any time period for DHS to respond to immigrants' requests to review their files, nor does it place any obligation on DHS to correct immigrants' records in a timely fashion.

The Proposed Rule May Exceed DHS's Authority

DHS May Not Have Authority to Restrict the List of Acceptable Documents for the Reverification Process

The proposed rule would create an exception to the list of documents that can be used to reverify the worker's employment authorization and identification as part of the I-9 requirement. But it appears that DHS may lack the ability to impose such restrictions. According to the INA, only the Attorney General has authority to promulgate regulations restricting the list of acceptable documents. 8 U.S.C. § 1324a(b)(1)(E). According to the statute, the Attorney General may only restrict the list of acceptable documents if he "finds, by regulation that any [of the listed documents] does not reliably establish [employment] authorization or identity or is being used fraudulently to an unacceptable degree." *Id.* Importantly, this power of the Attorney General was not transferred to the DHS upon its creation and the dissolution of the former Immigration and Nationality Service. 8 U.S.C. § 1103(a) (transferring powers under the INA to the Secretary of the DHS, *except* those that "relate to the powers, functions, and duties conferred upon" "the Attorney General," among others) (emphasis added). There is no indication in 8 U.S.C. § 1324a(b)(1)(E) and accompanying notes that the provision was ever amended to transfer the AG's authority to promulgate regulations to the DHS.

Despite this express statutory rule exclusively vesting the ability to restrict the congressionally approved list of I-9 documents to the Attorney General, Section 274a.1(1)(2)(iii) of the proposed rule would give DHS the power to restrict which documents are acceptable in the reverification process. According to that section, only documents bearing a photograph and *not* containing the SSN that triggered the no-match letter will satisfy the reverification requirement under the I-9 process. *Id.* Under current law, however, documents lacking photographs and those that include Social Security numbers are acceptable—even if the SSN triggers a no-match letter. 8 U.S.C. § 1324a(b)(1)(C), (D). Therefore, the proposed rule may inappropriately usurp the Attorney General's exclusive power to alter the congressionally created list of approved documents for reverification of a worker's status under the I-9 process and should be rejected.⁶⁶

RECOMMENDATION

In sum, we strongly oppose the Department of Homeland Security's proposed regulation. DHS should not risk the livelihoods of hundreds of thousands—possibly millions—of workers in an isolated, punitive immigration "enforcement" scheme on the eve of enactment of *comprehensive immigration reform*. Although the rule will cause enormous upheavals in the workplace, the rule will have *no* impact on undocumented migration, which is the purported purpose of this

⁶⁶ The proposed rule may also violate INA Section 274A(d)(3), which requires notice by the President to the House and Senate Judiciary Committees before changes are made to the employment eligibility verification system. We do not know whether the President has provided such notice to the appropriate committees.

proposal. Our experience with no-match firings and workplace audits is very clear: *the fired workers will not leave the United States*. In the absence of comprehensive immigration reform that addresses the root causes of undocumented migration, they will simply find other more marginal jobs, most likely in the underground economy. Because of this, the proposed rule will result in growth of the underground economy, which results in substantial losses in state and federal tax revenues as well as unfair competition. The proposed rule is simply the wrong rule at the wrong time. It provides no solution to the hiring and exploitation of undocumented workers and is far outweighed by the exorbitant implementation costs that will be borne by workers, taxpayers, and businesses. For all these reasons, we recommend that the Department of Homeland Security withdraw this proposed rule in its entirety.

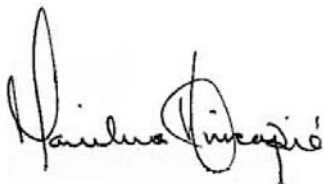
Respectfully submitted,

The Low-Wage Immigrant Worker (LWIW) Coalition

Co-Convened By:

American Federation of Labor – Congress of Industrial Organizations (AFL-CIO)
Change to Win (CtW)
Interfaith Worker Justice (IWJ)
Jobs with Justice
National Council of La Raza (NCLR)
National Day Laborer Organizing Network (NDLON)
National Employment Law Project (NELP)
National Immigration Law Center (NILC)

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EXHIBIT 1

**To DHS Docket No. ICEB-2006-0004;
Comment Regarding “Safe Harbor Procedures for
Employers Who Receive a No-Match Letter”**

**Submitted by:
The Low-Wage Immigrant Worker (LWIW) Coalition**

**Date:
Monday, August 14, 2006**



Office of the General Counsel

425 Eye Street N.W.
Washington, D.C. 20536

FEB 17 1994

Mr. Carl G. Borden
California Farm Bureau Federation
Office of the General Counsel
1601 Exposition Boulevard, FB3
Sacramento, CA 95815-5318

Dear Mr. Borden:

This letter is in response to your correspondence dated August 11, 1993, concerning the receipt of a letter from the Social Security Administration (SSA). The SSA letter in question informs an employer that the social security number of an employee does not agree with SSA records. Specifically, you ask whether an employer who receives this letter from SSA can continue to rely on the employment eligibility documents presented by that employee, assuming the documents appear on their face to be genuine and to relate to the employee?

If the document or documents presented to verify work authorization appear on their face to be genuine and to reasonably relate to the individual, the subsequent receipt of the SSA letter mentioned above does not impose any affirmative duty upon the employer to investigate further into an employee's eligibility to work in the United States. In addition, the receipt of this SSA letter by an employer, without more, would not be sufficient to establish constructive knowledge on the part of the employer regarding the employment eligibility of the named employee. As you correctly note in your correspondence, this letter from SSA could be prompted by a number of different reasons having nothing to do with an employee's eligibility to work in the United States.

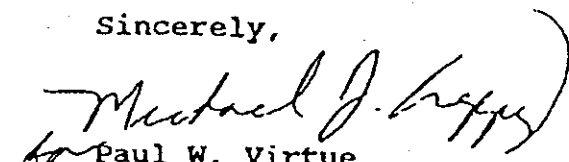
The answer provided above specifically applies to a situation where the employer receives such a letter from SSA and the employer has no additional evidence that an employee may not be work authorized. It should be noted, however, that if an employer receives notice from the Immigration and Naturalization Service (INS) that a social security card or other document presented to establish work authorization is not valid, the employer does have a duty to inquire further to ensure that the individual is authorized to work in the United States before the employer can continue to employ that individual. In addition, while an employer has no affirmative duty to inquire into an employee's

employment eligibility based solely upon receipt of a letter from SSA, if for some reason the employer discovers evidence that an employee may not be authorized to work in the United States, the employer must inquire further to verify the employment eligibility of that employee. If the employer is unable to verify work authorization, the employer cannot continue to employ that individual.

It should be noted that telephonic inquiries from employers regarding the employment authorization of employees will not be honored by INS.¹ However, if an employer suspects fraud, as it relates to INS documents, the employer may ask INS to physically examine the documents.

I hope that the above information is helpful to you. If you have any further questions, please contact Michael C. ~~McGoings~~ Associate General Counsel at (202) 514-2895.

Sincerely,


for Paul W. Virtue
Acting General Counsel

¹ (The only exception is where the written consent of that individual has been obtained.) See Salinas-Pena v. INS, No. 86-1033-DA (D.Oregon, March 16, 1988).