

January 2009

Giving Employers Guidance: The Proper Response to No-Match Letters Under Aramark Facility Services v. Service Employees International Union, Local 1877

Steffanie Bevington

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Recommended Citation

Steffanie Bevington, *Giving Employers Guidance: The Proper Response to No-Match Letters Under Aramark Facility Services v. Service Employees International Union, Local 1877*, 39 Golden Gate U. L. Rev. (2009).
<http://digitalcommons.law.ggu.edu/ggulrev/vol39/iss3/8>

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CASE SUMMARY

GIVING EMPLOYERS GUIDANCE: THE PROPER RESPONSE TO NO-MATCH LETTERS UNDER *ARAMARK FACILITY SERVICES V. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1877*

INTRODUCTION

Each year, the Social Security Administration (“SSA”) receives approximately 245 million wage reports on Wage and Tax Statements (“Forms W-2”) from employers, covering approximately 153 million workers.¹ If the combination of name and social security number (“SSN”) on a Form W-2 cannot be matched to an SSA record, SSA is unable to attribute the earnings to a worker’s earnings record.² In the event that the items cannot be matched, the SSA attempts to resolve the issue by sending letters to employees and employers to inform them of the mismatch.³ These letters are referred to as “no-match” letters, and their purpose is to “obtain corrected information to help SSA identify the individual to whom the earnings belong so that the earnings can be posted to the individual’s earnings record.”⁴ SSA began sending no-

¹ U.S. Social Security Administration, Overview of Social Security Employer No-Match Letters Process, <http://www.ssa.gov/legislation/nomatch2.htm> (last visited Mar. 20, 2009).

² *Id.* SSA uses earnings information to determine eligibility for and the amount of Social Security benefits to which that worker may be entitled. *Id.*

³ *Id.*

⁴ *Id.*

match letters to employees in 1979 and to employers in 1994.⁵

Failure to provide guidance to employers regarding the appropriate response to receipt of a no-match letter caused confusion among employers and ultimately resulted in the “hasty and ill-considered termination” of thousands of employees.⁶ Although the SSA informs employers that the information received does not make any statement about an employee’s immigration status, and employers are warned that the information provided is not a sufficient basis to take any adverse action against the employee,⁷ employers are left in the dark about what steps should be taken to avoid being found in violation of immigration law.

In *Aramark Facility Services v. Service Employees International Union, Local 1877*, the United States Court of Appeals for the Ninth Circuit provided some guidance to employers in receipt of a no-match letter. Finding that receipt of a no-match letter does not give an employer “constructive knowledge” that an employee is unauthorized to work in the United States, the Ninth Circuit upheld an arbitration award reinstating employees who were terminated after their employer received a no-match letter.⁸ The Ninth Circuit held that termination of the employees was unwarranted under the circumstances because the company did not have sufficient information that it would be violating immigration laws by continuing to employ them.⁹

I. FACTS AND PROCEDURAL HISTORY

In early 2003, Aramark Facility Services (“Aramark”) received no-match letters from the SSA notifying it that the SSNs of some of its 3,300 employees nationwide did not match those in the SSA’s database.¹⁰ Aramark responded by asking its regional managers to confirm that the information it provided matched the information provided by employees, and if necessary, to require corrective steps from

⁵ *Id.*

⁶ Michael Gibek & Joshua Shteierman, *The “No-Match” Letter Rule: A Mismatch Between the Department of Homeland Security and Social Security Administration in Worksite Immigration Law Enforcement*, 25 HOFSTRA LAB. & EMP. L.J. 233, 250 (2007) (quoting Austin T. Fragomen, Jr., & Steven C. Bell, *Complaint Procedures and Administrative Proceedings*, *Immigr. Emp. Compliance Handbook*, § 6:53 (2006), available at 2003 WL 1560595).

⁷ U.S. Social Security Administration, *Social Security Number Verification Service Handbook*, http://www.ssa.gov/employer/ssnvs_handbk.htm (last visited Mar. 20, 2009).

⁸ *Aramark Facility Servs. v. Serv. Employees Int’l Union, Local 1877*, 530 F.3d 817, 820-21 (9th Cir. 2008).

⁹ *Id.* at 821, 831-32.

¹⁰ *Id.* at 821.

the employees they supervised.¹¹ Among those with mismatched information were forty-eight employees working at the Staples Center in downtown Los Angeles.¹² These employees were represented by the Local 1877 of the Service Employees International Union (“SEIU”) and employed pursuant to a collective bargaining agreement (“CBA”) between SEIU and Aramark.¹³ On April 15 and 16, 2003, these employees received instructions from Aramark.¹⁴ The instructions required the employees to return to the SSA office to correct the discrepancy and to report back to Aramark with either a new social security card or verification that a new social security card was being processed.¹⁵ Employees were given three days to return with either of the required items.¹⁶ No employee was made aware of this policy prior to receiving the no-match letter.¹⁷ SEIU requested an extension of the three-day time constraint, which was denied by Aramark.¹⁸

Fifteen of the Staples Center employees obtained the requested documentation in time and retained their jobs.¹⁹ Thirty-three employees did not timely comply and were fired.²⁰ Although the instruction letters from Aramark gave the employees only three days to comply, the employees were actually given seven to ten days to provide the requested documentation.²¹ Nothing in the record indicates that the employees knew they had that much time.²² At a later date, the fired employees were told that they would be rehired if they supplied the required documentation, although it is not known when they received this

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* Instructions to the Aramark employees were as follows:

1. Please return to the [SSA] office to correct [the] discrepancy
2. Return to Aramark Facility Services at Staples Center with one of two items:
 - a. A new social security, [sic] photo copies will not be accepted
 - b. Verification form that shows a new card is being processed
3. You have three working days from the post-marked date of this letter to bring either. [] You have 90 days from the date of re-application on your receipt to bring in your new card.
4. A new card or verification of renewal must be in the office no later then [sic] close of business 4pm on Wednesday April 23rd, 2003.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 821-22.

²² *Id.* at 822.

information.²³

Though Aramark suspected immigration violations, it did not know why the terminated employees failed to comply with the instructions given.²⁴ Aramark even argued to the arbitrator that each of the employees could have had “valid” work eligibility.²⁵ At the time they were hired, each of the fired employees had properly completed the federal Employee Eligibility Verification Form (Form I-9) and provided Aramark with facially valid documents establishing their identity and eligibility to work in the United States.²⁶ Aramark was not notified by any federal agency that its workers were suspected of being undocumented.²⁷

After the terminations, SEIU filed a grievance on behalf of the employees, arguing that Aramark had violated the CBA by firing them without just cause.²⁸ Pursuant to the CBA, the matter was referred to mandatory arbitration, which took place over two days of hearings.²⁹ The arbitrator concluded that there was “no convincing information” that any of the terminated employees were undocumented; therefore, he found that the employees had been terminated without just cause.³⁰ The arbitrator ruled for SEIU and awarded the employees back-pay and reinstatements.³¹

After the arbitrator’s rulings, Aramark filed a complaint in U.S. District Court to vacate the arbitration award, and SEIU counter-claimed to confirm it.³² On cross-motions for summary judgment, the district court ruled for Aramark.³³ The court found that because the fired employees failed to inform Aramark that they were beginning the process of correcting the SSN mismatch, Aramark had constructive notice that they were ineligible to work in the United States.³⁴ The court vacated the arbitrator’s award, holding that the award of reinstatement and back-pay violated public policy because it would require Aramark to violate the immigration laws.³⁵ SEIU appealed.³⁶

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 821.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

II. NINTH CIRCUIT ANALYSIS

To resolve the appeal from the summary judgment entered by the district court, a three-judge panel of the Ninth Circuit was required to decide whether there were any issues of genuine material fact and whether the district court correctly applied the substantive law.³⁷ The court acknowledged that the scope of review of an arbitrator's decision in a labor dispute is "extremely narrow,"³⁸ but highlighted that a court "need not, in fact cannot, enforce an award which violates public policy."³⁹ The public policy exception to the generally deferential review of arbitration awards was the only ground relied upon by Aramark in attacking the arbitrator's award.⁴⁰

