Office of Investigations

U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Immigration and Customs Enforcement

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MEMORANDUM FOR: Assistant Director
Deputy Assistant Directors
Special Agents in Charge

FROM: Marcy M. Forman
Director

SUBJECT: Revised Administrative Fine Policy Procedures

On May 28, 2008, the ICE Office of Investigations (OI) Worksite Enforcement (WSE) Unit established new guidelines for the administrative Form I-9 audit process, by publishing the *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* (Guide). This Guide was designed to assist ICE Special Agents and Forensic Auditors in conducting an administrative fine investigation.

Since its implementation, the WSE Unit has monitored and communicated with ICE OI field offices in order to determine the effectiveness of the Guide. As a result, the WSE Unit in coordination with the Office of Principal Legal Advisor (OPLA) has made the following modifications to the Guide:

- Added three additional technical violations:
  - Use of the Spanish version of the Form I-9 except in Puerto Rico
  - Failure to state "individual underage 18" in Column B for employees under the age of 18 using only a list C document
  - Failure to state "special placement" in Column B for employees with a disability using only a list C document.

  These changes can be found on page 12 of the Guide.

- Defines an employer's failure to date Section 2 of the Form I-9 as a substantive rather than a technical violation. This change can be located on page 15 of the Guide.

- Form I-9 fine amounts to be calculated based on the total of Form I-9s that should have been filled out (number of employees), rather than the total number of Form I-9s submitted by the employer. This change can be found on pages 29 and 30 of the Guide.

Pursuant to the *Case Management Handbook*, a Special Agent and/or Forensics Auditor are required to update TECS II with administrative fine case closing information. Also, a standard record of proceeding was developed for administrative fine case folders requiring specific documents be maintained in record order, and ensuring that administrative fine cases are entered into TECS II with subject records. These changes can be found on page 33 of the Guide.

- Require field offices to use consistent charging language and provides sample *Memorandum to Case File* approved by OPLA and the WSE Unit. These changes can be found beginning on page 38 of the Guide.

Please forward the attached revised guidance to all OI personnel within your respective areas of responsibility and ensure that it is implemented immediately. Questions regarding this guidance should be directed to [redacted] WSE Section Chief, at (202) 732-[redacted] or [redacted]@dhs.gov.

U.S. Immigration and Customs Enforcement

Worksite Enforcement

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

November 25, 2008

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 by identifying patterns of identity theft, identifying human resources personnel providing fraudulent documents to unauthorized alien employees, or identifying a pattern and practice of employing unauthorized aliens. The particular circumstances of a case should be carefully evaluated to determine the appropriate time and method to conduct an inspection.

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

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

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; however, in cases where the NOI is served by certified mail or personally served by OI employees other than Special Agents, the appropriate GS must take into account the lack of opportunity to interview the employer and/or their human resources manager, the potential loss of incriminating statements, and issues of OI employee safety before directing such action. It is generally preferred that the NOI be personally served by an ICE Special Agent.

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) In cases where it is suspected that the employer may not be preparing Forms I-9 for its employees, it is recommended that the agent or auditor place a surreptitious mark on the front of the sample Form I-9 contained within the M-274 to identify instances where the employer may be backdating the form. (http://www.uscis.gov/files/form/i-9.pdf)

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

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. The agent or auditor will not document the receipt of Forms I-9 as part of an administrative inspection in the Search/Arrest/Seizure Module of the Seized Asset Case Management System SEACATS; however, the case agent is responsible for securing and maintaining the originals free from potential alteration or loss during the inspection process.

Interview of Human Resources Manager / Responsible Hiring Official

Agents should attempt to conduct an interview of the employer or the employer's human resources manager (HRM) or responsible hiring official (RHO) at the time of service of the NOI to develop information regarding the employers hiring practices and knowledge regarding the employment eligibility verification requirements of Title 8. It is important to develop this information at the beginning of the overt administrative investigation to preclude potential defenses should the investigation later reveal criminal or substantive violations of law.

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

1) The identity of the person(s) responsible for hiring employees for the business;

2) The employer's, HRM's, or RHO's knowledge of the laws governing employment eligibility verification and the provisions regarding preparation of the Form I-9;

3) The business entity's procedures for requesting production of documents from new employees used to establish identity and employment eligibility at the time of hire;

4) The identity and position of key managers and corporate officers of the business entity or employer;

5) The identity of any recruiters or referrers for a fee used by the entity or employer;

6) The existence of any internal guidelines or policies issued by the employer with respect to compliance with the employment eligibility verification process (these records may need to be obtained via issuance of an administrative subpoena or criminal search warrant at a future date, if warranted); and

7) Clarification of the "independent contractor" issue regarding employers who regularly use independent contractors in the normal course of business along with the existence of any records showing evidence of an independent contractor relationship.

ICE Special Agents should be mindful that the interview of the HRM or RHO is consensual. If evidence of criminal conduct or culpability is developed during the interview, agents may be required to provide appropriate Miranda warnings. Forensic Auditors should not conduct investigative interviews if they are directed to serve an NOI.

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. A determination of which process to use must be based on an analysis of factors such as the likelihood of an employer complying with an administrative subpoena, the willingness of the local U.S. Attorney's Office to seek enforcement of the administrative subpoena, and the time involved in enforcing the administrative subpoena if it is not honored by the employer. If, at any time during the investigation there is an indication that evidence may be altered or destroyed, the agent should seek to obtain and execute a search warrant without delay.

- 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.

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[1] 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.

[1] 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.

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. ICE Special Agents should be alert to practices that may reflect a scheme related to indemnification such as kickbacks or suspicious or irregular contract employment arrangements.

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

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.

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.

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;

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:

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

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

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[2]. 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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[2] 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."

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.

A statement in a question and answer format is more probative than a statement in paragraph form drafted by the agent. "Yes" or "No" answers resulting from leading questions by the agent are of little probative value. Questions should elicit descriptive answers. The statement must quote the answers of the declarant using the same vocabulary and grammar. If a relevant statement is made but it is not possible to obtain a sworn statement, the agent should record the statement in an ROI as soon as possible. A statement made standing alone without corroborative evidence is generally insufficient to support a charge even if the statement is sworn. The amount of corroborative evidence that is necessary to support a charge is case specific.

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). Often, this information is obtained during the interview of the HRM or RHO at the time of service of the NOI upon the employer. 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, was hiring part of the employee's duties? Did the employee receive instructions from the employer on how to conduct hiring? What were the instructions?

4. Sworn statements from unauthorized aliens which contain information such as:

a) how the alien came to the U.S. and the alien's status in the U.S.;

b) the name of the person or entity who employs the alien;

c) how the alien obtained the job;

d) whether the alien used an alias on the job;

e) the name of the person who hired the alien (making sure that there is corroborative proof (e.g., payroll records) that the person who hired the alien was an employee of the company if he or she was not the owner);

f) when the hire took place and under what circumstances;

g) the alien's pay and whether the alien was paid overtime;

h) whether the alien was paid on or off the books;

i) whether the alien completed a Form I-9, what documents the alien showed for the Form I-9, and how the alien obtained the documents;

j) whether the person who hired the alien knew that the alien was unauthorized and, if so, how and when that person acquired that knowledge;

k) whether the alien was treated differently from authorized employees, such as that the alien received lower pay, did not receive overtime pay, was housed by the employer, or was driven to work by the employer;

l) the nature of the relationship between the alien and the employer at the place of employment and outside the place of employment;

m) whether the alien is related to the employer or hiring employee; and

n) whether the alien speaks English; if not, whether a translator was used; if one was not used, whether the alien understood the questions being asked (and what language was used for the interview).

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:

a) the alien resides with the employer or in a home provided by the employer with other unauthorized aliens;

b) the alien receives pay that is lower than authorized employees or the amount permissible by law;

c) the alien's name is not listed on the payroll;

d) the employer did not complete a Form I-9 for the alien and other unauthorized aliens, but completed Forms I-9 for authorized aliens;

e) the employer failed to request the alien to present employment eligibility documentation;

f) the employer did not complete a Form I-9 for the alien until after the NOI was served on the employer;

g) the Form I-9 was falsified by the employer;
h) a Form I-9 was completed for the alien and certain portions of the Form I-9 for this alien and other unauthorized aliens were not completed creating an obvious pattern;

i) the employer arranged for the alien and other unauthorized aliens to be taken to and from work;

j) the employer arranged for the alien to come to the United States and work for him or her, or the employer met the alien at the border/port of entry;

k) the alien used false documents supplied by the employer for the Form I-9; or

l) the employer previously filed an ETA-750, Form I-129, or Form I-140 on behalf of one or more alien employees.

Retain the Record of Deportable/Inadmissible Alien (Form I-213) in the investigative case file and the NIF file along with the alien's statement. The NIF file is provided to the OCC and should contain copies of all the relevant reports and evidence used to support the NIF. The contents of a NIF file are described on Page 32. Obtain an exemplar of the alien's signature. If the employer subsequently presents a Form I-9 for the alien, the agent can then compare the signature exemplar to the signature in Section 1 of the Form I-9 to determine whether the alien in fact signed the form.

