

MEMORANDUM

HQIRT 50/5.12

Subject: Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996.

Date: March 6, 1997

To: Management Team
Regional Directors
District Directors
Chief Patrol Agents
Officers in Charge
Regional Counsels
District Counsels

From: Office of Programs

Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), signed into law on September 30, 1996, significantly changed enforcement of the verification requirements of section 274A(b) of the Immigration and Nationality Act (Act). The provisions of section 411 of IIRAIRA took effect upon the signing of the bill; implementing regulations are currently being drafted. Until implementing regulations are in place, the following interim guidelines shall apply to INS field officers and INS attorneys assigned to employer sanctions cases.

A. SECTION 411 OF IIRAIRA: THE GOOD FAITH COMPLIANCE PROVISION

1. Summary of the Good Faith Compliance Provision

The Good Faith Compliance Provision of section 411 of IIRAIRA amends section 274A(b) of the Immigration and Nationality Act (Act) by adding a new paragraph: section 274A(b)(6). The language of this section applies to failures occurring on or after September 30, 1996. See IIRAIRA Section 411(b). Under section 274A(b)(6)(A) of the Act, a person or entity is considered to have complied with a requirement of section 274A(b) of the Act 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 section 274A(b)(6)(A) of the Act. These are stated in sections 274A(b)(6)(B) and (C) of the Act. First, a person or entity will not be considered to have complied with the requirement in question if the INS 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. Second, 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 sections 274A(a)(1)(A) or 274A(a)(2) of the Act.

2. Applicability of Section 274A(b)(6) of the Act: General Overview of Procedures

Section 274A(b)(6) of the Act applies to cases arising from I-9 inspections conducted on or after September 30, 1996.¹ This requires that technical or procedural failures to meet a requirement of section 274A(b) of the Act discovered during an I-9 inspection conducted on or after September 30, 1996 not be included in a NIF unless and until certain notification procedures are followed.

It is within the discretion of the Supervisory INS officer to decide whether the NIF will include technical or procedural failures.² If the Supervisory INS officer decides to include these technical or procedural failures in the NIF, issuance of the NIF must be deferred until the employer is given notice of the failures and at least ten business days to correct the failures consistent with this guidance. After review of the corrected failures, the NIF should include any knowing hire/continuing to employ counts, verification counts and uncorrected technical or procedural failures.

If the Supervisory INS officer decides not to include technical or procedural failures in the NIF, a NIF excluding these failures can be issued without the necessity of providing the employer with notice of the failures and a correction period. However, in cases where the NIF will not include technical or procedural failures, the Supervisory INS officer may decide that notification to the employer of the technical or procedural failures is nevertheless appropriate. If an employer has been specifically notified by the INS³ of the technical or procedural failures and provided an opportunity to correct the failures, yet commits the same type of failure in the future, the employer will be found not to have made a good faith attempt to comply with the verification requirement related to that type of failure at a reinspection. In such a case, the employer cannot benefit from section 274A(b)(6) of the Act with respect to that type of failure. In cases where no unauthorized aliens are found at a worksite and only failures to meet the verification requirements of section 274A(b) of the Act are discovered, INS policy encourages that a Warning Notice be issued in lieu of a NIF.

3. Meaning of Terms

a. Substantive Verification Failures⁴

Section 274A(b)(6) of the Act is applicable only to those verification failures that are designated as “technical or procedural.” It has been determined that verification failures that are NOT “technical or procedural” include the following:

Failure of the person or entity to:

- (A) prepare or present the Form I-9;
- (B) in Section One of the Form I-9:

¹ Special consideration must be given to timeliness failure. See section 4 of part A for a discussion of these timeliness failures.

² This decision is to be based upon the severity and frequency of the failures, resources, etc.

³ Under this interim guidance only, a Warning Notice regarding verification violations issued by the Department of Labor does not constitute notice of technical or procedural failures for purposes of section 274A(b)(6) of the Act.

⁴ For a checklist of substantive verification failures, see Appendix A.

- (1) ensure that the individual⁵ provides his or her printed name in section 1 of the Form I-9;
- (2) 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;
- (3) 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);
- (4) ensure that the individual provides the Alien 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 Alien 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);
- (5) ensure that the individual signs the attestation in section 1 of the Form I-9; or
- (6) ensure that the individual dates section 1 of the Form I-9 at the time of hire if the date of hire occurred before September 30, 1996;

(C) in Section Two of the Form I-9:

- (1) review and verify a proper List A document or proper List B and List C documents in section 2 of the Form I-9;
- (2) 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;
- (3) sign the attestation in section 2 of the Form I-9; or
- (4) date section 2 of the Form I-9 within three business days of the date the individual is hired or, if the individual is hired for three business days or less, at the time of hire if the date that section 2 was to be completed occurred before September 30, 1996;

(D) in Section Three of the Form I-9:

⁵ The term “individual” refers to an individual hired or recruited or referred for a fee.

- (1) review and verify a proper List A document or proper List B and List C documents in section 3 of the Form I-9;
- (2) 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;
- (3) sign section 3 of the Form I-9;
- (4) date section 3 of the Form I-9; or
- (5) 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.

A person or entity that has committed one or more of the above failures has violated the verification requirements of section 274A(b) of the Act. The notification and correction period requirements of section 274A(b)(6)(B) of the Act do not apply to these failures.

b. “Technical or Procedural” Verification Failures⁶

Until final regulations are in place, it has been determined that verification failures that ARE “technical or procedural” include the following:

Failure of the person or entity to:

(A) in Section One of the Form I-9:

- (1) ensure that an individual provides his or her maiden name, address or birth date in section 1 of the Form I-9;
- (2) ensure that an 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 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);
- (3) ensure that an individual provides his or her Alien 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 Alien 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);

⁶ For a checklist of technical or procedural verification failures, see Appendix B

- (4) ensure that an individual dates section 1 of the Form I-9;
- (5) ensure that an individual dates section 1 of the Form I-9 at the time of hire if the time of hire occurred on or after September 30, 1996;
or
- (6) ensure that a preparer and or translator provides his or her name, address, signature or date;

(B) in Section Two of the Form I-9:

- (1) 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;
- (2) provide the title, business name and business address in section 2 of the Form I-9;
- (3) provide the date of hire in the attestation portion of section 2 of the Form I-9;
- (4) date section 2 of the Form I-9; or
- (5) date section 2 of the Form I-9 within three business days of the date the individuals hired or, if the individual is hired for three business days or less, at the time of hire if the date on which section 2 had to be completed occurred on or after September 30, 1996;

(C) in Section Three of the Form I-9:

- (1) 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; or
- (2) provide the date of rehire in section 3 of the Form I-9.

c. Good Faith Attempt to Comply With a Requirement of Section 274A(b) of the Act.

A person or entity will be considered to have made a good faith attempt to comply with a requirement of section 274A(b) of the Act notwithstanding a technical or procedural failure to meet such requirement unless:

- (1) the technical or procedural failure was committed with the intent to avoid a requirement of the Act, 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;
- (2) the technical or procedural failure was committed in knowing reliance on section 274A(b)(6) of the Act;
- (3) the employer corrected or attempted to correct the technical or procedural failure 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;
- (4) 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
- (5) the type of failure was previously the subject of a Warning Notice issued by the INS, Notice of Intent to Fine or Notification of Technical or Procedural Failures Letter (see Appendix E attached).

d. Correction of Technical or Procedural Verification Failures

An employer or recruiter or referrer for a fee who is provided with at least ten business days to correct technical or procedural failures after notification of such failures and corrects the failures within the designated time period is deemed to have complied with the requirements of section 274A(b) of the Act. An employer or recruiter or referrer for a fee will be subject to civil money penalties for uncorrected failures, unless the uncorrected failures could not reasonably be corrected.

To be deemed to have corrected technical or procedural failures that reasonably can be corrected, the employer or recruiter or referrer for a fee must:

- (1) in the case of a failure in section 1 of the Form I-9 ensure that the individual and/or preparer and/or translator:
 - corrects the failure on the Form I-9;
 - initials the correction;⁷ and
 - dates the correction;
- (2) in the case of a failure in sections 2 or 3 of the Form I-9:
 - correct the failure on the Form I-9;
 - initial the correction;⁸ and

⁷ Initialing and dating corrections is important for proper correction of the failure. However, failure to initial and date a correction does not render a failure substantive.

