

NO MATCH? NO THANKS: HOW THE DEPARTMENT OF HOMELAND SECURITY'S NO-MATCH RULE PUTS THE JOBS OF LEGAL IMMIGRANTS IN JEOPARDY

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This Note analyzes the potential harms to authorized, legal, foreign-born workers from the Department of Homeland Security's regulation, Safe-Harbor Procedures for Employers Who Receive a No-Match Letter. No-match letters inform employers of discrepancies between the employer's records and the Social Security Administration's records. Although no-match letters were previously considered benign, the No-Match Rule would give the once innocuous letters the power to trigger criminal and civil liability under the Immigration and Nationality Act. The No-Match Rule would give the letters this power by amending the regulatory definition of constructive knowledge and by establishing safe-harbor procedures for employers who receive such letters.

This Note addresses the landscape of immigration law and the role that the various regulatory agencies play in the process. After conducting a thorough analysis of the effects that the No-Match Rule would have on employers and authorized, legal foreign-born workers, the author concludes that the No-Match Rule does not pass muster under the Administrative Procedure Act. The author argues that the rule violates the APA because DHS acted in an arbitrary and capricious manner by failing to provide a rational explanation for the No-Match Rule, and by failing to consider the No-Match Rule's effect on aspects of sanctioning employers to curb illegal immigration that Congress deemed important. In addition, the No-Match Rule violates the APA because DHS, in carrying out the proposed No-Match Rule, would act outside the scope of its statutory authority. The author concludes by recommending that DHS should not implement the No-Match Rule.

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I. INTRODUCTION

Each year, certain U.S. employers receive letters from the Social Security Administration (SSA) informing them that a discrepancy exists between their records and SSA's records regarding at least ten of their employees' Social Security numbers (SSNs). Until 2006, those letters represented nothing more than a simple statement that such a discrepancy existed. In 2006, however, the Department of Homeland Security (DHS) attempted to grant enormous power to these letters when it proposed a regulation entitled Safe-Harbor Procedures for Employers Who Receive a No-Match Letter (No-Match Rule).¹ DHS desired to give these letters the ability to trigger criminal and civil liability under the Immigration and Nationality Act (INA). When DHS promulgated this new regulation, the agency disregarded an important segment of the American population often lost in the dark shadows of illegal immigration—authorized, legal, foreign-born workers.

In 2006, over 29 million immigrants resided in the United States.² Although over 11.5 million of those immigrants are unauthorized aliens, the majority of the foreign-born population are legal, authorized persons.³ These 17 million people not only stand to lose their jobs, but also face discrimination based on their national origin or citizenship as a result of the No-Match Rule.

This group of foreign-born workers understands the substantial costs the No-Match Rule will impose upon legal immigrants. Juan Morales can attest to the power of a single no-match letter.⁴ Morales, an authorized worker, lost his job as a baker at a California supermarket after his employer received a no-match letter.⁵ He is not alone. Another woman from North Carolina was fired because her employer received a no-match letter that listed her as a no-match.⁶ Although this woman was authorized to work, her employer terminated her because it believed she was an unauthorized worker.⁷ Unfortunately, the stories of these two workers are not unique. Many other legal, authorized workers have lost,

1. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281 (proposed June 14, 2006) (to be codified at 8 C.F.R. pt. 274a).

2. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006 3 (2007), http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf.

3. *Id.* at 1, 3. Of these 11.5 million illegal immigrants, about 4.2 million immigrated to the United States in 2000 or later. *Id.* at 1. The majority of the U.S. illegal immigration population emigrates from Mexico. *See id.* (noting that in 2006, 6.6 million illegal immigrants from Mexico resided in the United States).

4. CTR. FOR URBAN ECON. DEV., UNIV. OF ILL. AT CHI., SOCIAL SECURITY ADMINISTRATION'S NO-MATCH LETTER PROGRAM: IMPLICATIONS FOR IMMIGRATION ENFORCEMENT AND WORKERS' RIGHTS 24 (2003), <http://www.uic.edu/cuppa/uicued/npublications/recent/SSAnoMatchreport.pdf> [hereinafter NO-MATCH LETTER PROGRAM: IMPLICATIONS].

5. *Id.*

6. *Id.*

7. *Id.* (explaining that her employer later argued that "she was not entitled to benefits because she was an unauthorized worker").

and will continue to lose, their jobs and face discrimination based on their national origin or citizenship.⁸ Fortunately, this result can be prevented by stopping the implementation of the No-Match Rule. Simply because DHS disregarded this important segment of the American labor market does not imply that the rest of the country should.

This Note discusses the No-Match Rule recently proposed by DHS. Specifically, it discusses whether DHS's promulgation of its No-Match Rule constitutes an arbitrary and capricious agency action or an ultra vires action, in violation of the Administrative Procedure Act. This rule amends the current regulatory definition of knowing and establishes a safe-harbor procedure for employers to follow after receiving a no-match letter.⁹ Part II explores the history of immigration law, the roles DHS and SSA play in workplace enforcement, previous attempts by DHS to gain access to SSA database information, and the new no-match letters. Part III analyzes whether the new No-Match Rule constitutes an arbitrary and capricious action by DHS by examining whether the No-Match Rule represents a change in agency policy and whether DHS provided a well-reasoned explanation for the new rule. This Part seeks to determine whether DHS considered how the No-Match Rule will affect important aspects, recognized by Congress, of sanctioning employers to curb illegal immigration. Part III also discusses whether DHS exceeded its statutory authority when the agency promulgated the No-Match Rule. Part IV proposes that DHS cannot implement the No-Match Rule because it constitutes an invalid agency regulation, it imposes great costs on legal, authorized workers, and it upsets the current balance of agency power to regulate and enforce immigration laws.

II. BACKGROUND

The controversy surrounding the new No-Match Rule involves a number of significant legal issues, including immigration and administrative law. To provide an understanding of the current status of immigration law, Section A explores the history of the INA and the Immigration Reform and Control Act of 1986 (IRCA), focusing on the important factors Congress considered when enacting this legislation. Section B explains the importance of no-match letters by examining the role DHS and SSA each play in immigration workplace enforcement, including to what extent the agencies may work together to achieve strong workplace enforcement. To appreciate the impact the No-Match Rule may have, Section C examines the No-Match Rule, the potential impact of its new

8. Michael Wilson is another victim of the no-match letters. *Id.* Wilson, a United States citizen born in Virginia, lost the job he held for nine years after his employer received a no-match letter. *Id.* His employer believed that Wilson committed document fraud. *Id.* Even after Wilson corrected the discrepancy with his SSN, his employer still refused to reinstate him. *Id.*

9. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

no-match letters, and the current status of the 2007 no-match letters. Finally, Section D introduces the Administrative Procedure Act and how the No-Match Rule should be analyzed under the Act.

A. Current Immigration Law: Striking a Delicate Balance

Current immigration law subjects employers that knowingly hire or employ unauthorized workers to criminal and civil penalties.¹⁰ In 1952, Congress enacted the INA to govern immigration.¹¹ In 1986, Congress amended a substantial number of INA provisions when it enacted the IRCA.¹² The IRCA addressed the issue of unauthorized workers employed throughout the United States.¹³ The INA, as amended by the IRCA, currently provides that it is unlawful for an employer to knowingly hire or employ an unauthorized worker.¹⁴ An employer found in violation of the INA will be subject to civil and criminal penalties.¹⁵

Under the INA, employers must follow the employment verification process outlined in the Act to determine whether a potential employee is an authorized worker eligible for employment in the United States.¹⁶ To verify that a potential employee is an authorized worker, the employer must examine documents that establish both authorization and identity, and record these documents on a DHS Employment Eligibility Verification Form I-9.¹⁷ A single document may establish both authorization and identity, or a combination of two documents may be necessary to establish both requirements.¹⁸ For example, an employee may simply present his United States passport or certificate of nationalization to prove authorization and identity.¹⁹ To prove employment authorization, the employee may present the employer with a Social Security card or birth certificate indicating the employee was either born in the United States or established U.S. citizenship at birth.²⁰ To prove identity, the employee

10. Immigration and Nationality Act § 274A, 8 U.S.C. § 1324a(e)(4), (f) (2006); see also, e.g., Julie A. Phillips & Douglas S. Massey, *The New Labor Market: Immigrants and Wages After IRCA*, 36 DEMOGRAPHY 233, 233 (1999).

11. H.R. REP. NO. 99-682(I), at 51–52 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5655–56.

12. See *Etuk v. Slattery*, 936 F.2d 1433, 1437 (2d Cir. 1991).

13. *Id.*

14. 8 U.S.C. § 1324a(a)(1)–(2).

15. *Id.* § 1324a(e)(4), (f). An employer that violates the INA by knowingly hiring or employing an unauthorized worker faces sanctions that include fines up to \$10,000 and possible criminal charges. See Phillips & Massey, *supra* note 10, at 233.

16. See 8 U.S.C. § 1324a(b).

17. *Id.*; see also DEPT' OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., OMB BULL. NO. 1615-0047, FORM I-9: EMPLOYMENT ELIGIBILITY VERIFICATION (2007), <http://www.uscis.gov/files/form/I-9.pdf>.

18. 8 U.S.C. § 1324a(b)(1)(A) (“If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements . . . nothing in this [provision] shall . . . requir[e] the person or entity to solicit the production of any other document.”).

19. *Id.* § 1324a(b)(1)(B).

20. *Id.* § 1324a(b)(1)(C).

may present the employer with a driver's license or state identification card.²¹ Regardless of which documents an employee presents, his employer must follow the INA employment verification process to determine whether he is eligible for employment in the United States.²²

Congress established the current employment verification process, through the enactment of the IRCA, for numerous reasons.²³ The reasons cited by Congress include the need to control the flow of undocumented workers into the United States, preserve legal immigration, minimize burdens on employers, and preserve jobs for authorized workers.²⁴ Congress believed that amending the INA would address these pressing immigration issues.

To respond to a growing population of illegal immigrants, Congress subjected employers to criminal and civil penalties.²⁵ Congress desired to curtail the tide of illegal immigration by "making the plight of the undocumented alien even more onerous in the future than it had been in the past . . . impos[ing] criminal sanctions on employers who hired undocumented workers and ma[king] a number of federally funded welfare benefits unavailable to these aliens."²⁶ By making the employment of unauthorized workers subject to criminal penalty, Congress took a step towards controlling the movement of illegal immigrants into the United States.

To preserve legal immigration, Congress desired to deter the employment of unauthorized workers through the establishment of employer penalties.²⁷ Through the enactment of the INA, Congress sought "to close the back door on illegal immigration so that the front door on legal immigration may remain open."²⁸ Congress believed that employer sanctions constituted the most effective mechanism to curtail illegal immigration.²⁹ Because the prospect of employment in the United States attracts illegal immigrants, Congress established civil and criminal penalties to deter employers from hiring unauthorized workers.³⁰

Although the INA established a new employment verification process, Congress still sought to minimize the burdens on and risks to employers.³¹ The House Committee on the Judiciary expressly stated

21. *Id.*

22. After the employer verifies the eligibility of a potential employee, the employer must keep in his possession the Form I-9, which includes information about the documents presented to verify the employee's eligibility, so that he may present it to officers of the Special Counsel for Immigration-Related Unfair Employment Practices for inspection. *Id.* § 1324a(b)(3).

