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December 8, 2005

Social Security Administration
Office of Hearings & Appeals
300 Pearl Street
Buffalo, NY 14202

RE: Claimant **Redacted
SSN: **Redacted****

Dear Social Security:

The applicable law in this claim is improperly stated by the Commissioner's Program Service Center at Exhibit B8B, pages 3-8. The adjudicator should not apply the law as urged or indicated by the Program Service Center (hereafter "PSC"). This is especially true since the PSC noted none of the relevant exceptions to the general rules it stated. This is also true because the PSC failed to provide the record with a proper and specific authority upon which to base the adjudicator's decision (other than perhaps SSA Pub No 70-10281, not even provided to the claimant's record, and not a statutory or judicial authority). Furthermore, the claimant's record is presently devoid of the binding and/or helpful interpretations of the courts, especially from the Second Circuit within which ****Redacted's**** claim must be adjudicated. The claimant's record is devoid of reference to AR-86-20(6) in which the administration acquiesced to a position taken in the 6th Circuit, a position which is also required in the Second Circuit (which the 6th Circuit actually follows). Not even the existence of the glaring split within the federal circuits, upon precisely the limited question to be adjudicated in this claim was revealed by the PSC or any other agency on behalf of the Commissioner. Thus, the statement at Exhibit B8B, page 8, that the previous determination to remove ****Redacted's**** 2000 earnings was "correct and proper under the applicable law and implementing Regulations" is absolutely incorrect. Again, the PSC provided an improper interpretation of the law which should not be followed. If the proper law is followed, the claimant's record must be credited with his 2000 earnings. He will then be insured under the Social Security Act, contrary to the previous decision. He has already been found "disabled," and with a new finding of "insured" his Title II disability benefits should then promptly issue.

MAY IT PLEASE THE COURT,
THE CLAIMANT ASSERTS THAT THE FOLLOWING IS
A PROPER INTERPRETATION OF CURRENT LAW:

To determine benefits eligibility, the Secretary of Health and Human Services (hereafter “Secretary” or “Commissioner”) is required to maintain records of an individual’s wages and self-employment income. 42 U.S.C. § 405(c)(2)(A). These records evidence both wages paid by employers and self-employment income earned at any relevant time within a claimant’s file. 42 U.S.C. § 405(c)(3). If these records are incorrect, there is a time limitation of three years, three months, and fifteen days within which errors may be corrected, regardless of whether these errors are of inclusion or omission. 42 U.S.C. §§ 405(c)(1)(B), 405(c)(4). For such purposes, a “year” is defined as “a calendar year when used with respect to wages and a taxable year when used with respect to self-employment income.” 42 U.S.C.S. § 405(c)(1)(A).

After the expiration of the time limitation plus any applicable tolls, Social Security will only revise or correct earnings according to the exceptions set out in 42 U.S.C. §§ 405(c)(5)(A)-(J). For instance, Social Security’s records may be corrected after the time limitation has passed if the claimant has filed an application for benefits within the statutory period. 42 U.S.C.S. § 405(c)(5)(A)-(J) ; 20 C.F.R. § 404.822(c)(2) (2000). The extension of the time limit granted pursuant to this section terminates after a final decision on the application for benefits. This may be a final decision by the Commissioner or a decision of a federal court, if the claimant seeks judicial review. In addition, if the Administration begins any affirmative step to investigate the correctness of a claimant’s earnings record, the time limitation is tolled until the conclusion of that investigation, no matter how long. 20 C.F.R. § 404.822(e)(1) (2000).

Different results ensue after the expiration of the three year, three month, fifteen day time limitation depending on the nature of the alleged earnings. For wages, the absence of an entry in the Secretary’s records is *presumptive* evidence that no such wages were paid. 42 U.S.C. § 405(c)(4)(B). Thus, this presumption may still be rebutted by the claimant, for example to correct an error on the face of the record, 42 U.S.C. § 405(c)(5)(C), to conform the Administration’s records to “tax returns or portions thereof (including information returns and other written statements) filed with the Commissioner of the Internal Revenue”, 42 U.S.C. § 405(c)(5)(F)(i), or to include wages paid by an employer where these are not listed in the claimant’s earnings record. 42 U.S.C. § 405(c)(5)(H).

