



# U.S. Immigration and Customs Enforcement

## **Worksite Enforcement**

### **Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties**

**November 25, 2008**

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## **Foreword**

Worksite Enforcement (WSE) cases are defined as investigations of business entities suspected of violating the Immigration and Nationality Act (INA). ICE Special Agents may utilize statutes relating to the employment of unauthorized aliens, as well as a host of other crimes that facilitate or result from the unlawful employment of aliens (i.e. human trafficking, alien smuggling, document fraud, identity theft, money laundering, abuse / exploitation). Agents gather evidence of the criminal violations, typically targeting the owner(s) and principal manager(s) of the business, and present these findings to the appropriate Office of the U.S. Attorney for criminal prosecution. In addition, agents aggressively pursue the seizure and forfeiture of assets amassed by employers who profit from using unauthorized alien workers. ICE believes that criminal prosecutions, seizure of assets, and the imposition of meaningful civil penalties upon those employers and businesses that utilize and profit from the labor of unauthorized aliens is the most effective deterrent.

The administrative inspection process is initiated by the service of a Notice of Inspection (NOI) upon an employer compelling the production of all Employment Eligibility Verification Forms (Form I-9) for current and recently terminated employees. ICE Special Agents or Forensic Auditors then conduct an inspection of those Forms I-9s for substantive or technical violations after which a finding of compliance, a Warning Notice, or a Notice of Intent to Fine (NIF) may be issued.

In some instances, the administrative inspection process will be an integral part of the overall criminal investigation while in other instances this process may be the sole investigation of the employer. In both cases, the administrative inspection and fines process is a critical component of ICE's overall national strategy aimed at reducing employment as a motivating factor for illegal immigration and to garner employer's voluntary compliance with the nation's immigration laws.

The administrative inspection and fines process has been streamlined and standardized with the goal of facilitating field operations and creating a national "blueprint" for administrative case completion. To ensure effective implementation of this new process, field offices are directed to ensure that all ICE Special Agents, Forensic Auditors, and other staff involved in these types of investigations are familiar with the new policies prior to performing further operational activity.

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## Background

On November 6, 1986, the Immigration Reform and Control Act was signed into law which made it illegal for employers to hire or recruit unauthorized aliens, required employers to verify the identity and employment eligibility of their employees, and created criminal and civil sanctions for violations. The purpose of this legislation was to reduce the magnet of employment in the United States thereby reducing the level of illegal immigration. Section 274A(b) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1324a(b), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986. 8 C.F.R. § 274a.2 designates the Employment Eligibility Verification Form I-9 (Form I-9) for this purpose and requires employers to:

- Have employees fill out Section 1 of Form I-9 at the time of hire;
- Review the document(s) presented ensuring that the documents reasonably appear to be genuine and relate to the individual;
- Complete Section 2 within three business days of hire (if the person is hired for less than three days, the employer must review the documents presented by the employee to establish identity and employment eligibility and must complete the Form I-9 at the time of hire);
- Re-verify that an individual is still authorized to work if his or her employment authorization expires. This re-verification must occur not later than the date work authorization expires. Re-verification is accomplished by requiring the individual to present any acceptable document that establishes employment authorization and by completing Section 3 of the original Form I-9, or Section 3 of a new Form I-9, or by having the individual complete a new Form I-9;
- Retain the Form I-9 for at least three years from the date of hire or for one year after the employee is terminated, whichever is longer; and
- Present the Form I-9 for inspection to officers of Immigration and Customs Enforcement (ICE), the Office of Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor upon request.

## Notice of Inspection

The issuance of the Notice of Inspection (NOI) on any employer is the first step in the process that may lead to the issuance of a Notice of Intent to Fine (NIF), a Warning Notice, or a finding that the employer is in compliance with respect to the employment eligibility verification requirements of 8 U.S.C. § 1324a(b). The inspection of Forms I-9 may consist of a review of all forms or a random sampling of forms at the discretion of ICE. In the case of a large employer, ICE may elect to review only Forms I-9 for current employees. Employers are not required to copy documents presented as evidence of identity and employment eligibility; however, if they elect to do so, they should implement a consistent policy for all employees. An employer who treats employees differently based upon national origin, perceived citizenship status or other prohibited characteristics, may be found to have engaged in unlawful discrimination or other violations of law.

Prior to the issuance of the NOI, ICE Special Agents or Forensic Auditors are to contact the receiving business entity to obtain the necessary information to issue the NOI. Exceptions to this policy will be granted if the Group Supervisor (GS) determines that prior contact with the employer may jeopardize case integrity or outcome.

### *Purpose*

The purpose of a Form I-9 inspection is to identify any violations that might lead to criminal prosecution of an employer or identify either substantive or technical violations that might result in the issuance of an administrative fine or Warning Notice. The Form I-9 inspection should be considered part of an overall WSE investigative strategy and not considered a discreet, stand alone regulatory function. Oftentimes, Form I-9 inspections have been an effective means of furthering criminal investigations (b) (7)(E)

(b) (7)(E)

### *Three Day Rule*

8 C.F.R. § 274a.2(b)(2)(ii) requires ICE to provide an employer with at least three days written notice prior to a Form I-9 inspection. Normally, this notice will include only work days but may include weekends and holidays in the case of businesses such as restaurants and retail stores open on those days and thus constituting normal work days for those businesses.

ICE may not ask to see an employer's Forms I-9 without first serving the employer with a NOI containing an advisory of the employer's right to three days notice. Upon service of the NOI, a waiver of advance notice is permitted only if the employer requests, without solicitation, that the three day notice be waived for such reasons as convenience or business operations. The agent or auditor may advise the employer of the availability of a waiver, but must exercise caution to avoid crossing the line between merely advising the employer of the waiver and actually

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soliciting a waiver. The agent or auditor should not pursue a waiver if the employer expresses no interest after having been advised of its availability.

The employer may waive advance notice by annotating the NOI to indicate that he or she has been advised of the advance notice rule and desires to waive it. The employer must sign and date the annotation. The case agent or auditor should then make a note of this fact in the appropriate Report of Investigation (ROI).

### ***Authority to Issue***

NOIs may be issued by any ICE Special Agent authorized to issue a Notice to Appear as defined at 8 C.F.R. § 239.1(a) (i.e. GS or above). Field offices are to use the standardized NOI found on the OI proprietary website. Deviations from this standardized form are not acceptable without authorization from the Headquarters Worksite Enforcement Unit (HQ WSE) and the Office of the Principal Legal Advisor (OPLA).

### ***Contents of the NOI***

The NOI will contain the name of the business to be inspected, the date and time of the proposed inspection, a waiver of the three day notice, and the time period covered by the inspection. Employers will be requested to provide the following information (if applicable):

- 1) Forms I-9 of all current and terminated employees. 8 U.S.C. § 1324a(b)(3) requires that, in the case of an employer, the Form I-9 be retained for a period of three years after the date of hire or one year after the date of termination, whichever is later or, in the case of a recruiter or referrer for a fee, three years after the date of hire;
- 2) A list of all current and terminated employees with hire and termination dates;
- 3) Copies of quarterly wage and hour reports and/or payroll data for all employees (current and terminated) covering the period of the inspection;
- 4) Quarterly tax statements (IRS Form 941);
- 5) Business information to include Employer Identification Number (EIN), Taxpayer Identification Number (TIN), owner's Social Security number (SSN), owner address information, telephone numbers, email addresses, copies of Articles of Incorporation (if applicable), copies of business licenses, and any other pertinent information;
- 6) Copies of any and all correspondence from the Social Security Administration (SSA) to the employer regarding mismatched or no matched SSNs. These forms are known as Employer Correction Requests or Requests for Employee Information and commonly referred to as "No Match" letters; and

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- 7) Whether the company is a current or previous participant in E-Verify or the Social Security Number Verification Service.

The type of information noted above is not all inclusive and will not apply in all cases. ICE Special Agents and Forensic Auditors should use this list as a guide to assist in the preparation of the NOI.

Regulation only requires that the employer provide the Forms I-9 for inspection. If an employer declines to provide additional documentation as requested, the ICE Special Agent should use an administrative subpoena or other legal process to compel the production of that information.

***Service of NOI***

The NOI must be served in person or by certified U.S. mail, return receipt requested, upon the owner, designee, senior management official, or registered agent of the business entity. The NOI can be served by any OI employee; (b) (7)(E)

At the time of service, the employer will be provided a copy of the Handbook for Employers (M-274). (<http://www.uscis.gov/files/nativedocuments/m-274.pdf>) (b) (7)(E)

In situations where the Forms I-9 or senior management is physically located outside the OI field office Area of Responsibility (AOR), additional notification may be sent via facsimile and arrangement made for the production of the Forms I-9 at the location where the request for production was made. Whenever possible, the NOI should be served on the business entity located within the jurisdiction of the office conducting the inspection and proof of service (i.e. return receipt, fax transmission log, ROI documentation, or duplicate service notice) must be maintained in the investigative case file for evidentiary purposes.

