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Via E-mail: OSC.Engagement@usdoj.gov

Re: Comments Regarding OSC's Forthcoming Guidance on Form I-9 Self-Audits

www.aila.org

Crystal Williams
Executive Director

Susan D. Quarles
Deputy Executive Director

Dear Ms. Nanda:

We appreciate the opportunity to provide further comments and clarification regarding the Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) stakeholder input session held on September 13, 2012, addressing the topic of employer self-audits of Employment Eligibility Verification forms ("I-9 Forms" or "I-9").

The American Immigration Lawyers Association (AILA) is the national association of over 12,000 attorneys and law professors who practice and teach immigration law. AILA member attorneys represent U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace. AILA members also represent foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. Founded in 1946, AILA is a nonpartisan, not-for-profit organization that provides continuing legal education, information, professional services, and expertise through its 36 chapters and over 50 national committees.

Employers have an obligation to ensure that their I-9s are properly completed and compliant with the relevant statutory and regulatory obligations. Unfortunately, when employers uncover deficiencies in their I-9s, the current law, regulations, and agency guidance do not provide employers and employees with clear guidance on situations where employers can permissibly investigate further or request additional documentation from employees. The existing guidance in the Immigration and Nationality Act (INA) Section 274B focuses primarily on the limitations on employer actions at the time of hire. The lack of clarity in the applicability of Section 274B limitations during an employer I-9 self-audit can lead to confusion and, at times, conflict between employers and employees that could be avoided with a set of clear guiding principles on the way Section 274B applies in that context. AILA believes that OSC guidance with respect to I-9 self-audits will

go a long way in improving the understanding of employer and employee obligations and limitations on requesting additional documents to correct deficiencies found in internal I-9 audits. We believe that guidance is necessary so that all parties involved – employers, employees, and their representatives – understand their obligations under Section 274B.

Our comments are as follows:

1. It would be beneficial for OSC to issue guidance which includes suggested best practices for handling those situations when employers are permitted to request additional documentation from workers after the initial I-9 verification, such as when errors or discrepancies are uncovered during I-9 self-audits. We encourage OSC to clarify in its guidance that there is a balance between the employer's obligations under the INA's compliance provisions (which require employers to complete and maintain compliant I-9s) and the anti-discrimination provisions (which restrict employers from requiring additional documentation from employees based on discriminatory intent). We ask OSC to clarify that employers may request additional information and documents from workers as long as the employer's process is reasonable, consistent, and without discriminatory intent.
2. When an employer has reason to suspect that the I-9 process lacks integrity in only one of its facilities, what are the employer's best practices for structuring the I-9 self-audit consistently with Section 274B, particularly where the demographic make-up of the workforce varies among the facilities?
3. It is our understanding that when an employer becomes aware that an employee has presented false documents (e.g., pursuant to an I-9 self-audit performed by immigration counsel), the employer is entitled – and in fact required – to request additional documents from the employee because the employer now has constructive knowledge of false identity or lack of work authorization. We ask OSC issue guidance and suggested best practices on this issue so that employers understand that the basic rules that restrict an employer from requesting additional documentation at the time of hire do not apply to constructive knowledge situations, such when employers determine that employees have previously presented false documents.
4. We request that OSC include in its guidance best practices to assist employers in not running afoul of the anti-discrimination provisions of the INA when terminating employees under an honesty policy after the employer determines that an employee previously presented false documentation.
5. We request that OSC issue guidance for employers and employees on any special issues related to retaliation that may be implicated in the structuring and execution of an employer's I-9 self-audit.
6. In a letter dated December 1, 2011, addressed to William Cowen of the National Labor Relations Board, OSC addresses the issue of re-verification of employee documentation as well as an employer's request for additional information or documentation. OSC states that, "an employer may reverify employees' documents when it discovers, during the course of

conducting an audit of all I-9 forms in a non-discriminatory manner, that the I-9 forms or accompanying documents for some employees are missing or incomplete....” We request that OSC incorporate its prior Technical Assistance Letters, including the Cowen letter, in its forthcoming guidance so as to provide comprehensive guidance.

AILA appreciates your agency’s consideration of our comments and your work in issuing the forthcoming guidance relating to I-9 self-audits. We believe that this guidance will provide much-needed clarity for employers, employees and their representatives on this important issue.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION