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January 20, 2011

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500 Twelfth St. SW  
Washington, DC 20024

Via E-Mail: [brett.dreyer@dhs.gov](mailto:brett.dreyer@dhs.gov)

Re: Necessary Elements of ICE Regulations to Effectively Implement  
the Letter and Spirit of the 1996 Bono Amendment (IIRAIRA § 411)

Dear Mr. Dreyer:

The American Immigration Lawyers Association (“AILA”) seeks to renew and augment its 1998 comments in response to the publication by legacy INS of proposed regulations implementing the above-referenced provisions of the 1996 amendments to the Immigration Act (hereafter sometimes referred to as the “Bono Amendment”). *See* 63 Fed. Reg. 16909. In light of the increase in ICE’s worksite enforcement activity, we urge the agency to act now and reissue proposed regulations in order to reach closure on the important and long-delayed implementation of the “good faith” amendments passed by Congress in 1996.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality, and the facilitation of justice in the field. Many AILA members regularly advise and represent American companies, both in developing I-9 compliance programs and in preparing for and defending against worksite enforcement claims, as well as in compliance activity related to other workplace laws, including those that prohibit employment discrimination. Our members’ collective expertise and experience makes us particularly well-qualified to offer views that we believe will benefit the public and the government.

## DISCUSSION

AILA members and our clients, who take I-9 compliance responsibilities seriously, urge that ICE adopt regulations that provide clear guidance in the field to establish ICE’s commitment to the

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principles articulated in the Bono Amendment for the benefit of employers and ICE auditors alike. AILA hopes that such clarity will not only provide transparency, but will also encourage employers to review and correct their I-9 records, conduct periodic internal audits and take other actions to achieve maximum compliance with the law and spirit of the I-9 requirements.

To these ends, AILA believes that ICE, in promulgating final regulations to implement the Bono Amendment, must provide more interpretive text in the preamble and more detailed regulatory text to provide clarity and to ensure that procedural or technical violations are handled in a manner consistent with the intent behind the Bono Amendment—in the words of former INS Associate Commissioner Robert Bach, “through common sense regulation, make it possible to remove the burden of guilt from a small business person.” [*Hearing before the Subcommittee on Immigration and Claims of the Committee on the Judiciary, House of Representatives, 104<sup>th</sup> Cong., First Session, March 30, 1995 Serial No. 14*, referred to throughout as “**March 1995 Congressional Hearing Report**, at page 55.]

The proposed regulations fail in meeting these objectives in at least three critical respects.

**I. Bad Faith Should Not Be Implied Solely From A High Number of Technical Violations Related to Unauthorized workers**

The gist of the Bono amendment is to shelter employers who act in good faith from liability for technical and procedural shortcomings in their I-9 practices. In the first instance, then, the standards that forgive such technical and procedural errors will not apply if ICE concludes that the employer did not act in good faith. Good faith is not itself defined in either the statute or the regulations. Rather, in its prior effort to promulgate regulations in this area, the agency proposed situations that would rule out good faith and thus preclude an employer from the benefits of the technical and procedural defense. [ICE Regulations Implementing IIRAIRA Section 411 (Technical and Procedural Violations) (originally published at 63 Fed Reg. 16909 (April 7, 1998).] One of the circumstances that would disqualify an employer from asserting the technical and procedural defense is when the government concludes that the employer “intentionally avoided I-9 requirements” as demonstrated “circumstantially through such evidence as **large number of unauthorized aliens in the employer’s work force combined with a pattern of failures with respect to those unauthorized aliens.**” [63 Fed Reg 16909, et seq.] AILA submits that this definition of bad faith is erroneous and conflicts with the very purpose of the Bono Amendment—not to hold an employer liable when it accepted facially valid I-9 documents, even in circumstances where the employer made technical or procedural errors in completing I-9 forms.