For self employment income, on the other hand, the absence of an entry in the Commissioner’s records is *conclusive* evidence that no such self-employment income was derived, unless the claimant filed a tax return of his self-employment income before the expiration of the time limitation (considering all tolls). 42 U.S.C. §§ 405(c)(4)(C), 405(c)(5)(F). According to the Second Circuit in *Ciccone v. Sec’y of Health and Human Services*, 861 F.2d 14, 16 (2d Cir. 1988):

“The purpose of the self-employment provisions of section 405 was to provide a mechanism for self-employed individuals to record their wages with the Secretary, so that they can show that they meet minimum length of employment requirements and therefore become eligible for benefits. See *Jabbar v. Secretary of Health and Human Services*, 855 F.2d 295, 298 (6th Cir. 1988) (Congress viewed a “timely filed tax return . . . as sufficient to bring self-employed persons into the social security system”) (per curiam); *Weisbraut v. Secretary of the Department of Health and Human Services*, 757 F.2d 83, 85 (3d Cir.) (Congress had been concerned with claims of earnings of which there was no record), *cert. denied*, 474 U.S. 852, 106 S. Ct. 152, 88 L. Ed. 2d 125 (1985). As we have stated, section 405(c)(4)(C) “addresses the situation...where a claimant wishes to *create* a social security self-employment earnings record after the...time limit.” *Hollman v. Department of Health and Human Services*, 696 F.2d 13, 16-17 (2d Cir. 1982).

Certainly, the Commissioner may initially reduce or delete the amount of any wages or self-employment income erroneously credited on the records if the entry was made as a result of fraud. 42 U.S.C.S. § 405(c)(5)(E) (2000); 20 C.F.R. § 404.822(e)(3) (2000). However, if a tax return is filed within the time limit in accordance with section 205(c)(5)(F), any wages reported in the return, which have been deleted by SSA, may be redesignated as self-employment income up to the amount of the wages previously deleted. 42 U.S.C.S. § 405(c)(5)(J)(2000); 20 C.F.R. § 404.822(b)(2)(iii)(2000). As well, so long as a tax return is filed within the statutory limit, plus tolls, the Commissioner of the Social Security Administration loses much of her discretion to deny corrections to the earnings record based on mere suspicions of fraud. See, e.g., *Desselle v. Barnhart*, Docket No. 04-1241 (8th Cir. 2005)(finding that amended tax returns must be credited in the absence of a supported finding of fraud, even where obvious doubts in the amended returns may exist)[copy submitted herewith].

In fact, directly addressing the need for fraud protection, the Second Circuit stated clearly in its own landmark case that, “the government is completely protected from false claims based on subsequently manufactured evidence” so long as a timely tax return is filed reporting gross income, and net income can be ascertained from official documents (presumptively, here net income was ascertained by the IRS before an assessment, including penalties, was made against the claimant for filing late, although within the limitations period for correcting his earnings statement). *Hollman v. Department of Health and Human Services*, 696 F.2d 13, 17 (2d Cir. 1982). In fact, the *Hollman* Court specifically held (“*we conclude*”) that it is an “*abuse of discretion*” not to conform the earnings record to a timely filed tax return under the exception at 42 U.S.C. § 405(C)(5)(F). *Id.* at 16. Clearly, *Ciccone* cited above also follows this reasoning.

However, after the passage of *Hollman* in the Second Circuit, a split in the federal circuits developed (and still exists unresolved) because the Commissioner continued to argue that in order to protect the government sufficiently against fraud she possesses a wider discretion and greater power to require “verification” by satisfactory evidence of the income reported in even timely filed, amended tax returns.