23. See H.R. REP. NO. 99-682(I), at 45 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5650.

24. See *id.*; see also Phillips & Massey, *supra* note 10, at 233.

25. Phillips & Massey, *supra* note 10, at 233.

26. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 481-82 (1991).

27. Steiben v. INS, 932 F.2d 1225, 1228 (8th Cir. 1991).

28. H.R. REP. NO. 99-682(I), at 46.

29. *Id.*

30. *Id.*

31. See Collins Foods Int'l, Inc. v. INS, 948 F.2d 549, 554 (9th Cir. 1991).

that it never intended “to impose a continuing verification obligation on employers.”³² For this reason, the United States Court of Appeals for the Ninth Circuit stated that the INA did not require employers to verify identity and authorization documents with an expert eye.³³ While Congress desired to subject employers to penalties for knowingly employing an unauthorized worker, it also desired to minimize the burdens placed on those employers.

To summarize, U.S. immigration law seeks to balance a number of conflicting principles surrounding immigration. Immigration provides a great economic resource for the country, yet at the same time, it may challenge the rule of law.³⁴ Through its enactment of the IRCA, Congress desired to strike a delicate balance between combating illegal immigration and promoting opportunities for lawful immigration, as well as preserving jobs for authorized workers.

B. *Role Playing: How DHS and SSA Influence Workplace Enforcement*

To combat illegal immigration in the manner proscribed by Congress in the IRCA, DHS, specifically its Bureau of Immigration Customs Enforcement, enforces immigration law through the use of workplace enforcement investigations. The agency believes, in accordance with Congress’s reasons for enacting the IRCA, employers who hire unauthorized workers act contrary to DHS’s policy to control the border.³⁵ Although DHS currently enforces immigration law, when Congress enacted the IRCA, another agency held the responsibility of such enforcement.

The enactment of the Homeland Security Act of 2002 established DHS as an executive department of the U.S. government.³⁶ The mission of DHS includes the prevention of terrorist attacks within the United States’ borders, the performance of “all functions of entities transferred to the Department . . . [and] ensur[ing] that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”³⁷ DHS, including the various arms of the agency, works to protect the United States and its economy from threats of terrorism, as well as to promote lawful immigration.³⁸

To secure the U.S. border, the Homeland Security Act created new agencies to enforce immigration laws. Before the establishment of DHS,

32. H.R. REP. NO. 99-682(I), at 57.

33. See *Collins Foods*, 948 F.2d at 555.

34. See Press Release, Dep’t of Homeland Sec., Remarks by Homeland Sec. Sec’y Michael Chertoff on the State of Immigration (Nov. 6, 2007), available at http://www.dhs.gov/xnews/releases/pr_119447755019.shtml.

35. See *id.*

36. Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135, 2142 (codified as amended at 6 U.S.C. § 111 (2006)).

37. 6 U.S.C. § 111(b)(1)(A), (D), (F).

38. See DEP’T OF HOMELAND SEC., ONE TEAM, ONE MISSION, SECURING OUR HOMELAND 3 (2008), http://www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf.

the Department of Justice (DOJ) and the Attorney General possessed the responsibility of overseeing the Immigration and Naturalization Service of the Department of Justice (INS) and enforcing immigration laws. The establishment of DHS effectively abolished INS.³⁹ The Act also created an arm of DHS, the Bureau of Immigration and Customs Enforcement (ICE), to enforce immigration laws.⁴⁰ Following the transfer of functions, services, and responsibility from INS to DHS, the Secretary of Homeland Security possessed the authority to act in any manner that another official could have previously acted immediately prior to the abolishment of INS.⁴¹ The DHS Secretary currently possesses the authority to take actions consistent with prior INS actions, which included the enforcement of U.S. immigration laws. Therefore, DHS, along with ICE, retains the responsibility to enforce U.S. immigration laws.⁴²

1. Social Security Administration No-Match Letters

DHS recently recognized that another government agency, the Social Security Administration (SSA), may possess informative data to help strengthen workplace enforcement. SSA manages numerous economic programs that impact American workers, including the filing of their wage reports.⁴³ Annually, employers throughout the United States submit wage reports on Forms W-2 regarding each of their employees to SSA. Each year employers submit approximately 245 million wage reports regarding approximately 153 million employees.⁴⁴ SSA acts as an agent of the Internal Revenue Service (IRS) when processing these reports.⁴⁵ SSA possesses the authority to use the information contained in the wage reports only for the purpose of determining whether an employee is eligible for Social Security benefits, and if so, the amount of such benefits.⁴⁶

For SSA to attribute earnings to an employee's record, the employee's name and SSN must match those in SSA's records.⁴⁷ Pursuant to 20 C.F.R. § 422.120, SSA informs employers if an employee's name or SSN differs between his or her wage report and SSA's records.⁴⁸ Approximately 4 percent of the 250 million wage reports SSA receives each year contain name and SSN information that does not match SSA's

39. 6 U.S.C. § 291(a).

40. *See id.* § 542.

41. *Id.* § 551(d)(2).

42. The Act also provided that the enforcement of certain immigration law remained the responsibility of the DOJ and the Attorney General. Homeland Security Act of 2002, Pub. L. No. 107-296, § 1102, 116 Stat. 2135, 2273 (codified as amended at 8 U.S.C. § 1103(a)(1) (2006)).

43. *See SOC. SEC. ADMIN., STRATEGIC PLAN: FY 2006–FY 2011 2 (2006).*

44. Soc. Sec. Admin., Overview of Social Security Employer No-Match Letters Process, <http://www.ssa.gov/legislation/nomatch2.htm> (last visited Mar. 29, 2009) [hereinafter SSA: Overview].

45. *Id.*

46. *Id.*

47. *Id.*

48. 20 C.F.R. § 422.120(a) (2008).

records.⁴⁹ Because the information constitutes tax information that is protected under the Internal Revenue Code,⁵⁰ SSA cannot share these discrepancies with other federal agencies.⁵¹ Therefore, SSA is the only agency able to resolve name and SSN discrepancies to attribute earnings to an employee's record.

To resolve these discrepancies, SSA attempts to notify employers through the use of two different letters: worker notices and employer notices.⁵² SSA first attempts to contact the employee by sending a worker's notice via mail, using the address provided in the wage report.⁵³ If the employee cannot be contacted,⁵⁴ SSA notifies the employer by sending it the same worker's notice that was sent to the employee.⁵⁵ If the employee or employer fails to resolve the discrepancy within two weeks and an employer's wage report contained over ten no-matches representing over 0.5 percent of its Forms W-2, SSA sends an employer notice after the worker's notice.⁵⁶

A number of reasons explain why an employee's reported information may differ from SSA's records. The standardized 2006 letter (for the 2005 tax year) provided three reasons why reported information may differ from SSA's records: clerical error, employee name change, and an incomplete Form W-2.⁵⁷ The letter did not mention that a worker's authorization status may cause the discrepancy.⁵⁸ This letter also specifically provided that the letter "does [not] make any statement about an employee's immigration status."⁵⁹ Thus, SSA's 2006 letter only provided employers with reasons for the discrepancies that are outside the scope of whether employees were authorized workers.

If SSA cannot resolve a discrepancy, it places the wage report with the employee's name and SSN into the Earnings Suspense File (ESF).⁶⁰ The ESF, a cumulative database, includes information regarding the employee's name, SSN, earnings, and the employer's identification num-

49. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET: ICE AND SOCIAL SECURITY ADMINISTRATION "NO-MATCH" LETTERS (2007), http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/no-match_ice_factsheet_2007-08-10.pdf.

50. SSA: Overview, *supra* note 44.

51. *Id.*

52. *Id.*

53. 20 C.F.R. § 422.120(a).

54. In some circumstances the wage report lists an incomplete address or does not include the employee's address at all. *Id.*

55. *Id.* The DHS No-Match Rule does not concern worker notices. SSA: Overview, *supra* note 44.

56. SSA: Overview, *supra* note 44. The DHS No-Match Rule applies to these letters. *Id.*

57. AFL-CIO v. Chertoff, 552 F. Supp. 2d 999, 1002 n.1 (N.D. Cal. 2007) (order granting preliminary injunction).

58. *Id.* at 1002.

59. *Id.* (internal quotation omitted).

60. U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. GAO-06-814R, IMMIGRATION ENFORCEMENT: BENEFITS & LIMITATIONS TO USING EARNINGS DATA TO IDENTIFY UNAUTHORIZED WORK 3 (2006), <http://www.gao.gov/new.items/d06814r.pdf> [hereinafter GAO REPORT].

ber.⁶¹ Wage reports remain in the file until SSA resolves each discrepancy.⁶² In 2005, the file contained approximately 255 million records.⁶³ Each year, SSA adds approximately 8 to 11 million new records to the ESF.⁶⁴ “[A] small percentage of employers [constitute] . . . a disproportionate percentage of the unidentified earnings reports.”⁶⁵ This fact indicates that those employers may employ unauthorized workers who provided false Social Security documents during the employment verification process.

2. *Prior Attempts by DHS to Access SSA Data*

Recently, DHS recognized the possibility that it could use the wage reports in the ESF as a tool to fulfill its goal of eliminating illegal immigration and employment. DHS desires access to SSA data, specifically which employees supplied employers with SSNs that do not match their name, to further the agency’s workplace enforcement investigations.⁶⁶ Prior to proposing the No-Match Rule, DHS attempted to gain access to SSA data by announcing a comprehensive immigration enforcement strategy and requesting the authority from Congress to access such data.⁶⁷

On April 20, 2006, DHS Secretary, Michael Chertoff, and Assistant Secretary for ICE, Julie L. Meyers, announced a “comprehensive immigration enforcement strategy for the nation’s interior.”⁶⁸ The new strategy seeks to implement procedures to eliminate illegal immigration and employment⁶⁹ through the use of strong workplace enforcement investigations.⁷⁰ The strategy establishes multiple methods necessary to fulfill the goal of eliminating illegal immigration and employment, including requesting congressional aid to allow DHS access to Social Security

61. *Id.* at 8.

62. *Id.* at 3.

63. *Id.* at 8; see also *Is the Federal Government Doing All It Can to Stem the Flow of Illegal Immigration?: Hearing Before the Subcomm. on Regulatory Affairs of the H. Comm. on Government Reform*, 109th Cong. 9 (2006) [hereinafter *Hearing*] (statement of Martin H. Gerry, Deputy Comm’r, Office of Disability and Income Security Programs).

64. GAO REPORT, *supra* note 60, at 8.

65. *Id.* at 3.

66. See Press Release, Dep’t of Homeland Sec., Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation’s Interior (Apr. 20, 2007), available at http://www.dhs.gov/xnews/releases/press_release_0890.shtm (explaining that “Social Security abuse provides a gateway for illegal aliens to obtain jobs”).

67. *See id.*; see also GAO REPORT, *supra* note 60, at 12.

68. See Press Release, Dep’t of Homeland Sec., *supra* note 66.

69. *See id.*

70. *See id.* Secretary Chertoff emphasized the importance of workplace enforcement, stating, Illegal immigration poses an increasing threat to our security and public safety, and hard-hitting interior enforcement will reinforce the strong stance we are taking at our borders . . . This department will counter the unscrupulous tactics of employers with intelligence-driven worksite enforcement actions and combat exploitation by dangerous smuggling organizations with the full force of the law.

records and punishing employers who knowingly hire and employ unauthorized workers.

Shortly following DHS's announcement of the new comprehensive strategy, a Government Accountability Office (GAO) report analyzed the benefits and disadvantages of allowing DHS access to SSA records.⁷¹ As Congress considered enacting new immigration legislation, certain proposals suggested that DHS should be granted the authority to access employees' earnings information to help identify unauthorized workers.⁷² On July 11, 2006, the GAO provided the House Ways and Means Subcommittee on Social Security and the Subcommittee on Oversight with its findings regarding which information SSA possesses could be used by DHS to identify unauthorized workers.⁷³ The GAO analyzed a variety of databases maintained by SSA, including its ESF.⁷⁴

The ESF may provide DHS with useful information to promote workplace enforcement. The GAO stated that the ESF "could be used to identify employers who consistently submit large numbers or percentages of invalid name and SSN combinations, an indication that they may be disregarding laws."⁷⁵ The ESF may contain information suggesting certain employers hire and continue to employ unauthorized workers, however, it also contains a large amount of personal information regarding citizens and other authorized workers.⁷⁶

The number of unauthorized workers whose information remains in the ESF is unknown, but there may be one method that indicates the work status of the employees in the ESF.⁷⁷ Once an employee's name and SSN discrepancy is resolved, his wage reports leave the ESF and SSA credits his records.⁷⁸ This reinstatement process allows the work status of an employee formerly in the ESF to be known.⁷⁹ In the past, the GAO found that most reinstated workers are U.S.-born citizens.⁸⁰ This fact indicates that a large amount of reports contained in the ESF continue to pertain to citizens and other authorized workers.⁸¹

On June 11, 2006, the GAO concluded that although potential benefits exist for allowing DHS access to the information in the ESF, many potential limitations exist as well.⁸² The ESF records provide no informa-

71. See GAO REPORT, *supra* note 60, at 1.

72. *See id.*

73. *See id.* at attached letter.

74. *See id.* GAO analyzed databases other than the ESF, including SSA's Nonwork Alien File and IRS's Individual Taxpayer Identification Numbers with Wage Income. *See id.* at 6.

75. *Id.* at 8.

76. *See id.*

77. *Id.* ("Because, by definition, the records in the file cannot be assigned to an individual's Social Security record, the portion of these earnings that represent unauthorized work is unknown.").

78. *Id.* According to a SSA official, only 2.3 percent of all wage items for 1995 remain in the suspense file. *Hearing*, *supra* note 63, at 10–11.

79. GAO REPORT, *supra* note 60, at 8.

80. *Id.* ("The number of reinstatements to probable unauthorized workers is growing.").

81. *Id.*

82. *See id.* at 12.

tion regarding the immigration status of the employee.⁸³ The file contains sensitive personal information regarding many citizens and authorized workers, information DHS lacks the statutory authority to access.⁸⁴ The discrepancies that caused the wage reports to enter into the ESF may have been caused by unintentional errors, not in violation of the INA.⁸⁵ In its concluding observations, the GAO noted that “[p]roviding earnings data to DHS could involve divulging information about hundreds of thousands or even millions of U.S. citizens and work-authorized aliens.”⁸⁶ Therefore, how DHS intends to use specific data for worksite enforcement should be considered before DHS receives the authority to access this information.

C. The No-Match Rule and Its New No-Match Letters

At the same time that the GAO cautioned against allowing DHS to access SSA data for workplace enforcement purposes, DHS proposed a new regulation granting the agency such access. On June 14, 2006, DHS published Safe-Harbor Procedures for Employers Who Receive a No-Match Letter in the Federal Register, a proposed rule amending regulations pertaining to the employment of unauthorized workers.⁸⁷ This proposed rule set out to amend the current regulatory definition of knowing and to establish safe-harbor procedures for employers after the receipt of a no-match letter.⁸⁸ During the sixty-day public comment period, DHS received close to 5000 comments regarding this proposed rule.⁸⁹ The comments expressed a wide range of views, from strongly supporting the rule to adamantly opposing the proposal.⁹⁰

The No-Match Rule proposes to alter the definition of constructive knowledge under the INA.⁹¹ Currently, section 274A of the INA makes

83. *Id.* at 8.

84. *Id.* The DHS Comprehensive Immigration Enforcement Strategy provides that to combat rampant fraud, DHS has asked Congress to grant ICE investigators the authority to access Social Security data. *See* Press Release, Dep’t of Homeland Sec., *supra* note 66.

85. GAO REPORT, *supra* note 60, at 8.

86. *Id.* at 12. GAO provided a number of questions that policymakers should consider prior to allowing DHS access to ESF data: “What information does DHS believe would be most useful? . . . What steps would DHS take to safeguard personal information and protect it from misuse? . . . Given its limited resources, how useful might data with high potential for false leads be to DHS?” *Id.*

87. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281 (proposed June 14, 2006) (to be codified at 8 C.F.R. pt. 274a).

88. *See id.* at 34,282–83 (explaining how the new regulation would amend the regulatory definition of knowing and the safe-harbor procedures established by the regulation).

89. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

90. *See id.* DHS received comments from various sources, including “labor unions, not-for-profit advocacy organizations, industry trade groups, private attorneys, [and] businesses” *Id.*

91. *Id.* at 45,612. The No-Match Rule was declared a final rule by the DHS on two occasions. *Id.* at 45,611; Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis, 73 Fed. Reg. 63,843 (Oct. 28, 2008) (to be codified at 8 C.F.R. pt. 274a). It remains unenforceable because of a preliminary injunction issued in *AFL-CIO v. Chertoff*,

the hiring and continued employment of known unauthorized workers illegal.⁹² A violation of section 274A requires that the employer possess knowledge that the employee is an unauthorized worker.⁹³ The current regulatory definition of knowledge includes both actual and constructive knowledge.⁹⁴ Constructive knowledge constitutes 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 condition.”⁹⁵ A list of examples of when an employer may have constructive knowledge follows the definition.⁹⁶ These examples include situations where an employer fails to correctly complete a Form I-9, possesses information that indicates the employee is unauthorized,⁹⁷ or “acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.”⁹⁸ An employer may violate the INA by either possessing actual knowledge or constructive knowledge of an employee’s unauthorized status.

Not only does this regulation proscribe when an employer possesses knowledge under the INA, it also explains how an employer may not come to possess such knowledge.⁹⁹ Specifically, an employer cannot infer that an employee is unauthorized by his or her foreign appearance or accent.¹⁰⁰ An employer cannot discriminate against an employee by asking for more documents than statutorily required, nor can it refuse to accept documents that appear to be genuine and legitimate.¹⁰¹ Any knowledge an employer possesses must be the result of the processes listed under

552 F. Supp. 2d 999, 1001–02 (N.D. Cal. 2007). For more discussion on the status of the No-Match Rule, see *infra* Part II.C.3.

92. Immigration and Nationality Act § 274A, 8 U.S.C. § 1324a(1) (2006).

93. *Id.* (“It is unlawful . . . to hire . . . an alien *knowing* the alien is an unauthorized alien . . . with respect to such employment . . .”) (emphasis added).

94. 8 C.F.R. § 274a.1(l)(1) (2008); *see also* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,612 (noting that both case and regulation law recognize that an employer may violate the INA by possessing constructive, rather than actual, knowledge).

95. 8 C.F.R. § 274a.1(l)(1).

96. Control of Employment of Aliens, 56 Fed. Reg. 41,767, 41,783–84 (Aug. 23, 1991), *amended* by 73 Fed. Reg. 63,843 (Oct. 28, 2008) (current version at 8 C.F.R. § 274a.1(l)(1)).

97. *Id.* at 41,783–84. Before the No-Match Rule, the regulation specified that information that indicates the employee is unauthorized included labor certifications and applications for prospective employers. *Id.*

98. 8 C.F.R. § 274a.1(l)(ii).

99. The No-Match Rule does not alter the language of this provision but moves it from 8 C.F.R. § 274a.1(l)(2) to 8 C.F.R. § 274a.1(l)(3). Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,624 (to be codified at 8 C.F.R. § 274a.1(l)(3)); Control of Employment of Aliens, 56 Fed. Reg. at 41,784.

100. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,624 (to be codified at 8 C.F.R. § 274a.1(l)(3)) (“Knowledge that an employee is unauthorized may not be inferred from an employee’s foreign appearance or accent.”); Control of Employment of Aliens, 56 Fed. Reg. at 41,784 (same).

101. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,624 (to be codified at 8 C.F.R. § 274a.1(l)(3)); Control of Employment of Aliens, 56 Fed. Reg. at 41,784.

the definition of knowledge, rather than the result of discriminatory inferences.

The DHS No-Match Rule amends the current regulatory definition of constructive knowledge by providing two additional examples of types of information that indicate an employee may be an unauthorized worker.¹⁰² The new examples are an SSA no-match letter and a notice from DHS that an employment authorization document used by an employee to complete a Form I-9 was not assigned to that employee.¹⁰³ According to the new regulation, if after receiving a no-match letter, an employer fails to follow the new regulation's safe-harbor procedure and the employee is not an authorized worker, the employer may possess constructive knowledge that the employee is unauthorized.¹⁰⁴ By amending the definition of constructive knowledge, DHS expanded the number of possible instances that an employer will possess constructive knowledge and thus violate the INA.

1. The No-Match Rule's Safe-Harbor Procedure: How to Become a Reasonable Employer

The DHS No-Match Rule also establishes a safe-harbor procedure for an employer to follow once it receives a no-match letter.¹⁰⁵ It is only by following this procedure that an employer "eliminate[s] the possibility that the no-match letter can be used as any part of an allegation that an employer had constructive knowledge that it was employing an alien not authorized to work in the United States."¹⁰⁶ In other words, if an employer follows the procedure DHS deems reasonable, the employer eliminates the risk that the no-match letter will be used as evidence of constructive knowledge in violation of INA section 274a.¹⁰⁷ Thus, if an employer fails to take these reasonable steps and its employee is unauthorized, the employer may violate the INA because it had constructive knowledge of the fact it employed an unauthorized worker.¹⁰⁸

102. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,612, 45,623–24 (to be codified at 8 C.F.R. § 274a.1(l)(1)(iii)(B), (C)); *see also* Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis, 73 Fed. Reg. 63,843 (Oct. 28, 2008) (to be codified at 8 C.F.R. pt. 274a).

103. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,612, 45,623 (to be codified at 8 C.F.R. § 274a.1(l)(1)(iii)(B), (C)).

104. *See id.* at 45,612, 45,623–24 (to be codified at 8 C.F.R. § 274a.1(l)(1)).

105. *Id.* at 45,612, 45,624 (to be codified at 8 C.F.R. § 274a.1(l)(2)).

106. *Id.* at 45,612. The 2007 SSA letter includes an insert entitled, How to Correct Social Security Numbers (SSNs). SOC. SEC. ADMIN., HOW TO CORRECT SOCIAL SECURITY NUMBERS (SSNs) (2007), http://www.nilc.org/immsemploymnt/SSA-NM_ToolKit/ssa_no-match_prototypeletter_2007-08.pdf [hereinafter How To CORRECT SSNs]. This insert provides employers with information about how to comply with the safe-harbor procedures. *See id.*

107. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,612.

108. *Id.*; *see also* SOC. SEC. ADMIN., RETIREMENT, SURVIVORS AND DISABILITY INSURANCE, EMPLOYER CORRECTION REQUEST 2 (2007), http://www.nilc.org/immsemploymnt/SSA-NM_ToolKit/

According to the No-Match Rule, reasonable employers mitigate the risk that they possess constructive knowledge under the INA. To be considered a reasonable employer, each employer that receives an SSA no-match letter must follow the safe-harbor procedure established by the No-Match Rule.¹⁰⁹ First, within thirty days of receiving the SSA no-match letter, the employer must check its own records to determine if a clerical error caused the no-match discrepancy.¹¹⁰ If the employer believes a clerical error did not cause the no-match, the employer should ask the employee to verify whether its records are correct.¹¹¹ If the employee finds the records are not correct, then the employer should contact SSA with the correct information.¹¹² If the employee believes the records are correct, he should resolve the discrepancy with the agency himself.¹¹³ He may bring documents proving identity and authorization to an SSA office, or he may mail the documents directly to the SSA office.¹¹⁴ Regardless of whether the employer or the employee contacts SSA, the discrepancy must be resolved within thirty days.¹¹⁵ After contacting SSA, the employer should verify that the agency in fact updated its records.¹¹⁶

The No-Match Rule also addresses discrepancies that cannot be resolved within ninety days. If the employer fails to resolve the discrepancy within ninety days, the employer must complete another employment verification procedure.¹¹⁷ Within three days of the expiration of the ninety-day period, the employer must complete a new Form I-9 for the employee.¹¹⁸ However, the employee may not present any document to verify his identity or authorization that contains the SSN in question.¹¹⁹

ssa_no-match_prototypeletter_2007-08.pdf [hereinafter SSA 2007 REQUEST] ("You should not ignore this letter and do nothing. That could . . . expose you to liability under the immigration laws.").

109. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613, 45,624.

110. *Id.*; see also HOW TO CORRECT SSNs, *supra* note 106 (stating that employers should provide SSA with the corrections as soon as possible).

111. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,612.

112. *Id.* at 45,613, 45,624.

113. *Id.*; see also HOW TO CORRECT SSNs, *supra* note 106 ("Tell the employee that once he/she has visited the Social Security office he/she should inform you of any changes and you should correct your records accordingly.").

114. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613.

115. *Id.* An employer may also make the corrections online using W-2c online, an online service available for exchanging information with SSA. HOW TO CORRECT SSNs, *supra* note 106.

116. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613.

117. *Id.*

118. *Id.* The employer should complete the new Form I-9 in the same manner he would if the employee were a new hire, rather than a current employee. See Letter from Dep't of Homeland Sec. to Employer, <http://www.socialsecurity.gov/employer/ICEinsert.pdf>.

119. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613. The safe-harbor procedure also prohibits the employer from verifying the employee's identify with a document lacking a photograph of the employee. See Letter from Dep't of Homeland Sec., *supra* note 118.

Recognizing that employers will be unable to resolve some discrepancies within ninety-three days, possibly due to the fact that the employee is not authorized, the No-Match Rule explains how employers should respond to unresolved discrepancies. If, after following the safe-harbor procedure, an employer fails to resolve the discrepancy and thus fails to complete the new employment verification procedure, the employer has two options.¹²⁰ He can either terminate the employee or continue to employ the employee and assume the risk of having constructive knowledge in violation of the INA, thereby subjecting himself to possible criminal and civil liability.¹²¹

2. SSA's Response to the No-Match Rule

To comply with the DHS No-Match Rule, SSA amended its 2007 no-match letters for the 2006 tax year.¹²² The new letters also included an insert from DHS and ICE explaining the safe-harbor procedures.¹²³ SSA prepared to mail close to 140,000 of these letters to employers, affecting approximately 8 million workers, after the No-Match Rule was to go into effect on September 14, 2007.¹²⁴

The new no-match letter differs from previous letters because it provides an additional explanation as to why the discrepancy between the employer's records and SSA's records occurred, making reference to the authorization status of the employee.¹²⁵ The new list of explanations for the discrepancy includes clerical errors,¹²⁶ name change due to marriage or divorce,¹²⁷ error when filling out the Form W-2 report,¹²⁸ and that the name or SSN does not exist or is assigned to another person.¹²⁹ Previous no-match letters did not include the final explanation that the SSN

120. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,612.

121. *See id.*

122. *See* SSA 2007 REQUEST, *supra* note 108, at 1; *see also* INST. OF MGMT. & ADMIN., THE STAKES HAVE GOTTEN HIGHER FOR RESPONDING TO SSA NO-MATCH LETTERS (Oct. 2007).

123. *See* SSA 2007 REQUEST, *supra* note 108, at 2 (explaining that the insert will provide employers with more information about how to respond to the receipt of the new no-match letters).

124. NAT'L IMMIGRATION LAW CTR., WHAT THE ORDER GRANTING A PRELIMINARY INJUNCTION MEANS FOR THE DHS RULE ABOUT SOCIAL SECURITY "NO-MATCH" (2007), http://www.nilc.org/immsemploymt/SSA-NM_Toolkit/no-match_PI_2007-10-10.pdf.

125. SSA 2007 REQUEST, *supra* note 108, at 1 (stating that the employee's name or SSN is false, or not assigned to that particular employee).

126. *See id.* ("Errors were made in spelling an employee's name or listing the Social Security number . . ."); *see also* Letter from Dep't of Homeland Sec., *supra* note 118 (explaining that an employee, employer, or the government could have made the clerical error).

127. SSA 2007 REQUEST, *supra* note 108, at 1 ("An employee did not report a name change following a marriage or divorce . . .").

128. *Id.* ("The name or Social Security number was incomplete or left blank on the Form W-2 report sent to the Social Security Administration . . .").

129. *Id.* ("The name or Social Security Number reported is false, or the number was assigned to someone else.").

does not exist or is assigned to another person.¹³⁰ Therefore, the new no-match letter differs from previous letters because it provides that a worker's authorization status may be the reason for the discrepancy.

The 2007 no-match letter also explains what may be inferred about an employee's authorization status from the letter.¹³¹ Although the no-match letter provides that a false name or SSN may cause the discrepancy, the letter specifically states that the letter *alone* does not make any indications regarding an employee's immigration status.¹³² It also instructs the employer not to use the letter as the basis for taking adverse action against the employee because doing so may violate antidiscrimination or labor laws.¹³³

To further guide employers, the new no-match letter includes an insert from DHS and ICE. The insert is a guide for the employer on how to comply with the new No-Match Rule.¹³⁴ It briefly explains the safe-harbor procedure that each employer must follow after the receipt of a no-match letter.¹³⁵ The insert also answers common questions that employers may have. For example, it explains that an employer may not simply disregard the no-match letter because such action may establish the employer's constructive knowledge of an unauthorized employee.¹³⁶

The insert also addresses how an employer may respond if a discrepancy cannot be resolved. Although the insert provides that a variety of reasons may explain the discrepancy between employer and SSA records, it explicitly states that an employer cannot be liable for discrimination under the INA if, after following the safe-harbor procedure, the employer terminates an employee whose no-match discrepancy cannot be resolved within ninety-three days.¹³⁷ Therefore, according to DHS, if an employee's discrepancy cannot be resolved, an employer is free to terminate the employee without fear of liability under the INA antidiscrimination provisions.

SSA anticipates that following the mailing of the new no-match letters, it will receive a growth in the number of requests from employers

130. SOC. SEC. ADMIN., RETIREMENT, SURVIVORS AND DISABILITY INSURANCE, EMPLOYER CORRECTION REQUEST (2003), <http://www.immigration.com/newsletter1/socseedis.pdf> [hereinafter SSA 2003 REQUEST].

131. See SSA 2007 REQUEST, *supra* note 108, at 1.

132. *Id.* Following the word "important" in bold, capital letters, the letter states, "This letter does not imply that you or your employee intentionally gave the government wrong information about the employee's name or Social Security number. Nor does it, *by itself*, make any statement about an employee's immigration status." *Id.* (emphasis added).

133. *Id.* at 2.

134. See Letter from Dep't of Homeland Sec., *supra* note 118.

135. See *id.*; see also SSA 2007 REQUEST, *supra* note 108, at 2 (explaining that employers should follow the directions in an insert included with the letter entitled "How to Correct Social Security Numbers").

136. See Letter from Dep't of Homeland Sec., *supra* note 118.

137. See *id.* (noting that an employer must also follow the same procedures for each employee listed in the no-match letter to ensure that the employer will not be found liable under the INA's anti-discrimination provision).

seeking to clarify worker information.¹³⁸ According to the No-Match Rule preamble, SSA believes that the ninety-day time frame established by the safe-harbor procedure provides adequate time to resolve most inconsistencies.¹³⁹ However, the agency also predicts that it will not be able to resolve the most difficult cases within that time frame.¹⁴⁰ Therefore, if an authorized worker's discrepancy is difficult to resolve, the worker faces near mandatory termination under the No-Match Rule because his employer may terminate him without fear of liability under the INA antidiscrimination provisions once the safe-harbor time frame expires.

3. *The Current Status of No-Match Letters*

As the large number of public comments to the No-Match Rule indicates, much controversy surrounds the new DHS regulation.¹⁴¹ Interestingly, a diverse group of entities opposes the No-Match Rule, from labor unions to corporations to small businesses.¹⁴² Due to the debate regarding the No-Match Rule, on November 14, 2007, SSA announced that it would not send the new no-match letters to employers for the 2006 tax year.¹⁴³ The announcement came after the United States District Court for the Northern District of California Judge Charles R. Breyer granted a preliminary injunction to enjoin the release of the letters.¹⁴⁴ The injunction prevents the issuance of the letters until a hearing on the merits occurs, which is not expected to take place until after March 2009.¹⁴⁵ Therefore, employers will not receive the new no-match letters until at least 2009.¹⁴⁶

As the status of the new no-match letters changes in response to the debate about the No-Match Rule, so too does the status of the Rule. DHS responded to the injunction by filing a motion on December 18, 2007, to stay the proceedings of *AFL-CIO v. Chertoff* until March 24,

138. AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK § 3:12 (2007–08 ed. 2007).

139. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,617 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

140. *See id.*

141. *See id.* at 45,611 (noting that “DHS received approximately 5,000 comments in response to the proposed rule”).

142. *See id.*

143. Linda S. Husar & Jo Anne C. Alderstein, *United States: Employers Will Get No “No-Match” Letters in 2007*, MONDAQ BUS. BRIEFING, Nov. 16, 2007.

144. AFL-CIO v. Chertoff, 552 F. Supp. 2d 999, 1001–02 (N.D. Cal. 2007). Because “[t]he balance of hardships tips sharply in plaintiffs' favor and plaintiffs have raised serious questions going to the merits,” the court granted the motion for preliminary injunction. *Id.*

145. Husar & Alderstein, *supra* note 143. Under the briefing schedule established by Judge Breyer on December 8, 2008, the merits of the case will not be resolved until at least March 2009. *Obama to Inherit Legal Battle over DHS’s No-Match Rule*, CCH, Dec. 17, 2008, <http://hr.cch.com/news/employment/121708a.asp>.

146. *See* NAT'L IMMIGRATION LAW CTR., FACTS ABOUT THE SOCIAL SECURITY “NO-MATCH” LETTER 2 (2008), http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/factsaboutno-matchletter_2008-03-26.pdf (explaining that DHS desires to write a new regulation in time for SSA to send out its 2008 no-match letters).

2008.¹⁴⁷ DHS requested the stay to amend the No-Match Rule to address issues raised by the court in its order granting the preliminary injunction.¹⁴⁸ DHS completed its amendment process, and on November 6, 2008, the agency filed a motion to vacate the preliminary injunction and requested summary judgment for DHS.¹⁴⁹

On March 26, 2008, DHS proposed a supplemental rule to clarify and respond to three issues raised by Judge Breyer when he enjoined the release of the 2007 no-match letters.¹⁵⁰ The agency had a public comment period for the supplemental rule, and it was made final on October 28, 2008.¹⁵¹ Although DHS claimed to have addressed the issues raised by Judge Breyer, the supplemental rule only provides additional justifications for the No-Match Rule.¹⁵² In fact, the supplemental rule provides that DHS “reaffirms the text of the August 2007 [No-Match] Rule *without substantive changes.*”¹⁵³ Regardless of the changes DHS alleges it made to the No-Match Rule, the regulation must comply with the Administrative Procedure Act.¹⁵⁴

D. Analyzing the No-Match Rule Under the Administrative Procedure Act

Although it is well established that agency rules are not meant to continue forever, any agency that decides to alter an existing rule must comply with the standards set forth in the Administrative Procedure Act

147. Motion to Stay Proceedings Pending New Rulemaking at 2, AFL-CIO v. Chertoff, No. 07-4472 CRB (N.D. Cal. Nov. 23, 2007).

148. *Id.*

149. NAFSA: Association of International Educators, No-Match Letter Rule Updates, http://www.nafsa.org/regulatory_information.sec/no_match_letter_rule (last visited Apr. 1, 2009).

150. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis, 73 Fed. Reg. 15,944, 15,944 (proposed Mar. 26, 2008) (to be codified at 8 C.F.R. pt. 274a).

151. Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis, 73 Fed. Reg. 63,843 (Oct. 28, 2008) (to be codified at 8 C.F.R. pt. 274a). A number of comments concluded that the Supplemental Proposed Rule did not change the No-Match Rule or substantively address the problems outlined in the preliminary injunction. *See* Tyler Moran, Low-Wage Immigrant Worker Coalition, Comment to the No-Match Rule, Document ICEB-2006-0004-0610.1, at 2 (Apr. 27, 2008) (explaining that DHS merely reissued the No-Match Rule); *see also* Crystal Williams, American Immigration Lawyers Association, Comment to the No-Match Rule, Document ICEB-2006-0004-0732.1, at 2-3 (Apr. 28, 2008).

152. *See id.* at 63,844; Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis, 73 Fed. Reg. at 15,955; *see also* NAT'L IMMIGRATION LAW CTR., SUMMARY OF U.S. DEPT. OF HOMELAND SECURITY SUPPLEMENTAL PROPOSED RULE 1 (2008), http://www.nilc.org/immsemploymt/SSA_Related_Info/DHS_Final_Rule/SSA_no-match_summary_3-26-08.pdf (“The supplemental proposed rule . . . fails to make any substantive change to the safe-harbor procedures in the 2007 final rule.”).

153. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis, 73 Fed. Reg. at 63,844 (emphasis added).

154. The remainder of this Note addresses the issues surrounding the No-Match Rule promulgated in August 2007. The same analysis under the Administrative Procedures Act applies to the supplemental rule, as well as any additional amendments DHS may make to the regulation.

(APA).¹⁵⁵ The APA provides that a reviewing court may determine that an agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”¹⁵⁶ Before enacting a new rule, an agency must evaluate appropriate data and information, as well as explain the reasons for the new rule.¹⁵⁷ An agency’s rule may constitute an arbitrary and capricious action if the promulgating agency “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.”¹⁵⁸ Thus, to ensure that it is not acting arbitrarily or capriciously, an agency must—if its new rule constitutes a change in agency position—provide a reasoned explanation describing why it determined to change existing rules and consider important aspects of the problem the rule addresses.¹⁵⁹

If the No-Match Rule represents a change of course for DHS, it must provide a reasoned analysis explaining the change, acknowledging that it is purposely altering prior agency policies.¹⁶⁰ If prior to its promulgation of the No-Match Rule DHS failed to provide a reasoned explanation as to why it adopted the No-Match Rule, DHS’s promulgation will be found to be an arbitrary and capricious action in violation of the APA.¹⁶¹

The No-Match Rule may also constitute an arbitrary and capricious DHS action for another reason. An agency regulation may be arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem.”¹⁶² The No-Match Rule amends the regulatory definition of constructive knowledge under the INA provisions that Congress amended in 1986 when it enacted the IRCA.¹⁶³ Congress considered the problems that arise from sanctioning employees to curb illegal immigration when it enacted the IRCA.¹⁶⁴ When enacting the No-Match Rule, DHS must consider the important aspects of the problem that Congress intended to solve with the IRCA.¹⁶⁵ If DHS failed to do

155. Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983).

156. 5 U.S.C. § 706(2)(A) (2006).

157. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)) (requiring that the agency’s explanation provide a “rational connection between the facts found and the choice made”).

158. *Id.* at 43.

159. *Ramaprkash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003).

160. *Id.*

161. *Id.*

162. *State Farm*, 463 U.S. at 43.

163. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,612 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a) (“The final rule amends the definition of ‘knowing’ in 8 CFR 274a.1(l)(1), in the portion relating to ‘constructive knowledge.’”).

164. See discussion *supra* Part II.A.

165. See discussion *supra* Part II.A.

so, then the No-Match Rule may be an arbitrary and capricious action in violation of the APA.¹⁶⁶

The No-Match Rule may also represent an ultra vires action by DHS. Under the APA, an agency takes an ultra vires action when it acts outside the scope of its statutory authority.¹⁶⁷ Agencies are “creatures of statute” and may only act in accord with the authority Congress granted them.¹⁶⁸ Thus, DHS may only act in accordance with the power Congress gave it through the Homeland Security Act and the INA.¹⁶⁹ If DHS acted outside the scope of its statutory authority when promulgating the No-Match Rule, then the regulation constitutes an ultra vires action.¹⁷⁰

When agencies take new actions, they must act in accordance with the APA.¹⁷¹ The APA guides reviewing courts when analyzing agency actions.¹⁷² Because the No-Match Rule is an action by DHS, it should be analyzed under the APA.¹⁷³ If the new regulation represents a change in DHS policy and the agency failed to provide a rational explanation for this change, then the No-Match Rule is an arbitrary and capricious action.¹⁷⁴ The No-Match Rule may also be an arbitrary and capricious DHS action if the agency failed to consider important aspects of the problem of sanctioning employees to curb illegal immigration.¹⁷⁵ Finally, the new regulation may represent an ultra vires action by DHS if it acted outside its statutory authority when it promulgated the No-Match Rule.¹⁷⁶

III. ANALYSIS

All agency actions, including the proposal of new regulations, must comply with the APA. This Part will consider whether DHS complied with the APA when it proposed the No-Match Rule. Section A examines whether the agency acted in an arbitrary and capricious manner through a two-step analysis. First, it determines whether the No-Match Rule represented a change in agency policy. Because the regulation

166. See *Ramaprakash*, 346 F.3d at 1124.

167. 5 U.S.C. § 706(2)(C) (2006).

168. See *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (noting that the EPA, a federal agency, possesses no authority beyond that conferred by Congress).

169. See *id.*

170. See *id.*

171. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

172. 5 U.S.C. § 706(2)(A), (C) (“The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, . . . in excess of statutory jurisdiction, authority, or limitations . . .”).

173. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,623 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a) (“DHS considers this rule a ‘significant regulatory action’ under Executive Order No. 12866 . . .”).

174. See *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003).

175. See *id.*

176. See *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

represented such a change, this Note then examines whether DHS provided a rational explanation for this change in position. Section B discusses whether DHS considered how the No-Match Rule would affect the problems associated with sanctioning employers to curb illegal immigration that Congress considered important. Finally, to determine whether the No-Match Rule constituted an ultra vires agency action, Section C establishes what actions the No-Match Rule grants DHS the authority to take. It then examines whether these actions exceed the statutory authority given to DHS by Congress.

A. The Need for a Reasonable Explanation for DHS's Change in Position

Under the APA, courts may "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁷⁷ According to the Court's analysis in *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, the principal case that applied the reasoned decisionmaking requirement to an agency's proposed rule, an agency must reasonably explain any changes in position the agency makes.¹⁷⁸ Although agency regulations and positions are not meant to last forever, before changing a regulation or position, an agency must provide a rational explanation for its change.¹⁷⁹ If the agency fails to provide an explanation, its proposal constitutes an arbitrary and capricious action.¹⁸⁰ This Section examines whether DHS acted in an arbitrary and capricious manner when it proposed the No-Match Rule through a two-step analysis. It first determines whether the No-Match Rule constitutes a change in agency position. It then examines whether DHS reasonably explained this change its position.

The new no-match letters, along with the DHS/ICE inserts, constitute a change in agency policy. Whereas prior no-match letters failed to trigger liability under the INA, the new letters do trigger liability.¹⁸¹ From 1997 until the promulgation of the No-Match Rule, DHS (and INS,

177. 5 U.S.C. § 706(2)(A).

178. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 42–43 (1983); see also Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1778 (2007) (stating that in *State Farm* "the Court further elaborated the reasoned decisionmaking requirement and applied it to notice-and-comment rulemaking"). The reasoned decisionmaking requirement is also known as the hard look doctrine. See, e.g., *id.* at 1777. The requirement is generally justified because "it promotes rationality, deliberation, . . . accountability. . . . [and] encourages agencies to perform a thorough and logical analysis . . ." *Id.* at 1778.

