

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 274a

[RIN 1653-AA50]

ICE 2377-06

DHS Docket No. ICEB-2006-0004

Safe-Harbor Procedures for Employers Who Receive a No-Match Letter:

Clarification; Initial Regulatory Flexibility Analysis.

AGENCY: U.S. Immigration and Customs Enforcement, DHS.

ACTION: Supplemental proposed rule.

SUMMARY: The Department of Homeland Security (DHS) is proposing to amend its regulations that provide a “safe harbor” from liability under section 274A of the Immigration and Nationality Act for employers who follow certain procedures after receiving a notice – from the Social Security Administration (SSA), called a “no-match letter,” or from DHS, called a “notice of suspect document” – that casts doubt on the employment eligibility of their employees. The prior final rule was published on August 15, 2007 (the August 2007 Final Rule).

Implementation of that rule was preliminarily enjoined by the United States District Court for the Northern District of California on October 10, 2007. The district court based its preliminary injunction on three findings. This supplemental proposed rule clarifies certain aspects of the August 2007 Final Rule and responds to the three findings underlying the district court’s injunction.

DATES: Comments must be submitted not later than [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by DHS Docket No. ICEB 2006-0004, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Marissa Hernandez, U.S. Immigration and Customs Enforcement, 425 I St NW, Suite 1000, Washington DC, 20536. To ensure proper handling, please reference DHS Docket No. ICEB-2006-0004 on your correspondence. This mailing address may also be used for paper, disk, or CD-ROM submissions.
- Hand Delivery/Courier: Marissa Hernandez, U.S. Immigration and Customs Enforcement, 425 I St NW, Suite 1000, Washington DC, 20536.

FOR FURTHER INFORMATION CONTACT: Marissa Hernandez, U.S.

Immigration and Customs Enforcement, 425 I St NW, Suite 1000, Washington DC, 20536. Telephone: 202-307-0071 (not a toll-free number).

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I. Public Participation.

Interested persons are invited to comment on this rulemaking by submitting written data, views, or arguments on all aspects of the rule. DHS invites comments related to the Initial Regulatory Flexibility Analysis for this rule, including comments suggesting significant alternatives that might limit any significant economic impact the rule might have on small entities or comments related to the Small Entity Impact Analysis underlying the rule, available on the docket at ICEB-2006-0004-0232. Comments that will most assist DHS will reference a specific portion of this analysis and explain the reason for any recommended change. Include data, information, and the authority that supports the recommended change. Comments previously submitted to this docket do not need to be submitted again.

Instructions for filing comments: All submissions received must include the agency name and DHS docket number ICEB-2006-0004. All comments received (including any personal information provided) will be posted without change to <http://www.regulations.gov>. See ADDRESSES, above, for methods to submit comments. Mailed submissions may be paper, disk, or CD-ROM.

Reviewing comments: The Small Entity Impact Analysis and public comments may be viewed online at <http://www.regulations.gov> or in person at U.S Immigration and Customs Enforcement, Department of Homeland Security, 425 I St, NW, Room 1000, Washington, DC 20536, by appointment. To make an appointment to review the docket you must call telephone number 202-307-0071.

II. Background.

A. History of the Rulemaking.

DHS first published a proposed rule in June 2006 that would have provided means for employers to limit the risk of being found to have knowingly employed unauthorized aliens after receiving a letter from the SSA – known as a “no-match letter” – notifying them of mismatches between names and social security numbers provided by their employees and the information in SSA’s database or after receiving a letter from DHS – called a “notice of suspect document,” that casts doubt on the employment eligibility of their employees. 71 FR 34281 (June 14, 2006). A sixty-day public comment period ended on August 14, 2006.

DHS received approximately 5,000 comments in response to the proposed rule from a variety of sources, including labor unions, not-for-profit advocacy organizations, industry trade groups, private attorneys, businesses, and other interested organizations and individuals. The comments varied considerably; some commenters strongly supported the rule as proposed, while others were critical of the proposed rule and suggested changes. See www.regulations.gov, docket number ICEB-2006-0004.

DHS published a final rule on August 15, 2007, setting out safe harbor procedures for employers who receive SSA no-match letters or notices from DHS calling into question

the information previously provided by their employees when establishing their work eligibility. 72 FR 45611 (Aug. 15, 2007). Each comment received was reviewed and considered in the preparation of the August 2007 Final Rule. The August 2007 Final Rule addressed the comments by issue rather than by referring to specific commenters or comments.