- date the correction.

Situations will arise where the employer will not reasonably be able to correct the failures within the time frame provided. The following are examples of when a failure reasonably could not have been corrected:

- the individual is no longer employed by the employer;⁹
- the individual is on medical leave, leave of absence or vacation during the time provided for correction;¹⁰
- the preparer and/or translator reasonably cannot be located; or
- the failure relates to timeliness.¹¹

For technical or procedural failures that reasonably cannot be corrected, the employer or recruiter or referrer for a fee must provide the INS officer with a brief explanation of why the failures reasonably cannot be corrected. At the discretion of the INS officer, this may be accomplished orally or in writing. If the INS officer determines that the explanation is reasonable, the technical or procedural failure will not be considered a violation.

4. Timeliness Failures Contained on Forms I-9 Obtained From I-9 Inspections Conducted on or After September 30, 1996

The notification and correction period requirements of section 274A(b)(6) of the Act do not apply to timeliness failures in Sections 1 or 2 of the Form I-9 unless the date that the particular section should have been completed falls on or after September 30, 1996. Unlike all other failures, timeliness failures do not continue after they are first committed. Examples of how timeliness failures should be processed are contained in Appendix C at the end of these guidelines.

5. Forms I-9 That Contain Both Technical or Procedural Failures and Failures That Are Not Technical or Procedural

Where a particular Form I-9 contains technical or procedural failures as well as failures that are not technical or procedural, the notification and correction period requirements of section 274A(b)(6) of the Act apply to only those violations that stem from failures that are technical or procedural. No notice and correction period is required for those violations not considered technical or procedural. Examples of this principle are located in Appendix D at the end of these guidelines.

B. INTERIM PROCEDURES

Until implementing regulations are in place, current practices and procedures must be modified to ensure compliance with section 274A(b)(6) of the Act. Cases resulting from I-9 inspections conducted prior to September 30, 1996 do not fall under section 274A(b)(6) of the Act and, therefore, can proceed to the

⁸ Initialing and dating corrections is important for proper correction of the failure. However, failure to initial and date a correction does not render a failure substantive.

⁹ Only applicable where the failure relates to section 1 of the Form I-9.

¹⁰ Only applicable where the failure relates to section 1 of the Form I-9.

¹¹ See section 4 of part A for a discussion of these failures.

issuance of a NIF. However, section 274A(b)(6) of the Act does apply to reinspections conducted on or after September 30, 1996.

Each INS field officer and attorney should review cases arising from inspections or reinspections conducted on or after September 30, 1996 in accordance with the following procedures:

1. Where the only violations discovered consist of violations of sections 274A(a)(1)(A) or 274A(a)(2) of the Act or failures to meet section 274A(b) verification requirements that are not technical or procedural, a NIF should be issued as usual.
2. Where a pattern or practice of violations of sections 274A(a)(1)(A) or 274A(a)(2) of the Act is encountered as the result of an I-9 inspection, regardless of whether criminal charges have been brought against the employer, a NIF charging violations of sections 274A(a)(1)(A), 274A(a)(2) or 274A(b) of the Act can be issued as before and can include violations that stem from technical or procedural failures to meet the requirements of section 274A(b) of the Act without regard to the procedures specified in paragraph 4 below.
3. Where no unauthorized aliens are discovered during an I-9 inspection and only verification failures are found, a Warning Notice notifying the employer of verification failures may be issued in lieu of a NIF in accordance with current INS policy. Warning Notices may include technical or procedural verification failures in addition to substantive verification failures without regard to the notification and correction period requirements of section 274A(b)(6) of the Act. However, upon service of a Warning Notice, the INS officer should return the original Forms I-9 to the employer, circling in ink the technical or procedural failures found. A general list of technical or procedural failures must accompany the Warning Notice and Forms I-9. (See Appendix F).
4. Where failures to meet the requirements of section 274A(b) of the Act that include technical or procedural failures are encountered at an I-9 inspection, if the decision is made to include the technical or procedural failures in a NIF, the NIF cannot be issued unless and until the following procedures are followed:¹²
 - a. The employer must be notified of the applicable technical or procedural verification failures. To accomplish this notification, a notification packet must be prepared. This packet must include: a Notification of Technical or Procedural Failures Letter (see Appendix E attached), copies of the Forms I-9 originally presented by the employer that contain technical or procedural failures and copies of any documents originally retained with these Forms I-9.

