



September 18, 2009

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Re: The Catholic Legal Immigration Networks, Inc.
Comments to DHS Docket No. ICEB-2006-0004, Safe Harbor
Procedures for Employers Who Receive a No-Match Letter:
Rescission

Dear Mr. McClain:

The Catholic Legal Immigration Network, Inc. (CLINIC) submits the following comments in response to the request for public comment by the Department of Homeland Security (DHS) on the “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission” at 74 Fed. Reg. 41801 (August 19, 2009).

I. CLINIC’s Interest in the Proposed Rule

CLINIC, a subsidiary of the U.S. Conference of Catholic Bishops (USCCB), supports a national network of community-based immigration programs. The network includes nearly 200 affiliated immigration programs, which operate out of almost 300 offices in 48 states. The network employs roughly 1,200 attorneys and “accredited” representatives who, in turn, serve 600,000 low-income and at-risk immigrants each year. CLINIC and its network serve the most vulnerable migrants such as refugees, asylum-seekers, detainees, families in need of reunification, laborers in the workplace, victims of domestic violence, and survivors of human trafficking. The CLINIC network represents low-income immigrants without reference to their race, religion, ethnic group, or other distinguishing characteristic.

The CLINIC network has experienced the adverse impact on U.S. workers – including work-authorized immigrants and U.S. citizens – of the Social Security Administration’s (SSA’s) no-match letters. Every year CLINIC responds to severe problems caused by no-match letters in numerous cases that are brought to its attention by its member agencies, immigrant workers, and employers. These include unjustified terminations, job resignations by persons who are authorized to work, the exploitation of workers, and the erosion of workers rights.

We support the decision by DHS to rescind the rule on Safe Harbor Procedures for Employers Who Receive a No-Match Letter [hereinafter “Safe Harbor Procedures Rule”]. However, we caution against the expansion of E-Verify until the system is improved and strengthened.

II. Comments on the Rule with respect to SSA No-Match Letters and Safe Harbor Procedures

The SSA no-match letter program along with the safe harbor procedures are not effective tools or an effective use of DHS resources in reducing the incidences of unauthorized employment. First, SSA no-match letters are not a legitimate indicator of illegal work by unauthorized workers. Second, the letters harm workers by undermining labor rights, expanding the underground economy, contributing to job loss and loss of productivity, and unduly burdening SSA.

SSA no-match letters and the safe harbor procedures are not legitimate indicators that workers are unauthorized.

SSA no-match letters are not a proxy for unauthorized immigration status. In fact, the published facts and data overwhelmingly demonstrate the opposite – that SSA no-match letters are not a reliable indicator of immigration status. The SSA Office of Inspector General estimates that of the 17.8 million records in SSA’s database that contain discrepancies that could generate a SSA no-match letter, nearly 13 million (or 70 percent) of those records pertain to U.S. citizens.¹ SSA itself is unable to estimate how many of the un-matched wage items in its database belong to undocumented workers. The Government Accountability Office (GAO) testified before Congress that the Earnings Suspense File (ESF) contains “hundreds of millions of records, many unrelated to unauthorized work,” and that “in terms of poor earnings reporting, its focus is not on unauthorized workers.”² In the Safe Harbor rule itself, DHS admits that it “does not have adequate data to estimate the percentage of unauthorized employees whose SSNs are listed on no-match letters.”³ Thus, no-match letters are not a legitimate indicator of illegal work by unauthorized workers.

¹ See Office of the Inspector General, Social Security Administration, *Congressional Response Report: Accuracy of the Social Security Administration’s Numident File* (hereinafter *Accuracy of the Numident File*), A-08-06-26100, December 2006 (www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm).

² Barbara D. Bovbjerg, Director, Education, Workforce, and Income Security Issues, *Social Security Numbers: Coordinated Approach to SSN Data Could Help Reduce Unauthorized Work* (Washington, DC: Government Accountability Office, February 16, 2006) (www.gao.gov/new.items/d06458t.pdf)

³ 73 Fed. Reg. 15953 (March 6, 2008).

SSA no-match letters and the safe harbor procedures harm workers, regardless of their status.

SSA no-match letters adversely affect all workers, regardless of immigration status. CLINIC's affiliates have witnessed over the years, the firing of workers due to SSA no-match letters before workers have had a chance to correct their records. As noted previously, SSA's database is inaccurate, and no-matches often occur because of name changes and clerical errors. If the Safe Harbor Procedures Rule had not been rescinded, hundreds of thousands of workers -- including U.S. citizens and authorized noncitizens -- could have lost their jobs. Such firings may have run afoul of federal and state anti-discrimination laws and other worker protections, and led to costly and protracted litigation for wrongful terminations.

