

case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity: supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done. The use of labor or services of an independent contractor are subject to the restrictions in section 274A(a)(4) of the Act and § 274a.5 of this part;

(k) The term *pattern* or *practice* means regular, repeated, and intentional activities, but does not include isolated, sporadic, or accidental acts;

(1)(1) The term *knowing* includes not only actual knowledge but also 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:

(i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;

(ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or

(iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

(2) Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the Act or to refuse to honor documents tendered that on

their face reasonably appear to be genuine and to relate to the individual.

[52 FR 16221, May 1, 1987, as amended at 53 FR 8612, Mar. 16, 1988; 55 FR 25931, June 25, 1990; 56 FR 41783, Aug. 23, 1991; 72 FR 45623, Aug. 15, 2007; 73 FR 63867, Oct. 28, 2008; 74 FR 51452, Oct. 7, 2009; 74 FR 55739, Oct. 28, 2009]

§ 274a.2 Verification of identity and employment authorization.

(a) *General.* This section establishes requirements and procedures for compliance by persons or entities when hiring, or when recruiting or referring for a fee, or when continuing to employ individuals in the United States.

(1) *Recruiters and referrers for a fee.* For purposes of complying with section 274A(b) of the Act and this section, all references to recruiters and referrers for a fee are limited to a person or entity who is either an agricultural association, agricultural employer, or farm labor contractor (as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. 97-470 (29 U.S.C. 1802)).

(2) *Verification form.* Form I-9, Employment Eligibility Verification Form, is used in complying with the requirements of this 8 CFR 274a.1-274a.11. Form I-9 can be in paper or electronic format. A fillable electronic Form I-9 as well as a paper format Form I-9 may be obtained and downloaded from <http://www.uscis.gov>. Paper forms may also be ordered at <https://www.uscis.gov/forms/forms-by-mail> or by contacting the USCIS Contact Center at 1-800-375-5283 or 1-800-767-1833 (TTY). Alternatively, Form I-9 can be electronically generated or retained, provided that the resulting form is legible; there is no change to the name, content, or sequence of the data elements and instructions; no additional data elements or language are inserted; and the standards specified under 8 CFR 274a.2(e), (f), (g), (h), and (i), as applicable, are met. When copying or printing the paper Form I-9, the text of the two-sided form may be reproduced by making either double-sided or single-sided copies.

(3) *Attestation Under Penalty and Perjury.* In conjunction with completing the Form I-9, an employer or recruiter or referrer for a fee must examine documents that evidence the identity and

employment authorization of the individual. The employer or recruiter or referrer for a fee and the individual must each complete an attestation on the Form I-9 under penalty of perjury.

(b) *Employment verification requirements—(1) Examination of documents and completion of Form I-9.* (i) A person or entity that hires or recruits or refers for a fee an individual for employment must ensure that the individual properly:

(A) Completes section 1—“Employee Information and Verification”—on the Form I-9 at the time of hire and signs the attestation with a handwritten or electronic signature in accordance with paragraph (h) of this section; or if an individual is unable to complete the Form I-9 or needs it translated, someone may assist him or her. The preparer or translator must read the Form I-9 to the individual, assist him or her in completing Section 1—“Employee Information and Verification,” and have the individual sign or mark the Form I-9 by a handwritten signature, or an electronic signature in accordance with paragraph (h) of this section, in the appropriate place; and

(B) Present to the employer or the recruiter or referrer for a fee documentation as set forth in paragraph (b)(1)(v) of this section establishing his or her identity and employment authorization within the time limits set forth in paragraphs (b)(1)(ii) through (b)(1)(v) of this section.

(ii) Except as provided in paragraph (b)(1)(viii) of this section, an employer, his or her agent, or anyone acting directly or indirectly in the interest thereof, must within three business days of the hire:

(A) Physically examine (or otherwise examine pursuant to an alternative procedure authorized by the Secretary under paragraph (b)(1)(ix) of this section) the documentation presented by the individual establishing identity and employment authorization as set forth in paragraph (b)(1)(v) of this section and ensure that the documents presented appear to be genuine and to relate to the individual; and

(B) Complete section 2—“Employer Review and Verification”—on the Form I-9 within three business days of the hire and sign the attestation with a

handwritten signature or electronic signature in accordance with paragraph (i) of this section.