In essence, this standard would allow ICE to find bad faith and thus negate the procedural and technical defense any time that a government audit uncovered a large number of technical violations on I-9 forms for employees later determined to have presented

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fraudulent documents in the process. But the Act separately imposes liabilities on employers who *knowingly* accept fraudulent documents; the two statutory schemes—a technical and procedural defense for good faith employers and harsh penalties for knowing employment and document fraud—should not be conflated. AILA agrees that employers who knowingly employ undocumented aliens or knowingly accept fraudulent documents should not enjoy the good faith benefits of the technical and procedural defense. But, under the proposed regulation, it is quite possible for an employer who is innocent of document fraud to nonetheless face substantial monetary liability on account of scores of technical paperwork violations—**even though the employer had no reason to know that the documents presented in the I-9 process were fraudulent, even if those same violations would otherwise trigger the defense where the employee is work-authorized.**

This result flies in the face of the Bono amendment, as most dramatically illustrated by the following remarks from Congressman Bono during hearings on the bill:

...[E]very time we place a burden on small business, which is the backbone of our businesses there, we have a potential of impacting our economy more. And I don't think there's an equity here as far as penalizing small businesses for in good faith making a mistake in a very complicated paperwork. [March 1995 Congressional Hearing Report at p. 71.]

The statement by Congressman Bono demonstrates that his concerns related directly to the issue of employees presenting fraudulent documents. In fact, when Assistant Commissioner Bach offered that employers intentionally accept bad documents and need to be penalized for doing so, Congressman Bono responded:

It's very important, but let me ask you something. When you say 'produce a document that they are here legally,' don't—doesn't the employer fulfill their obligation? [sic] I mean, how would we possibly know? Those documents are counterfeited so beautifully; there is no way of recognizing the difference between a false document and a legal document. [Id. at 54]

Similarly, the proposed 1998 regulation bars the good faith defense of the procedural and technical provisions in a number of situations where the agency has determined that the employer committed “intentional avoidance” of the I-9 requirements, including (1) *intentional* commission of the technical or procedural failure to avoid the verification requirement, (2) correction of technical or procedural failure with *knowledge* that the correction contains false information and (3) preparation of the I-9 with the *knowledge or in reckless disregard* of the fact that it contains false information. 63 FR 16911. The preamble to the proposed regulation then states that a large number of unauthorized aliens in the workforce combined with a pattern of I-9 failures “can be demonstrated circumstantially” to establish “intentional avoidance.”

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The simple fact is that today's average employer, just like the restaurateur Sonny Bono, does not have the knowledge or skills to recognize the sophisticated fraudulent documents that employees may present during the hiring process. As was true during the 1996 Congressional testimony, and continues to be a fact of life today, fraudulent documents are commonplace and hard to detect. Moreover, the Department of Justice compounds this difficulty by emphasizing through its pronouncements to employers and enforcement activity that employers *must* accept documents that appear to be "genuine on their face" or face enforcement from the Office of Special Counsel. Furthermore, USCIS, legacy INS, and the Social Security Administration have contributed to the difficulty faced by employers by requiring employers to accept any acceptable document or combination of documents from a plethora of documents in a variety of formats in the course of the I-9 process.<sup>1</sup> It contradicts common sense to impose the same punishment on employers seeking to comply with the law – for example, one whose front-line human resources staff unwittingly accept sophisticated fraudulent documents from a cohort of employees with stolen identities of others and who also made a series of minor, technical errors when completing the I-9s – as would be imposed on egregious violators that knowingly subvert IRCA laws by intentionally hiring unauthorized workers. It is not fair—and it is patently contrary to the Bono amendment—to preclude applicability of the technical and procedural defense in the very circumstances that gave rise to Congressman Bono's concern in the first place.

Accordingly, AILA submits that any forthcoming ICE regulations should make no presumption about an employer's good faith based solely on the number of undocumented aliens ultimately discovered in the work place. AILA urges that forthcoming regulations clarify, like the proposed 1998 rule did, that an employer loses the good faith defense to technical and procedural violations only when facts and circumstances demonstrate that the employer had knowledge that it employed undocumented workers or otherwise intended to evade I-9 responsibilities, not simply because it committed technical I-9 violations.

