JACKSON & HERTOGS
IMMIGRATION AND NATIONALITY LAW SERVICES

DHS ANNOUNCES PUBLICATION OF "NO MATCH" RULE

October 24 2008

On October 23, 2008, the Department of Homeland Security (DHS) gave notice on how it will expect employers to respond to a "no-match letter" from the Social Security Administration or a "notice of suspect document" from DHS casting doubt on the employment eligibility of named employees. Receipt of either letter will require the employer to take certain actions to resolve the discrepancy. This may include the employer correcting its own records to fix clerical errors, or the employee contacting SSA and/or DHS to obtain proof that s/he is authorized to work in the United States. If an employer continues to employ an individual who is the subject of a no-match letter, and the employee provides no evidence that the discrepancy has been resolved, DHS may find that the employer has "constructive knowledge" that the worker is not authorized to work in the United States.

The "no match" rule was first published in August 2007, with an intended effective date of September 19, 2007. However, enforcement of the regulations was enjoined by lawsuit, and an injunction against DHS on implementing the regulations is still in effect. The Final Rule now being released by DHS addresses several points challenged in the lawsuit.

As proposed by DHS, the Rule requires that, within a maximum of 93 days after receipt of an SSA or DHS notification, employers take steps that involve checking their own records, requesting impacted employees to confirm employment records, and ultimately repeating the I-9 employment eligibility verification process to resolve discrepancies. If an employee's identity and work authorization cannot be verified using these procedures, the employer must terminate the individual's employment or risk a finding that the employer knowingly hired or continued to employ an unauthorized worker in violation of law. Note that these procedures do not safeguard against liability when an employer has actual knowledge that an employee is not authorized to work.

We would note that employers often receive "no match" letters due to clerical errors, or failure to register a change of name after marriage; the person who is the subject of a no-match letter is often, in fact, authorized to work in the United States.

The Final Rule released by DHS is essentially unchanged from the regulations which DHS published in August 2007, with the exception of minor technical corrections. It is not known at this time if DHS will be able to implement the no match rule immediately, or if the rule will again be blocked by the court. Jackson & Hertogs continues to monitor the status of the no match rule, and will provide updates as information becomes available.