(iii) An employer who hires an individual for employment for a duration of less than three business days must comply with paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B) of this section at the time of the hire. An employer may not accept a receipt, as described in paragraph (b)(1)(vi) of this section, in lieu of the required document if the employment is for less than three business days.

(iv) A recruiter or referrer for a fee for employment must comply with paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B) of this section within three business days of the date the referred individual is hired by the employer. Recruiters and referrers may designate agents to complete the employment verification procedures on their behalf including but not limited to notaries, national associations, or employers. If a recruiter or referrer designates an employer to complete the employment verification procedures, the employer need only provide the recruiter or referrer with a photocopy or printed electronic image of the Form I-9, electronic Form I-9, or a Form I-9 on microfilm or microfiche.

(v) The individual may present either an original document which establishes both employment authorization and identity, or an original document which establishes employment authorization and a separate original document which establishes identity. Only unexpired documents are acceptable. The identification number and expiration date (if any) of all documents must be noted in the appropriate space provided on the Form I-9.

(A) The following documents, so long as they appear to relate to the individual presenting the document, are acceptable to evidence both identity and employment authorization:

- (1) A United States passport;
- (2) An Alien Registration Receipt Card or Permanent Resident Card (Form I-551);
- (3) A foreign passport that contains a temporary I-551 stamp, or temporary I-551 printed notation on a machine-readable immigrant visa;

Department of Homeland Security

§ 274a.2

(4) An Employment Authorization Document which contains a photograph (Form I-766);

(5) In the case of an individual who is employment-authorized incident to status or parole with a specific employer, a foreign passport with an Arrival/Departure Record, Form I-94 (as defined in 8 CFR 1.4) or Form I-94A, bearing the same name as the passport and containing an endorsement by DHS indicating such employment-authorized status or parole, as long as the period of endorsement has not yet expired and the employment is not in conflict with the individual's employment-authorized status or parole;

(6) A passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI;

(7) In the case of an individual lawfully enlisted for military service in the Armed Forces under 10 U.S.C. 504, a military identification card issued to such individual may be accepted only by the Armed Forces.

(B) The following documents are acceptable to establish identity only:

(1) For individuals 16 years of age or older:

(i) A driver's license or identification card containing a photograph, issued by a state (as defined in section 101(a)(36) of the Act) or an outlying possession of the United States (as defined by section 101(a)(29) of the Act). If the driver's license or identification card does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address;

(ii) School identification card with a photograph;

(iii) Voter's registration card;

(vi) U.S. military card or draft record;

(v) Identification card issued by federal, state, or local government agencies or entities. If the identification card does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address;

(vi) Military dependent's identification card;

(vii) Native American tribal documents;

(viii) United States Coast Guard Merchant Mariner Card;

(ix) Driver's license issued by a Canadian government authority;

(2) For individuals under age 18 who are unable to produce a document listed in paragraph (b)(1)(v)(B)(I) of this section, the following documents are acceptable to establish identity only:

(i) School record or report card;

(ii) Clinic doctor or hospital record;

(iii) Daycare or nursery school record.

(3) Minors under the age of 18 who are unable to produce one of the identity documents listed in paragraph (b)(1)(v)(B) (I) or (2) of this section are exempt from producing one of the enumerated identity documents if:

(i) The minor's parent or legal guardian completes on the Form I-9 Section 1—"Employee Information and Verification" and in the space for the minor's signature, the parent or legal guardian writes the words, "minor under age 18."

(ii) The minor's parent or legal guardian completes on the Form I-9 the "Preparer/Translator certification."

(iii) The employer or the recruiter or referrer for a fee writes in Section 2—"Employer Review and Verification" under List B in the space after the words "Document Identification #" the words, "minor under age 18."