***Location of Inspection***

ICE is not required to conduct the Form I-9 inspection at the business entities location. ICE may require that the employer produce the Forms I-9 at the OI field office. 8 C.F.R. § 274a.2(b)(2)(ii), and associated regulations, requires that the Forms I-9 must be made available in their original paper, electronic form, a paper copy of the electronic form, or on microfilm or microfiche at the location where the request for production was made. A recruiter or referrer for a fee may present photocopies of the Form I-9 if they have designated the employer with the responsibility of completing the employment eligibility verification process. In cases where an

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employee is referred by a state employment agency and the employment agency completes the verification process, the employer is required to maintain the certification provided to them in compliance with the retention requirements of 8 U.S.C. § 1324a. State employment agencies are fully discussed at 8 C.F.R. § 274a.6.

***Receipt and Documentation***

ICE Special Agents and Forensic Auditors will document the receipt of Forms I-9 from an employer on Customs and Border Protection (CBP) Form 6051 and in an ROI. The original Form 6051 will be maintained in the investigative case file and a copy provided to the employer.

(b) (7)(E) [redacted] maintaining the originals free from potential alteration or loss during the inspection process.

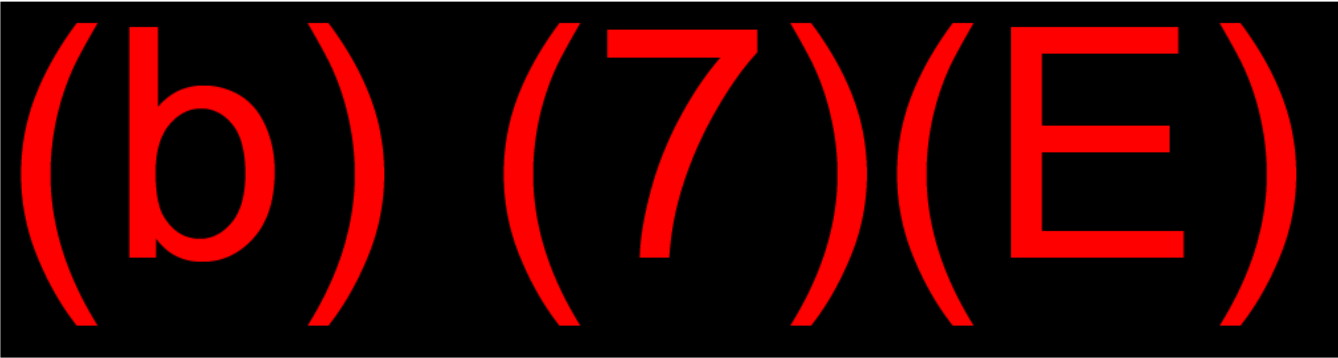
***Interview of Human Resources Manager / Responsible Hiring Official***

(b) (7)(E)

Suggested topics to be covered during this interview include, but are not limited to, the following:

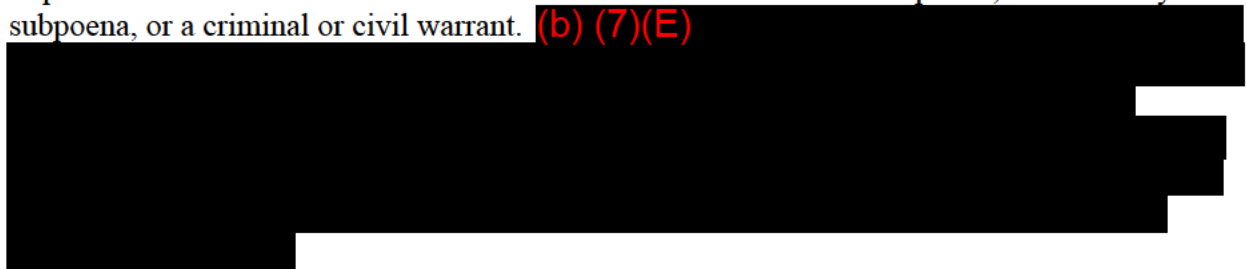
(b) (7)(E)





### *Enforcement of Access to Forms I-9*

Any refusal or delay in presentation of Forms I-9 for inspection is a violation of the retention requirements codified at 8 U.S.C. § 1324a(b)(3) of the INA. If an employer refuses to produce Forms I-9 after being provided three days notice, ICE Special Agents should seek to obtain the required forms and additional documentation via an administrative subpoena, a Grand Jury subpoena, or a criminal or civil warrant. (b) (7)(E)



- The issuance of an administrative subpoena is not required to compel an employer to produce Forms I-9 as part of the administrative inspection process but this does not preclude ICE from using a subpoena in this manner. ICE is not legally required to give three days notice prior to serving a subpoena upon an entity requiring testimony and/or production of Forms I-9 and other relevant documents.
- ICE Special Agents must note that serving a subpoena that provides an employer with less than three days for compliance is only justified by unusual circumstances. Such subpoenas may not be overly broad, unreasonable, or seriously disrupt the normal business operations of the business entity. Agents must also note that a subpoena is not a substitute for a warrant.

## **Legal Considerations**

### *Administrative and Regulatory Violations in Form I-9 Inspections*

Knowing Hire: 8 U.S.C. § 1324a(a)(1)(A) makes it unlawful after November 6, 1986, for a person or entity to hire, or to recruit or refer for a fee, an alien for employment in the U.S., knowing that the alien is not authorized by law to work in the U.S.

Continuing to Employ: 8 U.S.C. § 1324a(a)(2) prohibits a person or entity from continuing to employ an alien hired after November 6, 1986, knowing that the alien is or has become unauthorized by law to work in the U.S.

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Verification Requirements and Penalties: 8 U.S.C. § 1324a(a)(1)(B) requires employers to verify the identity and employment eligibility of all individuals hired in the U.S. after November 6, 1986. The verification requirements are described at 8 C.F.R. § 274a.2.

Indemnification and Penalties: 8 U.S.C. § 1324a(g)(1) prohibits employers from requiring an individual to post a bond or indemnity against future liability under the employer sanctions provisions. In short, this is where an employer mandates that the employee post a bond that the employer would use if they are fined by ICE.

Grandfathered Status: Neither the substantive prohibitions nor the verification requirements of Section 274A apply to hires that occurred prior to November 7, 1986. Therefore, ICE cannot sanction employers with respect to employees hired before that date and continuously employed by the same employer. While employers are not liable for continuing employment of grandfathered employees, the provision does not accord an unauthorized alien the right to work or an illegal alien the right to remain in the U.S.

### *Penalties for Administrative and Regulatory Violations*

Knowing Hire and Continue to Employ Violations: Employers determined to have knowingly committed one of these violations shall be required to cease the unlawful activity and may be fined according to three tiers of violations (i.e., first, second, or more than two violations) in escalating amounts. The range of these three tiers of penalty amounts<sup>1</sup> are as follows:

For Violations Occurring	On or After 3/27/08	Between 3/26/08 - 9/29/99	Before 9/29/99
First Tier	\$375 - \$3,200	\$275 - \$2,200	\$250 - \$2000
Second Tier	\$3,200 - \$6,500	\$2,200 - \$5,500	\$2,000 - \$5,000
Third Tier	\$4,300 - \$16,000	\$3,300 - \$11,000	\$3,000 - \$10,000

Debarment: Additionally, an employer holding a federal contract that is found to have knowingly hired or continued to employ unauthorized workers under 8 U.S.C. § 1324a (a)(1)(a) or (a)(2) may be subject to debarment by the contracting agency. Executive Order 12989, issued on February 13, 1996, established a policy of not contracting with employers who knowingly employ unauthorized workers. Field offices should forward copies of Final Orders or final criminal convictions issued against employers holding federal contracts to the HQ WSE Unit for forwarding to the appropriate contracting federal agency.

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<sup>1</sup> Since the passage of IRCA in 1986, federal civil monetary penalties have been increased on two occasions in 1999 and 2008 pursuant to the Federal Civil Penalties Inflation Act of 1990, as amended by the Debt Collection Improvement Act of 1996. These adjustments are designed to account for inflation in the calculation of civil monetary penalties and are determined by a non-discretionary, statutory formula.

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Verification Violations: Those who fail to properly complete, retain, or present for inspection Forms I-9 as required by law may be fined not less than \$110 and not more than \$1,100 for each person for whom the form was not properly completed, retained, or presented. For violations that occurred before September 29, 1999, the applicable fine range is not less than \$100 and not more than \$1000.

Indemnification Violations: Violations may result in a \$1,100 fine for each individual who was required to pay the indemnity and an order to make restitution. Violations that occurred before September 29, 1999 are subject to a \$1000 fine. (b) (7)(E)

### *Affirmative Defenses to Administrative and Regulatory Violations*

Pursuant to 8 U.S.C. § 1324a(b)(6)(A), a person or entity is considered to have complied with a verification requirement notwithstanding a *technical or procedural* failure to meet such requirement where the person or entity made a good faith attempt to comply with the requirement. There are two exceptions to the applicability of 8 U.S.C. § 1324a(b)(6)(A):

1. A person or entity will not be considered to have complied with the requirement in question if ICE or another enforcement agency has explained to the person or entity the basis for the failure, and the person or entity has been provided a period of not less than ten business days beginning after the date of the explanation within which to correct the failure, and the person or entity has not corrected the failure within such period. If the person or entity fails to correct the technical violations as required, those violations may be charged against the employer in a NIF.
2. A person or entity will not be considered to have complied with the requirement in question if the person or entity is engaging in a pattern or practice of violations of the knowing hire or continuing to employ provisions of 8 U.S.C. § 1324a(a)(1)(A) or (a)(2). The criminal penalties and civil injunctive remedies for a pattern and practice of knowingly hiring or continuing to employ unauthorized aliens are codified at 8 U.S.C. § 1324a(f).

