

MEMORANDUM FOR FINANCE COMMITTEE MEMBERS

From: Senate Finance Committee Staff

Date: May 12, 2010

Re: Alan Bersin Nomination

This memo describes the results of the Senate Finance Committee staff review of documentation submitted by Alan D. Bersin in connection with his September 29, 2009 nomination to be Commissioner of U.S. Customs and Border Protection (CBP) in the U.S. Department of Homeland Security (DHS). President Obama recess appointed Mr. Bersin on March 27, 2010. Mr. Bersin's nomination was resubmitted to the Senate on April 21, 2010. Mr. Bersin was confirmed by the Senate in November, 1993, to be the United States Attorney for the Southern District of California.

Background

Finance Committee staff has conducted a routine review of Mr. Bersin's Senate Finance Committee Questionnaire, his tax returns for 2006, 2007 and 2008, and his financial disclosure statements. As part of this review, a due diligence meeting was held with the nominee on March 17, 2010. Majority and minority staff have submitted two rounds of written questions and made oral requests before the due diligence meeting in order to obtain complete, accurate and consistent answers from the nominee. The nominee responded to both rounds of questions and provided additional information on two additional occasions before the due diligence meeting with staff. Questions regarding one issue, Form I-9, Employment Eligibility Verification, have been determined appropriate to bring to the attention of Committee members. These questions include whether Mr. Bersin complied with legal requirements to complete and retain Forms I-9, and whether the nominee provided complete answers in response to questions from the Finance Committee regarding individuals who worked for him.

The Department of Homeland Security leads the unified national effort to secure America, which includes preventing terrorist attacks and securing our nation's borders while facilitating lawful immigrants, visitors and trade. As the head of an agency within DHS, Mr. Bersin's responsibility as the Commissioner of Customs and Border Protection is to carry out Customs and Border Protection's dual mission of protecting our nation's borders while facilitating the flow of legitimate trade and travel. CBP is the primary U.S. border security agency and shares immigration enforcement responsibilities with two other agencies within DHS; U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE). USCIS is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities. ICE is responsible for immigration enforcement functions including investigating, identifying, arresting, prosecuting, detaining and deporting those who violate U.S. immigration laws. During the vetting process, the Committee routinely applies greater scrutiny to a nominee's activities that bear a relationship to the duties of the position the nominee seeks.

Forms I-9, Employment Eligibility Verification

Form I-9, Employment Eligibility Verification, is required to document that each new employee is authorized to work in the United States. The Form I-9 is issued by DHS (USCIS). The employee section must be completed no later than the time of hire and the employer section must be completed within three business days of the time of hire and then retained by the employer.

Mr. Bersin met with majority staff in August of 2009. Staff notes from that meeting indicate that Mr. Bersin stated he had an I-9 for his nanny. When asked in writing about this response, the nominee responded, "If I stated that Ms. S had an I-9 in August, 2009, then I misspoke and apologize for any misunderstanding." A Form I-9 for this employee dated 11/12/2009 subsequently was submitted to the Committee.

Mr. Bersin has employed ten household employees since 1993. Six of the ten individuals were in his employ during some portion of the time period beginning in 2006 covered by the Committee review. Beginning with his November 13, 2009 response to the Committee, until the date of his due diligence meeting with the Committee on March 17, 2010, Mr. Bersin identified three of the individuals as employees and did not identify any other individuals as employees or independent contractors. The remaining seven employees were identified by Mr. Bersin at the March 17, 2010 due diligence meeting.

Mr. Bersin did not timely and completely prepare and maintain Forms I-9 for any of the ten household employees he employed, as required by law. One I-9 was timely prepared by an employment agency, but the employee did not sign or date the form and Mr. Bersin's spouse, Lisa Foster, signed the form but did not enter the date that she signed it. Mr. Bersin stated that all employees were legally authorized to work in the United States, and copies of identification documents provided to the Committee confirm this statement for the three employees initially identified by Mr. Bersin on November 13, 2009. It appears that the nominee was not familiar with the Form I-9 requirements to establish that an employee was legally authorized to work in the United States, but the nominee's statements to staff indicate that the requisite information to establish eligibility for employment was reviewed at the time each individual was hired. Identification documents for the seven employees that subsequently were disclosed to the Committee were not requested or provided; the Committee has no indication that these individuals were not legally authorized to work in the United States.

The nominee treated all ten of the individuals as employees for purposes of issuing Forms W-2 and for reporting household employment taxes; these taxes in general were paid fully and timely. Mr. Bersin filed amended individual returns, Form 1040X, for 2006 and 2007 to pay Federal Unemployment Taxes (FUTA) that had not been timely paid in the amount of \$56 for each year. The nominee indicated that some of the individuals were paid by the hour, and some were paid salaries. In the Committee's initial written inquiry to Mr. Bersin, the nominee was asked to provide Forms I-9 for each household employee employed during and since 2006. In response, Mr. Bersin identified three individuals who worked for him during that time, a copy of the incomplete I-9 initiated by the employment agency for one of the employees, and an I-9 dated 11/12/09 for another employee hired in October of 2008. Copies of the October, 2008, employee's social security card and permanent resident card also were submitted.

