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U.S. Department of Justice
Civil Rights Division

*Office of Special Counsel for Immigration Related
Unfair Employment Practices - NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530*

VIA First Class Mail and E-Mail (Alain.Baudry@maslon.com)

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Dear Mr. Baudry:

Thank you for your e-mail inquiry of September 16, 2009. In your e-mail you state that the human resources manager of a client employer, upon learning from the police department that one of its employees is not authorized to work in the United States, reviewed the file of another individual hired around the same time. In reviewing the photocopies of the documents presented by this other employee for employment eligibility verification (I-9) purposes, the human resources manager identified notable spelling errors on the photocopy of the Social Security card. You then pose the following questions:

"First, is the client able to question the employee regarding this card, and request/require that another form of employment verification be submitted, as the document upon this review does not appear to be facially valid? If not, what, if any, other steps should be taken here?"

"Second, can the client conduct a further review/audit of other files and take similar steps assuming, upon inspection, there are such obvious errors?"

Please note that the Office of Special Counsel (OSC) cannot provide an advisory opinion on any particular instance of alleged discrimination or on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding employer compliance with the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, which OSC enforces.

The anti-discrimination provision prohibits hiring, firing, recruitment or referral for a fee, and unfair documentary practices during the employment eligibility verification (Form I-9) process (document abuse) on the basis of citizenship or immigration status or national origin. It

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also prohibits retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision.

An employer may choose to conduct an internal audit of its I-9 forms as long as it is conducted for every employee in the same manner. Consistent with the anti-discrimination provision of the INA, the employer may not treat employees differently because they look or sound foreign or possess a certain citizenship status during an audit. 8 U.S.C. § 1324b(a)(1) and (6). Selective audits, wherein an employer reviews only certain employees' previously completed I-9 forms and accompanying photocopies, are therefore suspect. Further, during audits employers may not scrutinize more closely the I-9 forms and documentation of select employees on the basis of national origin or citizenship status; employers are required to treat all employees in the same manner. *Id.*

If, during the course of conducting an audit in a non-discriminatory manner, an employer discovers that its I-9 forms or accompanying documents for some employees are missing or incomplete, the employer may re-verify those employees. *United States v. Ojuel*, 7 OCAHO 984, *4 (1998) (finding that the government has a considerable interest in encouraging employers to correct mistakes on the I-9 form, and that employers may correct paperwork mistakes at or before government inspection).

Further, if the employee presented documentation that does not reasonably appear to be genuine or to relate to the employee, an employer cannot accept that documentation. *See Handbook for Employers*, at 39. (

I hope this information is of assistance to you. Should you have any further questions, please contact OSC's employer hotline at (800) 255-7688.

Katherine A. Baldwin
Deputy Special Counsel

At the time of verification, employers are required to "examine the original document or documents that the employee presents to the employer" and may not rely upon photocopies. Handbook, at 6,32; 8 C.F.R. 274a.2(b)(1)(v) (requiring that individuals present only original and unexpired documents).