

Advocacy: the voice of small business in government

September 18, 2007

The Honorable Michael Chertoff
Secretary, Department of Homeland Security
Nebraska and Massachusetts Avenues, N.W.
Washington, DC 20528

Re: Impact of the “No Match” Rule on Small Business

Dear Secretary Chertoff:

I am writing to you concerning the Department of Homeland Security (DHS), Immigration and Custom Enforcement’s (ICE) *Final Safe Harbor Procedures for Employers Who Receive a No-Match Letter Rule*.¹ The final rule establishes procedures an employer must follow when the employer receives a “no-match” letter from the Social Security Administration (SSA). The Office of Advocacy (Advocacy) understands the final rule is now the subject of litigation in the Federal District Court for the Northern District of California.² I am writing to inform you that I agree with the Regulatory Flexibility Act (RFA)³ claim raised by the Plaintiffs-Intervenors, San Francisco Chamber of Commerce, *et al.*,⁴ and I am extending an offer to help DHS satisfy their requirements under the RFA.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a

¹ 72 Fed. Reg. 45611 (August 15, 2007).

² Case No. 3:07-cv-04472-CRB.

³ 5 U.S.C. § 601 et seq.

⁴ Plaintiff-Intervenors’ Memorandum of Points and Authorities in Support of Their Application for Preliminary Injunction, p. 14.

⁵ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.⁶

Background

The Immigration Reform and Control Act of 1986 (IRCA) makes it illegal for an employer to knowingly hire an employee who is not authorized to work in the United States.⁷ Under DHS/ICE's final rule, employers who receive a "no-match" letter from SSA indicating a discrepancy between an employee's name and social security number must now take certain actions to resolve those discrepancies.⁸ If the employer and employee are unable to correct the discrepancy within a specified timeframe, the employer is obligated to terminate the employee or be deemed to have "constructive knowledge" that the employee may be an unauthorized alien.⁹ While DHS/ICE stated that the rule would not impose any burden, small business representatives filed comments indicating that the rule actually would impose substantive and costly legal obligations on employers.¹⁰

The Plaintiff-Intervenors in the pending litigation have written to me requesting Advocacy's intervention as *amicus curiae* with respect to their RFA claim in the case. In response to the request, I feel that it is my responsibility to work with DHS and ICE to correct the RFA problems with the "no match" rule and to assist the court by providing Advocacy's unique expertise on the RFA.

Advocacy's Amicus Authority

Advocacy is authorized by the RFA to appear as *amicus curiae* in court cases involving rules, both with respect to RFA issues and to the adequacy of the rulemaking record.¹¹ Because Advocacy believes DHS/ICE improperly certified that the "no match" rule

⁶ 5 U.S.C. § 603.

⁷ 8 U.S.C. § 1324a.

⁸ 72 *Fed. Reg.* 45623.

⁹ 72 *Fed. Reg.* 45613.

¹⁰ See, for example, comments by the Associated Builders and Contractors, DHS Docket No. ICEB-2006-0004, Document No.0166.1; the American Subcontractors Association, DHS Docket No. ICEB-2006-0004, Document No. 0159; and the National Federation of Independent Business, DHS Docket No. ICEB-2006-0004, Document No.0194.

¹¹ 5 U.S.C. § 612, Reports and intervention rights, which provides in full:

- a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter ...;
- b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter [5 USC §§ 601 et seq.], the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities;
- c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

would not have a significant economic impact on a substantial number of small entities, Advocacy intends to brief the court on the requirements of the RFA. Advocacy believes the final rule imposes legal obligations and costs on small businesses that the agency failed to consider, and that our expertise on the RFA would be of assistance to the court.

Discussion

Federal regulations must undergo certain regulatory analyses before they are finalized.¹² One of these analyses is an Initial Regulatory Flexibility Analysis (IRFA) under the RFA. An IRFA is required whenever a federal rule is expected to “have a significant economic impact on a substantial number of small entities.”¹³ The IRFA describes why the action is being taken, who will be impacted, how much it will cost to comply, and significant alternatives the agency considered that would minimize the impact on small entities. If, however, the head of the agency is able to determine that the rule will not have a significant economic impact on a substantial number of small entities, the head of the agency may so certify and avoid having to perform an IRFA. That certification must include a statement providing the factual basis for such certification.¹⁴

DHS/ICE certified that the final “no match” rule would not have a significant economic impact on a substantial number of small entities. Advocacy believes that certification was in error because the rule imposes some thus-far unquantified costs on employers that DHS/ICE should have assessed in its RFA analysis. Specifically, the rule requires employers to take certain actions in response to receiving “no match” letters that they were previously not required to take. Those requirements represent costs that should have been quantified by the agency in compliance with the RFA.

Conclusion

Given the potential cost and impact of the no-match rule on small businesses, Advocacy believes a proper RFA analysis is of critical importance. Moreover, Advocacy believes that a proper RFA analysis will provide DHS/ICE with information that will improve the rule. Accordingly, Advocacy recommends that DHS stay the final rule pending completion of a proper RFA analysis. That analysis will allow the agency to determine whether a factual basis exists to certify the rule under the RFA, or whether an IRFA (including a discussion of feasible alternatives) is required. The agency’s analysis should

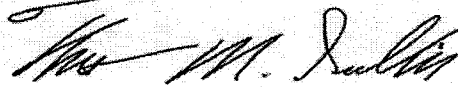
¹² See, Executive Order 12866, *Regulatory Planning and Review*, available at http://www.whitehouse.gov/omb/inforeg/EO12866/EO12866_amended_01-2007.pdf and Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 *Fed. Reg.* 53461) (August 16, 2002).

¹³ 5 U.S.C § 603(a).

¹⁴ 5 U.S.C § 605(b).

be published in the *Federal Register* for public comment in accordance with the RFA.¹⁵ Advocacy staff is available to assist the DHS and ICE in any way we can to ensure that analysis can be performed in a timely manner.

Sincerely,



Thomas M. Sullivan
Chief Counsel for Advocacy

cc: The Honorable Susan E. Dudley, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

¹⁵ See, 5 U.S.C. § 603 and § 605.