September 18, 2009

Charles McClain  
National Program Manager  
U.S. Immigration and Customs Enforcement  
Office of Investigations—MS 5112  
500 12th Street, S.W.  
Washington, DC 20536

DHS Docket No. ICEB 2006-0004

Dear Mr. McClain:


SHRM is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.
ACIP represents immigration professionals working in over 200 corporations, universities and research institutions across the United States. Each of our members employs at least 500 employees worldwide, and, in total, ACIP members employ millions of U.S. citizens and foreign nationals in all industries throughout the country. ACIP sponsors seminars and produces publications aimed at educating human resource and legal professionals on compliance with immigration laws, while working with Congress and the Executive Branch to facilitate the movement of international personnel.

Both SHRM and ACIP members exercise extraordinary care to ensure that their organizations’ hiring and employment practices are in compliance with the law. In particular, our members are committed to ensuring a legal workforce and welcome guidelines in areas where an employer’s obligations are not clearly spelled out in regulation. The lack of clarity about what actions an employer should take after receiving a no-match letter has been particularly troublesome.

As discussed below, we are concerned that rescinding the safe harbor rule will have negative consequences for employers and employees. We believe employers still have a need for both guidance and safe harbor protection from no-match letters and DHS notices relating to document discrepancies, and that the other tools DHS employs to combat unauthorized employment do not address these needs.

For years, our members have sought advice on what should be done when an employer receives a no-match letter. In light of this continued confusion, both SHRM and ACIP welcomed the issuance by DHS of a guidance and safe harbor regulation. The safe harbor rule that DHS now proposes to rescind laid out a series of actions an employer should take upon receipt of a no-match letter from the Social Security Administration or a notice from DHS that an immigration document or work authorization document was not assigned to the employee. Now that DHS intends to rescind the rule, the agency will leave employers without direction.

In our comments on the proposed rule, we welcomed having a set of step-by-step actions that an employer must take in order to achieve the safe harbor’s assurance that receipt of the letter would not be used as “constructive knowledge” that the employee is not legally authorized to work and that adherence to the rule would not result in a violation of anti-discrimination laws. This safe harbor was granted in return for the employer’s diligent and good faith efforts to resolve any discrepancies in identity and documentation. The requests we made for additional clarity and increased time periods for compliance were largely met by the changes made in the final rule published August 15, 2007. 72 Fed. Reg. 45611. We also urged close coordination regarding discriminatory conduct with the other agencies that have jurisdiction over the
anti-discrimination laws, including Department of Justice and the Equal Employment Opportunity Commission.

Rescinding the guidance and repealing the safe harbor will mean that employers will remain between a rock and a hard place—wanting to resolve discrepancies but having no guidance on what DHS would consider a good faith attempt to resolve or how to avoid violating anti-discrimination laws through the resolution process. As the rule itself states, there are a variety of reasons a discrepancy may occur including clerical errors, name changes, or something less benign, such as use of fraudulent or stolen social security numbers. 72 Fed. Reg. 45612. There are also a variety of explanations and/or new documentation an employee might provide to explain the discrepancies that reasonably appear genuine on their face. Without explicit guidance and protection, employers may hesitate to delve too deeply into a situation for fear of facing a discrimination claim. This leaves employers in the same quandary from which they sought relief.

The Department, in its published rescission notice, cites the development and use of “better tools for employers to reduce incidences of unauthorized employment and to better detect and deter the use of fraudulent identity documents by employees” as the rationale for rescinding the safe harbor rule. 74 Fed. Reg. 41802. Yet, for employers, the question of what actions to take upon receipt of a no-match letter will remain - regardless of additional tools.

DHS cites voluntary participation in the ICE Mutual Agreement Between Government and Employers (IMAGE) program, electronic filing of W-2 forms, and continued refinement and improvement to E-Verify as tools making the no-match safe harbor unnecessary. Yet, not all employers participate in these programs nor are they foolproof. While SHRM and ACIP support efforts to reduce errors and close loopholes that currently allow those who use identity theft to circumvent the rules, employers will still be faced with the dilemma of reacting to discrepancies involving names, social security numbers, work authorization documents, and inconsistencies revealed through audit. DHS also cites ICE worksite enforcement efforts as an effective tool to reduce incidences of unauthorized employment. And, in fact, ICE officials have stated that they intend to continue to look at employers’ responses to no-match letters when investigating worksites. We would respectfully argue that providing guidance to employers seeking to avoid any need for worksite enforcement is a preferable tool for prevention.

As we have discussed, employers continue to need guidance on what actions they should take to address discrepancies and react to no-match letters. In addition, the tools identified in the rescission notice do not address these needs. For these reasons, SHRM and ACIP respectfully request that DHS provide some sort of safe harbor for
employers who take action in a good faith attempt to properly verify the work authorization of employees.

SHRM and ACIP appreciate the opportunity to submit these comments on the proposed rescission of the safe harbor procedures for employers who receive no-match letters. We would be happy to discuss our thoughts on this matter with you at any time.

Respectfully submitted,

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Lynn Shotwell
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