The nominee was asked additional questions. On February 11, 2010, Mr. Bersin provided copies of identification documents to establish the legal status of all three identified employees. On March 4, 2010, the nominee submitted to the Committee updated Forms I-9 for two of the three employees. One was dated 1/27/2010, and one was dated 1/29/2010. The Form I-9 dated 11/12/09 was not updated. He indicated that these were “currently dated I-9 forms for the three individuals my wife and I have hired over the last 11 years.” He stated his agreement that it is “extremely important” for employers to verify the eligibility of individuals to work prior to hiring them, and said at the time he hired two of the individuals, he and his wife believed that I-9 forms were not required for this type of domestic housecleaning service.

A further review of the nominee’s tax returns identified two employees in addition to the three that Mr. Bersin had identified in his responses to the Committee.

Due Diligence Meeting

Mr. Bersin was accompanied by his wife, Lisa Foster, at the due diligence meeting. The nominee was asked by Committee staff about the number of employees that he had retained. In response, Mr. Bersin identified ten employees in total that he had hired, beginning in 1993. Six of the employees were in his employ at some point since 2006, the period covered by the Committee’s initial inquiry. Nine of the ten had been hired in 1999 or later. He stated that he knew employees must be legally eligible to work in the United States, but he was unaware that employers were required to complete and maintain Forms I-9 for household employees. Mr. Bersin said he knew of the existence of the Form I-9, as it had come up in his work as U.S. Attorney for the Southern District of California.

Ms. Foster explained that she had obtained an employer identification number, registered with the State of California to obtain a state identification number, and paid employment taxes for all employees. She described how she reviewed documents, including social security cards, passports and drivers’ licenses, at the time the employees were hired – although not necessarily all of those documents for each employee. She stated it did not occur to her to obtain I-9s. When asked why they didn’t realize they needed to complete an I-9 after the employment agency prepared an I-9 for their second employee in 1999, they both said they didn’t realize what they had [the I-9]. Ms. Foster told Committee staff that she didn’t know why she didn’t pay more attention to the incomplete I-9 initiated by the employment agency, or why she didn’t date it.

The nominee was asked why he had identified only three employees since 2006 when there were actually six. The nominee explained that during the vetting process, the distinctions between employees and independent contractors were raised. He concluded the other three may be independent contractors and Forms I-9 would not have been required. He said he had not filed amended tax returns to treat the individuals as independent contractors. None of his staff had been treated as independent contractors prior to his nomination and vetting process. He explained that he had first focused on the distinction between employees and contractors when responding to the Committee’s I-9 questions. When asked why the other three were treated as employees for purposes of employment taxes, and whether reclassifying them as independent contractors was a rationalization provided to Committee staff for not filling out Forms I-9, Mr.

Bersin responded, "That could be." He indicated he was troubled by the fact they made a mistake and took that way out. He stated he didn't think the issue of classifying workers was black and white, that he thinks of it as a continuum. The nominee acknowledged that, regarding the workers' classification, he made a mistake and that he "should not have lawyered it."

The nominee was asked why he had not disclosed to the Committee that he had changed the classification of the individuals from employee to independent contractor. He responded that "I should have done that." He said he was accountable for this and regrets this very much. The nominee was asked whether the reclassification of workers was initiated by him. He stated he received advice during the vetting process, but should not have taken it. He stated he was responsible. He acknowledged his error and said it was an honest mistake, and that he had learned from it.

When asked to reconcile his characterization of the issue as an honest mistake and his failure to notify the Committee that he had decided certain workers treated as employees should be reclassified as independent contractors, Mr. Bersin stated that he should not have made the distinction, even though arguably it could be made. The nominee did not explain on a technical level why he thought some of his employees could be classified as independent contractors.

Attachments:

Attachment A: Senate Finance Committee Questionnaire, Financial Data, Question 10

Attachment B: Schedule H and Form 2441 from 2005 Form 1040 (Employees #5 and #1)

Attachment C: Schedule H and Form 2441 from 2006 Form 1040 (Employees #6 and #1)

Attachment D: Schedule H from 2007 Form 1040

Attachment E: Schedule H from 2008 Form 1040

Attachment F: Responses to Round 1 of written questions dated November 13, 2010: Question 11, with 2006 and 2007 Forms 1040X; Question 15, with Forms I-9; and Question 16 (Employees #1, #2, and #3)

Attachment G: Responses to Round 2 of written questions dated February 11, 2010, with declaration from employee #3 (Employees #1, #2, and #3)

Attachment H: third submission, not in response to written questions, dated March 4, 2010, with Forms I-9 (Employees #1, #2, and #3)

Attachment I: Notice of New Employer Identification Number Assigned, from State of California to Lisa Foster

Attachment J: Annual Payroll Tax Return for 2004 and Quarterly Report of Wages and Withholdings for first quarter of 2004, State of California (Employees #4 and #1)

Attachment K: Annual Payroll Tax Return for 2005 and Quarterly Report of Wages and Withholdings for first quarter of 2005, State of California (Employees #5 and #1)

Attachment L: Annual Payroll Tax Return for 2006 and Quarterly Report of Wages and Withholdings for first quarter of 2006, State of California (Employees #6 and #1)

Attachment M: Annual Payroll Tax Return for 2007 and Quarterly Report of Wages and Withholdings for first quarter of 2007, State of California (Employees #1 and #7)

Attachment N: Annual Payroll Tax Return for 2008 and Quarterly Report of Wages and Withholdings for first quarter of 2008, State of California (Employees #2 and #7)

Attachment O: Representative Sample, Wage and Tax Statements (Employees #6, #7, and #8)