In addition, CLINIC feared that employers, confused by the Safe Harbor Procedures Rule would have incorrectly implemented the rules. For instance, CLINIC was concerned that many employers would have failed to give their employees the time allotted in the DHS rules to correct their records. CLINIC also was concerned that employers would fire workers who were in the midst of correcting their records but were unable to do so within the 93-day timeframe. Indeed, CLINIC strongly believes that the 93-day time period for compliance was unreasonable and did not account for the numerous bureaucratic steps that employees must go through to correct their records with the various agencies and with their employer.

SSA no-match letters and the safe harbor procedures would have undermined the labor rights of all workers.

Since the beginning of the SSA no-match program, unscrupulous employers have misused no-match letters as a tool to undermine workers' rights to engage in concerted activity, erase the benefits that come with seniority, and defeat a variety of workplace claims, including their own failure to pay the minimum wage. This, in turn, affects the ability of other workers to exercise their labor rights, and the conditions of all workers suffer. The Safe Harbor Procedures Rule would have continued this practice of providing unscrupulous employers with an added tool to undermine labor and employment rights of all workers.

SSA no-match letters and the safe harbor procedures likely would have expanded the underground economy.

Although the Safe Harbor Procedures Rule purported to provide employers with guidance, DHS was in fact imposing a new set of legal obligations on almost seven and one-half million employers. These new legal obligations may have led some businesses to go "off the books" resulting in lost revenue, unfair competition, and further exploitation of workers. It is likely that the Safe Harbor Procedures Rule would have had the perverse effect of punishing employers who keep good records and want to stay on the books. These "responsible" employers

would have been put at a disadvantage in relation to those unscrupulous employers who would have simply disregarded the new rule.

SSA no-match letters and the safe harbor procedures would have been costly to workers and the economy.

The loss of jobs and loss of productivity that would have resulted from the Safe Harbor Procedures Rule is a high price to pay for an ineffective immigration enforcement tool. U.S. workers and the economy would have undoubtedly born the brunt of these rules. Because of the millions of inaccurate records in the SSA database, hundreds of thousands of U.S. workers would have been required to take time off of work to visit SSA field offices to correct alleged SSA no-match discrepancies. Many of these hundreds of thousands of workers likely would have been required to make multiple visits to SSA offices in order for SSA no-match issues to be resolved due to evidentiary requirements. Workers would have lost time from work and pay to correct discrepancies, while employers would have lost a much-needed workforce.

SSA no-match letters and the safe harbor procedures would have unduly burdened SSA.

It is well-documented that SSA's primary database that is used for identification, the Numident file, is riddled with inaccuracies. The SSA no-match letter program is only one of several programs that the agency employs to correct the voluminous errors in its database. Yet, the DHS's attempt to convert the SSA no-match letter program into an immigration enforcement tool using the SSA's fatally flawed database would have resulted in huge costs to the SSA and its employees.

The SSA is already overburdened with its current workload of delivering services for which the agency was created. SSA estimates that the average wait time for more than three quarters of a million cases awaiting a hearing decision on disability cases is 499 days.⁴ SSA Field Offices receive over 60 million phone calls each year and over half of the callers receive a busy signal. Despite SSA's increased workload, its workforce is at its lowest staffing level.⁵ Because SSA

⁴ Patrick P. O'Carroll Jr., Inspector General, Social Security Administration, *Reducing the Disability Backlog at the Social Security Administration*, testimony before the U.S. House Appropriations Committee, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, February 28, 2008 (www.ssa.gov/oig/communications/testimony_speeches/02282008testimony.htm).

⁵ While SSA's responsibilities have increased over time, its financial resources have not increased commensurately. Since the beginning of FY 2006, SSA's 1,267 field offices have lost over 1,700 claims representatives and over 520 service representatives. Richard Warsinsky, Past President, National Council of Social Security Management Associations Inc., *Written Testimony for the Record*, submitted to the U.S. House Appropriations Committee, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, February 28, 2008. (<http://socsecperspectives.blogspot.com/2008/02/social-security-advocacy-group-written.html>).

estimates that four percent of the U.S. workforce has records that don't match, the DHS rule would have inundated SSA offices with visitors seeking to correct records. This is a heavy burden to place on an agency that is struggling to meet its current obligations.