(4) Individuals with handicaps, who are unable to produce one of the identity documents listed in paragraph (b)(1)(v)(B) (I) or (2) of this section, who are being placed into employment by a nonprofit organization, association or as part of a rehabilitation program, may follow the procedures for establishing identity provided in this section for minors under the age of 18, substituting where appropriate, the term "special placement" for "minor under age 18", and permitting, in addition to a parent or legal guardian, a representative from the nonprofit organization, association or rehabilitation program placing the individual into a position of employment, to fill out and sign in the appropriate section, the

§ 274a.2

8 CFR Ch. I (1-1-24 Edition)

Form I-9. For purposes of this section the term *individual with handicaps* means any person who

- (i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities,
- (ii) Has a record of such impairment, or
- (iii) Is regarded as having such impairment.

(C) The following are acceptable documents to establish employment authorization only:

- (1) A Social Security account number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States;
- (2) Certification or report of birth issued by the Department of State, including Forms FS-545, DS-1350, FS-240;
- (3) An original or certified copy of a birth certificate issued by a State, county, municipal authority or outlying possession of the United States bearing an official seal;
- (4) Native American tribal document;
- (5) United States Citizen Identification Card, Form I-197;
- (6) Identification card for use of resident citizen in the United States, Form I-179;
- (7) An employment authorization document issued by the Department of Homeland Security.

(D) The following are acceptable documents to establish both identity and employment authorization in the Commonwealth of the Northern Mariana Islands only, for a two-year period starting from the transition program effective date (as defined in 8 CFR 1.1), in addition to those documents listed in paragraph (b)(1)(v)(A) of this section:

- (1) In the case of an alien with employment authorization in the Commonwealth of the Northern Mariana Islands incident to status for a period of up to two years following the transition program effective date that is unrestricted or otherwise authorizes a change of employer:
 - (i) The unexpired foreign passport and an Alien Entry Permit with red band issued to the alien by the Office of the Attorney General, Division of Immigration of the Commonwealth of the Northern Mariana Islands before the

transition program effective date, as long as the period of employment authorization has not yet expired, or

- (ii) An unexpired foreign passport and temporary work authorization letter issued by the Department of Labor of the Commonwealth of the Northern Mariana Islands before the transition program effective date, and containing the name and photograph of the individual, as long as the period of employment authorization has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Temporary Work Authorization letter;
- (iii) An unexpired foreign passport and a permanent resident card issued by the Commonwealth of the Northern Mariana Islands.

(2) [Reserved]

(vi) *Special rules for receipts.* Except as provided in paragraph (b)(1)(iii) of this section, unless the individual indicates or the employer or recruiter or referrer for a fee has actual or constructive knowledge that the individual is not authorized to work, an employer or recruiter or referrer for a fee must accept a receipt for the application for a replacement document or a document described in paragraphs (b)(1)(vi)(B)(I) and (b)(1)(vi)(C)(I) of this section in lieu of the required document in order to comply with any requirement to examine documentation imposed by this section, in the following circumstances:

(A) *Application for a replacement document.* The individual:

- (1) Is unable to provide the required document within the time specified in this section because the document was lost, stolen, or damaged;
- (2) Presents a receipt for the application for the replacement document within the time specified in this section; and
- (3) Presents the replacement document within 90 days of the hire or, in the case of reverification, the date employment authorization expires; or

(B) *Form I-94 or I-94A indicating temporary evidence of permanent resident status.* The individual indicates in section 1 of the Form I-9 that he or she is a lawful permanent resident and the individual:

(1) Presents the arrival portion of Form I-94 or Form I-94A containing an unexpired “Temporary I-551” stamp and a photograph of the individual, which is designated for purposes of this section as a receipt for Form I-551; and

(2) Presents the Form I-551 by the expiration date of the “Temporary I-551” stamp or, if the stamp has no expiration date, within one year from the issuance date of the arrival portion of the Form I-94 or Form I-94A; or

(C) *Form I-94 or I-94A indicating refugee status.* The individual indicates in section 1 of the Form I-9 that he or she is an alien authorized to work and the individual:

(1) Presents the departure portion of Form I-94 or I-94A containing an unexpired refugee admission stamp, which is designated for purposes of this section as a receipt for the Form I-766, or a social security account number card that contains no employment restrictions; and

(2) Presents, within 90 days of the hire or, in the case of reverification, the date employment authorization expires, either an unexpired Form I-766, or a social security account number card that contains no employment restrictions and a document described under paragraph (b)(1)(v)(B) of this section.