179. See *State Farm*, 463 U.S. at 42–43.

180. See *id.* at 43 (explaining that an agency must provide a rational explanation for any change in agency position).

181. See AFL-CIO v. Chertoff, 552 F. Supp. 2d 999, 1010 (N.D. Cal. 2007) (order granting preliminary injunction) (noting that DHS believed prior letters did not trigger liability under IRCA). Prior to DHS's proposal of the No-Match Rule, a single SSA no-match letter could not sufficiently establish an employer's constructive knowledge under the INA. *Id.* at 1009.

the predecessor to DHS) held the position that it “would not consider [a no-match letter] by itself to put the employer on notice that the employee is unauthorized to work, or to require reverification of documents or further inquiry as to the employee’s work authorization.”¹⁸² DHS’s new position under the No-Match Rule is that a single no-match letter sufficiently provides an employer with constructive knowledge under the INA, thereby subjecting the employer to civil and criminal sanctions.¹⁸³ No further evidence of illegality need exist.¹⁸⁴ By changing when an employer may be liable under the INA, the new no-match letters represent a change in DHS policy.¹⁸⁵

The No-Match Rule, when applied, represents a change in DHS’s position regarding the liability SSA no-match letters impose on employers, regardless of DHS’s assertions in the preamble of its new regulation.¹⁸⁶ The preamble of the No-Match Rule states that the receipt of a no-match letter by itself fails to trigger INA liability.¹⁸⁷ However, the rule itself provides that an employer possesses constructive knowledge if he fails to take reasonable steps, after he receives a no-match letter, to verify his employee is an authorized worker.¹⁸⁸ The new letters, along with DHS/ICE inserts, explain that if an employer ignores the no-match letter, it may be subject to civil and criminal sanctions.¹⁸⁹

Recently, the government admitted that the receipt of a single no-match letter may be sufficient to cause the employer to possess constructive knowledge.¹⁹⁰ Because constructive knowledge constitutes knowledge under the INA, this may trigger criminal and civil liability for an employer. This statement contravenes earlier agency policy and reflects a change in agency position. Because DHS changed its position when it published the No-Match Rule, under the APA, the agency must provide a rational explanation for why it decided to change its policy.¹⁹¹

The analysis of whether an agency provided a sufficient, rational explanation for its change in policy is apropos of the Supreme Court’s reasoning in *Motor Vehicle Manufacturers Ass’n of the United States v.*

182. *Id.* (internal quotation omitted).

183. *See id.* at 1004.

184. *Id.* at 1010 (“Nothing in the [DHS] insert suggests that any evidence of illegality other than receipt of a no-match letter is necessary for liability to be imposed.”).

185. *Id.* (“It is clear to this Court that DHS has changed course.”).

186. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,616 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a) (“DHS acknowledges that an SSA no-match letter by itself does not impart knowledge that the identified employees are unauthorized aliens.”).

187. *Id.*

188. *See id.* at 45,623.

189. SSA 2007 REQUEST, *supra* note 108 (explaining that by ignoring the no-match letter an employer exposes himself to liability under immigration laws).

190. *Chertoff*, 552 F. Supp. 2d at 1009–10 (“At oral argument, the government confirmed that under the new rule, receipt of a no-match letter by itself can be sufficient to impart knowledge that the identified employees are unauthorized.”).

191. *See* discussion *supra* Part II.D.

*State Farm Mutual Automobile Insurance Co.*¹⁹² In that case, the Court concluded that an action by the National Highway Traffic Safety Administration (NHTSA) was arbitrary and capricious because the agency failed to provide a reasoned explanation for its change in policy.¹⁹³ The Court explained its conclusion by emphasizing that NHTSA provided “no findings and no analysis . . . to justify the choice made, [and] no indication of the basis on which the [agency] exercised its expert discretion.”¹⁹⁴ Thus, under the APA, the Court could not determine that the agency reasonably explained its change in policy and reaffirmed the principle that an agency must provide a reasonable explanation for changing its policy.¹⁹⁵

According to *State Farm*, DHS must reasonably explain its change in policy by providing findings, analysis, or the basis for its decision to change when an employer may be liable under the INA.¹⁹⁶ DHS had various forums to provide a rational explanation for its change in policy, including the preamble of the No-Match Rule¹⁹⁷ and the action the AFL-CIO¹⁹⁸ brought against DHS.¹⁹⁹ If DHS seized an opportunity to reasonably explain its change in position, then the No-Match Rule would not be a change in agency position lacking a rational explanation.²⁰⁰

The preamble to the No-Match Rule lacks any explanation as to why DHS changed its position because the agency does not admit that it changed its position regarding when no-match letters trigger employer liability under the INA.²⁰¹ DHS responds to a number of public comments regarding the regulation in the No-Match Rule preamble, yet it omits a reasoned explanation for its changed position.²⁰² DHS responds to comments accusing it of lacking the authority to promulgate the No-Match Rule by simply stating that the authors of those comments misunderstood the rule.²⁰³ Stating that the authors of the public comments mis-

192. 463 U.S. 29 (1983).

193. *See id.* at 57 (stating that the agency failed to provide the necessary reasoned analysis).

194. *Id.* at 48 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962)) (second alteration in original).

195. *See id.* at 48–49.

196. *See supra* note 194 and accompanying text.

197. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,611–23 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a) (addressing the various issues surrounding the final rule). This Note limits the following analysis to the No-Match Rules promulgated on August 15, 2007 and does not examine DHS’s additional arguments provided in the later supplemental No-Match Rule. *See supra* Part II.C.3.

198. A number of other plaintiffs brought the suit as well: San Francisco Labor Council, San Francisco Building and Construction Trades Council, and Central Labor Council of Alameda County Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 1, AFL-CIO v. Chertoff, 552 F. Supp. 2d 999 (N.D. Cal. Aug. 29, 2007) (No. C 07-04472 CRB).

199. *Chertoff*, 552 F. Supp. 2d at 1001.

200. *See Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003) (explaining that an agency must provide a rational explanation for any change in position it makes).

201. *See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*, 72 Fed. Reg. 45,611, 45,611–23 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

202. *See id.*

203. *Id.* at 45,614.

understood the regulation does not sufficiently provide any explanation as to why the agency changed its position. Just as the NHTSA in *State Farm* provided no findings, analysis, or basis for its change in agency position,²⁰⁴ DHS did not provide any findings, analysis, or basis for its change in policy in the preamble of the No-Match Rule.

DHS also failed to provide a rational explanation for its action during the preliminary injunction hearing for *AFL-CIO v. Chertoff*.²⁰⁵ Although the government admitted that the new no-match letters alone may trigger liability under the INA during the hearing,²⁰⁶ the agency did not admit that it had changed its position or provide a rational explanation for the change.²⁰⁷ To provide a rational explanation for its actions, DHS must first acknowledge that the new regulation represents a change in agency policy. Currently, no rational explanation for the agency's change in policy exists because DHS failed to use two potential forums to explain its change in position, the preamble of the No-Match Rule and *AFL-CIO v. Chertoff*.

Simply because DHS has yet to provide a reasoned explanation for its change in position does not necessarily indicate that DHS cannot explain its action. DHS may provide a rational explanation for its change in policy during the hearing on the merits of *AFL-CIO v. Chertoff*.²⁰⁸ Regardless of the forum the agency utilizes to explain its action, a number of reasonable explanations may explain the agency's change in position. Thus far, however, DHS has not provided the public with any such reasons. Therefore, at this time, the No-Match Rule constitutes an arbitrary and capricious agency action because DHS failed to provide a rational explanation for its change in position regarding employer liability under the INA.

B. Important Problems Surrounding the Enforcement of the INA

Regardless of whether DHS may provide a rational explanation for its promulgation of the No-Match Rule, the agency's action may still constitute an arbitrary and capricious action if DHS failed to consider "important aspect[s] of the problem[s]"²⁰⁹ associated with sanctioning employers to curb illegal immigration.²¹⁰ The legislative history of the

204. See *supra* note 193–94 and accompanying text.

205. See 552 F. Supp. 2d 999 (N.D. Cal. 2007).

206. See *supra* note 190 and accompanying text.

207. See *Chertoff*, 552 F. Supp. 2d at 1009–10.

208. See *id.*; see also *Obama to Inherit Legal Battle over DHS's No-Match Rule*, CCH, Dec. 17, 2008, <http://hr.cch.com/news/employment/121708a.asp>.

209. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

210. The No-Match Rule describes the steps an employer should take to avoid liability, under the INA, for knowingly hiring or employing an unauthorized worker. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,612 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a). When Congress amended the INA by enacting the IRCA in 1986, the House Committee on the Judiciary believed "legislation containing employer sanctions is the most humane,

IRCA indicates that Congress intended to preserve jobs for authorized workers and prevent employers from discriminating against employees on the basis of their national origin or citizenship when it amended the INA.²¹¹ Congress identified these two problems, namely the termination of authorized workers and employer discrimination, as potential effects of the sanctions the INA imposes upon employers that knowingly employ unauthorized workers.²¹² To comply with the APA, DHS must have considered how the No-Match Rule would affect these congressionally recognized problems.

This Section examines how the No-Match Rule is inconsistent with congressional intent, and thus reflects that DHS failed to consider how the regulation would affect two important problems that result from sanctioning employers to curb illegal immigration. The No-Match Rule is contrary to congressional intent for two reasons. First, when Congress amended the INA by enacting the IRCA, it intended to preserve jobs for authorized workers.²¹³ The No-Match Rule, however, will lead to mass firings of authorized workers.²¹⁴ Second, when Congress enacted the IRCA it worried that the legislation would lead to employer discrimination against workers on the basis of their national origin or citizenship.²¹⁵ For this reason, Congress included the antidiscrimination provision in the IRCA.²¹⁶ Past responses to no-match letters imply that the new letters, sent out in compliance with the No-Match Rule, will lead to mass discriminatory firings of legal, authorized workers.²¹⁷ Because the No-Match Rule conflicts with two important, congressionally recognized problems that result from sanctioning employers to curb illegal immigration, the new regulation represents an arbitrary and capricious action by DHS.

credible and effective way to respond to the large-scale influx of undocumented aliens.” H.R. REP. NO. 99-682(I), at 46 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5650.

211. See discussion *supra* Part II.A.

212. See H.R. REP. NO. 99-682(I), at 68–71.

213. See *id.* at 103 (explaining that the theme surrounding the amendments to INA was to “close the back door—illegal immigration—while [Congress] open[s] the front door—legal immigration—slightly more” (citation omitted)).

214. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,621 (responding to public comments that suggested that the agency’s new regulation would result in mass firings); see also NO-MATCH LETTER PROGRAM: IMPLICATIONS, *supra* note 4, at 25.

215. See H.R. REP. NO. 99-682(I), at 68, 70–71.

216. See *id.*

217. Marielena Hincapié, Low-Wage Immigrant Worker Coalition, Comment to the No-Match Rule, Document ICEB-2006-0004-0099, at 6, (Aug. 14, 2006) (explaining that employment discrimination rose following the enactment of IRCA); see also NO-MATCH LETTER PROGRAM: IMPLICATIONS, *supra* note 4, at 29 (providing GAO data indicating that the IRCA caused an increase in employment discrimination based on nation origin or citizenship).

1. *The Termination of Authorized Workers*

Although the preamble of the No-Match Rule provides that the new rule “should not result in the firing of legally authorized workers,”²¹⁸ past reactions to no-match letters indicate that employers who receive the new letters will fire authorized workers.²¹⁹ Results from a study conducted by the University of Illinois at Chicago Center for Urban Economic Development²²⁰ indicate that employers react to no-match letters by firing workers, including authorized workers.²²¹ For example, in 2002, SSA sent about 800,000 no-match letters to employers.²²² These letters resulted in approximately 100,000 workers losing their jobs, including “U.S. citizens, lawful permanent residents, and other work-authorized employees.”²²³ Just as no-match letters in 2002 caused employers to fire authorized workers, so too may the new no-match letters.

In fact, the new no-match letters may cause the termination of more authorized workers than the previous letters. Many public comments responding to the No-Match Rule expressed concern that the new no-match letters, along with the DHS/ICE inserts, may cause more employers to fire authorized workers than the previous letters.²²⁴ In the past, employers fired workers who were the subjects of no-match letters; even though the letters specifically stated that the letters alone do not provide evidence that a worker is unauthorized to work.²²⁵ The new letters send employers a different message. They explain to employers that the letters alone may constitute sufficient evidence that an employee is an unauthorized worker because an employer that does not follow the safe-harbor procedures may be liable under the INA for knowingly employing an unauthorized worker.²²⁶ Because the government specifically states that a single letter may trigger liability (whereas prior letters did not), an employer is more likely to believe that the subjects of the letter are unauthorized workers.

The underlying principle of the No-Match Rule also explains why the new no-match letters will lead to the termination of authorized workers. The regulation is “based on the faulty premise that SSA no-match letters are foolproof indicators of work authorization.”²²⁷ Through the

218. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,621.

219. NO-MATCH LETTER PROGRAM: IMPLICATIONS, *supra* note 4, at 25.

220. *Id.*

221. *Id.*

222. Hincapié, *supra* note 217, at 3.

223. *Id.*

224. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,611, 45,621 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

225. SSA 2003 REQUEST, *supra* note 130, at 1 (stating that the no-match letter does not “make any statement about an employee’s immigration status”).

226. SSA 2007 REQUEST, *supra* note 108, at 2 (explaining that by ignoring the letter an employer may be exposed to liability under the INA).

227. Hincapié, *supra* note 217, at 3.

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No-Match Rule, DHS attempts to use the ESF to curb illegal immigration. It desires to identify potential ESF wage reports before they enter the database. A large number of these reports will pertain to authorized workers, thereby causing no-match letters to be sent to those authorized workers.²²⁸ When the GAO analyzed the ESF, it noted that the database could be used to identify employers that employ unauthorized workers.²²⁹ However, the GAO also cautioned DHS about accessing this information because the database also contains information regarding authorized workers.²³⁰ By using the no-match letters to provide constructive knowledge that an employee is an unauthorized worker, the No-Match Rule will mistakenly identify legal, authorized workers as unauthorized workers, thereby causing these workers to face potential termination.²³¹

Although DHS acknowledges the concern that the new letters will result in the termination of authorized workers exists, the agency does not sufficiently explain why the new letters will not produce this result. DHS addresses this concern in the preamble of the No-Match Rule by stating that the safe-harbor procedure "is simply one method of resolving the problem while ensuring that DHS does not use the employer's receipt of a DHS or SSA notice as evidence of constructive knowledge."²³² However, DHS recently contravened this statement when it admitted that a single no-match letter may be sufficient evidence that an employer knowingly employed an unauthorized worker. The receipt of a new no-match letter may constitute constructive knowledge and thus trigger liability.²³³ Thus, DHS fails to fully explain why the new letters will not result in employers terminating authorized workers. Simply stating that the new no-match letters should not cause employers to fire legal, authorized workers does not provide sufficient evidence that DHS considered this possible consequence of its new regulation.

Because the new letters may cause employers to fire even more authorized workers than the previous no-match letters, DHS failed to consider an important aspect of the problem with sanctioning employers to curb illegal immigration. When Congress enacted the IRCA in 1986, it intended to preserve jobs for authorized workers.²³⁴ Evidence suggests that the No-Match Rule will result in more authorized workers losing

228. See GAO REPORT, *supra* note 60, at 7.

229. See discussion *supra* Part II.B.2.

230. See GAO REPORT, *supra* note 60, at 12.

231. See NAT'L IMMIGRATION LAW CTR., WHY DHS'S FINAL SOCIAL SECURITY "NO-MATCH" LETTER RULE IS BAD FOR WORKERS, EMPLOYERS, AND THE ECONOMY 1 (2007), http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/SSA_no-match_TPs_2007-08-14.pdf [hereinafter NILC, WHY NO-MATCH RULE IS BAD] (stating that 17.8 million SSA records that contain discrepancies will cause many authorized employees to be inaccurately listed as a no-match).

232. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,621 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

233. See AFL-CIO v. Chertoff, 552 F. Supp. 2d 999, 1009–10 (N.D. Cal. 2007).

234. See discussion *supra* Part II.A.

their jobs than prior to the Rule's promulgation.²³⁵ Thus, DHS's No-Match Rule contravenes congressional intent because it is likely to cause a problem that Congress desired to address and fix through the enactment of the IRCA in 1986.

2. *The Discriminatory Effects of the No-Match Rule*

Not only was Congress concerned with the preservation of jobs for authorized workers when it enacted the IRCA, Congress also worried about the discriminatory effects of the legislation.²³⁶ Congress expressed concerns that holding employers civilly and criminally liable for knowingly employing unauthorized workers would result in the discrimination of employees on the basis of their national origin or citizenship.²³⁷ As a result, Congress included the antidiscrimination provision in the IRCA, which provides that "[i]t is an unfair immigration-related employment practice for a person . . . to discriminate against any individual . . . with respect to . . . hiring . . . because of such individual's national origin, or . . . citizenship status."²³⁸ Congress viewed the antidiscrimination provision as an important aspect of immigration reform,²³⁹ and believed the provision would minimize potential discrimination that could occur as a result of the legislation.²⁴⁰

Congress's concerns regarding employer discrimination proved to be legitimate. After the enactment of the IRCA, employment discrimination against authorized, foreign-born workers rose.²⁴¹ In 1990, the GAO found that following the enactment of the IRCA, nearly 20 percent of employers admitted to engaging in discriminatory treatment on the basis of an employee's citizenship or national origin.²⁴² This employment discrimination continues to exist today. Recently, the Office of Special Counsel saw an increase in national-origin discrimination cases.²⁴³ After the SSA sent almost one million no-match letters to employers in 2002, employment discrimination rose.²⁴⁴ This data suggests that no-match let-

235. See NILC, WHY NO-MATCH RULE IS BAD, *supra* note 231, at 1 ("Using [SSA's ESF] for immigration enforcement will ensnare employment-authorized workers, resulting in unjust firings."); see also *supra* notes 220–26 and accompanying text.

236. See *supra* notes 233–35 and accompanying text.

237. H.R. REP. NO. 99-682(I), at 70–71 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5674–75.

238. 8 U.S.C. § 1324b(a)(1)(A), (B) (2006).

239. H.R. REP. NO. 99-682(I), at 68. The Chairman of the ABA's Coordinating Committee on Immigration Law testified that antidiscrimination protections are important to help protect against "any perceived or likely ill-effects . . . in the workplace." *Id.*

240. *Id.* (stating that "every effort must be taken to minimize the potentiality of discrimination and that a mechanism to remedy any discrimination that does occur must be a part of this legislation").

241. Hincapié, *supra* note 217, at 6.

242. NO-MATCH LETTER PROGRAM: IMPLICATIONS, *supra* note 4, at 29.

243. *Id.* at 25.

244. Hincapié, *supra* note 217, at 6 (explaining that Office of Special Counsel investigations has risen since 2002).

ters contribute to an increased number of employers discriminating against employees due to their national origin or citizenship.²⁴⁵

The No-Match Rule disregards Congress's concern that sanctioning employers to curb illegal immigration will lead to employer discrimination.²⁴⁶ Many fear that once an employer receives the new no-match letter the employer will discriminatorily fire employees who are the subjects of the letter.²⁴⁷ Past reactions by employers to no-match letters justify this fear. Employer responses to previous no-match letters indicate that employees who are the subject of the letters are exposed to potential discrimination, including discriminatory firing.²⁴⁸ This employer discrimination contravenes Congress's desire to prevent employment-related discrimination. Although Congress considered employer discrimination an important problem that may result from sanctioning employers to curb illegal immigration,²⁴⁹ the No-Match Rule may actually contravene Congress's effort to reduce discrimination by increasing employer discrimination. Thus, DHS failed to consider this congressionally recognized, important aspect of sanctioning employers to curb illegal immigration.

As shown through the previous analysis, the No-Match Rule constitutes an arbitrary and capricious action by DHS for two reasons. First, DHS changed its position regarding when the INA imposes liability on employers without providing a rational explanation for its change in position.²⁵⁰ Second, DHS failed to consider how the No-Match Rule will affect two important aspects of sanctioning employers to curb illegal immigration: the preservation of jobs held by authorized workers and preventing discrimination on the basis of national origin or citizenship.²⁵¹ Therefore, the No-Match Rule constitutes an arbitrary and capricious action by DHS in violation of the APA.

245. NO-MATCH LETTER PROGRAM: IMPLICATIONS, *supra* note 4, at 25.

246. See *supra* notes 213–16 and accompanying text.

247. A number of public comments submitted in response to the proposed No-Match Rule expressed concern that the new no-match letters would lead to discriminatory firings. See Hincapié, *supra* note 217, at 2 (stating that the No-Match Rule will “trigger massive, potentially unlawful firings” and “[o]verly cautious employers will fire listed workers before workers have a chance to show they are on the list mistakenly”); see also Sherwin Siy, Electronic Privacy Information Center, Comment to the No-Match Rule, Document ICEB-2006-0004-0200.1, at 8, (Sept. 5, 2006) (“[E]mployers have little incentive to continue employment of an individual stigmatized by a potential error.”); Ricardo A. Flores, Public Justice Center, Comment to the No-Match Rule, Document ICEB-2006-0004-0203.1, at 1, (Sept. 5, 2006) (“The rule will result in unnecessary, unjust, and potentially discriminatory mass firings.”).

248. See NO-MATCH LETTER PROGRAM: IMPLICATIONS, *supra* note 4, at 13.

249. H.R. REP. NO. 99-682(I), at 70 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5674 (“It makes no sense to admit immigrants and refugees to this country, require them to work and then allow employers to refuse to hire them because of their immigration (non-citizenship) status.”).

250. See discussion *supra* Part III.A.

251. See discussion *supra* Part III.B.

C. *The No-Match Rule Upsets the Delicate Balance of Agency Power Set up by Congress*

In addition to representing an arbitrary and capricious action, an agency's publication of a new regulation may also constitute an ultra vires action in violation of the APA.²⁵² Under the APA, an agency regulation violates the Act if it grants the agency with more authority than Congress granted the agency.²⁵³ The original legislation that granted the agency authority provides insight as to the scope of the agency's power because a federal agency is a "creature of statute," possessing no authority beyond what Congress delegated.²⁵⁴ If an agency lacks the statutory authority to perform an action, then the action is "plainly contrary to law and cannot stand."²⁵⁵ To determine whether the No-Match Rule constitutes an ultra vires agency action, this Section determines what actions the No-Match Rule grants DHS the authority to take. It then explores whether such actions encroach on the authority of any other agencies, thus exceeding the boundaries of statutory authority Congress granted DHS.

Through the No-Match Rule, and DHS/ICE inserts included with the new SSA no-match letters, DHS attempts to enforce the antidiscrimination provisions of the INA. The new no-match letter inserts provide that if an employer follows the safe-harbor procedure, fails to resolve the discrepancy in SSA records, and then terminates the employee, the employer will not be subject to an antidiscrimination suit under the INA.²⁵⁶ If an employer follows the safe-harbor procedure in compliance with the antidiscrimination provisions of the INA, the employer "will not be found to have engaged in unlawful discrimination."²⁵⁷ When DHS tells employers when they will not be liable for discrimination under the INA, DHS interprets the antidiscrimination provision by determining when it will not be enforced.