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

ICE Special Agents, Forensic Auditors, Criminal Research Specialists, and any other designated Office of Investigations (OI) employees involved in conducting a Form I-9 inspection should follow these steps:

1. Document receipt of the Forms I-9 on a CBP Form 6051 and provide a copy to the employer.

2. Make copies of all original Forms I-9 and any attachments. All marking will be done on the copies. The case agent is responsible for securing and maintaining the original Forms I-9 free from alteration or loss during the inspection process.

3. Review for substantive violations.

    a. Failure to prepare or present Forms I-9.

        i. To identify failure to prepare and present violations, compare Forms I-9 presented against payroll records, IRS Quarterly Tax Statements, SSA "No Match" letters (if secured), state wage reports, Forms I-213 of apprehended aliens, and other investigative information such as pre-inspection surveillance of the business entity.

    b. Determine whether to conduct an inspection of all Forms I-9 presented or to inspect a sampling of the forms. This determination should be based on the number of Forms I-9 presented versus the resources available to conduct the inspection.

i. If the sampling method is selected, the method should remain consistent throughout the process (i.e. inspect every 3rd, 5th, or 10th form).

ii. If sampling reveals any substantive violations, a 100% survey of the Forms I-9 must be conducted.

4. Review for technical and procedural violations.

5. Mark all violations whether substantive or technical on the copy of the Form I-9. Marking must be done by highlighting or circling the violation in ink.

6. Conduct DHS, ICE, and commercial record checks on each Form I-9 inspected to identify fraudulent immigration documents and indicators of identity theft and/or fraud committed by unauthorized aliens in order to gain employment.

7. Separate the Forms I-9 by violation type (i.e. "knowing hire," "continuing to employ," failure to prepare and present, substantive paperwork violations, or technical paperwork violations). It is not necessary to further separate the violations into their sub-violation types (e.g., no employee signature in Section 1, improper document reviewed in Section 2).

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

If the Form I-9 inspection reveals evidence of the presence of unauthorized aliens within the employer workforce, the ICE Special Agent is obligated to take affirmative and timely steps to address this issue. The presence of unauthorized aliens may be indicative of criminal culpability on the part of the employer or may simply indicate that the unauthorized alien committed criminal acts, such as providing fraudulent immigration documents or assuming the identity of a U.S. citizen, in order to gain employment. The administrative arrest and interview of suspected unauthorized aliens, the introduction of confidential informants and undercover agents into the business entity, consensual monitoring, review of Suspicious Activity reports, surveillance, and the vetting of employee identifiers though the SSA and Federal Trade Commission, Bureau of Consumer Protection are all investigative techniques that may be used to advance any potential criminal investigation.

Only in cases where there is no indication of the presence of unauthorized aliens within the employer workforce is the case agent permitted to proceed directly to the administrative disposition phase of the Form I-9 inspection without taking further investigative action.

Disposition of Administrative Case

When it is determined that there is no evidence of criminal culpability on the part of the employer or the local U.S. Attorney's Office has declined criminal prosecution of the employer, the case agent or auditor shall move the Form I-9 inspection into the administrative disposition phase. Based on the specific circumstances of the case, this phase may involve a large scale enforcement operation at the employer's worksite to arrest unauthorized aliens or may involve the targeted arrest of a limited number of unauthorized aliens, at or away from the employer's worksite, and the displacement of the remaining aliens from the employer's workforce. This phase also includes the issuance of a NIF, Warning Notice, or a finding of compliance.

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

When an employer is found to have suspected unauthorized aliens within their workforce, the case agent shall take affirmative and timely steps to administratively arrest some or all of those aliens. This may be limited in scope or involve a large scale enforcement operation depending on the nature of the case and available resources. The case agent should seek to bring criminal charges against the individual aliens, as appropriate. Upon the arrest of an unauthorized alien employee(s), a "Notice of Unauthorized Aliens" letter will be sent to the employer notifying them that ICE has determined that employee(s) to be an unauthorized alien and advises the employer of the potential criminal and civil penalties should they continue to employ that individual(s).

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

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

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

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). Although this is permitted by law and regulation, OI field offices are discouraged from issuing Warning Notices that contain technical violations since failure to correct the technical violations should result in the case agent or auditor filing an application for a NIF.

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. Generally, when more than 50% of the Forms I-9 inspected exhibit substantive errors, without regard to whether or not those errors resulted in the hire of unauthorized aliens, the case agent or auditor should seek a NIF.