Indeed, *Hollman* specifically declined to address the situation in which a claimant might file quite different returns, one original return and one subsequent return within the time limitation (plus tolls) as a means to obtain government benefits, although *Hollman* also did cite with clear favor three lower court decisions where this “more difficult” question was resolved to the benefit of the claimant. See, e.g., *Hollman v. Department of Health and Human Services*, 696 F.2d 13, 16-17 (2d Cir. 1982)(citing to *Maloney v. Celebrezze*, 236 F. Supp. 222 (N.D. Ohio 1964); *Ellis v. Gardner*, 304 F. Supp. 765 (E.D. Pa 1969); and *North v. Califano* [1978 Transfer Binder] Unempl. Ins. Rep. (CCH) P15,720 (D. Minn. 1978) stating that the Commissioner has primarily a “record keeping authority” and should focus primarily on the date of a filing, rather than the contents, in order to protect the government from fraud, because to place the emphasis otherwise would force claimants into an “unacceptable dilemma” regarding unresolved tax liabilities).

To further illustrate the rationale behind the split in the circuits, the First Circuit agreed with the Secretary’s self-asserted, expansive authority to root out fraud in *Matta v. Secretary of Health and Human Services*, 806 F.2d 287, 290 (1st Cir. 1986) by observing that:

“there is nothing in the statute [including section 405(c)(4)(C)] which requires the Secretary to conclude that the individual’s self-employment income is as stated in the tax return. [Rather,] “the Secretary may require such verification as he deems necessary, 42 U.S.C. § 405(c)(2)(A), and determine what, if any, self-employment income the individual actually realized.”

The Sixth Circuit promptly disagreed with the First Circuit, choosing instead to side with the Second Circuit. In *Jabbar v. Secretary of Health and Human Services*, 855 F.2d 295 (6th Cir. 1988)(concluding that where the Secretary had evidence of document regularity in the government’s possession, such as tax bills which were paid and a verifiable signature on a timely submitted *amended* return, the fact that “circumstances worked out to the benefit of the claimant, perhaps a bit too neatly for the Secretary’s taste,” was an improper basis upon which to deny benefits) the Sixth Circuit explained itself (internal citations omitted) as follows:

“Relying on the plain language of the statute and its legislative history, we conclude that the approach in *Hollman* is the better one. First, the language of 505(c)(4)(C) is unequivocal: if a timely filed tax return contains “self employment income,” the Secretary shall include in his records the “self-employment income” of the return. It does not say that the Secretary “may” include such income, or that he shall include such income but only after verification.

The language relied upon in *Matta*, referring to “verification,” is not present in section 405(c)(4)(C), but in section 405(c)(2)(A), which is concerned with the Secretary’s duty to maintain records of wages and self-employment income in the first place, and not with the amendment of those records by the claimant. The absence of “verification” language in section 405(c)(4)(C) is very probative, in our view.

The statute's legislative history supports this interpretation. Prior to 1950, those who were self-employed were not included in the social security system because there was no agreement on a feasible method of obtaining reports of their income. By 1950, however, a consensus had been reached that the federal income tax reporting system would allow Congress to extend social security benefits to the self-employed....reliance on income tax returns was regarded as the only workable plan. The legislative history thus reveals Congress's determination that tax returns would provide a reliable vehicle for ascertaining self-employment income. Section 405(c)(4)(C) reflects this idea, by indicating that timely filed tax returns are necessary to amend the Secretary's records. *It would be anomalous if a timely filed tax return, which Congress viewed as sufficient to bring self-employed persons into the social security system, were insufficient to allow a claimant to have the Secretary amend the records of that system.*

A timely filed tax return generally provides sufficient safeguards against fraud or abuse, thereby 'avoiding difficult, after-the-fact litigation which would likely not be *submissible to concrete proof.*' (Internal citation omitted). The filing of a return not only subjects the individual to tax liability, but also to both civil and criminal penalties for reporting incorrect information.

Of course, the Secretary is not required to accept records that have been filed fraudulently, See 42 U.S.C. § 405(c)(5)(E). At most, however, the claimant could be required to show 'convincing' evidence of the regularity of the documents and the accuracy of their contents." 20 C.F.R. § 404.708."

Claimant's Argument:

According to the above citations and applicable Second Circuit law, the adjudicator must be vigilant not to turn the Social Security fair hearing into a secondary forum for assessing greater penalties than the IRS has already imposed against both **Redacted** and his former employer, **Redacted**, due to the employer's already-admitted failure to promptly report **Redacted's** income for 2000. For instance, **Redacted** has already had money seized in collection for his back taxes from 2000, and **Redacted's Employer** has long since entered into an installment agreement to pay its own admitted tax arrears from the same period.