## **II. Any Forthcoming Regulations Should Clarify Circumstances When the Failure to Timely Complete an I-9 Form Becomes a Substantive Violation**

AILA endorses the provisions in the 1998 proposed regulations establishing that, so long as the employer otherwise acts in good faith, its failure to complete the form within the regulatory timelines (employee completes section 1 on the first day of employment; employer completes section 2 no later than the third day of employment) is a technical and procedural violation that does not give rise to fines. The proposed regulations contemplate that a late-completed I-9 occurring after September 30, 1996 is not a "continuing violation" which cannot be corrected, but will nonetheless not lead to a verification I-9 fine. This outcome is vital to employers seeking to be compliant with the

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<sup>1</sup> The preamble of the proposed regulations on document reduction makes reference to the long-standing criticism of the large number of permissible I-9 documents. 63 FR 5289.

I-9 rules because it provides incentive for the employer to perform regular internal audits of I-9 files and protects such employers from fines when they complete I-9 forms found to be missing in the course of internal audits.

In its current enforcement posture, however, ICE limits application of the technical and procedural defense to I-9 forms completed before ICE serves a Notice of Inspection. Once the inspection notice is served, ICE apparently takes the position that it is too late for the employer to complete an I-9. Some ICE offices have even assessed fines for “missing” I-9s that were completed late, but years before the ICE inspection. AILA respectfully submits that this position is inconsistent with the statutory language of the Bono Amendment and unnecessary to ICE’s enforcement goals.

There are three arguments that support this conclusion:

- First, it bears emphasis that the 1998 proposed regulations do not draw a line of demarcation at the time of NOI. Instead, the regulations anticipate that corrections can be made at any time until presented *at the time of ICE inspection*. Contrary to ICE’s current position in the field, the proposed rule states that “...Failures to meet a verification requirement continue from the first day the requirement must be met until ....the day that the failures can no longer be corrected, such as *when the Service or other enforcement agency inspects the employer’s...I-9s...*” (Emphasis supplied.) Moreover, this interpretation is in keeping with controlling OCAHO precedent. [See *United States v. Naim Ojeil*, 7 OCAHO 984]
- Second, the distinction between timeliness violations and other technical and procedural violations set out in the 1998 proposed regulations—the apparent basis for the current ICE enforcement posture on post-NOI I-9s--does not stand for the proposition that missing forms are exempt from late corrections. Rather, the distinction is offered to explain the difference between a continuing violation—which can be corrected--and a fixed violation, which cannot be corrected, but may nonetheless be technical and procedural. The regulatory distinction in this regard assumes that the employer has already obtained an I-9, but it was completed late. Where the good faith employer neglected to complete or cannot locate an I-9, the failure is not one of timeliness; it is a failure to meet the verification requirement, and, under the regulations, the employer has until the time of inspection to correct such failures.
- Third, the current ICE interpretation is in fact consistent with the provision in the draft regulations that precludes a finding of good faith for Bono Act purposes where the employer neglects to complete I-9 forms in whole or substantial part until an NOI is served. That situation is qualitatively different from one where an employer in substantial compliance attempts to perfect its records before delivering them to the government for inspection.

**III. Continuing to Distinguish Between Technical and Procedural Errors Before and After September 30, 1996 No Longer Makes Sense.**

AILA submits that ICE should eliminate the distinction for timeliness errors that occurred before and after September 30, 1996, as the distinction is confusing and no longer has legal consequence in light of the passage of time and the applicability of the underlying statute of limitations. In drafting the proposed regulations in 1998, legacy INS appears to have concluded that it had no authority under the safe harbor provisions to forgive timeliness violations, which are fixed in time, as opposed to continuing violations that predated the Bono Amendment and continued to exist beyond the date of its passage. This distinction led to the awkward result of making the most stale errors—the type of errors that had in fact led to the passage of the Bono amendment in the first place—subject to fine, while the identical error committed even days later became exempt.

AILA submits that ICE now has broad jurisdiction to ignore the distinction because such violations, which are fixed in time, are now long beyond the five-year statute of limitations. As OCAHO has authoritatively applied the federal statute five-year limitation period to violations of the I-9 rules, liability for any pre-1996 fixed (and not continuing) employer conduct has long since expired. [See, *U.S. v. Curran Engineering*, 7 OCAHO, 975, 897 (October 31, 1997) where OCAHO (in a case arising before the Bono amendments) held that an employer violated the timeliness requirements by failing to complete an I-9 form by the date that the completion is required. “The timeliness violation is frozen in time at that point.” OCAHO held that the claim was time barred by the five-year statute of limitations under 28 U.S.C. Section 2462.]