(1) An INS officer must identify the technical or procedural failures on the copy of each Form I-9 included in the notification packet. To identify

¹² If it is determined that a person or entity has not made a good faith attempt to comply with a requirements of section 274A(b) of the Act notwithstanding a technical or procedural failure to meet such requirement, the technical or procedural failure to meet the requirement may be charged in a NIF without regard to the notification and correction requirements of section 274A(b)(6) of the Act. For a flowchart analysis of verification failures under section 274A(b)(6) of the Act, see Appendix H.

the technical or procedural failures, the INS officer must circle in ink, initial and date each technical or procedural failure. The original Forms I-9 should be maintained in the investigative file.

(2) The Notification of Technical or Procedural Failures Letter must include: the date of issuance; the name and address of the employer; the file number; the date of the inspection; the number of Forms I-9 included in the notification packet; the date by which corrections to the Forms I-9 must be completed and ready for review; the name and telephone number of the immigration contact person; and the signature, name and title of the INS officer issuing the letter. The date by which corrections on the Form I-9 must be completed and ready for review must be at least 10 business days after the date that the Notification of Technical or Procedural Failures Letter is served on the employer. For notification packets served by certified mail, allow at least 15 business days after the date that the notification packet is served on the employer for receipt. INS officers that are authorized to sign the Notification of Technical or Procedural Failures Letter are Immigration Agents, Special Agents, Supervisory Special Agents, Border Patrol Agents and all officers authorized to sign NIFs (see 8 C.F.R. sections 274a.9(c) & 242.1).

b. The notification packet is to be served on the employer either personally or by certified mail, return receipt requested.

c. Prior to service of the notification packet, a complete copy of the notification packet must be made and included in the investigative file. A Form G-166C indicating the date and means of service of the notification packet, the number of the Forms I-9 returned to the employer and the date that the notification packet is to be ready for review should precede the copy of the notification packet in the investigative file.

d. If it is determined, within the exercise of discretion, that the Forms I-9 in the notification packet will NOT be retrieved from the employer and reviewed by an INS officer, a NIF that contains only knowing hire, continuing to employ or substantive verification violations may be issued any time after the date the notification packet is to be ready for review as stated on the Notification of Technical or Procedural Failures Letter.

e. If it is determined, within the exercise of discretion, that the Forms I-9 in the notification packet WILL be retrieved from the employer and reviewed by an INS officer, the notification packet is to be retrieved from the employer on the date specified in the Notification of Technical or Procedural Failures Letter and by the means chosen by the INS officer (certified mail or personal visit to the employer's business).

f. Once the notification packet is retrieved, the INS officer is to review the retrieved Forms I-9 to determine whether the employer corrected the verification failures identified where such corrections reasonably could have been made. This review is a continuation of the original I-9 inspection; it is not a new inspection. This review is limited to a review of the technical or procedural failures identified on the Forms I-9 that were contained in the notification packet provided to the employer. [If evidence of failures to meet the verification requirements of section 274A(b) of the Act for new hires should arise during this stage of the inspection, such evidence can only be considered in the context of a new inspection.]

g. The INS officer reviewing the retrieved Forms I-9 must determine whether the employer corrected the failures identified in the notification packet. This determination must be documented on a Form G-166C and placed in the investigative file. For those technical or procedural failures that the employer has properly corrected, the employer shall be deemed to be in compliance with section 274A(b) of the Act, and these corrected failures are not considered violations. For those identified technical or procedural failures that the employer has not properly corrected where such corrections could reasonably have been made, the employer is deemed to be not in compliance with section 274A(b) of the Act. These failures are considered violations and can be charged in the NIF. For technical or procedural failures that reasonably could not have been corrected, these failures will not be considered violations if the employer provided a reasonable explanation for not correcting the failures. Where the INS officer determines that the explanation is reasonable, an oral explanation may be accepted. An INS officer's acceptance for the employer's oral explanation must be documented on a Form G-166C. Where the INS officer determines that the explanation is not reasonable, the INS officer must request the employer to submit a written explanation that is signed and dated by the employer.

