

April 25, 2008

Ms. Marissa Hernandez
U.S. Immigration and Customs Enforcement
425 I St NW, Suite 1000
Washington DC 20536

RE: DHS Docket No. ICEB-2006-0004 – Supplemental Proposed Rule-Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis

Dear Ms. Hernandez:

On behalf of the International Franchise Association (IFA), I write to comment on the Supplemental Proposed Rule cited above. IFA is the largest and oldest franchising trade group, representing more than 85 industries, including more than 10,000 franchisee, 1,200 franchisor and 470 supplier members nationwide. IFA protects, enhances and promotes franchising by advancing the values of integrity, respect, trust, commitment to excellence, honesty and diversity. According to a 2008 study conducted by PricewaterhouseCoopers, there are more than 900,000 franchised establishments in the U.S. that are responsible for creating 21 million American jobs and generating \$2.3 trillion in annual economic output.

On behalf of our members, I respectfully submit these comments and appreciate the opportunity to share our views on the Supplemental Proposed Rule. As an organization, we support a comprehensive immigration reform solution that places appropriate responsibilities upon the individuals who wish to enter the United States, the state and federal government agencies that must enforce the laws and the employers that have an obligation to hire authorized individuals. However, we have significant concerns regarding the Department of Homeland Security's (DHS) supplemental proposed rule and its impact on franchised businesses.

First and foremost, franchisors and franchisees are primarily small business owners. These entrepreneurs are helping our economy grow. From 2001 to 2005, the franchising sector expanded at a faster pace than many other sectors of the U.S. economy. For example, direct economic output of franchised businesses grew by over 41 percent from \$625 billion to \$881 billion. Similarly, employment generated by franchised businesses grew by 12.6 percent from 9.79 million to 11 million, while employment generated by all businesses grew by only 3.5 percent.

We also strongly support the comments submitted by the Essential Worker Immigration Coalition (EWIC) and endorse the comments submitted by Dr. Richard Belzer. Dr. Belzer's comments provide an analysis of the Initial Regulatory Flexibility Analysis (IRFA) performed by the Department of Homeland Security as well as a complete economic impact of the Rule on employers.

Request for Additional Time to Comment

Given the complexity of the Initial Regulatory Flexibility Analysis that is part of this proposed rule, and the significant public policy interests implicated by this rule, the thirty-day comment period does not allow the public enough time to collect meaningful data in order to fully evaluate the DHS IRFA and explore the significant economic issues highlighted by the IRFA and the Rule. IFA also notes that the initial Proposed Rule in this rulemaking provided for a sixty-day comment period, and we respectfully request additional time so that our members can adequately analyze the proposal.

The Supplemental Proposed Rule

The Supplemental Proposed Rule purports to address the issues that led to the Federal District Court for the Northern District of California issuing an injunction against DHS preventing the rule from taking effect. It is thus perplexing that, after much discussion, the Supplemental Proposed Rule simply states that it will “repromulgate, without change, the regulations published at 72 FR 45611...” Therefore, the IFA submits that this proposal fails to adequately address the substantive concerns of the court.

Furthermore, franchised business owners have significant concerns over the reliability and accuracy of the Social Security Administration (SSA) database that DHS’s system relies upon to verify individuals. The Department itself notes that there will be individuals who are legally authorized to work in the United States, but due solely to errors in their personal records at SSA, their employer would receive “no-match” letters. The uncertainty provided by the proposal regarding whether there is an actual “safe-harbor” for employers who follow the guidelines leaves great doubt about employees’ obligations and liabilities.

A definite result of this proposal will be the increased demand for illegally obtained identities that match authorized identities in the SSA database. Of those employees who are terminated, those who lack work authorization will not simply leave the U.S. Rather, many will attempt to acquire authorization through identity theft and fraud. The increase in identity theft and fraud will further tap the limited resources of the Department and other law enforcement agencies. In addition, employers will again be in stuck in limbo, unable to conclusively determine if the identification documents being presented are authentic or not. The proposal provides no clear solution for the unfortunate situation where a DHS investigation determines an employer has hired unauthorized workers with stolen identities.