On August 29, 2007, the American Federation of Labor and Congress of Industrial Organizations, and others, filed suit seeking declaratory and injunctive relief in the United States District Court for the Northern District of California. AFL-CIO, et al. v. Chertoff, et al., No. 07-4472-CRB, D.E. 1 (N.D. Cal. Aug. 29, 2007). The district court granted plaintiffs' initial motion for a temporary restraining order against implementation of the August 2007 Final Rule. AFL-CIO v. Chertoff, D.E. 21 (N.D. Cal. Aug. 31, 2007) (order granting motion for temporary restraining order and setting schedule for briefing and hearing on preliminary injunction). On October 10, 2007, the district court granted the plaintiffs' motion for preliminary injunction. AFL-CIO v. Chertoff, D.E. 135 (N.D. Cal. 2007) (order granting motion for preliminary injunction).

The district court concluded that the plaintiffs had raised serious questions about three aspects of the August 2007 Final Rule. Specifically, the court questioned whether DHS had: (1) supplied a reasoned analysis to justify what the court viewed as a change in the Department's position – that a no-match letter may be sufficient, by itself, to put an employer on notice, and thus impart constructive knowledge, that employees referenced in the letter may not be work-authorized; (2) exceeded its authority (and encroached on the authority of the Department of Justice (DOJ)) by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. 99-603,

100 Stat. 3359 (1986), 8 U.S.C. 1324b; and (3) violated the Regulatory Flexibility Act, 5 U.S.C 601 et seq., by not conducting a regulatory flexibility analysis. See AFL-CIO v. Chertoff, D.E. 135 (N.D. Cal. Oct. 10, 2007) (order granting motion for preliminary injunction) at 8.

DHS proposes this supplemental rule to address the issues raised by the court in the preliminary injunction order. After addressing these three issues, DHS will seek to have the preliminary injunction dissolved. DHS continues its defense of the case, and this simultaneous rulemaking – which is intended to lead to the rule becoming effective as quickly as possible – is not a concession of any issue pending in the litigation.

In developing this supplemental proposed rule, DHS has considered the administrative record of the August 2007 Final Rule and the record of proceedings in the pending litigation. AFL-CIO v. Chertoff, D.E. 129 (N.D. Cal. Oct. 1, 2007) (certified administrative record); D.E. 146-2 (N.D. Cal. Dec. 4, 2007 (errata)) (hereafter AFL-CIO v. Chertoff, D.E. 129). Accordingly, DHS provides the following clarification to the August 2007 Final Rule and publishes an initial regulatory flexibility analysis.

B. Purpose of the rulemaking.

DHS, and its predecessor agencies, has been aware for many years that employment in the United States is a magnet for illegal immigration, and that a comparison of names and social security numbers submitted by employers against SSA's data provides an indicator of possible illegal employment:

Reducing the employment magnet is the linchpin of a comprehensive strategy to deter unlawful immigration. Economic opportunity and the prospect of employment remain the most important draw[s] for illegal migration to this country. Strategies to deter unlawful entries and visa overstays require both a reliable process for verifying authorization to work and an enforcement capacity to ensure that employers adhere to all immigration-related labor standards.

* * * * *

The Commission concluded that the most promising option for verifying work authorization is a computerized registry based on the social security number; it unanimously recommended that such a system be tested not only for its effectiveness in deterring the employment of illegal aliens, but also for its protections against discrimination and infringements on civil liberties and privacy.

* * * * *

The federal government does not have the capacity to match social security numbers with [Immigration and Naturalization Service (INS)] work authorization data without some of the information captured on the I-9. Congress should provide sufficient time, resources, and authorities to permit development of this capability.

U.S. Commission on Immigration Reform, Becoming an American: Immigration and Immigrant Policy 113 - 14, 117 (1997) (emphasis in original); AFL-CIO v. Chertoff, D.E. 129 at 139 - 140, 143.

Similarly, DHS has been aware of the potential for abuse of social security numbers by aliens who are not authorized to work in the United States. The abuse of social security numbers has been the subject of numerous public reports of the Government Accountability Office and the Inspector General of the Social Security Administration, as well as congressional hearings. See, e.g., AFL-CIO v. Chertoff, D.E. 129, at 35 - 661; Government Accountability Office, Report to the Subcommittee on Terrorism, Technology and Homeland Security, Committee on the Judiciary, U.S. Senate, Estimating the Undocumented Population: A "Grouped Answers" Approach to Surveying Foreign-Born Respondents (GAO Rept. No. GAO-06-775, Sept. 2006) (describes alternative means of gathering interview data from undocumented aliens to reduce the "question threat" to some respondents because they fear that a truthful answer could result in negative consequences); Subcommittee on Oversight and Subcommittee on

Social Security, Committee on Ways and Means, U.S. House of Representatives, Social Security Number and Individual Taxpayers Identification Number Mismatches and Misuse, 108th Cong., 2nd Sess., Serial No. 108-53 (March 10, 2004).