h. Upon completion of the Form I-9 review, the case may proceed to the issuance of a NIF. The NIF may charge all violations encountered during the I-9 inspection, including violations of sections 274A(a)(1)(A), 274A(a)(2) and 274A(b) of the Act. In counts that include uncorrected technical or procedural verification failure, additional allegations must be stated in the count. See Appendix G for a list of these allegations. In calculating the civil money penalty, factor 5 cannot be aggravated on the basis of the Notification of Technical or Procedural Failures packet.

5. If a reinspection is conducted at a later date, the same procedures listed in paragraph 4 must be followed. These procedures are only applicable to those types of technical or procedural verification failures that were not the type of failures that were the subject of a previous Notification of Technical or Procedural Failures Letter. An employer that commits the same type of failures as were indicated in a previous Notification of Technical or Procedural Failures Letter has not demonstrated a good faith attempt to comply with the verification requirements with respect to those types of failures and, therefore, cannot benefit from section 274A(b)(6) of the Act.

6. Cases resulting from I-9 inspections conducted on or after September 30, 1996 where a NIF has been issued and served on the employer without adherence to the notification procedures outlined in paragraph 4 above may require additional action.

- a. If the case is in settlement negotiations, INS attorneys are to either, at the discretion of the District Director or Chief patrol Agent: (1) remove the technical or procedural verification failures charged in the NIF, reduce the civil money penalty accordingly and proceed with the case on the remaining charges or (2) cancel the NIF through a letter prepared by the INS attorney and signed by the District Director or Chief Patrol Agent which explains the reason for the cancellation of the NIF and informs the employer of a forthcoming Notification of Technical or Procedural Failures Letter; the investigative file should then be returned to the agent who must follow the procedures outline in paragraph 4 above before a new NIF is issued.
- b. In cases where a complaint has been filed with the Chief Administrative Hearing Officer, the complaint should be amended, removing technical or procedural failures that were listed as violations.
- c. In cases where a hearing was not timely requested after the NIF was served, either: (1) a Final Order may be issued stating a fine amount that is reduced by those technical or procedural verification failures charged in the NIF that could not be charged absent compliance with

the notification procedures outlined in paragraph 4 or (2) in order to allow the technical or procedural failures to be charged in the NIF, cancel the NIF through a letter signed by the District Director or Chief Patrol Agent explaining the reason for the cancellation and that a Notification of Technical or Procedural Failures packet will be prepared. If the second option is chosen, a new NIF may be issued that includes technical or procedural verification failures only after compliance with the procedures outlined in paragraph 4.

These guidelines are effective immediately.

(Signed)
Paul W. Virtue
Acting Executive Commissioner Programs

FORM I-9 SUBSTANTIVE VERIFICATION FAILURE CHECKLIST

No I-9 prepared or presented

FAILURES IN SECTION ONE OF THE FORM I-9

- Employee's name not printed on the Form I-9
- No check mark in indicating whether employee attests to being a United States Citizen, Lawful Permanent Resident of alien authorized to work
- No A number next to the phrase, "A Lawful Permanent Resident" where A number is not 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)
- No Alien or Admission number next to the phrase, "An alien authorized to work until" where Alien 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)
- No employee signature
- Employee attestation not completed at the time of hire where employee was hired before 9/30/96

FAILURES IN SECTION TWO OF THE FORM I-9

- Improper List A, B or C documents reviewed or verified
- No document title; identification number; or expiration date of a List A, B or C document and a legible copy of document(s) is not retained with the Form I-9 and presented at the I-9 inspection
- No attestation signature
- Employer attestation not completed within 3 business days of the hire or, if the employee is hired for 3 business days or less, at the time of hire where the date section 2 had to be completed is before 9/30/96

FAILURES IN SECTION THREE OF THE FORM I-9

- Improper List A, B or C documents reviewed or verified
- No document title; identification number; or expiration date of a List A, B or C document and a legible copy of document(s) is not retained with the Form I-9 and presented at the I-9 inspection
- No signature
- No signature date
- Section 3 is dated after the date that work authorization expired.