The Ninth Circuit explained that for the public policy exception to apply, a court must "(1) find that an explicit, well-defined and dominant policy exists . . . and (2) that the policy is one that specifically militates against the relief ordered by the arbitrator."⁴¹ The public policy evaluation proceeds by taking the facts as found by the arbitrator.⁴² Relying on the arbitrator's factual findings, the Ninth Circuit found that compliance with immigration law, as argued by Aramark, was a sufficiently defined and dominant public policy to warrant application of the public policy exception in an appropriate case, but that here, the policy did not specifically militate against the arbitrator's award.⁴³

A. COMPLIANCE WITH IMMIGRATION LAW IS A SUFFICIENTLY DEFINED AND DOMINANT PUBLIC POLICY

Aramark relied on compliance with immigration law as the basis for its public policy argument.⁴⁴ More specifically, Aramark argued that under the Immigration Reform and Control Act of 1986 ("IRCA"), (1) employers are subject to civil and criminal liability if they employ

³⁶ *Id.*

³⁷ *Id.* at 822.

³⁸ *Id.* at 822-23 (citing *Federated Dep't Stores v. United Food & Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1990)).

³⁹ *Id.* at 823 (citing *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1209 (9th Cir. 1989) (en banc); *accord SFIC Properties, Inc. v. Int'l Ass'n of Machinists and Aerospace Workers*, 103 F.3d 923, 925 (9th Cir. 1996)).

⁴⁰ *Aramark*, 530 F.3d at 823.

⁴¹ *Id.* (quoting *United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir.1995)).

⁴² *Id.*

⁴³ *Id.* at 824.

⁴⁴ *Id.*

undocumented workers “knowing” of their undocumented status, and (2) the term “knowing” includes constructive knowledge.⁴⁵ The Ninth Circuit agreed that these policies are related to the arbitrator’s award because they would be violated if Aramark reinstated undocumented employees and because the Supreme Court has precluded awarding back-pay to undocumented employees.⁴⁶ The Ninth Circuit further found that these policies are “explicit,” “well-defined,” “dominant,” and expressed by more than “general considerations,” and therefore held that compliance with immigration law was an adequate basis for Aramark’s public policy argument.⁴⁷

B. COMPLIANCE WITH IMMIGRATION LAW DID NOT SPECIFICALLY MILITATE AGAINST THE ARBITRATOR’S AWARD

The Ninth Circuit then moved on the issue of whether the policy specifically militated against the arbitrator’s award; in other words, whether the award would have had Aramark reinstate and provide back-pay to employees when Aramark had “constructive knowledge” that they were undocumented.⁴⁸ Under federal immigration law, constructive knowledge is defined as “knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain

⁴⁵ *Id.* (citing 8 U.S.C. § 1324a(a)(1), (2); 8 C.F.R. § 274a.1(f)). 8 U.S.C.A. § 1324a (Westlaw 2009) provides:

§ 1324a. Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity—

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

⁴⁶ *Aramark*, 530 F.3d at 824; *see Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148-52 (2002).

⁴⁷ *Aramark*, 530 F.3d at 824.

⁴⁸ *Id.* at 825.