The illegal alien population in the United States and the number of unauthorized workers employed in the United States are both substantial. See, e.g., J. Passel, Pew Hispanic Center, The Size and Characteristics of the Unauthorized Migrant Population in the U.S. (March 2006), found at <http://pewhispanic.org/files/factsheets/17.pdf> (approximately 11.2 million illegal aliens in the United States; approximately 7.2 million illegal aliens in the workforce); with M. Hoefler, N. Rytina & C. Campbell, Office of Immigration Statistics, Policy Directorate, U.S. Department of Homeland Security, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006 (August 2007) found at http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf (estimating unauthorized population of 11,550,000 as of January 2006).

The scale of the problem the rule seeks to address – employment of aliens not authorized to work in the United States – has become more well-defined through the course of the rulemaking and related litigation. The comments submitted in response to the initial proposed rule in 2006 by organizations such as Western Growers, and the public statements by representatives of such organizations, have been bracingly frank:

In the midst of the combustive debate over immigration reform, we in agriculture have been forthright about the elephant in America's living room: Much of our workforce is in the country illegally – as much as 70%.

T. Nassif, “Food for Thought,” The Wall Street Journal, Nov. 20, 2007, at A19. See also, Docket ICEB-2006-0004-0145 (August 14, 2006), AFL-CIO v. Chertoff, D. E. 129 at

1306 (comments of the National Council of Agricultural Employers, suggesting over 76% of agricultural workers are not authorized to work in the United States). DHS recognizes this critical fact – that many employers are aware that large proportions of their workforce are illegal – and has therefore taken steps within the Department’s existing authorities to assist employers in complying with the law.

Public and private studies in the administrative record of this rulemaking make clear that social security no-match letters identify some portion of the population of aliens without work authorization who are illegally employed in the United States. One private study concluded that “most workers with unmatched SSNs are undocumented immigrants.” C. Mehta, N. Theodore & M. Hincapie, Social Security Administration’s No-Match Letter Program: Implications for Immigration Enforcement and Workers’ Rights (2003) at i; AFL-CIO v. Chertoff, D.E. 129 at 309, 313.

Based on the rulemaking record and the Department’s law enforcement expertise, DHS finds that there is a clear connection between social security no-match letters and the lack of work authorization by some employees whose SSNs are listed in those letters. DHS’s (and legacy-INS’s) interactions with employers who receive no-match letters have consistently shown that employers are also aware that an employee’s appearance on a no-match letter may indicate the employee lacks work authorization. Nevertheless, as Mehta, Theodore & Hincapie found, SSA’s no-match letters currently “do[] not substantially deter employers from retaining or hiring undocumented immigrants. Twenty-three percent of employers retained workers with unmatched SSNs who failed to correct their information with the SSA.” C. Mehta, N. Theodore & M. Hincapie, supra at ii; AFL-CIO v. Chertoff, D.E. 129 at 314.

Some employers may fail to respond to no-match letters because they have consciously made the illegal employment of unauthorized aliens a key part of their business model or because they conclude that the risk of an immigration enforcement action is outweighed by the cost of complying with the immigration laws by hiring only legal workers. See C. Mehta, N. Theodore & M. Hincapie, *supra* at 2, 20 – 30; AFL-CIO v. Chertoff, D.E. 129 at 314, 316, 334 – 44 (noting employer “complaints” over loss of their illegal workforce when employees are asked to correct their SSN mismatches, as well as the practice by some employers of encouraging workers to procure new fraudulent documents to provide cover for their continued employment). DHS’s interactions with employers have also shown, however, that many law-abiding employers are unsure what their obligations are under current immigration law when they receive an SSA employer no-match letter, and that some employers fear accused of having violated anti-discrimination laws if they react inappropriately to no-match letters.

In light of these facts, DHS has concluded that additional employer guidance on how to respond to SSA no-match letters will help law-abiding employers to comply with the immigration laws.¹ Accordingly, in the August 2007 Final Rule and in this supplemental proposed rulemaking, DHS outlines specific steps that reasonable employers may take in response to SSA no-match letters, and offers employers who follow those steps a safe harbor from ICE’s use of SSA no-match letters in any future enforcement action to show

¹ United States citizens and aliens authorized to work in the United States would also receive an ancillary benefit from improved employer compliance with the bar to employment of aliens not authorized to work in the United States and of correction of records with the Social Security Administration. Correction of the SSA’s records to properly credit wages to a citizen or alien authorized to work may increase authorized workers’ benefits under the Social Security Act and other laws, and improved employer compliance with the laws barring employment of unauthorized alien workers will likely expand the employment opportunities of those authorized to work in the United States.

How