Another basis of the District Court’s injunction purportedly addressed by this rule is the Rule’s encroachment on the Department of Justice’s authority to enforce the anti-discrimination provisions of the Immigration Reform and Control Act (IRCA). The proposed and Final Rule made broad statements concerning the potential liability under IRCA’s antidiscrimination provisions of employers who took action following the DHS rule. The Proposed Rule states that employers who follow the safe harbor procedures uniformly “will not be found to have engaged in unlawful discrimination.” Notwithstanding that statement, the new Supplemental Proposed Rule states that “DHS recognizes the jurisdiction of DOJ over enforcement of the anti-discrimination provisions.” The Supplemental Proposed Rule also states that “DHS does not

have the authority to obligate the DOJ or its Office of Special Counsel for Immigration-Related Unfair Employment Practices to a course of action and the August 2007 Final Rule did not purport to make any such obligation.”

Unfortunately, this has created more uncertainty and confusion for franchised employers and increased the likelihood of discrimination suits. The protection that the Proposed Rule attempted to offer, however ineffective it may have been, is gone. No action from DHS and DOJ will be able to prevent costly litigation from terminated employees. DHS must provide an explanation of how it intends to fully protect employers from costly private suits that will result from this Rule and allow the public an opportunity to comment on those protections.

The Regulatory Flexibility Act Analysis

The final issue raised by the District Court in its preliminary injunction was DHS’ failure to conduct what is known as an Initial Regulatory Flexibility Analysis (IRFA). The Regulatory Flexibility Act requires agencies to identify and analyze alternatives in the IRFA that would make compliance less burdensome for small entities. However, the Department’s IRFA does not include any such analysis. This oversight is explained by claiming that any of the standard modifications specifically suggested in the text of the Regulatory Flexibility Act would actually disadvantage small entities by providing them a smaller safe harbor.

One obvious alternative that DHS could have examined would be to accept some of the burden of resolving mismatches. For example, the government could assign specific staff at local ICE and SSA offices with responsibility for assisting workers who receive no-match letters. Such a program would significantly assuage employers concerned about litigation claiming civil rights violations if they provide assistance to employees that after the fact might be judged to have been discriminatory. Nevertheless, the Department did not examine such an alternative in the IRFA. Most employees attempting to resolve no-match letters will need to personally visit the local SSA field office to resolve their mismatched data. Depending on the proportion of no-matches that are unauthorized workers, the number of additional in-person visits to SSA field offices will range from 611,000 to 2,750,000 per year. For FY 2007, SSA expected 42 million field office visits, but the vast majority of them were for more mundane services than resolving no-matches. Many of these individuals also will require in-person visits to local government offices to retrieve certified birth certificates, marriage licenses, divorce decrees, and similar documents.

The Regulatory Flexibility Act also requires agencies to examine a range of alternatives that would be less burdensome to small businesses. The purpose of this requirement is to motivate agencies to think creatively about how to *cost-effectively* address the problem they are trying to solve, taking into account the inherent inability of smaller employers to take advantage of economies of scale. The IRFA does not include a genuine examination of alternatives, nor does it examine cost-effectiveness critically. Instead, the Department merely acknowledges that the rule would require employers to act in a cost-ineffective fashion to maximize their chance of avoiding liability for illegal discrimination. (*See Comments on DHS’ Safe-Harbor Interim Regulatory Flexibility Analysis, April 21, 2008, Richard B. Belzer, Ph.D., pp 1-2*).