### *Substantive and Technical Verification Violations*

Verification violations are defined as any paperwork or procedural errors that occur within the Form I-9 employment eligibility verification process. Verification violations are classified as either technical or substantive. The test of whether a verification violation is either technical or substantive lies in the seriousness of the error and whether or not it could have led to the hiring of an unauthorized alien.

Technical Violations: 8 U.S.C. § 1324a(b)(6) applies to cases arising from Form I-9 inspections conducted on or after September 30, 1996. This requires that technical or procedural failures to meet a verification requirement of 8 U.S.C. § 1324a(b) discovered during a Form I-9 inspection

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conducted on or after September 30, 1996 not be included in a NIF unless and until certain notification procedures are followed.

Examples of Technical Violations are as follows:

1. Use of the Spanish version of the Form I-9, except in Puerto Rico.
2. Section One Technical Violations:
  - a) Failure to ensure that an individual provides his or her maiden name, address or birth date in Section 1 of the Form I-9 (failure to ensure that an individual provides his or her Social Security number is not a violation);
  - b) Failure to ensure that an individual provides his or her alien registration number (“A” Number) on the line next to the phrase in Section 1 of the Form I-9, “A Lawful Permanent Resident”, but only if the “A” Number is provided in Sections 2 or 3 of the Form I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);
  - c) Failure to ensure that an individual provides his or her “A” Number or Admission number on the line provided under the phrase in Section 1 of the Form I-9, “An alien authorized to work until”, but only if the “A” Number or Admission number is provided in Sections 2 or 3 of the Form I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection); and/or
  - d) Failure to ensure that a preparer and/or translator provide his or her name, address, signature, or date.
3. Section Two Technical Violations:
  - a. Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in Section 2 of the Form I-9, but only if a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection; and/or
  - b. Failure to provide the title, business name, and business address in Section 2 of the Form I-9.
  - c. Failure to state “Individual underage 18” in Colum B, for employees under the age of 18 using only a List C document.
  - d. Failure to state “Special Placement” in Colum B, for employees with a disability using only a List C document.

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4. Section Three Violations:

- a. Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in Section 3 of the Form I-9, but only if a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection.

Ten Day Correction Period for Technical Violations: An employer or recruiter or referrer for a fee who is provided with at least ten business days to correct technical violations after notification of such violations and corrects the violations within the designated time period is deemed to have complied with the requirements of 8 U.S.C. § 1324a(b). An employer or recruiter or referrer for a fee will be subject to a NIF for uncorrected violations unless the uncorrected violations could not reasonably be corrected.

- 1. Procedure for Correcting Technical Violations: To be deemed to have corrected technical or procedural violations that reasonably can be corrected, the employer or recruiter or referrer for a fee must:
  - a) In the case of a violation in Section 1 of the Form I-9, ensure that the individual and/or preparer and/or translator:
    - 1) correct the failure on the Form I-9;
    - 2) initial the correction; and
    - 3) date the correction.
  - b) In the case of a violation in Sections 2 or 3 of the Form I-9:
    - 1) correct the failure on the Form I-9;
    - 2) initial the correction; and
    - 3) date the correction.
- 2. Technical Violations that Reasonably Cannot be Corrected: Situations will arise where the employer will not reasonably be able to correct the violations within the time frame provided. The following are examples of when a violation reasonably could not have been corrected:
  - a) The individual is no longer employed by the employer;
  - b) The individual is on medical leave, leave of absence, or vacation during the time provided for correction; and/or
  - c) The preparer and/or translator reasonably cannot be located.

For technical violations that reasonably cannot be corrected, the employer or recruiter or referrer for a fee must provide ICE an explanation in writing of why the violations reasonably cannot be corrected. If the ICE Special Agent determines that the explanation is reasonable, the technical violation will not be considered a violation for purposes of a NIF. The agent shall make a written record of the employer's explanation in an ROI.

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3. Exemptions from Ten Day Correction Period: A person or entity that has committed one or more of the below failures has violated the verification requirements of 8 U.S.C. § 1324a(b). The notification and correction period requirements of 8 U.S.C. § 1324a(b)(6)(B) do not apply to these violations and the violations can be immediately charged in a NIF:
- a) The technical violation was committed with the intent to avoid a requirement of the law, as demonstrated by the totality of circumstances including but not limited to the substantial presence of unauthorized aliens hired by the employer and a pattern of repeated failures in the completion of the Forms I-9;
  - b) The technical violation was committed in knowing reliance on 8 U.S.C. § 1324a(b)(6);
  - c) The employer corrected or attempted to correct the technical violation with knowledge or in reckless disregard of the fact that the correction or the attempted correction contains a false, fictitious, or fraudulent statement or material misrepresentation, or has no basis in law or fact;
  - d) The employer or recruiter or referrer for a fee prepared the Form I-9 with knowledge or in reckless disregard of the fact that the Form I-9 contains a false, fictitious, or fraudulent statement or material misrepresentation, or has no basis in law or fact; or
  - e) The type of violation was previously the subject of a NIF, Warning Notice, or “Notification of Technical or Procedural Failures” letter.

Substantive Verification Violations: 8 U.S.C. § 1324a(b)(6) of the Act is applicable only to those verification violations that are designated as “technical.” The following violations have been determined to be substantive. A person or entity that has committed one or more of the below violations has violated the verification requirements of 8 U.S.C. § 1324a(b) and is subject to a NIF. The notification and correction period requirements of 8 U.S.C. § 1324a(b)(6)(B) do not apply to these violations:

- 1. Failure to timely prepare or present the Form I-9.
- 2. Section One Violations:
  - a) Failure to ensure that the individual provides his or her printed name in Section 1 of the Form I-9;
  - b) Failure to ensure that the individual checks a box in Section 1 of the Form I-9 attesting to whether he or she is a citizen or national of the United States, a lawful permanent resident, or an alien authorized to work until a specified date, or checking multiple boxes attesting to more than one of the above;

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- c) Failure to ensure that the individual provides his or her “A” Number on the line next to the phrase in Section 1 of the Form I-9, “A Lawful Permanent Resident”, but only if the “A” Number is not provided in Sections 2 or 3 of the Form I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);
- d) Failure to ensure that the individual provides the “A” Number or Admission number on the line provided under the phrase in Section 1 of the Form I-9, “An alien authorized to work until”, but only if the “A” Number or Admission number is not provided in Sections 2 or 3 of the Form I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);
- e) Failure to ensure that the individual signs the attestation in Section 1 of the Form I-9; and/or
- f) Failure to ensure that the individual dates Section 1 of the Form I-9 at the time employment begins.

3. Section Two Violations:

- a) Failure to review and verify a proper List A document or proper List B and List C documents in Section 2 of the Form I-9;
- b) Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in Section 2 of the Form I-9, unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection;
- c) Failure to provide the date employment begins in the attestation portion of Section 2 of the Form I-9;
- d) Failure to sign the attestation in Section 2 of the Form I-9;
- e) Failure on the part of the employer of authorized representative to print their name in the attestation portion of Section 2.
- f) Failure to date Section 2 of the Form I-9; and/or
- g) Failure to date Section 2 of the Form I-9 within three business days of the date the individual begins employment or, if the individual is employed for three business days or less, at the time employment begins.
- h) Failure to recertify and complete within 90 days the pertinent Section 2 information for verification with a receipt for lost or stolen documents.

4. Section Three Violations:

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- a) Failure to review and verify a proper List A document or proper List B and List C documents in Section 3 of the Form I-9;
- b) Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in Section 3 of the Form I-9, unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection;
- c) Failure to provide the date of rehire in Section 3 of the Form I-9;
- d) Failure to sign Section 3 of the Form I-9;
- e) Failure to date Section 3 of the Form I-9; and/or
- f) Failure to date Section 3 of the Form I-9 not later than the date that the work authorization of the individual hired or recruited or referred for a fee expires.

***Requirements to Substantiate Knowing Hire and Continuing to Employ Charges***

Knowing Hire Charges: Pursuant to 8 U.S.C. § 1324a(a)(1)(A), a person or entity is prohibited from hiring, or recruiting or referring for a fee, an alien for employment in the United States knowing that the alien is not authorized to work in the United States. To charge a violation of this provision in a fine, there must be evidence to prove that:

- 1. a person or entity;
- 2. after November 6, 1986 (and still employed on or after June 1, 1987);
- 3. hired;
- 4. for employment in the United States;
- 5. an unauthorized alien; and
- 6. **knowing** the alien is not authorized to work for the person or entity.