APPENDIX A

FORM I-9 TECHNICAL OR PROCEDURAL VERIFICATION FAILURE CHECKLIST

FAILURES IN SECTION ONE OF THE FORM I-9

- No employee: maiden name; address; birth date
- No A number next to the phrase, "A Lawful Permanent Resident" where A number is 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 upon inspection)
- No alien or Admission number next to the phrase, "An alien authorized to work until" where: Alien or Admission number is in sections 2 or 3 of the I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection)
- No employee attestation date
- Employee attestation not completed at the time of hire where: employee was hired on or after 9/30/96
- No preparer and/or translator: name; address; signature
- No date in the preparer and/or translator certification box

FAILURES IN SECTION TWO OF THE FORM I-9

- No document title; identification number; or expiration date of a List A, B or C document and a legible copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection
- No business title; name; address
- No date of hire
- No employer attestation date
- Employer attestation not completed with 3 business days of the hire or, if the employee is hired for 3 business days or less, at the time of hire where: the date section 2 had to be completed falls on or after 9/30/96

FAILURES IN SECTION THREE OF THE FORM I-9

- No document title; identification number; or expiration date of a List A,B or C document and a legible copy of comment(s) is retained with the Form I-9 and presented at the I-9 inspection
- No date of rehire

APPENDIX B

TIMELINESS EXAMPLES

- (1) *Employee is hired on September 30, 1996.
Section 1 of the Form I-9 is dated October 12, 1996.*

Result: The notification and correction period requirements of section 274A(b)(6) of the Act apply to this timeliness failure since the date that the employer was required to ensure that the employee completed section 1 of the Form I-9 falls on September 30, 1996, the effective date of section 274A(b)(6) of the Act.

- (2) *Employee is hired on August 1, 1995.
Section 1 of the Form I-9 is dated October 12, 1996.*

Result: The notification and correction period requirements of section 274A(b)(6) of the Act do not apply to this timeliness failure since the employer was required to ensure that the employee completed section 1 of the Form I-9 at the time of hire, August 1, 1995, and that date falls before September 30, 1996.

- (3) *Employee is hired on September 26, 1996.
Section 2 of the Form I-9 is dated October 12, 1996.*

Result: The notification and correction period requirements of section 274A(b)(6) of the Act apply to this timeliness failure. The employer was required to complete section 2 of the Form I-9 within three business days from the date of hire. Three business days from the date of hire is September 30, 1996, the effective date of section 274A(b)(6) of the Act.

MIXED FAILURE EXAMPLES

- (1) *Section 2 of the Form I-9 does not contain the employer attestation date and the employer's signature.*

Result: The missing employer attestation date is a “technical or procedural” certification failure. The missing signature is a “substantive” verification failure. The substantive failure is a violation independent of the technical or procedural failure. Section 274A(b)(6) of the Act does not apply to the substantive failure. Based on the substantive failure, the correct Count to charge in the NIF is: **FAILED TO PROPERLY COMPLETE SECTION 2 OF THE EMPLOYMENT ELIGIBILITY VERIFICATION FORM (FORM I-9).** The technical or procedural failure need not be considered.

- (2) *Section 1 of the Form I-9 does not contain the employer attestation date.
Section 2 of the Form I-9 does not contain the employer's signature.
The employee is authorized to work.*

Result: The missing employer attestation date is a “technical or procedural” verification failure. The missing signature is a “substantive” verification failure. The substantive failure is a violation independent of the technical or procedural failure. Section 274A(b)(6) of the Act does not apply to the substantive failure. Based on the substantive failure alone, the following Count can be charged in the NIF: **FAILED TO PROPERLY COMPLETE SECTION 2 OF THE EMPLOYMENT ELIGIBILITY VERIFICATION FORM (FORM I-9).** The following Count could not be charged: **FAILED TO ENSURE THAT EMPLOYEE PROPERLY COMPLETED SECTION 1 AND FAILED TO PROPERLY COMPLETE SECTION 2 OF THE EMPLOYMENT ELIGIBILITY VERIFICATION FORM (FORM I-9),** unless and until the notification and correction period requirements are met.

