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MEMORANDUM BY ELECTRONIC MAIL

To: Andrew W. LaVigne

From: Gary Jay Kushner
Paul W. Virtue

Date: August 17, 2007

Re: Analysis of Immigration Reform Measures Announced by the White House

In a fact sheet issued by the White House Office of Communications on Friday, August 10, 2007, Homeland Security Secretary Michael Chertoff And Commerce Secretary Carlos Gutierrez announced a series of twenty-six reforms the Administration intends to pursue to address border security and immigration problems. A copy of the statement is attached.

Among the reforms to be undertaken by the Administration within the confines of existing statutory authority are the following ten measures relating to worksite enforcement and guest worker programs:

WORKSITE ENFORCEMENT

1. Final Social Security Number "No-Match" Rule 1/

The final rule, which was published on Wednesday, August 15, 2007, and will become effective on September 14, 2007, expands the definition of "constructive knowledge" [of unauthorized employment] to include the failure to take reasonable steps to address three situations: (1) an

1/ From summary prepared by the American Immigration Lawyers Association (AILA InfoNet Doc. No. 07081366) (posted Aug. 13, 2007)

employee's request for the employer's sponsorship of the employee for a labor certification or visa petition; (2) receipt of a no-match letter from the Social Security Administration ("SSA"); and (3) receipt of a notice from DHS (usually after an I-9 audit) that the employee's employment authorization documents presented in connection with completion of the I-9 form do not match DHS records.

The final rule includes slight revisions to the June 2006 proposed "safe harbor" protocol in relation to SSA no-match letters and DHS notices, most notably extending from 63 days to 93 days the period of time an employer has to complete reconciliation of information when there is a discrepancy, and promises immunity from a constructive knowledge charge premised on such notices should the employer follow the procedure exactly as stated. While acknowledging that other actions taken by employers may constitute "reasonable steps" in the context of a "total facts and circumstances test," employers who fail to follow the protocol may not have the "safe harbor" from a finding of constructive knowledge in the event of a civil or criminal investigation.

In final form, the "safe harbor" protocol is as follows:

Within 30 days of Receipt of the Notification From the Government

No-Match Letter from SSA: The employer must check its records to determine whether the discrepancy was caused by a clerical error, correct the error with SSA, and verify that the corrected name and social security number now match SSA's records. The rule advises employers to retain a record of the manner, date, and time of such verification. The employer may update the I-9 form relating to the employee or complete a new I-9 (retaining the original), but should not perform a new I-9 verification.

If the employer determines that the SSA no-match is not a result of an error in the employer's records, the employer must promptly request that the employee confirm that the name and social security account number in the employer's records are correct. If the information is incorrect, the employer must make corrections, inform the SSA of the correction and verify a match on the corrected information, and make a record of its actions.

If the employee confirms that the employer's record information is correct, the employer must promptly advise the employee of the date of receipt of the no-match letter and advise the employee to resolve the discrepancy with the SSA no later than ninety (90) days after the receipt date. The employer is under no legal obligation to advise the employee regarding the means or manner of resolving the discrepancy with the agency. *Notice of discrepancy from DHS:* The employer must contact the local DHS office in

accordance with the written notice's instructions and attempt to resolve the question raised by DHS about the immigration status document or employment authorization document. Note that the specific instructions in the notice may provide less than 30 days for the employer to respond.

Within 93 days of Receipt of Notification From the Government

- If the discrepancy cannot be resolved with either SSA or DHS within 90 days of receipt of the written communication from either agency, the employer must attempt to reverify the worker's employment eligibility by completing a new I-9 employment verification form. Companies

should use the same procedures as when completing an I-9 form at the time of hire, with a few exceptions:

- o The employee must complete section one and the employer must complete section two of the new I-9 form within 93 days of receipt of the notice from either SSA or DHS.
- o The employer cannot accept any document (or receipt for such a document) referenced in the DHS notification or any document (or receipt) that contains a social security number that is the subject of the SSA no-match letter to establish employment authorization or identity.
- o The employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.
- o The new I-9 form should be retained with the original I-9 form(s). If the employer cannot verify the employee's work eligibility through completion of a new I-9 form, the employer must decide whether to terminate the employee, or face the risk in any subsequent DHS enforcement action of being determined to have constructive knowledge and being penalized for the continuing employment of an unauthorized alien. The final rule provides that whether an employer would be found to have constructive knowledge in any particular case will depend on the "totality of relevant circumstances." An employer should not terminate an employee until the process is completed, unless the employer obtains actual knowledge (such as through an admission by the employee) that the employee is not eligible for employment in the U.S.

DHS takes the position that applying the safe harbor rule in a uniform manner for all employees whose account numbers or work authorization documents are challenged by the SSA or DHS should not subject an employer to liability for document abuse and/or unlawful discrimination on the basis of national origin and citizenship status.

No "safe harbor" protocol is available where an employee requests employer sponsorship for a labor certification or visa petition and the employee turns out to be unauthorized. Where the request is made by an employee who admits to the employer that he/she is currently unauthorized, or where the request is inconsistent with information provided by the employee in connection with the employment verification process (i.e., a claim of U.S. citizenship or permanent resident status in Part I of the form), the employer may be charged with actual or constructive knowledge of unauthorized status if the employer permits the employee to continue working for the employer.

2. The Administration announced that, in the coming months, it will publish a regulation that will reduce the number of documents that employers must accept to confirm the identity and work eligibility of their employees.

Presently, 29 documents can be used to establish identity and work eligibility. According to DHS, employers have little capacity to verify the authenticity of many of these documents, and the agency sees the sheer quantity of acceptable documents as an invitation to fraud. In reducing the number of acceptable documents, the DHS will focus on insecure documents now often used for identity fraud.