(vii) If an individual’s employment authorization expires, the employer, recruiter or referrer for a fee must reverify on the Form I-9 to reflect that the individual is still authorized to work in the United States; otherwise, the individual may no longer be employed, recruited, or referred. Reverification on the Form I-9 must occur not later than the date work authorization expires and must comply with the applicable document presentation and examination procedures in paragraphs (b)(1)(ii)(A) and (b)(1)(ix) of this section, and form instructions. If an Employment Authorization Document (Form I-766) as described in §274a.13(d) was presented for completion of the Form I-9 in combination with a Notice of Action (Form I-797C), stating that the original Employment Authorization Document has been automatically extended for up to 180 days, reverification applies upon the expiration of the automatically ex-

tended validity period under §274a.13(d) and not upon the expiration date indicated on the face of the individual’s Employment Authorization Document. In order to reverify on the Form I-9, the employee or referred individual must present a document that either shows continuing employment eligibility or is a new grant of work authorization. The employer or the recruiter or referrer for a fee must review this document, and if it appears to be genuine and relate to the individual, reverify by noting the document’s identification number and expiration date, if any, on the Form I-9 and signing the attestation by a handwritten signature or electronic signature in accordance with paragraph (i) of this section.

(viii) An employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times.

(A) An individual is continuing in his or her employment in one of the following situations:

(1) An individual takes approved paid or unpaid leave on account of study, illness or disability of a family member, illness or pregnancy, maternity or paternity leave, vacation, union business, or other temporary leave approved by the employer;

(2) An individual is promoted, demoted, or gets a pay raise;

(3) An individual is temporarily laid off for lack of work;

(4) An individual is on strike or in a labor dispute;

(5) An individual is reinstated after disciplinary suspension for wrongful termination, found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement;

(6) An individual transfers from one distinct unit of an employer to another distinct unit of the same employer; the employer may transfer the individual’s Form I-9 to the receiving unit;

(7) An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I-9 where applicable. For

§ 274a.2

8 CFR Ch. I (1–1–24 Edition)

this purpose, a related, successor, or reorganized employer includes:

(i) The same employer at another location;

(ii) An employer who continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets;

(iii) An employer who continues to employ any employee of another employer's workforce where both employers belong to the same multi-employer association and the employee continues to work in the same bargaining unit under the same collective bargaining agreement. For purposes of this subsection, any agent designated to complete and maintain the Form I-9 must record the employee's date of hire and/or termination each time the employee is hired and/or terminated by an employer of the multi-employer association; or

(8) An individual is engaged in seasonal employment.

(B) The employer who is claiming that an individual is continuing in his or her employment must also establish that the individual expected to resume employment at all times and that the individual's expectation is reasonable. Whether an individual's expectation is reasonable will be determined on a case-by-case basis taking into consideration several factors. Factors which would indicate that an individual has a reasonable expectation of employment include, but are not limited to, the following:

(1) The individual in question was employed by the employer on a regular and substantial basis. A determination of a regular and substantial basis is established by a comparison of other workers who are similarly employed by the employer;

(2) The individual in question complied with the employer's established and published policy regarding his or her absence;

(3) The employer's past history of recalling absent employees for employment indicates a likelihood that the individual in question will resume employment with the employer within a reasonable time in the future;

(4) The former position held by the individual in question has not been taken permanently by another worker;

(5) The individual in question has not sought or obtained benefits during his or her absence from employment with the employer that are inconsistent with an expectation of resuming employment with the employer within a reasonable time in the future. Such benefits include, but are not limited to, severance and retirement benefits;

(6) The financial condition of the employer indicates the ability of the employer to permit the individual in question to resume employment within a reasonable time in the future; or

(7) The oral and/or written communication between employer, the employer's supervisory employees and the individual in question indicates that it is reasonably likely that the individual in question will resume employment with the employer within a reasonable time in the future.