Recognizing this fact in forthcoming regulations will substantially help to clarify the standards both for employer compliance audits and government enforcement and will demonstrate that the enforcement priorities of ICE lie in current compliance, and not “gotcha” fines for errors committed more than a dozen years ago. As OCAHO stated in *Curran*, citing *Developments in the Law—Statute of limitations*, 63 Harv.L.Rev.1177, 1185 (1950): “Statutes of limitations also reflect the judgment that there comes a time when the potential defendant “ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.” 7 OCAHO, 975 AT 890

**IV. The Regulations Should Limit Required Corrections to Those Errors that Undermine the Policies Underlying IRCA.**

The 1998 proposed regulations and the March 1997 Virtue Memorandum interpreting the Bono Amendment provide for only two types of I-9 errors: substantive, which lead to fines, and technical and procedural, for which fines can be avoided if they are first corrected in accord with government notice. In practice, the correction requirement applies to picayune as well as important errors, with the result that employers can be forced to spend hundreds of hours and thousands of dollars to chase down their employees’ maiden names or addresses; to re-document Section 2 when the issuing

authorities were not spelled out fully or correctly; or to obtain entirely new I-9 forms where the employer used the wrong form, even if the differences in the forms are not material to an employee's identity and work authorization. AILA urges that ICE establish a third category of errors, those that are obviously *de minimus*. Such *de minimus* errors should be completely disregarded by ICE auditors where the agency determines that the employer has acted in good faith. Adopting a *de minimus* rule will have a substantial collateral benefit for ICE as well as for employers because once adopted, ICE auditors will no longer be required to spend enormous energy in documenting and following up on these procedural and technical errors – which are correctible and therefore yield little in enforcement revenue – and can instead focus on compliance activities more in keeping with the agency's core worksite enforcement priority—ensuring that employers are verifying the identity and work authorization of new employees and that their employees in fact are work authorized.

AILA submits that the following errors should be classified as *de minimus*:

- In Section 1, missing address, birth date, maiden name, or social security number (except for E-Verify employers), or signatures on the wrong line;
- In Section 2, missing or abbreviated name of issuing authority where document is otherwise recognizable (Example: "CDL" for a California Driver's License or "DMV" where that is the common reference to the motor vehicle department in the state where the form was completed);
- In Section 2, abbreviations in the issuing authority
- In Section 2, failure of the signing representative to print his/her name or provide his/her job title, when the signature is otherwise legible and when the employer during audit affirms the representative's identity and authority to sign for the employer;
- In Section 2, failure to include the employer's full address so long as identity of the employer is clear from other information on the form or known to the ICE auditor, particularly if I-9's are stored at the employer's worksite;
- In Section 2, for employers who maintained copies of identity and work authorization documents, failure to provide document number, expiration date or issuing authority (in other words, if copies of the documents are attached to the I-9 form, there is no need to correct the omission of documentation information on the form); and
- Use of an outdated or Spanish version of the form, unless the error was compounded by accepting a document that was no longer a valid identity or work authorization document at the time the I-9 was completed (for example, employer used 1991 version in 2009 and accepted an expired U.S. passport).

## CONCLUSION

In light of what AILA anticipates will be a period of continuing increased worksite enforcement, it is in the best interest of both the government and employers that ICE

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focus its resources on egregious violators and develop effective mechanisms to efficiently distinguish between good and bad faith actors and between substantive and unimportant paperwork errors in the I-9 process. AILA submits that ICE can and should adopt regulations that allow it to streamline its audit responsibilities yet make clear to employers that it will audit and it will pursue substantive errors and bad faith employers vigorously. We believe that the suggestions addressed above will greatly foster these common objectives.

Respectfully submitted,

American Immigration Lawyers Association  
Verification and Documentation Committee

cc: John Morton, Director, Immigration & Customs Enforcement  
Alejandro Mayorkas, Director, United States Citizenship & Immigration Services