For this charge to be sustained, ICE must prove that the employer knew of the alien's unauthorized status ***at the time of the hire***. If the evidence indicates only that the employer learned that the alien was unauthorized after the alien was hired, the appropriate charge in the fine is the "continuing to employ" charge discussed below. If the evidence is sufficient to establish one of the two, but it is unclear which charge more appropriately applies, both charges should be included in the fine in the alternative. The ICE Special Agent should consult with the local Office of Chief Counsel (OCC) to determine the appropriate charge.

It should be noted that a properly completed Form I-9 is a rebuttable affirmative defense to a "knowing hire" charge, but not to any other charge.

Continuing to Employ Charges: An employer violates the "continuing to employ" provision of 8 U.S.C. § 1324a(a)(2) if the employer, "upon hiring an individual for employment in the United States after 1986, becomes aware of the individual's unauthorized status, but, nevertheless



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continues to employ that individual.” To establish that a violation of this provision has occurred, it must be shown that:

1. a person or entity;
2. after November 6, 1986 (and still employed on or after June 1, 1987);
3. continued to employ;
4. an unauthorized alien;
5. in the United States; and
6. **knowing** the alien is or has become unauthorized to work for the person or entity.

Regardless of how or when the knowledge was acquired, the fact that employment continued after the employer acquired knowledge of the alien’s unauthorized status is essential.

**Burden of Proof:** ICE must establish a violation “by a preponderance of the evidence.” That is, ICE bears the burden of proving that it is more likely than not that the employer hired or continued to employ an alien knowing that he or she was unauthorized to work in the United States. The phrase “more likely than not” means that there exists a greater than 50% chance that the employer knew that the employee was unauthorized to work in the United States.

In cases that proceed to a hearing in which the Respondent (employer) ultimately prevails in all or part of the case, ICE may be liable to the Respondent for fees and other expenses under the Equal Access to Justice Act unless a judge finds that ICE’s position was "substantially justified.”

**Defining Knowledge:** These guidelines focus upon the element of knowledge in "knowing hire" or "continuing to employ" charges. The term "knowing" is defined in the regulations to include both actual and constructive knowledge.

1. **Actual Knowledge:** To establish actual knowledge, the evidence must demonstrate that the employer in fact knew that the alien was not authorized to work but nevertheless employed the alien. Actual knowledge can be imputed to the employer where an officer of the employer or an agent of the employer (i.e., someone authorized to act on the employer's behalf), acting within the scope of his or her authority, had knowledge even if the employer did not.
2. **Constructive Knowledge:** To establish constructive knowledge, the evidence must demonstrate that the employer should have known that the alien was not authorized to work. Constructive knowledge is knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:
  - a) fails to complete or improperly completes the Form I-9;
  - b) has information available to it that would indicate that the alien is not authorized to work; and/or

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- c) acts with reckless and wanton disregard for the legal consequence of permitting another individual to introduce unauthorized aliens into its work force or to act on its behalf.

Courts have consistently found constructive knowledge where the employer fails to take the appropriate steps or to make reasonable inquiries to re-verify employee's work eligibility after receiving specific, detailed information regarding the employees' possible unauthorized work status<sup>2</sup>. For example, constructive knowledge has been found where the employer fails to re-verify an employee's work eligibility when the Form I-9 indicates that the employee's work eligibility is expiring. Another example is where an employer receives a notice from ICE that lists employees suspected of being unauthorized aliens. If the employer fails to re-verify the named employee's employment eligibility within a reasonable time after receiving the notice and continues to employ these employees, the employer can be charged with a "continuing to employ" count in a NIF if the named employees are in fact unauthorized.

Failure to complete a Form I-9 for an employee alone is not sufficient to support a "knowing hire" or "continuing to employ" charge but it is a relevant consideration. Additional considerations include: whether the employer only failed to complete Forms I-9 for unauthorized aliens; the circumstances surrounding the hiring of the unauthorized aliens; disparate treatment of unauthorized aliens; the employer's knowledge of the verification requirements; the employer's prior history of verification (paperwork) and hiring violations; or the employer's knowledge of employees within their workforce with no matched or mismatched Social Security numbers.

Fraudulent Documents: With respect to constructive knowledge arising from the acceptance of fraudulent documents, the employer is only held to the "reasonable person" standard. The employer is not expected to ascertain whether the document in fact is fraudulent or not; however, the employer is required to act with *reasonable* care. If the document appears genuine, the employer must accept it. This is not a defense if the employer has direct or constructive knowledge that the document is fraudulent or that the employee is an unauthorized alien.

Evidence to Support a Knowing Hire or Continuing to Employ Charge: The types of evidence that can be used to demonstrate actual or constructive knowledge of the employer for purposes of supporting a "knowing hire" or "continuing to employ" charge in a fine include, *inter alia*:

1. Sworn statements regarding the hire from the employer, unauthorized alien employee, third party employees, and the hiring employee;
2. Detailed notes in a ROI regarding the hire;
3. Record of Deportable/Inadmissible Alien (Form I-213);

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<sup>2</sup> On October 10, 2007, the U.S. District Court for the Northern District of California issued a preliminary injunction in *AFL-CIO, et al. v. Chertoff, et al.* (N.D. Cal. Case No. 07-CV-4472 CRB). The preliminary injunction enjoins and restrains the Department of Homeland Security and the Social Security Administration from implementing the Final Rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter."

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4. Application for Alien Employment Certification (ETA-750) and Petition for Immigrant and Nonimmigrant Alien Worker (Form I-140 and I-129);
5. Corroborative documentary evidence (e.g., payroll records, tax returns); and
6. DOL inspection results.

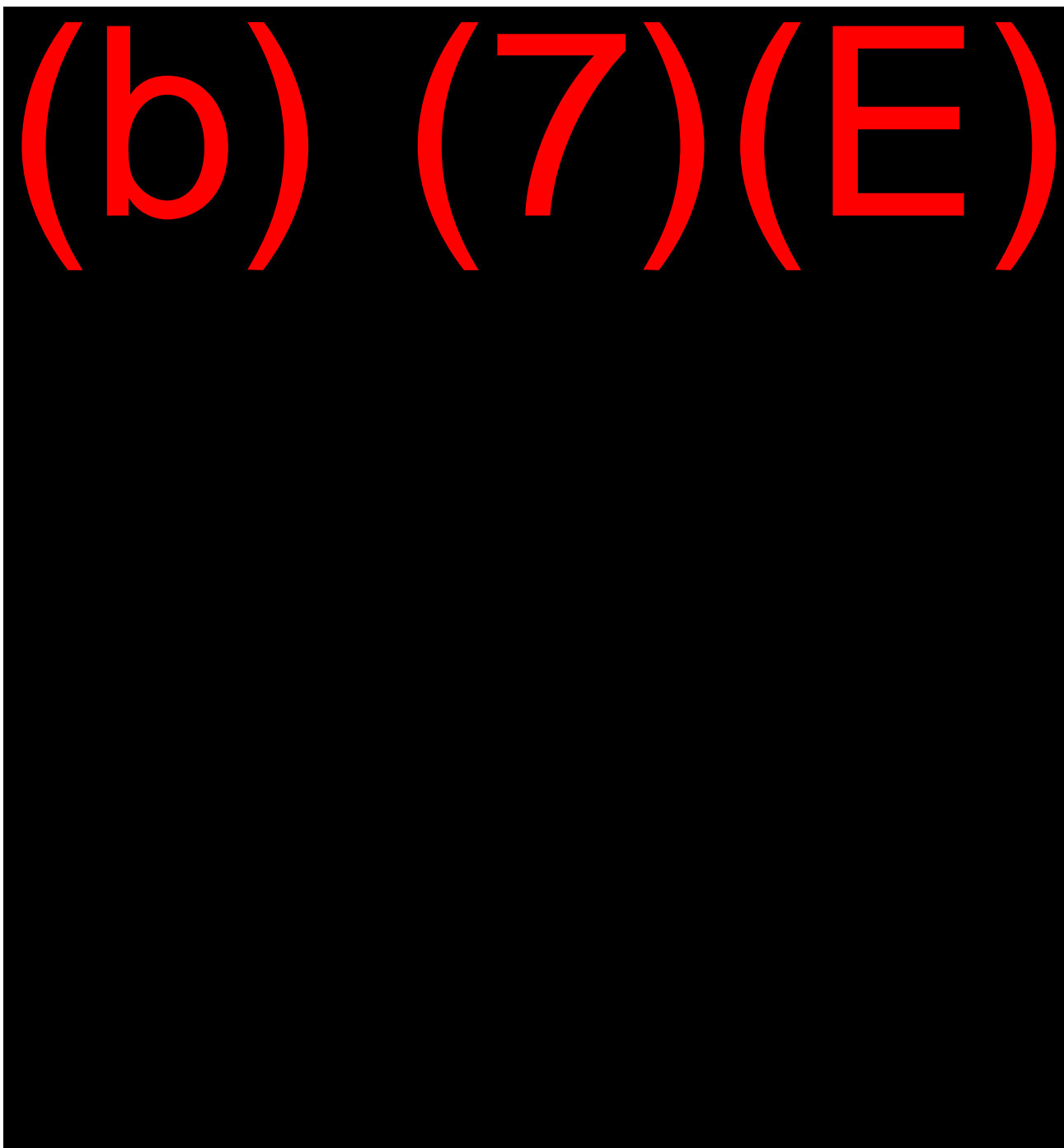
The quantum of evidence sufficient to support a charge will vary from case to case.

Sworn Statements: Statements must be sworn, signed, and dated by the person from whom the statement is being taken. The ICE Special Agent taking the statement must determine whether the person would be willing to testify. The agent must also sign and date the statement. A sworn statement must be detailed, internally consistent, consistent with other evidence, and supported by corroborating evidence. Any unexplained discrepancies between the statement and corroborative evidence significantly diminish the value of the statement and may make the statement unacceptable.

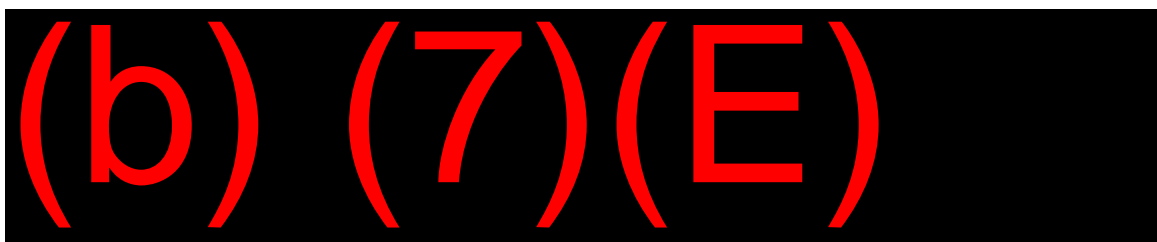


Probative Evidence: Probative evidence includes the following:

1. Admissions by the employer (in a sworn statement or ROI) that he or she had knowledge regarding the unauthorized status of the employee in question at the time of hire or after the hire but employed the unauthorized alien anyway. How the employer obtained knowledge that the alien is unauthorized gives the admission credibility.
2. Form I-9 verification and hiring practices of the employer generally and with respect to the unauthorized alien in question (as stated by the employer or employees in a sworn statement or ROI). (b) (7)(E) [redacted]. In addition to helping to prove knowledge, this is necessary for proving that the alien was in fact employed by the employer, which is often denied by an employer charged with a "knowing hire" or "continuing to employ charge".
3. Whether the hiring employee acted within the scope of his or her employment when hiring the alien and whether the hiring employee knew of the alien's status at the time of hire or after the hire. For example, (b) (7)(E) [redacted].
4. Sworn statements from unauthorized aliens which contain information such as:



5. The following are examples of circumstantial or corroborative evidence that may be used to support a “knowing hire” or “continuing to employ” charge within a NIF:



(b) (7) (E)

The knowledge elements and evidentiary standards needed to support a “knowing hire” and/or a “continuing to employ” charge in a NIF are the same as those required to support a criminal charge. The only difference is the burden of proof.

Knowing Hire and Continuing to Employ Charges in NIFs: In all cases where a “knowing hire” or “continuing to employ” violation is found, a NIF will be pursued against that employer. The only exception to this policy is those cases where criminal charges are being pursued in U.S. District Court against the employer. In cases where criminal charges are only being pursued against employees of the business entity, ICE may still pursue a NIF against the employer.

However, a NIF should only be initiated when all investigative activities have concluded and criminal prosecution of the employer is no longer considered.

## **Form I-9 Inspection**

### ***OI Employees Who May Conduct a Form I-9 Inspection***

The Form I-9 inspection may be conducted by ICE Special Agents, Forensic Auditors, and Criminal Research Specialists, with the assistance of Investigative Assistants, or any other OI employee as designated by the Special Agent in Charge (SAC). Employees designated by the SAC to conduct Form I-9 inspections should have a working knowledge of the types of violations present in administrative inspections and specifically be able to differentiate between substantive and technical violations. At all times, an ICE Special Agent must supervise and maintain the integrity of the inspection process. The case agent or auditor is responsible for documenting inspection results in an ROI against the appropriate case in the Treasury Enforcement Communications System (TECS-II).

### ***Procedure for Conducting the Form I-9 Inspection***

(b) (7) (E)

(b) (7) (E)

The case agent, auditor, or criminal research specialist must document the process and results of the Form I-9 inspection in an ROI. At a minimum, this ROI should include the number of Forms I-9 inspected, the number and types of violations present, and the percentage of Forms I-9 found in violation. The percentage of overall violations present will be a determining factor in whether a NIF or Warning Notice will be issued. Warning notices are outlined on Page 24. The percentage of overall violations will also determine the base fine amount to be recommended by the OI in the Application for a Notice of Intent to Fine (I-761). This ROI must be sufficiently detailed to support any potential charges in a NIF.

***Evidence of the Presence of Unauthorized Aliens***

(b) (7) (E)

(b) (7)(E)

### Disposition of Administrative Case

(b) (7)(E)

#### *Employer in Compliance*

When an employer is found to have no “knowing hire,” “continuing to employ,” substantive, or technical violations and no unauthorized aliens are identified within the employer’s workforce, the case agent or auditor shall serve a “Notice of Inspection Results” letter upon the employer. This letter advises the employer that they are in compliance with the employment eligibility verification requirements of 8 U.S.C. § 1324a(b) and no further investigation is necessary. This is generally referred to as a “Compliance Letter.”

#### *Presence of Unauthorized Aliens*

(b) (7)(E)

The case agent or auditor shall serve “Notice of Suspect Documents” and “Notice of Discrepancies” letters upon the employer for all known and suspected unauthorized aliens not administratively arrested.

1. The “Notice of Suspect Documents” letter advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has determined that the employee is unauthorized with respect to employment and advises the employer of the possible criminal and civil penalties for continuing to employ this individual. These letters are issued when the Form I-9 inspection process identifies fraudulent immigration



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documents or identifies aliens unauthorized to work such as nonimmigrant visitors or nonimmigrant students without employment authorization.

- a. If the employer or employee disputes this determination, the employer is allowed to continue to employ this individual until ICE evaluates any additional documentation provided by the employee. A “Confirmation of Notice of Inspection Results” or “Change to Notice of Inspection Results” will be sent to the employer confirming or amending ICE’s earlier determination. If a determination cannot be made within 30 days based on the documentation submitted, ICE Special Agents will make arrangements to interview the alien to determine their work eligibility.
2. The “Notice of Discrepancies” letter advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has been unable to determine their work eligibility in the United States. A notice explaining the employee’s rights and responsibilities is forwarded with this letter, which the employer is requested to serve on each affected employee.
  - a. These letters are issued when the Form I-9 inspection process reveals indicators of identity theft being committed by the employee. The purpose of this letter is to displace unauthorized aliens who have assumed the identities of U.S. citizens in order to evade the employment eligibility verification requirements of 8 U.S.C. § 1324a(b) when the local OI field office is unable, based on case specific factors, to encounter, verify the work eligibility, and criminally or administratively arrest, as appropriate, these individuals.
  - b. This letter advises the employer that ICE Special Agents will make themselves available at the employer’s business location to conduct interviews with the employees identified as having discrepancies. In the alternative, those employees may submit additional documentation to ICE to verify their identity and work eligibility.

### ***Verification Violations***

The presence of unauthorized aliens within the employer’s workforce must be addressed either through administrative arrest or displacement from the workforce prior to issuing a “Notice of Technical or Procedural Failures” letter or serving a Warning Notice or NIF upon the employer.

#### 1. Technical or Procedural Violations

The case agent or auditor will serve a “Notice of Technical or Procedural Failures” letter upon the employer for all technical violations identified during the Form I-9 inspection. The employer will be provided the marked copies of the Forms I-9 (agents will make copies for use during the follow-up inspection) and will be provided a minimum of 10 business days to correct the forms. The case agent or auditor will conduct a follow-up inspection of the Forms I-9 within one week after the expiration of the 10 day period to ensure compliance. If the employer has not corrected the forms as directed or provided a

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reasonable explanation why the forms cannot be corrected, these uncorrected technical violations should be deemed substantive and considered in the computation of a NIF.

If the employer has corrected the violations, the case agent or auditor will serve a “Notice of Inspection Results” letter on the employer noting that they have been brought into Adjusted Compliance. The case agent or auditor will return the original Forms I-9 containing the technical violations to the employer who should be directed to attach the corrected marked copies to the original forms. All Forms I-9 found to have no violations or deficiencies should also be returned at this time. The return of the original Forms I-9 should be documented on CBP Form 6051R. The Form 6051R should be included in the investigative case file with a copy provided to the employer. The case agent or auditor should schedule a follow-up inspection within six months to ensure continued compliance.

### 2. Substantive Violations

Substantive violations are defined as “knowing hire,” “continuing to employ,” failure to prepare and present, and those serious paperwork violations that could have led to the hiring of an unauthorized alien. When substantive violations are identified, either a Warning Notice or a NIF will be prepared. The determination of whether to issue a Warning Notice or a NIF will be left to the discretion of the local OI field office based on the following factors:

- a. Warning Notice: A Warning Notice may be issued in circumstances where substantive verification violations were identified but there is the expectation of future compliance by the employer, with the below noted exceptions. Because a Warning Notice lays the groundwork for subsequent action, a Warning Notice should be based on evidence that would generally be sufficient to support a fine.