Under such circumstances, the Second Circuit adjudicator must realize that the government is sufficiently protected from fraud, so long as actual income did flow from **Redacted's Employer** to **Redacted** in 2000. Thus, the questions to be answered here are: 1) was there actual income to **Redacted Claimant** from **Redacted Employer** during 2000; 2) was there a timely filed or amended return; and 3) was the income earned by **Redacted Claimant** reported accurately enough such that quarters of coverage could be determined? This is a very simple progression, and it covers the entire universe of discretion allowed to the adjudicator in this Second Circuit claim.

Here, **Redacted Claimant** had actual income which can be demonstrated by convincing evidence and circumstances. First, **Redacted's Employer** admitted to its own liability and paid IRS penalties in order to right the injustice done to **Redacted Claimant** following **Redacted's Employer's** earlier failure to properly report that income. It must be noted, as the record reflects, that **Redacted Claimant** is far from sophisticated, either by education or experience, and **Redacted's Employer** is independent from him and not under his control (that his ex-wife serves as an officer of the corporation does not prove his control, especially when the moneys paid out by **Redacted's Employer** were distributed by the trustees, none of whom were **Redacted Claimant's** ex-wife). Second, **Redacted Claimant** has a long history of hard work that is reported in his earnings record. This makes it more likely than not that **Redacted Claimant** continued in the performance of such hard work during 2000. Third, **Redacted Claimant** was injured while working on **Redacted Employer's** property (nobody has ever claimed that **Redacted Claimant** was not injured while working on **Redacted Employer's** property, and the medical records do clearly support a conclusion that **Redacted Claimant** suffered a traumatic injury that is likely to be work-related due to its nature). Fourth, **Redacted Claimant** made a claim against **Redacted's Employer** at the New York State Workers' Compensation Board. This is evidence that **Redacted Claimant** at all times considered himself "employed" by **Redacted's Employer**, and given his obvious lack of sophistication, he likely was. Fifth, **Redacted Claimant** has at all times maintained that he earned money while working for **Redacted's Employer** during 2000. Sixth, were a supplemental hearing allowed, **Redacted Claimant** would then produce witnesses to state that he did, indeed, work at **Redacted's Employer** during 2000, as well as a trustee to state under oath that he was paid. Such circumstances should certainly be "convincing" to any reasonable mind to prove that **Redacted Claimant** earned income in 2000.

Certainly, when **Redacted Claimant** was informed that the failure of all parties to report his income would negatively impact his lawful entitlements, he did promptly admit his failure to report actual income during 2000 (which admission does not prove fraud so long as he did not attempt to "fabricate" or "manufacture" income that never existed). However, merely that circumstances here may work out in a fashion that appears too "neat", in the language of *Jabbar*, does not mean that **Redacted Claimant** committed a fraud as the PSC found. Such "neat" circumstances, the claimant submits, cannot amount to "substantial evidence" necessary to sustain a finding of fraud, nor can these properly justify a refusal to credit **Redacted Claimant's** earnings record after he timely submitted an amended return.

Again, the *Hollman* case instructs that the adjudicator should not overly emphasize a search for fraud, nor utilize rules which would result in "unacceptable dilemmas", once a timely amended return is filed. Furthermore, this binding approach makes perfect sense under the *Jabbar* reasoning that what should be sufficient in an original return must also be sufficient in an amended return, in order that the exception for amended returns can be given its full statutory respect. The *Cicccone* Court clearly understood that there will be legitimate instances in which claimants will update their tax returns in order precisely to "create" benefits eligibility. Thus, the mere fact of "neat" circumstances cannot be used to prevent **Redacted Claimant** from exercising his rights.