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condition.”⁴⁹ Under the IRCA, “constructive knowledge” is to be narrowly construed.⁵⁰ Aramark argued that it had constructive knowledge that the employees were undocumented because of the no-match letters themselves and because of the employees’ reactions to the no-match letters.⁵¹ The Ninth Circuit examined each of these arguments in turn and held that neither the no-match letters themselves⁵² nor the employees’ reactions to the no-match letters provided constructive knowledge of immigration violations.⁵³

1. The No-Match Letters Themselves

The Ninth Circuit found that given the narrow scope of the constructive knowledge doctrine, the no-match letters could not have put Aramark on constructive notice that the employees were undocumented.⁵⁴ The court reasoned that no-match letters are routinely sent to employers when the W-2 records differ from the SSA’s database regarding employees’ SSNs.⁵⁵ The main purpose of the no-match letters is not to report immigration violations, but to indicate to workers that their earnings are not being properly credited to their social security accounts.⁵⁶ No-match letters can be generated for a number of different reasons, including typographical errors, name changes, and inaccurate or incomplete employer records.⁵⁷ Therefore, a SSN discrepancy does not mean that an employee is undocumented.⁵⁸

The court further noted that the SSA tells employers that the information provided is not a statement about immigration status and “not a basis, in and of itself, to take any adverse action against the employee.”⁵⁹ Employers do not face any penalty for ignoring a no-match

⁴⁹ 8 C.F.R. § 274a.1(f).

⁵⁰ *Aramark*, 530 F.3d at 825 (citing *Collins Foods Int’l, Inc. v. INS*, 948 F.2d 549, 554-55 (9th Cir. 1991)).

⁵¹ *Id.*

⁵² *Id.* at 828.

⁵³ *Id.*

⁵⁴ *Id.* at 825.

⁵⁵ *Id.* at 826.

⁵⁶ *Id.* (citing Social Security Number High-Risk Issues: Hearing Before the Subcomms. on Social Security and Oversight of the H. Comm. on Ways and Means, 109th Cong. 60 (Feb. 16, 2006) (statement of Patrick P. O’Carroll, SSA Inspector General, available at <http://waysandmean.house.gov/hearings.asp?formmode=printfriendly&id=47-10>; and statement of James B. Lockhart, III, Deputy Commissioner of Social Security, available at <http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=4708>)).

⁵⁷ *Aramark*, 530 F.3d at 826.

⁵⁸ *Id.*

⁵⁹ *Id.* (quoting Social Security Number Verification Service Handbook,

letter, because the SSA does not have enforcement capability.⁶⁰ Furthermore, the Office of Special Counsel of Immigration-Related Practices, an agency of the Department of Justice, is in accord, stating that “[a] no match does not mean that an individual is undocumented” and that employers “should not use the mismatch letter by itself as the reason for taking any adverse employment action against any employee.”⁶¹ Even the new Department of Homeland Security (“DHS”) regulations regarding the use of no-match letters in the enforcement of immigration laws, which were adopted after the arbitrator’s ruling, would not “treat the no-match letter by itself as creating constructive knowledge of an immigration violation.”⁶² For these reasons, the Ninth

http://www.ssa.gov/employer/ssnvs_handbk.htm (last visited June 9, 2008)).

⁶⁰ *Id.* at 826.

⁶¹ *Id.* at 827 (citing Office of Special Counsel, Frequently Asked Questions, <http://www.usdoj.gov/crt/osc/html/facts.htm#verify> (last visited June 9, 2008)).

⁶² *Id.* at 827-28. The new DHS regulations were adopted after Aramark received the no-match letter and are currently subject to a preliminary injunction. *Id.* As noted by the court, the DHS has taken steps to use the enforcement of no-match letters in its enforcement of immigration laws. *Id.* at 827. In June 2006, DHS proposed amendments to 8 C.F.R. § 274a.1 in order to redefine “constructive knowledge” of immigration violations. See Safe Harbor Procedures for Employers Who Receive A No-Match Letter, 71 Fed. Reg. 34281-01, 34281 (June 14, 2006). After a series of revisions, the proposed amendments were adopted. See 8 C.F.R. § 274a.1(*l*). Under the new regulations, situations where constructive knowledge may arise, depending on the totality of the circumstances, include when the employer receives written notification from the SSA in the form of a no-match letter. See 8 C.F.R. § 274a.1(*l*)(1)(iii)(B). However, the new regulations provided a safe harbor for an employer that receives a no-match letter: if the employer “take[s] reasonable steps” to resolve the discrepancy, receipt of the written notice will not be used against the employer as evidence of “constructive knowledge” that the employee was undocumented. 8 C.F.R. § 274a.1(*l*)(2)(i). The exact “reasonable steps” that must be taken are further enumerated to give specific guidance to employers. See 8 C.F.R. § 274a.1(*l*)(2)(i)(A-C). The government was preliminarily enjoined from enforcing these new regulations in October 2007 by the U.S. District Court for the Northern District of California. See *AFL v. Chertoff*, 552 F. Supp. 2d 999, 1015 (N.D. Cal. Oct 10, 2007). On November 23, 2007, defendants filed a motion to stay the proceedings in order to conduct additional rulemaking to address the issues raised by the court. See Motion to Stay Proceedings Pending New Rulemaking, *AFL v. Chertoff*, 2007 WL 5136846 (N.D. Cal. Nov. 23, 2007) (No. C-07-4472-CRB). The court granted the motion. In October 2008, the DHS issued its new Supplemental Final Rule. See Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis, 73 Fed. Reg. 63843-67 (Oct 28, 2008). On November 6, 2008, DHS filed a motion to vacate the preliminary injunction and for summary judgment. See Memorandum of Points and Authorities in Support of Defendants’ Motions: (1) To Vacate the Preliminary Injunction and (2) For Summary Judgment, *AFL v. Chertoff*, No. C-07-4472-CRB (N.D. Cal. Nov. 6, 2008). At a status conference on December 5, 2008, the court rejected the request to lift the injunction and further refused to expedite the case, instead adopting a briefing schedule that would leave the case unresolved until at least March 2009. See The American Immigration Law Foundation, *Employment Verification Litigation: Latest Developments*, http://www.aifl.org/lac/clearinghouse_nomatch.shtml (last visited Mar. 19, 2009); Victoria M. Garcia & Nelli Nikova, *Court Rejects DHS’ Attempt to Expedite “No-Match” Letters Lawsuit*, (Dec. 12, 2008), available at <http://www.bracewellgiuliani.com/index.cfm/fa/news.advisory/item/298580fe-bfd9-4f10-90a8->

Circuit held that the letters themselves did not provide constructive notice of immigration violations.⁶³

2. *Employees' Reactions to the No-Match Letters*

Aramark further argued that the employees' reactions to the no-match letters and instructions from Aramark gave Aramark constructive knowledge that the employees were undocumented.⁶⁴ The Ninth Circuit found that the arbitrator's findings and the short turnaround time weighed against a finding of constructive knowledge on this ground.⁶⁵ The Ninth Circuit further found that Aramark's offer to rehire the terminated employees who later came forward with proper documentation did not change the analysis or outcome.⁶⁶

First, although it was up to the court to determine whether the public policy exception applied, the factual findings of the arbitrator were "not up for discussion."⁶⁷ Here, the arbitrator had weighed all the evidence brought forth by the parties and determined that it was not "convincing information" of immigration violations.⁶⁸ The Ninth Circuit found that this weighed strongly against Aramark.⁶⁹ Second, workers were given an extremely short time period in which to respond before they would be fired.⁷⁰ The Ninth Circuit found that Aramark's reverification policy was demanding and significantly more accelerated than the one envisioned by the new DHS safe harbor regulations for employers. Thus, if the safe harbor provision of those regulations had been in effect, Aramark would have qualified for the safe harbor when it fired the employees, avoiding a finding of constructive knowledge.⁷¹ Last, despite the fact that Aramark told the workers that they would be rehired at any time if they provided the proper documentation, the arbitrator did not weigh this factor in favor of Aramark and found no "convincing information" of immigration violations.⁷²

Regardless of the reason why the arbitrator declined to credit this

929dc8754799/Court_Rejects_DHS_Attempt_to_Expedite_NoMatch_Letters_Lawsuit.cfm.

⁶³ *Aramark*, 530 F.3d at 827.

⁶⁴ *Id.* at 828.

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 827.