A Warning Notice should not be issued in the following circumstances:

- 1) instances of “knowing hire” and/or “continuing to employ” violations;
- 2) instances of failure to prepare and present violations;
- 3) instances where unauthorized aliens were hired as a result of substantive paperwork violations;
- 4) any evidence of fraud in the completion of the Form I-9 on the part of the employer (e.g., backdating);
- 5) instances where the employer was previously the subject of an educational visit, a Warning Notice, or a NIF; and/or

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- 6) instances where the employer was notified of technical violations and failed to correct them within the allotted 10 day period.

A Warning Notice may include technical as well as substantive violations without regard to the notification and 10 day correction requirements of 8 U.S.C. § 1324a(b)(6). (b) (7)(E)

- b. Notice of Intent to Fine: A NIF will be issued in all of the circumstances noted above as well as instances where, based on the totality of the circumstances, the local field office determines that the employer has not acted in good faith and the substantive paperwork violations rise to a level warranting a fine (b) (7)(E)

***Procedure for Issuing Warning Notices and Notices of Intent to Fine***

**Warning Notices**

The ICE Special Agent or Forensic Auditor is responsible for preparing the Warning Notice (Form I-846). The Warning Notice will include the specified charging documents and attachments just as in the case of an Application for a Notice of Intent to Fine (Form I-761) less the final paragraph of the charging document that lists the fine amount. The Warning Notice must include a date for a follow-up inspection. Generally, this follow-up inspection should be conducted within six months of issuance of the Warning Notice.

The Warning Notice and supporting evidence must be reviewed by an OI GS and must be approved/signed by the SAC or their designee not below the level of an Assistant Special Agent in Charge (ASAC). (b) (7)(E)

The Warning Notice must be served personally or via certified U.S. mail, return receipt requested, upon the owner, designee, senior management official, or registered agent of the business entity by an ICE Special Agent or Forensic Auditor. The date, time, and manner of service must be noted on the Warning Notice and a copy retained for inclusion in the investigative case file. The service of the Warning Notice and any explanation of violations provided by ICE to the business entity should be thoroughly documented in an ROI.

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**Notice of Intent to Fine**

The ICE Special Agent or Forensic Auditor is responsible for completing the Application for Notice of Intent to Fine including the recommendation for the base fine amount in Block D. The recommended base fine amount is determined by dividing the number of “knowing hire,” “continuing to employ,” and substantive verification violations by the total number of Forms I-9 presented for inspection to determine a violation percentage. This percentage determines the base fine amount as listed in the below tables. The ICE Special Agent or Forensic Auditor then applies an enhancement matrix to the specific facts of the case which may increase or decrease the recommended fine by up to 25%.

***Assessment Criteria for Civil Money Penalties***

Typically, the date of the violation shall be the date ICE conducted the Form I-9 inspection and not the date the Form I-9 was completed by the employer.

**Knowing Hire / Continuing to Employ Fine Schedule  
(For violations occurring on or after 3/27/08)**

<b>Knowing Hire and Continuing to Employ Violations</b>	<b>Standard Fine Amount</b>		
	<b>First Tier \$375 - \$3,200</b>	<b>Second Tier \$3,200 - \$6,500</b>	<b>Third Tier \$4,300 - \$16,000</b>
<b>0% - 9%</b>	<b>\$375</b>	<b>\$3,200</b>	<b>\$4,300</b>
<b>10% - 19%</b>	<b>\$845</b>	<b>\$3,750</b>	<b>\$6,250</b>
<b>20% - 29%</b>	<b>\$1315</b>	<b>\$4,300</b>	<b>\$8,200</b>
<b>30% - 39%</b>	<b>\$1785</b>	<b>\$4,850</b>	<b>\$10,150</b>
<b>40% - 49%</b>	<b>\$2255</b>	<b>\$5,400</b>	<b>\$12,100</b>
<b>50% or more</b>	<b>\$2,725</b>	<b>\$5,950</b>	<b>\$14,050</b>

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The case agent should divide the number of “knowing hire” and “continuing to employ” violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage. This percentage provides a base fine amount depending on whether this is a First Tier (1<sup>st</sup> time violator), Second Tier (2<sup>nd</sup> time violator), or Third Tier (3<sup>rd</sup> or subsequent time violator) case. The standard fine amount listed in the table relates to each “knowing hire” and “continuing to employ” violation.

**Knowing Hire / Continuing to Employ Fine Schedule  
(For violations occurring between 9/29/99 and 3/27/08)**

<b>Knowing Hire and Continuing to Employ Violations</b>	<b>Standard Fine Amount</b>		
	<b>First Tier \$275 - \$2,200</b>	<b>Second Tier \$2,200 - \$5,500</b>	<b>Third Tier \$3,300 - \$11,000</b>
<b>0% - 9%</b>	<b>\$275</b>	<b>\$2,200</b>	<b>\$3,300</b>
<b>10% - 19%</b>	<b>\$600</b>	<b>\$2,750</b>	<b>\$4,600</b>
<b>20% - 29%</b>	<b>\$925</b>	<b>\$3,300</b>	<b>\$5,900</b>
<b>30% - 39%</b>	<b>\$1250</b>	<b>\$3,850</b>	<b>\$7,200</b>
<b>40% - 49%</b>	<b>\$1575</b>	<b>\$4,400</b>	<b>\$8,500</b>
<b>50% or more</b>	<b>\$1,900</b>	<b>\$4,950</b>	<b>\$9,800</b>

The case agent should divide the number of “knowing hire” and “continuing to employ” violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage. This percentage provides a base fine amount depending on whether this is a First Tier (1<sup>st</sup> time violator), Second Tier (2<sup>nd</sup> time violator), or Third Tier (3<sup>rd</sup> or subsequent time violator) case. The standard fine amount listed in the table relates to each “knowing hire” and “continuing to employ” violation.

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**Substantive / Uncorrected Technical Violation Fine Schedule**

<b>Substantive Verification Violations</b>	<b>Standard Fine Amount</b>		
	<b>1st Offense \$110 - \$1100</b>	<b>2nd Offense \$110 - \$1100</b>	<b>3rd Offense + \$110 - \$1100</b>
<b>0% - 9%</b>	<b>\$110</b>	<b>\$550</b>	<b>\$1,100</b>
<b>10% - 19%</b>	<b>\$275</b>	<b>\$650</b>	<b>\$1,100</b>
<b>20% - 29%</b>	<b>\$440</b>	<b>\$750</b>	<b>\$1,100</b>
<b>30% - 39%</b>	<b>\$605</b>	<b>\$850</b>	<b>\$1,100</b>
<b>40% - 49%</b>	<b>\$770</b>	<b>\$950</b>	<b>\$1,100</b>
<b>50% or more</b>	<b>\$935</b>	<b>\$1,100</b>	<b>\$1,100</b>

The case agent should divide the number of substantive violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage. Agents should remember that substantive violations include failures to prepare and present Forms I-9. If there are any technical or procedural violations that remain uncorrected after the 10 day allotted period or that fall within any of the exceptions to 8 U.S.C. § 1324a(b)(6), those violations should be added to the substantive violations for the purpose of determining the overall percentage of violations. The standard fine amount in the table relates to each substantive or uncorrected technical violation.

The overall percentage of substantive violations provides a standard base fine amount depending on whether or not this is the employer's first, second, or subsequent offense. 8 U.S.C. § 1324a(e)(5) does not differentiate between a first or subsequent offense for paperwork violations; however, offenses committed after an employer has been previously the subject of a NIF or Warning Notice are considered more severe as evidenced by the increased penalties in the fine schedule.

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Note: If an employer fails to timely correct technical violations after being provided notice to do so, such failure effectively increases the overall percentage of violations and will generally result in an increase of their civil money penalty.

### *Memorandum to Case File*

8 U.S.C. § 1324a(e)(5) requires that ICE consider five factors in determining a civil money penalty for violation of the verification, or paperwork, requirements. These factors will also be considered for enhancing or mitigating the penalty with respect to “knowing hire” and “continuing to employ” violations. No substantive hiring or verification violations may be mitigated below the statutory minimum fine amount.

Each of these five factors contains sub-factors that must be considered and addressed in a Memorandum to Case File prepared by the case agent or auditor and made a part of the investigative case file and NIF file. The case agent or auditor will use this memorandum to enhance or mitigate the recommended fine placed on the Application for Notice of Intent to Fine. It is extremely important when preparing the Memorandum to Case File that the case agent or auditor clearly and concisely addresses all relevant aggravating, mitigating, or neutral factors in a manner that is consistent and preserves his or her thought process.

The five factors and examples of sub-factors are listed below.