II. Comments on the Rule with respect to the E-Verify

DHS should not rely heavily on E-Verify as a solution to unauthorized employment for it is a system that verifies a small percentage of employers and it still needs improvement and strengthening.

DHS should not rely heavily on E-Verify as a solution to unauthorized employment as the system accommodates a very small percentage of employers.

There are approximately 7.4 million employers in the U.S. According to DHS, only 134, 000 employers were enrolled in E-Verify as of July 2009.⁶ This number will increase by approximately 168, 324 as contractors and subcontractors who are required to use the system as of September 8, 2009, join the program.⁷ Thus, the combined numbers of employers (302,324) represents just over 4 percent of the approximately 7.4 million employers in the U.S.⁸ It is difficult to imagine how a system that only verifies a tiny fraction of the employers in the U.S. (4%) will be able to accommodate the remaining 96 percent of employers in the near future. A significant increase in employer utilization clearly will place a strain on the systems infrastructure and staffing and lead to higher rates of errors and similar unintended consequences.

Errors to the E-Verify databases can disproportionately affect legal immigrants and foreign-born citizens.

The E-Verify system operates in a way that disproportionately affects the accuracy as it applies to legal immigrants, foreign-born citizens, and other minority groups. This situation exists because of the size and breadth of the databases, the status changes that occur among immigrants, spelling errors, as

⁶ "Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify," U.S. Department of Homeland Security press release, July 8, 2009, www.dhs.gov/ynews/releases/pr_1247063976814.shtml.

⁷ See 73 Fed. Reg. 67651-705 (Nov. 14, 2008).

⁸ The US Government Accountability Office estimates that a mandatory verification system would have to accommodate 7.4 million employers; see statement for the record of Richard M. Stana, Director of Homeland Security and Justice Issues, Government Accountability Office, "Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System," GAO-08 895T before the House Judiciary Committee Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, 110th Cong., 2d sess., June 10, 2008, <http://www.gao.gov/new.items/d08895t.pdf>.

well as mistakes that occur as individuals input information from the Form I-9 into the databases.⁹

As explained by Migration and Policy Institute, the E-Verify system relies on series of large data bases – Numident and the Verification Information System. “Numident, for example, contains 449 million records and the Verification Information System (VIS), the operating system for E-Verify, checks against 80 million records.”¹⁰ These databases are subject to human error as “[s]ome records accessed by E-Verify consist of paper files, and are still being converted to electronic formats, resulting in potential errors.”¹¹

Additionally, “[d]atabases accessed by E-Verify are constantly evolving as citizens, legal residents, and work-authorized nonimmigrants change their names (through marriage) and immigration status.”¹² These databases must keep up with these constant changes.

Additionally, the accuracy of the databases is affected by the misspellings and incorrect name order as well as the errors that can occur when an employers inputs I-9 Form information into the system.¹³ These types of “problems disproportionately affect legal immigrants, foreign-born citizens, and other minority groups, who are more likely than other workers to be affected” by these types of database errors.¹⁴

E-Verify cannot be fully effective because it lacks a universal and secure system of identity verification.

As currently configured, “E-Verify lacks a reliable mechanism for authenticating an individual’s identify because the system continues to rely on the I-9 process whereby employers review existing identity documents.”¹⁵ E-Verify can verify much of the information contained on the From I-9 such as name, date of birth, Social Security number, or alien registration number. However, it cannot tell you if the document presented by the worker to prove his/her work eligibility actually corresponds to that worker. In short, it cannot authenticate a worker’s identity. Thus, the system is “vulnerable to identity fraud.”¹⁶ The vulnerability of the system to identify fraud undermines its ability to be an effective tool to reduce incidences of unauthorized employment.

⁹ Meissner, Doris and Marc R. Rosenblum. 2009. The Next Generation of E-Verify Getting Employment Verification Right. Washington, D.C: Migration Policy Institute. July 2009: p 5-6.

¹⁰ Id. At 6.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id. at 9.

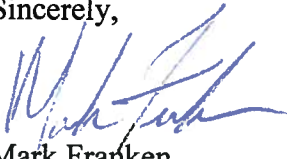
¹⁶ Id. at 10.

Conclusion

Based on the foregoing, CLINIC supports the decision by DHS to rescind the rule on Safe Harbor Procedures for Employers Who Receive a No-Match Letter, while cautioning against any expansion of E-Verify until the system is improved and strengthened.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mark Franken". The signature is fluid and cursive, with the first name "Mark" being more prominent than the last name "Franken".

Mark Franken
Executive Director, CLINIC