(ix) As an optional alternative to the physical examination procedure described in paragraph (b)(1)(ii)(A) of this section, the Secretary may, consistent with applicable law and via notice published in the FEDERAL REGISTER, authorize alternative documentation examination procedures with respect to some or all employers. The Secretary may adopt such procedures:

(A) As part of a pilot program;

(B) Upon the Secretary's determination that such procedures offer an equivalent level of security to that of physical examination as indicated by, for instance, observed measures of system integrity (such as error or fraud rates) or the procedure's capacity for confirming certain documents or information; or

(C) As a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services pursuant to Section 319 of the Public Health Service Act, or a national emergency declared by the President pursuant to Sections 201 and 301 of the National Emergencies Act.

(2) *Retention and Inspection of Form I-9.* (i) A paper (with original handwritten signatures), electronic (with acceptable electronic signatures that meet the requirements of paragraphs (h) and (i) of this section or original

paper scanned into an electronic format, or a combination of paper and electronic formats that meet the requirements of paragraphs (e), (f), and (g) of this section), or microfilm or microfiche copy of the original signed version of Form I-9 must be retained by an employer or a recruiter or referrer for a fee for the following time periods:

(A) In the case of an employer, three years after the date of the hire or one year after the date the individual's employment is terminated, whichever is later; or

(B) In the case of a recruiter or referrer for a fee, three years after the date of the hire.

(ii) Any person or entity required to retain Forms I-9 in accordance with this section shall be provided with at least three business days notice prior to an inspection of Forms I-9 by officers of an authorized agency of the United States. At the time of inspection, 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. If Forms I-9 are kept at another location, the person or entity must inform the officer of the authorized agency of the United States of the location where the forms are kept and make arrangements for the inspection. Inspections may be performed at an office of an authorized agency of the United States. A recruiter or referrer for a fee who has designated an employer to complete the employment verification procedures may present a photocopy or printed electronic image of the Form I-9 in lieu of presenting the Form I-9 in its original paper or electronic form or on microfilm or microfiche, as set forth in paragraph (b)(1)(iv) of this section. Any refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements as set forth in section 274A(b)(3) of the Act. No Subpoena or warrant shall be required for such inspection, but the use of such enforcement tools is not precluded. In addition, if the person or entity has not complied with a request to present the Forms I-9, any officer listed in 8 CFR 287.4 may compel production of the

Forms I-9 and any other relevant documents by issuing a subpoena. Nothing in this section is intended to limit the subpoena power under section 235(d)(4) of the Act.

(iii) The following standards shall apply to Forms I-9 presented on microfilm or microfiche submitted to an officer of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor: Microfilm, when displayed on a microfilm reader (viewer) or reproduced on paper must exhibit a high degree of legibility and readability. For this purpose, legibility is defined as the quality of a letter or numeral which enables the observer to positively and quickly identify it to the exclusion of all other letters or numerals. Readability is defined as the quality of a group of letters or numerals being recognizable as words or whole numbers. A detailed index of all microfilmed data shall be maintained and arranged in such a manner as to permit the immediate location of any particular record. It is the responsibility of the employer, recruiter or referrer for a fee:

(A) To provide for the processing, storage and maintenance of all microfilm, and

(B) To be able to make the contents thereof available as required by law. The person or entity presenting the microfilm will make available a reader-printer at the examination site for the ready reading, location and reproduction of any record or records being maintained on microfilm. Reader-printers made available to an officer of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor shall provide safety features and be in clean condition, properly maintained and in good working order. The reader-printers must have the capacity to display and print a complete page of information. A person or entity who is determined to have failed to comply with the criteria established by this regulation for the presentation of microfilm or microfiche to the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor, and at the time of the inspection does not present

§ 274a.2

8 CFR Ch. I (1–1–24 Edition)

a properly completed Form I-9 for the employee, is in violation of section 274A(a)(1)(B) of the Act and § 274a.2(b)(2).