To be clear, **Redacted Claimant** possesses a statutory *right* to amend his previous application, even if such amendment might produce IRS fines and penalties as it certainly did in this case. **Redacted Claimant** possesses a statutory *right* to amend his previous application, even if such amendment might produce SSD eligibility as it must in this case. **Redacted Claimant** possesses a statutory *right*, to truthfully amend his previous IRS filing, and this statutory right is not negated by the mere possibility that he may attain a net financial benefit by being more truthful. In fact, **Redacted Claimant** also possesses a statutory *right* to obtain Title II eligibility based on his employer's admission that it did pay him for his labor during 2000. Furthermore, the Second Circuit certainly believes **Redacted Claimant** should *not* be dissuaded from filing updated, truthful tax returns, even though belatedly. Thus, no adjudication toward establishing such a deterrence would be appropriate. The Social Security Act was never intended to be wielded as both the honey and the hammer. Claimants may update their records to "create" eligibility when appropriate. *Ciccione*. Here, **Redacted Claimant's** actions were appropriate.

Finally, it doesn't change the results here that the Workers' Compensation Board for New York made the "non-finding" that "no employer-employee relationship has been established" by **Redacted Claimant**, because such a finding is not binding on the adjudicator in a federal law claim such as one for Title II benefits, *Baca v. Department of Health & Human Services*, 5 F.3d 476, 480 (10 Cir. 1993), and such a finding by a state agency does nothing to relieve the adjudicator in a Title II matter from making a full and complete inquiry on this topic anew. See 20 C.F.R. § § 404.1006, 404.1007 (discussing the indicia to be utilized when making this finding). Besides, even if no employer-employee relationship is found, **Redacted Claimant** still has a statutory right, as cited above, to claim any actual income earned as "self-employment" income, even if this was previously removed from his earnings record by the Administration. Thus, the question of eligibility in this claim will always reduce to one which asks whether or not **Redacted Claimant** had actual, earned income in 2000 sufficient to establish the additional quarters claimed.

For the above reasons, convincing evidence supports the conclusion that **Redacted Claimant** had actual, earned income in 2000. Convincing evidence exists in the record to show that his amended return was timely filed within the limitations period, including all tolls (otherwise, he could not have been assessed additional taxes for 2000 prior to the final resolution of his disability claim). Both **Redacted Claimant** and his employer reported **Redacted Claimant's** 2000 income the same: \$31,200. In fact, far less income was required in order to credit **Redacted Claimant** with sufficient quarters as would allow his earnings record to be updated and would allow a finding here of "eligible" for Title II benefits under the Social Security Act. Further "verification" of this income is unwarranted and even legally intolerable in the Second Circuit. Thus, **Redacted Claimant** should be found eligible for Social Security Disability Insurance, and the fair hearing process should not become an additional forum to levy penalties against **Redacted Claimant** for his late filing of an honest tax return.

No evidence, and only raw conjecture by the PCS, exists to dispute the fact that **Redacted Claimant** earned \$31,200 in 2000. On the contrary, **Redacted Claimant** stands both desirous and ready to attend a supplemental hearing and will produce

additional witness testimony and oral argument at such a hearing if the adjudicator is not already convinced that he is entitled to Title II benefits.

Indeed, the claimant hopes the adjudicator will immediately follow the opinions of the [binding] *Hollman* and [concurring and expounding] *Jabbar* Courts while recognizing under *Ciccone* that a claimant may legally “create” eligibility by filing amended returns. Certainly, a plausible motivation to fabricate false earnings retrospectively, even when combined with “neat” or seemingly “convenient” timing, will not by themselves justify a denial of **Redacted Claimant**’s claim within the Second Circuit. Nothing more occurred in this claim, so **Redacted Claimant’s** claim should not have been denied.

Summary:

For the above reasons, the claimant seeks findings that he worked during 2000, earned income during that year, filed an amended tax return within the limitation and tolls statutorily provided, had an employer who similarly filed qualifying returns, and is statutorily entitled to have his earnings record reflect \$31,200 worth of income in 2000. Accordingly, the claimant seeks a finding of eligibility under the Social Security Act, as well as an affirmation of the previous finding that he is “disabled” under the same. The claimant also stands desirous for supplemental process should the facts required for these requested findings remain insufficiently clear to the adjudicator at present.

Respectfully Submitted,

LAW OFFICE OF VINCENT J. CRISCUOLO

Electronically Signed: *Spencer Parr*

SPENCER D. PARR, Esq.