TINDALL & FOSTER, P.C.
IMMIGRATION, EMIGRATION & RELATED INTERNATIONAL LAW

IMMIGRATION BULLETIN

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# This Email Bulletin from Tindall & Foster, P.C. contains important information regarding the new Department of Homeland Security Employment Verification Regulations

As reported in the Tindall & Foster, P.C. Email Bulletin dated August 10, 2007, the U.S. Department of Homeland Security (DHS) Secretary Michael Chertoff and U.S. Department of Commerce Secretary Carlos Gutierrez announced a series of reforms that the Administration will pursue to address worksite enforcement, border security, and other immigration-related issues.

Key among those provisions was the publication of new regulations in the Federal Register on August 15, 2007, regarding employment eligibility verification and the hiring or continued employment of foreign nationals unauthorized for work. **Specifically, the new regulations list steps that must be taken by employers upon receipt of a "no match" letter from the Social Security Administration or a letter regarding employment verification forms from the Department of Homeland Security.** Failure to take the required steps within 93 days following receipt of such letter could result in a finding that the employer knew or should have known that the employment was unauthorized if the individual is later found to have been unauthorized for employment. Essentially, if the employer does not follow the prescribed steps, the employer can be found to have had *constructive knowledge* of the employee's unauthorized status, in violation of the Immigration & Nationality Act and regulations prohibiting the knowing hire or continued employment of persons not authorized for employment. The new regulations go into effect September 14, 2007.

So long as the employer follows the prescribed steps in a timely manner in accordance with the regulations, the employer may benefit from a "safe-harbor" provision in the event that the employee is later found to have been unauthorized for employment.

In order to take advantage of the "safe-harbor" provision after receipt of a Social Security "no match" letter, the employer must take the following actions:

1. The employer must check the employer's records to ensure there has not been a typographical, transcription, or similar clerical error in recording the Social Security Number. In the event of an error, the employer is required to correct the employer's records, notify the Social Security Administration (SSA), and obtain verification that the new number, as properly recorded, matches SSA records. The employer must keep a record of the date and time of verification, and the manner in which verification was secured. The employer should store this record with the employee's Form I-9. This step must be completed within 30 days of receipt of the "no match" letter.

2. If the employer determines that the discrepancy is not due to an error in its own records, or if correcting such an internal error does not resolve the discrepancy, the

employer must request that the employee confirm the accuracy of the employer's records. If the employee states that the employer's records are incorrect and provides corrected data, the employer must then correct the employer's records, notifying the SSA, and obtaining verification that the new number, as properly recorded, matches SSA records. The employer must keep a record of the date and time of verification, and the manner in which verification was secured. This step must be completed within 30 days of receipt of the "no match" letter.

3. If the correction provided by the employee does not resolve the discrepancy, or if the employee states that the employer's records are correct, the employer must promptly instruct the employee to address the matter with the SSA in order to correct the matter within 90 days of the employer's initial receipt of the "no match" letter. The employer must then, before the expiration of the 90-day period, verify with the SSA that the employee's name and social security number match SSA records.

4. If the discrepancy has not been resolved within 90 days following the employer's receipt of the "no match" letter, on or before the 93rd day, the employer must re-verify the employee's employment eligibility and identity by completion of a new Form I-9. The employer may not accept any document referenced in any written notice, any document that contains the disputed number, or any receipt for an application for a replacement of such document. The employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization. The employer must retain the new Form I-9 with the prior Form I-9. If this re-verification process results in proper verification of employment eligibility, the employer should not be deemed to have *constructive* knowledge of the hiring or continued employment of a foreign national unauthorized for work merely by virtue of having received a "no match" letter. This "safe-harbor" provision only protects the employer from an automatic finding of "constructive knowledge" based solely on the receipt of the "no match" letter and does not protect against findings of actual knowledge in the event that the facts warrant such a finding. In addition, the DHS will continue to review the totality of the relevant circumstances in determining if an employer had constructive knowledge that an employee was an unauthorized alien.

In order to take advantage of the "safe-harbor" provision after receipt of a letter from the Department of Homeland Security (DHS), the employer must take the following actions:

1. If an employer receives a written notice from the DHS stating that the immigration status or employment authorization documentation presented or referenced by the employee in completion of Form I-9 was not assigned to the employee, according to DHS records, the employer must contact local DHS and attempt to resolve the questions raised. The employer must complete this step within 30 days of receipt of the letter.

2. If the employer is unable to verify with DHS within 90 days of receipt of the written notice that the discrepancy has been resolved, the employer must verify the employee's employment authorization and identity within an additional 3 days by following the verification procedure outlined in #4 above.

If you receive such a letter from the Social Security Administration or Department of Homeland Security and require assistance in responding in a timely manner, please contact

your Tindall & Foster immigration attorney. Tindall & Foster, P.C. is also available to assist employers in the establishment of compliance programs and revised procedures for responding to "no match" letters in a timely manner that will ensure protection of the "safe-harbor" provision of the new DHS regulations.

As always, Tindall & Foster, P.C. will continue to monitor worksite enforcement activity and will make new information available to our clients via the Tindall & Foster, P.C. web site at www.tindallfoster.com, and, when appropriate, via future Email Bulletins.

## Further Information

**Your Tindall & Foster attorneys are available to help clarify and apply the news in this bulletin to your unique situation.**


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