1. The size of the business:
  - a. business revenue or income;
  - b. amount of payroll;
  - c. number of employees;
  - d. length of time in business; and
  - e. resources available for compliance.
2. The employer’s good faith efforts to comply:
  - a. cooperation with the Form I-9 inspection;
  - b. any criminal culpability on the part of the employer;
  - c. any evidence of forgery or alteration of Forms I-9 (e.g., backdating)
  - d. overall level of compliance (i.e., minor errors vs. significant deficiencies); and
  - e. whether the violation is reflective of the employers overall practice with respect to compliance or an aberration.
3. The seriousness of the violation:
  - a. types of violations present (i.e. knowing hire vs. technical failure);
  - b. number of unauthorized alien workers;
  - c. percentage of Forms I-9 with violations; and
  - d. fraud and/or falsification.
4. Whether or not the violation involved unauthorized alien employees:
  - a. number of unauthorized aliens as a percentage of the workforce;

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- 5. The employer’s history of previous violations:
  - a. prior fines or penalties; and
  - b. prior notification of non-compliance (Warning Notice, Adjusted Compliance).

The Memorandum to Case File must address the five factors listed above. The case agent or auditor, in consultation with OI supervisory personnel, will make a recommendation with respect to each factor identifying it as aggravating, mitigating, or neutral. The sub-factors listed above are examples that the agent or auditor might use to assist them in crafting their narrative and making their recommendation but should not be considered an exhaustive list. The agent or auditor is neither required nor expected to address each sub-factor but should draft their memorandum relative to the specific facts of their case.

Enhancement Matrix

The following matrix will be used to enhance or mitigate the OI recommended fine contained on the Application for Notice of Intent to Fine.

<u>Factor</u>	<u>Aggravating</u>	<u>Mitigating</u>	<u>Neutral</u>
Business size	+ 5%	- 5%	+/- 0%
Good faith	+ 5%	- 5%	+/- 0%
Seriousness	+ 5%	- 5%	+/- 0%
Unauthorized Aliens	+ 5%	- 5%	+/- 0%
History	<u>+ 5%</u>	<u>- 5%</u>	<u>+/- 0%</u>
Cumulative Adjustment	+ 25%	- 25%	+/- 0%

For example, if in a particular case the agent or auditor determines that three of the above factors are mitigating (- 15%) while two are aggravating (+ 10%), then the final fine amount determined from the fine schedule would be mitigated downward 5%. This matrix allows the fine to be enhanced or mitigated no more than 25% in either direction.

Any enhancement or mitigation must be applied separately to the **Knowing Hire / Continuing to Employ Fine Schedule** and the **Substantive / Uncorrected Technical Violations Fine Schedule** since it is possible that an enhancement or mitigation could result in a final fine that is above or below the statutory minimum or maximum. If this occurs, the case agent or auditor should use the statutory minimum or maximum in computing the final recommended fine.

***Determination of Recommended Fine***

The cumulative recommended fine for the Application for Notice of Intent to Fine is determined by adding the amount derived from the **Knowing Hire / Continuing to Employ Fine Schedule** (plus enhancement or mitigation) with the amount derived from the **Substantive / Uncorrected Technical Violations Fine Schedule** (plus enhancement or mitigation). This amount will be placed in Block D on the I-761.



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While going through the process of determining the cumulative recommended fine, the case agent or auditor should take note of the number of violations by type (i.e., “knowing hire,” “continuing to employ,” failure to prepare and present, substantive paperwork, and uncorrected technical violations). This should be done because each Count must list the number of violations and the fine for those specific violations in the last paragraph of the charging document.

### ***Charging Documents***

Charging documents are the mechanism by which an employer is advised of the allegations and charges being lodged against them in a NIF. The last paragraph of each charging document lists the fine by violation type as determined by the fine schedules. The case agent or auditor is responsible for preparing the charging documents with respect to each Count. As previously discussed, the applicable Counts are “knowing hire,” “continuing to employ,” failure to prepare and present, substantive paperwork violations, and technical paperwork violations (if uncorrected after the 10 day allotted period or if they fall within one of the exceptions). Any questions regarding the preparation of charging documents should be coordinated with the local OCC.

### ***Structure of NIF File (Top to Bottom)***

1. I-763 Notice of Intent to Fine
2. I-761 Application for Notice of Intent to Fine
3. Memorandum to Case File for Determination of Civil Money Penalty
4. NIF Charging Documents
5. Evidence Summary List
6. Evidence and Exhibits
  - a. Marked copies of Forms I-9 separated by violation type;
  - b. Copy of Certificate of Incorporation or Partnership;
  - c. Evidence of any prior educational visits; and
  - d. ROIs.

After consultation with the OCC, the completed I-763, I-761 and NIF file will be forwarded through the OI GS to the appropriate SAC, or designee not below the level of an ASAC, with signatory authority. Both the GS and the SAC, or their designee not below the level of an ASAC, are responsible for reviewing the NIF file to ensure that all charges alleged against the employer are properly supported by the evidence contained in the file. The I-763, I-761 and NIF file will then be forwarded to the local OCC for legal concurrence.

### ***Disposition of Forms I-9***

Forms I-9 that contain substantive or uncorrected technical violations should be retained until the issuance of a Final Order or until the NIF is withdrawn. Once a Final Order is issued or the NIF is withdrawn, the case agent or auditor should attach copies of the marked Forms I-9 to the deficient originals and return both to the employer. The case agent or auditor will advise the employer to correct the Forms I-9 and retain the marked copies with the originals as evidence of their compliance. Return of the original Forms I-9 will be documented on CBP Form 6051R with a copy provided to the employer and the original placed in the investigative case file. The

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case agent or auditor will request that the employer provide written notice to ICE once the deficient Forms I-9 have been corrected or provide an explanation why they cannot reasonably be corrected. This notice, if provided by the employer, shall be placed in the investigative case file.

### Case Documentation

Once a WSE Audit has been initiated, ICE Special Agents or Forensic Auditors must document the Audit in TECS-II (b) (7)(E)

[REDACTED]

(b) (7)(E)

In accordance with section 6.4.1 of the Case Management Handbook, enforcement statistics are required to be entered in TECS-II after the occurrence of the enforcement activity. Statistics must be entered no later than 5 days after the occurrence of the enforcement activity or upon being notification. Receipt of the following information will trigger the 5 day period and require the modification of the case record (b) (7)(E)

1. The receipt of the I-9's from the target business;
2. The issuance of a NIF including the date and amount;
3. The issuance of a Final Order with the date and amount;
4. Completion of the audit (b) (7)(E)

Case File Contents:

Copies of all pertinent information to include the Notice of Inspection, I-9's, correspondence, worksheets, Notice of Intent to Fine, Suspect Document Letters, Memorandum to Case File, and Final Orders need to be maintained in the hard copy of the case file.

### Responsibilities of the Office of Chief Counsel

Upon receipt of a properly prepared I-763, I-761 and NIF file, the Chief Counsel, or designee, will have 30 days to review for legal sufficiency. The OCC may request that the submitting OI field office conduct additional investigation and/or request changes to the original NIF Counts if the OCC believes that the evidence presented does not support the proposed charges. The OCC may also request modifications to the Memorandum to Case File to ensure that both the OI and the OCC are in agreement with respect to any enhancements or modifications to the cumulative fine. The local OI field offices should work closely with OCC staff attorney(s) responsible for handling NIFs to ensure that requests for additional investigation and/or modifications are kept

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to a minimum. All requests from the OCC to OI field offices for additional investigation or modifications to the original NIF Counts should be routed through the SAC or their designee.

Once the OCC or their designee has reviewed the I-763 for legal sufficiency, the complete file will be forwarded to the SAC, or their designee not below the level of an ASAC, for concurrence and signature. A NIF may be issued by any officer authorized to issue a Notice to Appear as defined in 8 C.F.R. § 239.1(a); however, this responsibility will not be delegated below the level of an ASAC. The OCC will then place the NIF case into the General Counsel Electronic Management System (GEMS) project notebook. The Special Agent in Charge (SAC), or designee, will have limited query access to GEMS in order to track the status of cases.

The I-763 will be returned to the OI field office for service of the NIF upon the employer. The NIF must be served by the local field office upon the employer within five business days of signature by the SAC or their designee. The NIF must be served in person upon the owner, designee, senior management official, registered agent, or other person authorized to accept legal process on behalf of the employer. The NIF may be served by an ICE Special Agent or Forensic Auditor; however, when directing an auditor to serve a NIF, the GS must take into consideration issues of OI employee safety especially in cases where the NIF contains a substantial fine. It is generally preferred that the NIF be served by a Special Agent. Evidence of service must be contained in the investigative case file, NIF file, and documented in an ROI.

Contents of the NIF

The employer (person or business entity) is referred to as the Respondent in the NIF. The NIF must contain the basis for the charges against the respondent, the statutory provisions alleged to have been violated, and the penalty that will be imposed. The NIF advises the respondent that they may be represented by counsel of their own choice at no cost to the government, that any statements given may be used against them, that they have the right to a hearing before an Administrative Law Judge pursuant to 5 U.S.C. § 554-557, and that such request must be made within 30 days of receipt of the NIF. ICE will issue a Final Order (I-764) within 45 days of service of the NIF if a written request for a hearing is not timely received. There is no appeal from this Final Order.