- (3) *Employee was hired on January 1, 1990.
Section 1 of the Form I-9 does not contain the employee's date of birth.
Section 1 of the Form I-9 is dated January 10, 1990.
Employee is currently employed by the employer.*

Result: Failure of the employer to ensure that the employer completed section 1 of the Form I-9 at the time of hire occurred on January 1, 1990. The notification and correction period requirements of section 274A(b)(6) of the Act do not apply to this timeliness failure because it occurred before September 30, 1996. It is a substantive verification failure. However, the notification and correction period requirements of section 274A(b)(6) of the Act do apply to the failure of the employer to ensure that the employee provided his or her date of birth in section 1 of the Form I-9. This is a technical or procedural verification failure. This failure continues from the day the requirement had to be met (the hire date) until the employer corrects the failure or no longer is required to retain the Form I-9. Because this failure is continuing, it occurs on each day that it persists. The employer is under a continuing duty to ensure proper completion of the Form I-9. Based on the substantive failure verification alone, the following Count can be charged in the NIF: **FAILED TO ENSURE THAT EMPLOYEE PROPERLY COMPLETED SECTION 1 OF THE EMPLOYMENT ELIGIBILITY VERIFICATION FORM (FORM I-9) AT THE TIME OF HIRE.** The technical or procedural failure need not be considered.

APPENDIX D

U. S. Department of Justice
Immigration and Naturalization Service

NOTIFICATION OF TECHNICAL OR PROCEDURAL FAILURES

[INS Office Address]
[Date]

[Name of Company Official]
[Company Name]
[Company Address]

RE: I-9 Inspection
File No. [Fill-In File No.]

Dear Sir/Madam:

On [Date of I-9 Inspection], officers of the Immigration and Naturalization Service conducted an inspection of [Company Name] to determine compliance with Section 274A of the Immigration and Nationality Act (Act). At that time, [Number of I-9s Presented] Employment Eligibility Verification Forms (Forms i-9) were presented for inspection.

During the inspection of the Forms I-9 presented, technical or procedural failures to meet the employment verification requirements of Section 274A(b) of the Act were discovered. Pursuant to Section 274A(b)(6) of the Act, these technical or procedural failures are considered violations of Section 274(b) of the Act if they remain uncorrected.

NOTE: Additional failures to meet the employment verification requirements of Section 274A(b) of the Act may have been discovered. These failures are not included in this notification and may result in the issuance of a Notice of Intent to Fine (Form I-763). If a Notice of Intent to Fine is issued, it will be served separately from this notification.

This letter and accompanying documents are to notify [Company Name] of the technical or procedural failures encountered and to provide [Company Name] a period of not less than ten business days within which to correct these failures.

Accompanying this letter are copies of [number of I-9s being returned] Forms I-9 that contain technical or procedural failures. The technical or procedural failures found on each Form I-9 have been circled in ink. They include one or more of the following technical or procedural failures:

APPENDIX E

File. No. (Insert File No.)

Page 2

- Employees maiden name, address or birth date missing in section 1
- No "A" number filled in next to the phrase in section 1, "A Lawful Permanent Resident" where the file number is in sections 2 or 3 of the I-9 (or on a document retained on the the Form I-9 and presented at the I-9 inspection)
- No Alien or Admission number filled in next to the phrase in section 1, "An alien authorized to work until" where the number is in sections 2 or 3 of the I-9 (or on a document retained on the Form I-9 and presented at the I-9 inspection)
- Employee attestation date missing in section 1
- Employee attestation not completed at the time of hire in section 1
- Name, address or signature of the preparer and/or translator missing in section 1
- No date in the preparer and/or translator certification box in section 1
- No document identification number of a List A, B or C document in section 2 where a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection
- No document expiration date of a List A, B, or C document in section 2 where a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection
- Business title, name or address missing in section 2
- Date of hire missing in section 2
- No employer attestation date in section 2
- Employer attestation in section 2 not completed within 3 business days of the hire or, if the employee is hired for 3 business days or less, at the time of hire
- No document identification number of a List A, B or C document in section 3 where a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection
- No document expiration date of a List A, B or C document in section 3 where a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection
- Date of rehire missing in section 3

You must correct the circled failures directly on the Form I-9. Initial and date the corrections made. A brief explanation must be provided for corrections that reasonably cannot be made (e.g., "information unavailable: individual's employment terminated"). Verification failures that are not technical or procedural have not been circled on the Forms I-9 accompanying this letter.

