

Operations Message, released July 13, 2009.

This message is sent at the request of the Deputy Assistant Director, Division 3:

To ALL SACs and DSACs:

Please distribute this message regarding Worksite Enforcement to all OI managers, supervisors and agents.

ICE is in the process of promulgating a final agency rule specifying precisely which verification failures should be considered substantive or “technical or procedural” violations. Based on a legal precedent, until such time as this rule is finalized, the definitions of Form I-9 technical and substantive violations found on pages 15 and 16 in the *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* (“Guide”), dated November 25, 2008, are now modified in the following way:

SAC offices are directed to consider the following violations as TECHNICAL and not substantive:

- 1) Failure to ensure that the individual dates Section 1 of the Form I-9 at the time employment begins (Currently on Page 15, Paragraph 2(f) of the Guide);
- 2) Failure to provide the date employment begins in Section 2 (Currently on Page 15, Paragraph 3(c) of the Guide);
- 3) Failure to date section 2 within 3 business days of date employment begins (Currently on Page 15, Paragraph 3(g) of the Guide);
- 4) Failure to provide the date of rehire in Section 3 (Currently Page 16, Paragraph 4(c) of the Guide).

This change will remain in effect until the superseding guidance is published in the final rule. SAC offices should ensure that this memorandum is widely disseminated to all personnel within their respective areas of responsibility, especially those personnel who conduct or supervise Form I-9 inspections. Questions regarding this issue should be addressed to (b)(6), (b)(7)c, National Program Manager - Headquarters WSE Unit at (202) 732-(b)(6), (b)(7) or (b)(6), (b)(7)d.

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

Examples of Technical Violations are as follows:

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

4. Section Three Violations:

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

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

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

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

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

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

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

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- c) Failure to ensure that the individual provides his or her "A" Number on the line next to the phrase in Section 1 of the Form I-9, "A Lawful Permanent Resident", but only if the "A" Number is not provided in Sections 2 or 3 of the Form I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);
 - d) Failure to ensure that the individual provides the "A" Number or Admission number on the line provided under the phrase in Section 1 of the Form I-9, "An alien authorized to work until", but only if the "A" Number or Admission number is not provided in Sections 2 or 3 of the Form I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);
 - e) Failure to ensure that the individual signs the attestation in Section 1 of the Form I-9; and/or
 - f) Failure to ensure that the individual dates Section 1 of the Form I-9 at the time employment begins.
3. Section Two Violations:
- a) Failure to review and verify a proper List A document or proper List B and List C documents in Section 2 of the Form I-9;
 - b) Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in Section 2 of the Form I-9, unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection;
 - c) Failure to provide the date employment begins in the attestation portion of Section 2 of the Form I-9;
 - d) Failure to sign the attestation in Section 2 of the Form I-9;
 - e) Failure on the part of the employer of authorized representative to print their name in the attestation portion of Section 2.
 - f) Failure to date Section 2 of the Form I-9; and/or
 - g) Failure to date Section 2 of the Form I-9 within three business days of the date the individual begins employment or, if the individual is employed for three business days or less, at the time employment begins.
 - h) Failure to recertify and complete within 90 days the pertinent Section 2 information for verification with a receipt for lost or stolen documents.
4. Section Three Violations:

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

Requirements to Substantiate Knowing Hire and Continuing to Employ Charges

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

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

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

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

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