(iv) Paragraphs (e), (f), (g), (h), and (i) of this section specify the standards for electronic Forms I-9.

(3) *Copying of documentation.* An employer, or a recruiter or referrer for a fee may, but is not required to, copy or make an electronic image of a document presented by an individual solely for the purpose of complying with the verification requirements of this section. If such a copy or electronic image is made, it must either be retained with the Form I-9 or stored with the employee's records and be retrievable consistent with paragraphs (e), (f), (g), (h), and (i) of this section. The copying or electronic imaging of any such document and retention of the copy or electronic image does not relieve the employer from the requirement to fully complete section 2 of the Form I-9. An employer, recruiter or referrer for a fee should not, however, copy or electronically image only the documents of individuals of certain national origins or citizenship statuses. To do so may violate section 274B of the Act.

(4) *Limitation on use of Form I-9.* Any information contained in or appended to the Form I-9, including copies or electronic images of documents listed in paragraph (c) of this section used to verify an individual's identity or employment eligibility, may be used only for enforcement of the Act and sections 1001, 1028, 1546, or 1621 of title 18, United States Code.

(c) *Employment verification requirements in the case of hiring an individual who was previously employed.* (1) When an employer hires an individual whom that person or entity has previously employed, if the employer has previously completed the Form I-9 and complied with the verification requirements set forth in paragraph (b) of this section with regard to the individual, the employer may (in lieu of completing a new Form I-9) inspect the previously completed Form I-9 and:

(i) If upon inspection of the Form I-9, the employer determines that the Form I-9 relates to the individual and that the individual is still eligible to work, that previously executed Form I-

9 is sufficient for purposes of section 274A(b) of the Act if the individual is hired within three years of the date of the initial execution of the Form I-9 and the employer updates the Form I-9 to reflect the date of rehire; or

(ii) If upon inspection of the Form I-9, the employer determines that the individual's employment authorization has expired, the employer must reverify such employment authorization on the Form I-9 in accordance with paragraph (b)(1)(vii) of this section, including complying with the applicable document presentation and examination procedures in paragraphs (b)(1)(ii)(A) and (b)(1)(ix) of this section, and form instructions; otherwise the individual may no longer be employed.

(2) For purposes of retention of the Form I-9 by an employer for a previously employed individual hired pursuant to paragraph (c)(1) of this section, the employer shall retain the Form I-9 for a period of three years commencing from the date of the initial execution of the Form I-9 or one year after the individual's employment is terminated, whichever is later.

(d) *Employment verification requirements in the case of recruiting or referring for a fee an individual who was previously recruited or referred.* (1) When a recruiter or referrer for a fee refers an individual for whom that recruiter or referrer for a fee has previously completed a Form I-9 and complied with the verification requirements set forth in paragraph (b) of this section with regard to the individual, the recruiter or referrer may (in lieu of completing a new Form I-9) inspect the previously completed Form I-9 and:

(i) If upon inspection of the Form I-9, the recruiter or referrer for a fee determines that the Form I-9 relates to the individual and that the individual is still eligible to work, that previously executed Form I-9 is sufficient for purposes of section 274A(b) of the Act if the individual is referred within three years of the date of the initial execution of the Form I-9 and the recruiter or referrer for a fee updates the Form I-9 to reflect the date of rehire; or

(ii) If upon inspection of the Form I-9, the recruiter or referrer determines

that the individual's employment authorization has expired, the recruiter or referrer for a fee must reverify on the Form I-9 in accordance with paragraph (b)(1)(vii) of this section; otherwise the individual may no longer be recruited or referred.

(2) For purposes of retention of the Form I-9 by a recruiter or referrer for a previously recruited or referred individual pursuant to paragraph (d)(1) of this section, the recruiter or referrer shall retain the Form I-9 for a period of three years from the date of the hire.