(Company Name) is being provided until [date Forms I-9 must be corrected] to correct the circled failures on the accompanying Forms I-9. These Forms I-9 may be subject to review by an INS officer after that date.

Be aware that any uncorrected technical or procedural failures may result in the issuance of a Notice of Intent to Fine.

If you have any questions regarding your responsibilities in the verification process, you may call (Agent's Name) at [phone number].

Sincerely,

_____ (signature)

(name)

(title)

Enclosures

APPENDIX E

Following is a list of possible technical or procedural failures to meet verification requirements of section 274A(b) of the Immigration and Nationality Act. The technical or procedural verification failures that have been found on the Forms I-9 accompanying the Warning Notice have been circled. Verification failures that are not technical or procedural also may be present on these Forms I-9. Such verification failures have not been circled.

TECHNICAL OR PROCEDURAL VERIFICATION FAILURES

FAILURES IN SECTION ONE OF THE FORM I-9

- No employee: maiden name, address; birth date
- No A number next to the phrase “A Lawful Permanent Resident” where A number is in sections 2 or 3 of the I-9 (or on a document retained on the Form I-9 and presented at the I-9 inspection)
- No Alien or Admission number next to the phrase “alien authorized to work until” where Alien or Admission number is in sections 2 or 3 of the I-9 (or on a document retained on the Form I-9 and presented at the I-9 inspection)
- No employee attestation date
- Employee attestation not completed at the time of hire where the employee was hired on or after 9/30/96
- No preparer and/or translator: name; address; signature
- No date in the preparer and/or translator certification box

FAILURES IN SECTION TWO OF THE FORM I-9

- No document title; identification number; or expiration date of a List A, B or C document and a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection
- No business title; name; address
- No date of hire
- No employer attestation
- Employer attestation not completed within 3 business days of the hire or, if the employee is hired for 3 business days or less, at the time of hire where the date section 2 had to be completed falls on or after 9/30/96

FAILURES IN SECTION THREE OF THE FORM I-9

- No document title; identification number; or expiration date of a List A, B or C document and a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection
- No date of rehire

LIST OF ADDITIONAL ALLEGATIONS THAT MUST BE INCLUDED IN NIF COUNTS CHARGING UNCORRECTED TECHNICAL OR PROCEDURAL VERIFICATION FAILURES

X. 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 requirement of section 274A(b) of the Immigration and Nationality Act.

Y. 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 but were returned to the Respondent with the Notification of Technical or Procedural Failures Letter.

Z. 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, numbers [fill in applicable numbers].

SAMPLE COUNT

FAILED TO ENSURE THAT EMPLOYEE PROPERLY COMPLETED SECTION 1 AND FAILED TO PROPERLY COMPLETE SECTION 2 OF THE EMPLOYMENT ELIGIBILITY VERIFICATION FORM (FORM I-9)

- A. XYZ CORP. (hereinafter referred to as The Respondent) hired the following four (4) individuals for employment in the United States:
 - 1. Heddy Hostess
 - 2. Bart Bellboy
 - 3. Penelope Personnel
 - 4. Gus Gardener
- B. The Respondent hired the individual list 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 section 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.
- 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, numbers 2 and 3.
- F. The Respondents failed to ensure that the individuals listed in paragraph A properly completed section 1 of the Form I-9
- G. The Respondent failed to properly complete section 2 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)(1) and (2) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b)(1) and (2) and 8 C.F.R. § 274a.2(b)(1)(i) and (ii).

The penalty for this count is a civil money penalty in the amount of

APPENDIX G

**ANALYSIS OF VERIFICATION FAILURES
UNDER SECTION 274A(b)(6) OF TUE INA**

Is Failure to Meet a Verification Requirement Technical or Procedural?