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). Warning Notices may be issued at the discretion of the OI without OCC concurrence; however, it is recommended that the OI coordinate with appropriate OCC counsel to ensure that the issuance of a Warning Notice will not jeopardize or affect other civil actions occurring within the OI SAC offices or any national initiatives.

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.

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 be the employer.

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

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

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 (1st time violator), Second Tier (2nd time violator), or Third Tier (3rd 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)

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

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 (1st time violator), Second Tier (2nd time violator), or Third Tier (3rd or subsequent time violator) case. The standard fine amount listed in the table relates to each "knowing hire" and "continuing to employ" violation.

Substantive / Uncorrected Technical Violation Fine Schedule

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

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.

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.

(b) (7)(E) [redacted]

3. (b) (7)(E) [redacted]

5. (b) (7)(E) [redacted]

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.

Factor	Aggravating	Mitigating	Neutral
Business size	+ 5%	- 5%	+/- 0%
Good faith	+ 5%	- 5%	+/- 0%
Seriousness	+ 5%	- 5%	+/- 0%
Unauthorized Aliens	+ 5%	- 5%	+/- 0%
History	+ 5%	- 5%	+/- 0%
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

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

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

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 by opening a formal record utilizing the case opening module (CM79) and completing the worksite enforcement fields found under PF11. Detailed information related to the opening of cases and use of the primary case codes can be found in chapter 5 of the Guide to Worksite Enforcement Investigation.

ICE Special Agents or Forensic Auditors must also enter a subject or business record for the company being audited, linking this record to the case. As the audit progresses, it is the responsibility of the subject record owner to ensure that the most current information available is included in the subject / business record. This also applies to the requirement of updating the case record to reflect the eventually outcome of the administrative audit.

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 using the CM79 function in TECS-II.

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 (the administrative disposition field under PF11 will be updated);

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

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.

If a proposed negotiated settlement reduces the fine set forth in the NIF by more than 10%, the OCC must request the concurrence of the appropriate OI SAC prior to the OCC and the employer entering into such an agreement. The OCC is responsible for documenting the rational for any reduction in proposed fine which will be provided to the SAC for inclusion in the investigative case file and will also be documented in the NIF file. If the SAC does not concur with the proposed settlement agreement, the SAC and Chief Counsel are encouraged to negotiate

a compromise locally. If the SAC and Chief Counsel are unable to reach an agreement on a proposed NIF settlement, the SAC will elevate the matter to the Director of Investigations (or designee) which will coordinate with OPLA to resolve the issue.

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);

- 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

RESPONDENT: ABC Cleaning Services, Inc.
CASE NUMBER: FY19NR08FY0001
INITIAL PENALTY ☒ SUBSEQUENT PENALTY ☐

1. Size of the business

ABC Cleaning Services, Inc. has been in continuous operation since 1973 and primarily provides contract cleaning services to federal and state government facilities. ABC Cleaning Services, Inc. is incorporated in the state of Missouri and currently has offices operating in ten (10) states. The corporate website lists the current number of employees as 1,525 and the corporate earnings for Fiscal Year 2007 were in excess of 25 million dollars.

The business location at 123 Main Street, Columbia, Missouri employs 130 individuals who provide cleaning services for the Missouri State Capital Complex, the Missouri Attorney General's Office, the Missouri State Highway Patrol, and Office of the Governor all located in Jefferson City, Missouri. All paperwork for newly hired employees, after being completed at the local level, is forwarded to the corporate headquarters in St. Louis where it is stored and filed. The Columbia, Missouri office has a dedicated human resources manager and an assistant human resources manager responsible for all hiring and completion of employment paperwork. The corporate office has a human resources department headed by a vice-president who oversees hiring in all of the subordinate offices.

The size of ABC Cleaning Services, Inc. is seen as an aggravating factor due to the fact that Form I-9 review and oversight is completed by employees dedicated to the task within the corporate structure. Further, the corporation has sufficient financial resources to provide appropriate training to its human resources staff to ensure compliance with the employment eligibility verification requirements of Section 274A of the Act.

An enhancement of + 5% is recommended for this factor.

Mitigating ☐ (- 5%) Aggravating ☒ (+ 5%) Neutral ☐ (+/- 0%)

2. Good faith of the employer

On May 1, 2008, RAC Anywhere served a Notice of Inspection (NOI) on ABC Cleaning Services, Inc. for all current employees. Upon service of the NOI, Tim Johnson, vice-president for human resources, waived the three day requirement and immediately provided original Forms I-9 for all employees at the Columbia, Missouri location. Additionally, Mr. Johnson provided copies of payroll records and IRS Forms 941 to assist in completion of the audit. Mr. Johnson has expressed an interest in the Form I-9 inspection process and has requested that educational training be conducted by ICE with his staff regarding the employment eligibility verification requirements of Title 8. Mr. Johnson also expressed interest in enrolling in the E-Verify program upon completion of the inspection.