(e) *Standards for electronic retention of Form I-9.* (1) Any person or entity who is required by this section to complete and retain Forms I-9 may complete or retain electronically only those pages of the Form I-9 on which employers and employees enter data in an electronic generation or storage system that includes:

(i) Reasonable controls to ensure the integrity, accuracy and reliability of the electronic generation or storage system;

(ii) Reasonable controls designed to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of, or deterioration of an electronically completed or stored Form I-9, including the electronic signature if used;

(iii) An inspection and quality assurance program evidenced by regular evaluations of the electronic generation or storage system, including periodic checks of the electronically stored Form I-9, including the electronic signature if used;

(iv) In the case of electronically retained Forms I-9, a retrieval system that includes an indexing system that permits searches consistent with the requirements of paragraph (e)(6) of this section; and

(v) The ability to reproduce legible and readable hardcopies.

(2) All documents reproduced by the electronic retention system must exhibit a high degree of legibility and readability when displayed on a video display terminal or when printed on paper, microfilm, or microfiche. The term "legibility" means the observer must be able to identify all letters and numerals positively and quickly, to the exclusion of all other letters or numer-

als. The term "readability" means that the observer must be able to recognize any group of letters or numerals that form words or numbers as those words or complete numbers. The employer, or recruiter or referrer for a fee, must ensure that the reproduction process maintains the legibility and readability of the electronically stored document.

(3) An electronic generation or storage system must not be subject, in whole or in part, to any agreement (such as a contract or license) that would limit or restrict access to and use of the electronic generation or storage system by an agency of the United States, on the premises of the employer, recruiter or referrer for a fee (or at any other place where the electronic generation or storage system is maintained), including personnel, hardware, software, files, indexes, and software documentation.

(4) A person or entity who chooses to complete or retain Forms I-9 electronically may use one or more electronic generation or storage systems. Each electronic generation or storage system must meet the requirements of this paragraph, and remain available as long as required by the Act and these regulations. Employers may implement new electronic storage systems provided:

(i) All systems meet the requirements of paragraphs (e), (f), (g), (h) and (i) of this section; and

(ii) Existing Forms I-9 are retained in a system that remains fully accessible.

(5) For each electronic generation or storage system used, the person or entity retaining the Form I-9 must maintain, and make available upon request, complete descriptions of:

(i) The electronic generation and storage system, including all procedures relating to its use; and

(ii) The indexing system.

(6) An "indexing system" for the purposes of paragraphs (e)(1)(iv) and (e)(5) of this section is a system that permits the identification and retrieval for viewing or reproducing of relevant documents and records maintained in an electronic storage system. For example, an indexing system might consist of assigning each electronically stored

§ 274a.2

document a unique identification number and maintaining a separate database that contains descriptions of all electronically stored books and records along with their identification numbers. In addition, any system used to maintain, organize, or coordinate multiple electronic storage systems is treated as an indexing system. The requirement to maintain an indexing system will be satisfied if the indexing system is functionally comparable to a reasonable hardcopy filing system. The requirement to maintain an indexing system does not require that a separate electronically stored documents and records description database be maintained if comparable results can be achieved without a separate description database.

(7) Any person or entity choosing to retain completed Forms I-9 electronically may use reasonable data compression or formatting technologies as part of the electronic storage system as long as the requirements of 8 CFR 274a.2 are satisfied.

(8) At the time of an inspection, the person or entity required to retain completed Forms I-9 must:

(i) Retrieve and reproduce (including printing copies on paper, if requested) only the Forms I-9 electronically retained in the electronic storage system and supporting documentation specifically requested by an agency of the United States, along with associated audit trails. Generally, an audit trail is a record showing who has accessed a computer system and the actions performed within or on the computer system during a given period of time;

(ii) Provide a requesting agency of the United States with the resources (e.g., appropriate hardware and software, personnel and documentation) necessary to locate, retrieve, read, and reproduce (including paper copies) any electronically stored Forms I-9, any supporting documents, and their associated audit trails, reports, and other data used to maintain the authenticity, integrity, and reliability of the records; and

(iii) