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April 25, 2008

Director, Regulatory Management Division  
U.S. Citizenship & Immigration Services  
Department of Homeland Security  
425 I Street, NW, Ste 1000  
Washington, DC 20536

ATTN: Marissa Hernandez

RE: DHS Docket # ICEB- 2006-0004  
Rule Making Proceedings on Safe-Harbor Procedures for Employers  
Who Receive “No-Match” Letters – Clarification; Initial Regulatory  
Flexibility Analysis

Dear Director:

The Department of Homeland Security (“DHS”) published its supplemental proposed rulemaking (“Supplemental Proposed Rule”) on “safe-harbor” procedures for employers who receive “no-match” letters in the Federal Register on March 26, 2008. The DHS allowed a comment period of 30 days from the date of publication. DHS Docket No. ICEB-2006-0004.

The Oregon Association of Nurseries is based in Wilsonville, Oregon with a membership of more than 1,500 wholesale growers, retailers, landscapers and suppliers. Oregon’s nursery and greenhouse industry is the state’s largest agricultural sector. Oregon trails only California in nursery production and accounts for 18 percent of all U.S. nursery crops.

Oregon's nursery and greenhouse industry continues its record of strong growth. On September 13, 2007, the Oregon field office of the National Agricultural Statistics Service reported the state's nursery and greenhouse growers set another sales record with wholesale sales of \$966 million in 2006, ten percent greater than the \$877 million set in 2005.

The Social Security No-Match system as proposed is an unworkable and ineffective tool that utilizes an inaccurate database combined with a cumbersome vetting process which is overseen by an unpracticed bureaucracy. This is a recipe for a disaster that places the U.S. economy at risk. Consider that:

- The new rule will hurt American workers, perhaps as many as 12 million American workers, whose records don't match because they changed their names when they got married or failed over the years to correct the SSA's inaccurate spelling of their names -- and who will now risk being terminated as a result making these corrections.
- The new rule will have unintended consequences for the Social Security system, which will be overwhelmed by the volume of cases generated when the rule goes into effect and may take years to recover from the strain.
- The new rule creates the wrong kind of incentives for business owners. It's a simple fact: the regulation targets employers trying to play by the rules, but does not touch competitors who operate outside the law. It's Congress that's at fault for failing over the years to permit the legal flow of workers we need to grow our businesses. But now the rule will burden employers trying to do the right thing.

### **OAN COMMENTS**

The OAN respectfully submits the following comments to DHS regarding the Supplemental Proposed Rule:

1. Time for Response Should Be Extended

As a threshold comment, OAN points out that the 30 day response period to review and comment on DHS's conclusions and applicability of the impact on small business is insufficient to allow for a careful and reasoned response by the OAN. DHS should consider extending the response period an additional 60 days to allow interested parties to evaluate, study and respond to the Supplemental Proposed Rule.

2. Cost Impact on Small Business

In the Proposed Supplemental Rule, DHS summarized its economic findings. DHS estimated costs in the range of \$3,009 for an employer with five employees or less to \$33,759 for an employer with 500+ employees. This fee structure, in our view, is more about providing adequate costs for enforcement rather than capture the economic impact on business. It is important DHS sets up a system to provide a disincentive to employers to flaunt the law instead of adding an additional layer of cost to those who are seeking a willing, legal workforce. Small business across the country are facing increased cost inputs regarding fuel, health care and other essential business activities – this rule only serves to burden the employer with enforcement responsibilities – but place a financial burden as well.

OAN members proceed cautiously when recruiting and hiring employees. They comply with the immigration laws by requiring new employees to present acceptable documents to establish identity and eligibility to work in the United States. OAN members report that the documents presented to establish identity and eligibility to work in the United States appear reasonable on their face. But OAN members are concerned that

because they cannot distinguish between true documents and fraudulent documents they are risking legal liability. An unintended consequence of a poorly thought out rule may create a proliferation of fraudulent documents and fuel unsavory underground economies – which are not welcome or healthy for the US business community.

### 3. Safe-Harbor Timeline

The Supplemental Proposed Rule essentially repeats (except for a few minor changes) what is contained in the final rule published in August 2007. While the OAN has concerns for its members and the agriculture industry in general, its comments here will focus on the safe-harbor 90 day correction timetable.

Under the no-match rule, an employer generally has 90 days from the date it receives the SSA no-match letter to correct, rectify any no-match problem identified in the letter and then verify that any correction has been properly verified with the SSA. If that does not resolve the problem, the employer must take certain steps within 3 days (new I-9 completion, etc.). If the problem still is not resolved, the employer must either fire the employee or run the risk that continued employment will indicate “constructive knowledge” that the employee is unauthorized, and thus be evidence of an employer’s violation of immigration laws.

OAN member employers may receive a SSA no-match letter that ranges from a few names to hundreds of names for larger agriculture employers. To ensure and correct a discrepancy in 90 days, including if an error occurs between the employer and SSA records, exposes the employer to the potential difficult choice the OAN originally complained about in its comments submitted to the issuance of the DHS proposed no-match rules in August 2006, i.e., terminate the worker or face a potential immigration law violation. Indeed, if the SSA records are the problem, employer experience in this industry indicates that many times SSA cannot remedy errors in 90 days.

Many lawful workers will not be able to have their SSN discrepancies resolved within the 90-day time frame and will be fired because of this rule. We believe that implementation of the Supplemental Proposed Rule will result in unwarranted firings due to database errors and predictable delays in obtaining documentation of status or database corrections. OAN member employers will be left with an untenable choice – keep the employee while potentially being exposed to employment verification penalties or terminate the employee and face possible wrongful termination or discrimination charges. Firing a worker in the agricultural industry is one of the industry’s greatest challenges due to labor workforce shortages. This lack of an available and legal workforce will create additional economic burdens and jeopardizes the ability of OAN members to provide services to their customers.

### 4. Receipt of No-Match Letter

The no-match regulation triggers the time requirements for an employer to take certain action, from the time the employer “receives” the no-match letter. However, neither the

final rule issued in August 2007 nor the Supplemental Proposed Rule issued in March 2008 month clarifies when an employer is deemed to have “received” the letter for purposes of triggering the time periods. Does the time period commence when an employee who initially handles the mail an employer receives each day, even though that employee does nothing more than route the notice letter to the responsible person in the company, or does it start at some other time? The OAN recommends that the DHS consider inserting a statement in the no-match letter that identifies when the full 90 day period begins and ends. This could be accomplished simply by allowing for a 10 day mail delivery and processing time. Whatever the DHS decides, the OAN encourages DHS to issue guidance in its final rule outlining what should be done in order for the employer to have use of the full (and severely limited) time periods specified under the safe-harbor procedures.

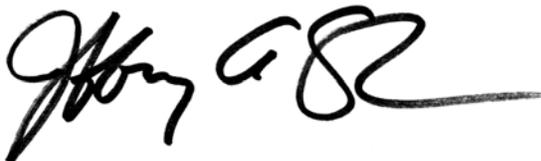
5. DHS “Notice of Suspect Document” Notice

While most of the focus has been on the SSA “no match” notice to employers a “Notice of Suspect Document” from DHS. There has been little or no focus on such notices. Unlike SSA, however, it is the OAN’s understanding that DHS has no process that regularly checks and reports no-matches in immigration documents, except in the context of an I-9 audit.

The OAN suggests that DHS also explain in any final rule how the safe-harbor rules apply and the process to be undertaken by employers when a “Notice of Suspect Document” notice comes from the DHS rather than the SSA.

The proposed rule will only serve to destabilize a workforce that labor-intensive industries depend upon. Employers wish to abide by the law and they want DHS to provide tools to employ a legal workforce. Unfortunately this rule will not accomplish that goal. DHS would be well served to resist political expedient solutions and work with the Congress and the Bush Administration toward a sensible pathway to support the US economy and not place untenable financial burdens on employers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeff Stone", with a long horizontal flourish extending to the right.

Jeff Stone, Director of Government Relations  
Oregon Association of Nurseries