When DHS determines whether the INA antidiscrimination provisions will not be enforced, it encroaches on the statutory authority of another agency, the DOJ. Congress authorized the DOJ to enforce the INA antidiscrimination provision²⁵⁸ when it created a special office within the DOJ, the Office of the Special Counsel for Immigration-Related Unfair Employment Practices, to enforce those provisions.²⁵⁹ Congress

252. 5 U.S.C. § 706(2)(C) (2006).

253. *Id.*

254. Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

255. *Id.* (explaining that if, under the Clean Air Act, EPA lacked authority, then its action cannot stand).

256. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,611, 45,613–14 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

257. *Id.* at 45,614.

258. *Id.* (recognizing that the DOJ possesses the responsibility for enforcing the antidiscrimination provisions of the INA).

259. 8 U.S.C. § 1324b(c) (2006).

created this office “[b]ecause of the widespread fear that sanctions could result in employment discrimination against Hispanics and other minority groups.”²⁶⁰ Congress explicitly intended the Office of Special Counsel to protect minority workers by working to ensure that employers did not violate the antidiscrimination provision.²⁶¹ Granting DHS the authority to prevent enforcement of the INA antidiscrimination provisions would encroach on the authority of the Office of Special Counsel.

When an agency encroaches on another agency’s statutory authority, the agency exceeds its authority.²⁶² Although DHS possesses the authority to conduct investigations for violations of the INA and serve employers with warning notices and notices of intent to fine,²⁶³ DHS lacks the authority to enforce the INA antidiscrimination provisions.²⁶⁴ Determining whether an employer faces suit under the antidiscrimination provisions of the INA is the responsibility of the Office of Special Counsel.²⁶⁵ By stating that employers will not face suit if they follow the new safe-harbor procedures prior to terminating an employee, DHS determines which employers will face antidiscrimination charges.²⁶⁶ This is the responsibility of the Office of Special Counsel, not DHS. By determining when an employer is not in violation of the antidiscrimination provisions of the INA, DNS encroaches on the authority of the DOJ and exceeds its own statutory authority.²⁶⁷ Thus, the No-Match Rule constitutes an ultra vires agency action.

To summarize, DHS violated the APA because it acted in an arbitrary and capricious manner, as well as outside the scope of its statutory authority, when it promulgated the No-Match Rule. The No-Match Rule constitutes an arbitrary and capricious action by DHS in violation of the APA for two reasons. First, DHS failed to provide a rational explanation for the change in agency position that the No-Match Rule represents. Second, DHS failed to consider the No-Match Rule’s affect on two aspects of sanctioning employers to curb illegal immigration that Congress considered important. The No-Match Rule also constitutes an

260. H.R. REP. NO. 99-682(I), at 49 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649.

261. *Id.* at 71 (explaining that Congress charged the Special Counsel “with the responsibility of investigating and prosecuting discrimination charges filed under the” INA).

262. See Nat’l Treasury Employees Union v. Chertoff, 452 F.3d 839, 865 (D.C. Cir. 2006) (stating that a DHS regulation is “flawed insofar as it allows DHS to encroach on [another agency’s] operations without the statutory authority to do so”).

263. See 6 U.S.C. §§ 251–256 (2006); see also 8 C.F.R. § 274a.9(b) (2008).

264. 8 U.S.C. § 1324b(c).

265. See *supra* notes 256–58 and accompanying text; see also U.S. DEP’T OF JUSTICE, LOOK AT THE FACTS NOT AT THE FACES: YOUR GUIDE TO FAIR EMPLOYMENT 3, http://www.usdoj.gov/crt/osc/pdf/publications/en_guide0507.pdf (explaining that the Office of Special Counsel “covers *all* cases of discrimination based on citizenship status by employers of four or more employees” and cases regarding national origin discrimination involving employers of four to fourteen employees).

266. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,611, 45,613–14 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

267. See Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (noting that an agency may not exceed the authority Congress granted it).

ultra vires action by DHS because it grants DHS authority that Congress specifically granted to the DOJ. Therefore, the No-Match Rule constitutes an arbitrary and capricious, as well as an ultra vires, action by DHS in violation of the APA.

IV. RECOMMENDATION

This Note recommends that DHS should not implement the No-Match Rule for three reasons. First, the No-Match Rule currently constitutes an arbitrary and capricious action by DHS, in violation of the APA, because the agency has yet to reasonably explain its change in agency policy regarding employer liability under the INA.²⁶⁸ Although DHS may provide a rational explanation for its proposed No-Match Rule, two other reasons also prevent DHS from implementing the regulation. DHS failed to consider how the No-Match Rule will affect two congressionally recognized, important aspects of the problem of sanctioning employers to curb illegal immigration.²⁶⁹ The hardships that the No-Match Rule will impose on legal, foreign-born workers cannot be overlooked. The substantial costs the No-Match Rule imposes on authorized immigrants outweigh any benefit the regulation may bring to workplace enforcement investigations. Finally, DHS cannot implement the No-Match Rule because the agency must yield to Congress's established balance of agency power and allow Congress to promulgate comprehensive immigration reform.

A. *DHS Must Explain Its Reasons for Changing Agency Policy*

Because the No-Match Rule represents a change in agency position, DHS must provide a rational explanation for its new regulation.²⁷⁰ DHS has yet to provide such an explanation. Although DHS failed to utilize two forums that provided the opportunity to explain its change in policy, the No-Match Rule's preamble and the preliminary injunction hearing of *AFL-CIO v. Chertoff*, two potential forums are still available: the preamble of additional amendments to the No-Match Rule and the hearing on the merits in *AFL-CIO v. Chertoff*.²⁷¹ The preamble of an amended No-Match Rule would provide DHS an excellent opportunity to reasonably explain why it changed agency policy regarding employer liability under the INA. If DHS fails to sufficiently explain its change in policy in the preamble, then it should provide a rational explanation for its change during the hearing on the merits in *AFL-CIO v. Chertoff*. Until the agency explains this change, the regulation remains an arbitrary

268. See *supra* notes 180, 201–07 and accompanying text.

269. See *supra* Part III.B.

270. See *supra* notes 91–94, 102–04, 180 and accompanying text.

271. See *supra* notes 201–08 and accompanying text.

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and capricious agency action and thus constitutes an invalid agency regulation that cannot be implemented.

B. Legal Immigrants: Those Who Stand to Lose the Most as a Result of the No-Match Rule

Even if DHS reasonably explains its policy change, it must not implement the No-Match Rule because of the detrimental effect on authorized, foreign-born workers. Legal immigration provides the United States a strong economic resource.²⁷² Authorized immigrants represent an important segment of the American labor market.²⁷³ The impact of the No-Match Rule on legal, foreign-born workers must not be overlooked.

Congress considered how immigration law affects legal immigrants prior to enacting the IRCA. It identified important aspects that must be considered when sanctioning employers to curb illegal immigration.²⁷⁴ Yet, prior to proposing the No-Match Rule, DHS failed to consider two of these important aspects: the preservation of jobs held by authorized workers and employer discrimination based on national origin and citizenship. These two aspects are not inconsequential. The implementation of the No-Match Rule may cost thousands of authorized workers their jobs and lead to discrimination against even more workers. DHS needs to consider the impact on these workers because Congress considered those consequences prior to enacting the IRCA. Therefore, DHS must also evaluate how the No-Match Rule will impact authorized workers and employer discrimination based on national origin or citizenship. The benefits from accessing SSA records for workplace enforcement purposes do not outweigh the substantial costs the new regulation imposes on authorized immigrant workers.

C. DHS Must Respect the Balance of Agency Power

Congress designed a delicate balance of agency power by establishing various agencies and offices to regulate different aspects of immigration.²⁷⁵ If DHS implements the No-Match Rule, the agency will upset this balance. The No-Match Rule represents an invalid regulation because DHS must act outside its statutory authority to enforce the Rule's guidelines. DHS will enforce the INA antidiscrimination provision, exceeding its statutory authority. Congress created the Office of Special Counsel to enforce the antidiscrimination provisions. Congress never delegated that authority to DHS. The No-Match Rule circumvents Con-

272. See RUTH ELLEN WASEM, CONG. RESEARCH SERV., IMMIGRATION REFORM: BRIEF SYNTHESIS OF ISSUE 5 (2007), <http://fpc.state.gov/documents/organization/91856.pdf>.

273. See *supra* note 2.

274. Phillips & Massey, *supra* note 10, at 234.

275. See *supra* Part II.B.

gress's explicit mandate that DHS not enforce the INA antidiscrimination provisions.

DHS must yield to Congress's desires regarding immigration law and its enforcement. In the past, Congress considered legislation similar to the No-Match Rule that would have allowed SSA records to be used to enforce immigration laws.²⁷⁶ Congress, however, never passed that legislation. Congress rejected the proposals allowing agencies to use no-match letters as a tool in workplace enforcement investigations.²⁷⁷ Because Congress never delegated the authority to enforce the INA antidiscrimination provision to DHS and past congressional actions expressed a desire to limit the use of no-match letters, the No-Match Rule exceeds the boundaries of congressionally granted authority.

To summarize, the No-Match Rule should not be implemented for three reasons. First, the new regulation constitutes an invalid agency regulation because DHS failed to provide a rational explanation for its change in position regarding employer liability under the INA. Second, the substantial costs the No-Match Rule imposes on legal immigrants outweigh the benefits the regulation may provide. When DHS proposed the No-Match Rule, it failed to consider the regulation's effect on the preservation of jobs held by authorized workers and employer discrimination based on national origin and citizenship. Finally, if DHS implements the No-Match Rule, the agency will upset the balance of agency power Congress established to regulate and enforce immigration laws.

V. CONCLUSION

In 2006, DHS proposed the No-Match Rule. When DHS proposed this regulation, the agency violated the APA because the No-Match Rule constitutes an arbitrary and capricious, as well as an ultra vires agency action. Although the text of the No-Match Rule simply amends the regulatory definition of knowledge and establishes safe-harbor procedures for employers, the potential consequences of this regulation reveal that the No-Match Rule will cause great harm.

Not only is the No-Match Rule an arbitrary and capricious and ultra vires action by DHS, its promulgation will affect millions of legal, authorized workers throughout the United States. When DHS proposed this new regulation, it failed to consider its impact on this important segment of the American labor market. These workers will face the consequences imposed by the No-Match Rule. They stand to lose their jobs and face discrimination by their employers. DHS disregarded this group of people when it proposed the No-Match Rule. By providing an analysis explaining why the No-Match Rule should not be implemented, perhaps

276. See GAO REPORT, *supra* note 60, at 1; see also *supra* Part II.B.2.

277. See Posting of Michael Chertoff to Homeland Security Leadership Journal, http://www.dhs.gov/journal/leadership/2007_10_01_archive.html (Oct. 4, 2007, 17:38 EST).

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this Note can help bring light to a segment of the American workforce lost in the dark shadows of illegal immigration.

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