⁷⁰ *Id.* at 829.

⁷¹ *Id.* at 829-30. For a discussion of the new DHS safe harbor regulations for employers, see *supra* note 62.

⁷² *Id.* at 831.

information in favor of Aramark, the Ninth Circuit determined that courts could not “second-guess the arbitrator’s findings, even while conducting a public policy inquiry.”⁷³ By reweighing this evidence, the district court erred.⁷⁴ For these reasons, the Ninth Circuit held that the public policy against knowingly employing undocumented workers did not militate against the arbitrator’s award.⁷⁵ Because the asserted public policy did not militate against the arbitrator’s award, the public policy exception did not apply. Therefore, the Ninth Circuit found no issues of material fact and concluded that SEIU was entitled to judgment as a matter of law.⁷⁶

III. IMPLICATIONS OF THE DECISION

The Ninth Circuit decision in *Aramark v. SEIU* emphasizes the deference owed to arbitrator’s factual findings in labor disputes. In fact, the Ninth Circuit stated that the case turned on the deference owed to the arbitrator’s factual findings.⁷⁷ SEIU’s attorney, David A. Rosenfeld, said the decision is “wonderful” because it “affirms the role of arbitrators under collective bargaining agreements.”⁷⁸

More importantly, *Aramark v. SEIU* provides some guidance to employers about the proper response to a no-match letter. The court noted that the main purpose of the no-match letters is not to report immigration violations and that no-match letters can be generated for a number of different reasons.⁷⁹ The court further emphasized that, “[b]y SSA’s own estimates, approximately 17.8 million of the 430 million entries in its database (called ‘NUMIDENT’) contain errors, including about 3.3 million entries that mis-classify foreign-born U.S. citizens as aliens.”⁸⁰ In its thorough discussion of the history of no-match letters, the Ninth Circuit makes clear that a SSN discrepancy and receipt of a no-

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 831-32.

⁷⁶ *Id.* at 832.

⁷⁷ *Id.*

⁷⁸ Susan J. McGolrick, *Ninth Circuits Rules Aramark Must Reinstate Janitors Fired After No-Match Letters Sent*, BNA EMPLOYMENT & LABOR LAW, WORKPLACE IMMIGRATION REPORT, June 30, 2008, available at <http://emlawcenter.bna.com/pic2/em.nsf/id/BNAP-7G4K86?OpenDocument>.

⁷⁹ *Aramark*, 530 F.3d at 826.

⁸⁰ *Id.* at 826 (citing Congressional Response Report: Accuracy of the Social Security Administration’s NUMIDENT File (Dec.2006), available at <http://www.socialsecurity.gov/oig/ADOBEPDF/auditxt/A-08-06-26100.htm>).

match letter does not mean that a worker is undocumented.⁸¹ Although the new DHS regulations attempt to provide some guidance to employers, whether they will ultimately go into effect remains to be seen.⁸² In the interim, *Aramark v. SEIU* makes clear that employers should not hastily conclude that employees mentioned in a no-match letter are undocumented, and termination of such employees is not required under current federal immigration law.

STEFFANIE BEVINGTON*

⁸¹ See *id.* at 826-27.

⁸² For a discussion of the new DHS regulations and preliminary injunction that prevents them from taking effect, see *supra* note 62. The Obama administration was asked by the district court to state its position on *AFL v. Chertoff* and the new DHS regulations by February 9, 2009. See *AFL v. Chertoff*, No. C-07-4472-CRB (N.D. Cal.); Muzaffar Chishti & Claire Bergeron, *Impending Deadlines on a Number of Immigration Decisions Await Obama* (Jan. 15, 2009), <http://www.migrationinformation.org/USfocus/display.cfm?ID=717>. Under the new Obama administration, DHS policy regarding no-match letters may change entirely.

* J.D. Candidate, 2009, Golden Gate University School of Law, San Francisco, CA; B.A. Politics and Latin American and Latino Studies, 2005, University of California at Santa Cruz, Santa Cruz, CA.