This is not the first such effort to reduce the number of documents that may be used to prove identity and employment authorization. Section 412(a) of the Illegal Immigration and Immigrant Responsibility Act of 1996 (“IIRIRA”) amended section 274A(b)(1) to delete certain documents from the statutory list of acceptable documents. The IIRIRA, however, retained the authority of the Attorney General to designate specific documents as acceptable in addition to the statutory list. Accordingly, while the INS published an interim rule on September 30, 1997, to take account of these statutory changes, at the same time the agency acted to restore the use of some of those documents by exercising its authority to continue to designate certain documents as acceptable for employment verification until completion of a planned document reduction initiative. Thus, the rule resulted in no change to the lists of identity documents (List B) and employment authorization documents (List C). Consistent with congressional direction, the INS did eliminate three documents from List A: a Certificate of U.S. Citizenship; a Certificate of Naturalization; and a foreign passport not meeting the standards set forth in the interim rule. In order to minimize confusion and disruption, however, the INS exercised its discretion to forgo enforcement actions against employers who continue to act in reliance upon and in compliance with existing guidelines for employment verification that continue today to list those documents.

While DHS has not indicated how it will propose to revise the list of acceptable documents, we can expect the agency to clarify its position on certificates of citizenship and naturalization and to propose removal of the state-issued birth certificate as acceptable documents.

3. The Department Of Homeland Security will raise the civil fines imposed on employers who knowingly hire illegal immigrants by approximately 25 percent.

DHS will use existing authority to adjust the amount of civil fines for inflation, resulting in an increase of about 25 percent. Current fines for knowingly hiring or continuing to employ an unauthorized alien are as follows:

- (i) not less than \$250 and not more than \$2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,
- (ii) not less than \$2,000 and not more than \$5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or
- (iii) not less than \$3,000 and not more than \$10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph.

The current fine for a verification (paperwork) violation is not less than \$100 and not more than \$1,000 for each individual with respect to whom such violation occurred.

4. The Administration announced that it will continue to expand criminal investigations against employers who knowingly hire large numbers of illegal aliens.

According to the release, arrests by U.S. Immigration and Customs Enforcement (“ICE”) for criminal violations have increased from 24 in FY 1999 to a record 716 in FY 2006. There have been 742 criminal arrests since the beginning of FY 2007 (through July 31).

Conviction for a pattern or practice of hiring or continuing to employ unauthorized aliens is punishable by a fine of \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisonment for not more than six months for the entire pattern or practice, or both.

5. The Administration will commence a rulemaking process to require all federal contractors and vendors to use E-Verify, the Federal Electronic Employment Verification System, to ensure that their employees are authorized to work in the United States.

One of the problems that U.S. employers have long lamented is the lack of a reliable and timely electronic system for verifying the authenticity of the documents provided by newly hired employees. In addition to the reforms announced by the White House on Friday, the Department of Homeland Security revealed that it will be re-branding the often-criticized Basic Pilot Program as "E-Verify" effective next month:

The E-Verify program will be launching new and exciting changes later next month, such as photo screening features and online resources for employees.

DHS website, Aug. 10, 2007. Presumably, the DHS will fund the expansion of the electronic verification system and the federal contractor requirements through appropriated funds. There is no existing statutory authority for the collection of a user fee for use of the system.

According to the announcement, more than 200,000 Federal contractors would be affected by the rule.

6. The Administration will help states make greater use of E-Verify.

In the vacuum created by the failure of Congress to enact comprehensive immigration reform, a number of states, Colorado, for example, have enacted legislation requiring that state contractors participate in the Basic Pilot Program (now E-Verify) administered by the ICE. According to the announcement, the Administration plans to assist such efforts through outreach and offers of technical assistance.

7. The Administration Will Bolster E-Verify By Expanding The Data Sources It Can Check.

The new sources of data will include cross-checks of visa and passport information.

8. The Administration will seek voluntary State partners willing to share their Department Of Motor Vehicles photos and records with E-Verify.

According to the announcement, agreements to allow E-Verify to have access to the repository of photographs in state DMV databases will help prevent unauthorized aliens from using fraudulent driver's licenses to obtain employment. Such agreements are also expected to lay the groundwork for further expansion of the electronic employment eligibility verification system.

STREAMLINING EXISTING GUEST-WORKER PROGRAMS

9. The Department Of Labor (DOL) will reform the H-2A agricultural seasonal worker program.

Before the U.S. Citizenship and Immigration Services (USCIS) can approve an employer's petition for seasonal agricultural (H-2A) workers, the employer must file an application with the DOL stating that there are not sufficient workers who are able, willing, qualified, and available, and that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers. The statute and DOL regulations provide for numerous worker protections and employer requirements with respect to wages and working conditions that do not apply to nonagricultural programs.

DOL regulations provide for a decision to be made on an application for labor certification not later than thirty days prior to the stated date of need. The employer must file the labor certification request no later than forty-five days before the date of need. Delays at both the state and federal level have made the H-2A labor certification process unwieldy and of limited utility. As a result, of the 1.1 million employed farm workers fewer than 40,000 are H-2A visa holders.

According to the announcement, the President has directed DOL to review the regulations implementing the H-2A program and to institute changes that will provide farmers with an orderly and timely flow of legal workers, while protecting the rights of laborers.

10. The Department Of Labor will issue regulations streamlining the H-2B Program for non-agricultural seasonal workers.

DOL's proposed rule is expected to speed processing by moving from a government-certified system to an employer-attestation system akin to the PERM system that has reduced backlogs in the permanent immigration process. Nonetheless, the statutory cap of 66,000 on the number of H-2B visas that may be granted annually will continue to make this guestworker program an unpredictable source of seasonal and peak load laborers.

Attachment