Inaccuracy of a Process that Relies on SSA for Confirmation

Since the publication of the Interim Final Rule, the Department's own contractors have called into question the accuracy of the verification process. In a report dated September 2007, Westat, a DHS contractor commissioned to evaluate the effectiveness of the E-Verify system, released its report. The E-Verify system pulls data from multiple sources to electronically attempt to verify a new employee's work authorization. A major data source for this system is the SSA databases, the same SSA databases that will generate no-match letters and that will have to be consulted in attempting to resolve discrepancies. The Westat report states as follows:

As anticipated by immigrant rights advocates, foreign-born work-authorized employees are more likely to receive tentative non confirmations than are U.S.-born employees, thereby subjecting a greater percentage of foreign-born work authorized employees to potential harm arising from the Web Basic Pilot process. For U.S.-born employees authorized at some point during the verification process, 0.1 percent received tentative non confirmations prior to verification; for foreign born employees, the rate was 3.0 percent.

The report also stated as follows:

Foreign-born U.S. citizens are considerably more likely to receive erroneous tentative nonconfirmations than are work-authorized foreign-born persons who have not become U.S. citizens. Among foreign-born employees verified by the Web Basic Pilot in October 2006 through March 2007, the percentage of everauthorized employees found to be work-authorized after a tentative nonconfirmation was 1.4 percent for noncitizens compared to 9.8 percent for naturalized citizens. Reducing the erroneous tentative nonconfirmation rate for naturalized citizens will take considerable time and will require better data collection and data sharing between SSA, [United States Citizenship and Immigration Services], and the U.S. Department of State than is currently the case.

See Westat Report, September 2007, Page xxv.

Violates the Paperwork Reduction Act (PRA)

The Department has certified that this rulemaking imposes no new information collection burdens. The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), is designed to reduce, minimize and control burdens and maximize the practical utility and public benefit of the information created, collected, disclosed, maintained, used, shared and disseminated by or for the Federal government.

Any franchised employer who receives a no-match letter under the DHS rule must take certain steps in order to avoid liability for unauthorized employment under the rule. Similarly, an employee who wishes to correct his or her no-match discrepancy will be required to take certain steps, most likely involving providing enough information to the Social Security Administration to allow it to examine the discrepancy. This is an information collection under the PRA. Additionally, it has the significant potential to be a burdensome process on employees and other individuals who visit a SSA field office.

An agency seeking to impose a new information collection requirement must obtain approval from the Office of Management and Budget (OMB) of the proposed information collection. This requires publishing the format of the information to be collected and allowing the public sixty (60) days to comment. The agency must then address the comments received and provide an additional thirty (30) days for the public to comment on DHS' estimate of the burden. OMB must approve the information collection and issue an OMB control number before the information collection can take place.

Even though the information in question will be collected by the Social Security Administration, it is DHS that is issuing this rule and causing the information to be collected, and thus DHS that must take the necessary steps to obtain approval from the OMB for the information collection.

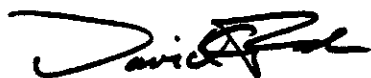
Clearly the steps required to correct a no-match letter, even if voluntary, are a new information collection within the meaning of the PRA and the regulations. Accordingly IFA requests that DHS comply with the provisions of the PRA before proceeding with this rule and the information collection it requires.

Conclusion

The IFA and its members are committed to working toward enactment of comprehensive immigration reform. In order to meet this goal, DHS should allow Congress to advance the immigration debate forward as a whole and not attempt to address reform in a piecemeal regulatory approach. Current proposals for Comprehensive Immigration Reform include employment eligibility and verification systems and strengthened interior enforcement procedures. They also significantly change an employer's responsibilities when verifying the identity and work authorization eligibility of its workforce. Each measure specifically addresses the case when an employer receives a no-match letter from the SSA or from DHS. It is important to let this ongoing, fruitful public debate run its course without undermining it with regulations that may lead to duplicative and contradictory proposals that create new liabilities rather than eliminate them. To advance an enforcement-only regulation independently—without (1) a plan to resolve the question of current unauthorized workers; and, (2) to provide for a guest worker program to address our future workforce needs—is short-sighted and not responsive to our nation's economic needs.

Thank you for your consideration of these comments.

Respectfully submitted,



David French
Vice President, Government Relations