Settlement Agreements

Upon receipt of a NIF, an employer may wish to enter into negotiations with ICE to reach a settlement regarding the charges or fine imposed. All negotiations conducted with an employer regarding the settlement of a NIF will be conducted by the OCC. The OCC is encouraged to request input from the OI during this process but that input will be merely advisory.



(b) (7)(E)

A provision should be included in any settlement agreement that the employer shall furnish its business and financial records for inspection by the OI should the employer fail to fulfill the terms and conditions of the agreement. In any matter that proceeds to a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO), the OCC shall request that the Administrative Law Judge add language to the order requiring that the employer furnish its business and financial records to the OI should the employer fail to comply with the terms and conditions of the OCAHO order.

#### Final Order

A Final Order (I-764) must be issued for each case in which a NIF is issued that has not been withdrawn. The OCC is responsible for preparing the I-764. Once prepared, the I-764 will be forwarded to the SAC or their designee for signature. A Final Order may be signed and issued by any officer defined in 8 C.F.R. § 239.1(a); however, this authority will not be delegated below the level of an ASAC. Once signed, the Final Order will be forwarded to the OI field office for service upon the employer. The Final Order must be served in person upon the owner, designee, senior management official, or other person authorized to accept legal process on behalf of the business entity. The Final Order must be served within three days of receipt from the SAC or their designee. A Final Order must be served by an ICE Special Agent. A copy of the Final Order and proof of service must be retained in the investigative case file and NIF file.

#### Contents of Final Order

The Final Order informs the Respondent that a NIF, a copy of which is attached, has been served on them and that the Respondent had the opportunity to contest the NIF by requesting a hearing before an Administrative Law Judge, but failed to do so. A Final Order is also issued in all cases where the employer enters into a settlement agreement with ICE or the OCAHO issues a decision and order. The Respondent will be ordered to pay a civil money penalty in the amount specified in the Final Order. If the Respondent violated 8 U.S.C. § 1324a(1)(A) (“knowing hire”) or § 1324(a)(2) (“continuing to employ”), an order to the Respondent to cease and desist from the violation(s) is added to the Final Order.

### **Collection of Civil Money Penalties**

Within five days of the service of a Final Order upon an employer, the case agent, or other designated OI employee, is responsible for submitting a completed financial package to the Burlington Finance Center (BFC) for collection of civil money penalties. The financial package consists of the following items:

- Copy of the Final Order (I-764);
- Copy of the Notice of Intent to Fine (I-763), to include charging documents;
- Copy of the Settlement Agreement (if applicable);

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- Copy of the OCAHO decision and order (if applicable); and
- Memorandum to the Burlington Finance Center containing the following:
  - Number of violations delineated by type with the corresponding fine;
  - Name of the person or business entity;
  - Address of the person or business entity;
  - EIN, TIN, or SSN of the person or business entity;
  - Point of contact (if a business entity); and
  - Any telephone numbers or email address associated with the person or business entity.

ICE OI employees should not accept payment for any civil money penalties. The correct address for payment will be listed on the Final Order. Payment should be made in the form of a cashier's check, bank check, or money order made payable to "U.S. Immigration and Customs Enforcement" and sent to:

Burlington Finance Center  
Attn: Employer Sanctions  
166 Sycamore Street  
Williston, VT 05495

The BFC shall not mitigate a civil money penalty or make any changes to a settlement agreement or OCAHO order without first obtaining the concurrence of the originating OI SAC and OCC.

**FAILED TO ENSURE THAT EMPLOYEE PROPERLY COMPLETED SECTION 1 AND/OR FAILED TO PROPERLY COMPLETE SECTION 2 OR 3 OF THE EMPLOYMENT ELIGIBILITY VERIFICATION FORM (FORM I-9) (UNCORRECTED TECHNICAL PAPERWORK VIOLATIONS)**

A. The Respondent hired the following individuals for employment in the United States:

- 1.
- 2.
- 3.

B. The Respondent hired the individuals listed in paragraph A after November 1986;

C. The Respondent was served with a Notification of Technical or Procedural Failures Letter which included copies of Forms I-9 that contain technical or procedural failures to meet the verification requirements of § 274A(b) of the Immigration and Nationality Act;

D. The Respondent was provided at least ten business days from the date of service of the Notification of Technical or Procedural Failures Letter to correct the technical or procedural verification failures contained in the Forms I-9 that were returned to the Respondent with the Notification of Technical or Procedural Failures Letter; and

E. The Respondent failed to properly correct the technical or procedural verification failures contained in the Forms I-9 that were returned to the Respondent with the Notification of Technical or Procedural Failures Letter for the individuals listed in paragraph A.

**WHEREFORE**, it is charged that the Respondent is in violation of § 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or entity to hire, for employment in the United States, an individual without complying with the requirements of § 274A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b).

The penalty for this Count is a civil money penalty of \$ \_\_\_\_\_ for each violation relating to the individuals listed in paragraph A.

The total penalty for this Count is a civil money penalty of \$ \_\_\_\_\_.

**FAILED TO ENSURE THAT EMPLOYEE PROPERLY COMPLETED SECTION 1 AND/OR FAILED TO PROPERLY COMPLETE SECTION 2 OR 3 OF THE EMPLOYMENT ELIGIBILITY VERIFICATION FORM (FORM I-9) (SUBSTANTIVE PAPERWORK VIOLATIONS)**

- A. The Respondent hired the following individuals for employment in the United States:
  - 1.
  - 2.
  - 3.
- B. The Respondent hired the individuals listed in paragraph A after November 6, 1986;
- C. The Respondent failed to ensure that the individuals listed in paragraph A properly completed Section 1 of the Employment Eligibility Verification Form (Form I-9); and/or
- D. The Respondent failed to properly complete Section 2 or Section 3 of the Form I-9 for the individuals listed in paragraph A.

**WHEREFORE,** it is charged that the Respondent is in violation of § 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or entity to hire, for employment in the United States, an individual without complying with the requirements of § 274A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b).

The penalty for this Count is a civil money penalty of \$ \_\_\_\_\_ for each violation relating to the individuals listed in paragraph A.

The total penalty for this Count is a civil money penalty of \$ \_\_\_\_\_.

**FAILED TO PREPARE AND/OR PRESENT THE EMPLOYMENT ELIGIBILITY  
VERIFICATION FORM (FORM I-9)**

A. The Respondent hired the following individuals for employment in the United States:

- 1.
- 2.
- 3.

B. The Respondent hired the individuals listed in paragraph A after November 6, 1986; and

C. The Respondent failed to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for the individuals listed in paragraph A after being requested to do so by an authorized agency of the United States.

**WHEREFORE**, it is charged that the Respondent is in violation of § 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or entity to hire, for employment in the United States, an individual without complying with the requirements of § 274A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b).

The penalty for this Count is a civil money penalty of \$ \_\_\_\_\_ for each violation relating to the individuals listed in paragraph A.

The total penalty for this Count is a civil money penalty of \$ \_\_\_\_\_.



**KNOWINGLY CONTINUED TO EMPLOY**

- A. The Respondent hired the following individuals for employment in the United States:
  - 1.
  - 2.
  - 3.
- B. The Respondent hired the individuals listed in paragraph A after November 6, 1986;
- C. The individuals listed in paragraph A were, or became, aliens not authorized for employment in the United States; and
- D. The Respondent continued to employ the individuals listed in paragraph A in the United States, knowing that they were, or had become, unauthorized aliens with respect to such employment.

**WHEREFORE**, it is charged that the Respondent is in violation of § 274A(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(2) which render it unlawful for a person or other entity, after hiring an alien for employment in the United States after November 6, 1986, to continue to employ the alien in the United States knowing that the alien is (or has become) an unauthorized alien with respect to such employment.

The penalty for this Count is a civil money penalty of \$ \_\_\_\_\_ for each violation relating to the individuals listed in paragraph A and an Order to Cease and Desist from violating § 274A(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(2).

The total penalty for this Count is a civil money penalty of \$ \_\_\_\_\_.

**KNOWINGLY HIRED**

The Respondent hired the following individuals for employment in the United States:

- 1.
- 2.
- 3.

- A. The Respondent hired the individuals listed in paragraph A after November 6, 1986;
- B. At the time the Respondent hired the individuals listed in paragraph A, they were aliens not authorized for employment in the United States; and
- C. The Respondent hired the individuals listed in paragraph A knowing that they were aliens not authorized for employment in the United States.

**WHEREFORE**, it is charged that the Respondent is in violation of § 274A(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(A), which renders it unlawful, after November 6, 1986, for a person or other entity to hire, for employment in the United States, an alien knowing that the alien is not authorized for employment in the United States.

The penalty for this Count is a civil money penalty of \$ \_\_\_\_\_ for each violation relating to the individuals listed in paragraph A and an Order to Cease and Desist from violating § 274A(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(A).

The total penalty for this Count is a civil money penalty of \$ \_\_\_\_\_.

MEMORANDUM TO CASE FILE  
DETERMINATION OF CIVIL MONEY PENALTY

(b) (7) (E)



(b) (7) (E)



(b) (7) (E)

(b) (7) (E)