A review of the Forms I-9 for the 130 employees of the Columbia, Missouri location reveals that 70 of the 130 employees are unauthorized aliens with respect to employment. Forms I-9 appear to have been completed for all new hires; however, in many instances, employees were permitted to leave portions of Section 1 blank, specifically the attestation requirement, and the local human resources staff routinely accepted foreign government identification documents such as Mexican voter cards and Guatemalan matricula cards as identity documents in Section 2. There does not appear to be any instances of fraud in the completion of the Forms I-9 but there was widespread disregard for documentary requirements.

Although ABC Cleaning Services, Inc. has been cooperative with the inspection, the above noted failures led to the hiring of a significant number of unauthorized aliens who might otherwise not have been hired. This is especially true of the unauthorized aliens who presented foreign government identification documents that were accepted by ABC Cleaning Services, Inc. to satisfy the Form I-9. This practice substantially contributed to more than 50% of ABC Cleaning Services, Inc's workforce being unauthorized aliens.

An enhancement of + 5% is recommended for this factor.

Mitigating ☐ (- 5%) Aggravating ☒ (+ 5%) Neutral ☐ (+/- 0%)

3. Seriousness of hiring and verification violations

Of the 130 Forms I-9 reviewed for employees at the Columbia, Missouri location, 70 of the forms had substantive verification violations that directly led to the hire of unauthorized aliens. In addition to these 70 forms, 25 additional forms exhibited substantive verification violations that do not appear to have led to the hire of unauthorized aliens. Approximately 73% of the Forms I-9 inspected exhibited substantive violations.

The majority of these violations relate to not ensuring that the employee complete the attestation portion of Section 1 and the employer accepting unauthorized foreign government identification documents in Section 2. This lack of adherence to the instructions contained with the Form I-9 itself directly led to a disproportionate portion of ABC Cleaning Services, Inc's workforce consisting of unauthorized aliens. Simply following the Form I-9 instructions would likely have prevented the hire of many of the unauthorized aliens discovered during this inspection.

On June 5, 2008, an enforcement operation was conducted at the Missouri State Capital Complex resulting in the administrative arrest of 28 unauthorized alien employees of ABC Cleaning Services, Inc. Subsequent interviews of the apprehended aliens developed evidence that Maria Smith, an assistant human resources manager at the Columbia, Missouri location, learned subsequent to hire that eight of the employees were unauthorized aliens and continued to employ them. Sworn statements of the aliens are contained in the case file as well as a Report of Investigation (ROI) documenting an interview of Ms. Smith where she admits to learning that eight of the employees were unauthorized aliens and allowed them to continue to work.

ABC Cleaning Services, Inc. has exhibited a serious disregard for the employment eligibility verification requirements by not requiring employees to properly complete Section 1, by accepting unauthorized identity documents in Section 2, and by continuing to employ individuals after the company learned that they were unauthorized.

An enhancement of + 5% is recommended for this factor.

Mitigating ☐ (- 5%) Aggravating ☒ (+ 5%) Neutral ☐ (+/- 0%)

4. Involvement of unauthorized aliens

Of the substantive verification violations found, 70 relate to unauthorized aliens. This represents approximately 54% of the employer's workforce. An additional 25 substantive verification violations were found that did not relate to unauthorized aliens. In total, approximately 73% of the Forms I-9 inspected exhibited substantive verification violations.

Even though the employer completed Forms I-9 for all new hires, the employer's disregard for the documentary requirements of the Form I-9 resulted in a corporate culture that fostered and promoted the employment of unauthorized aliens. This culture is further evidenced by the local human resource manager's admissions that she continued to allow unauthorized aliens to work after acquiring direct knowledge of their status. ABC Cleaning Services, Inc's corporate headquarters, which maintained and filed all Forms I-9 for its local offices, failed to have basic procedures in place to conduct compliance reviews of their local offices employment verification practices which would have prevented or resolved the hire of a significant number of unauthorized aliens found within their workforce.

An enhancement of + 5% is recommended for this factor.

Mitigating ☐ (- 5%) Aggravating ☒ (+ 5%) Neutral ☐ (+/- 0%)

5. History of previous violations

ABC Cleaning Services, Inc. has no history of previous violations and no record of prior educational visits.

This factor is considered neutral. No enhancement or mitigation is recommended.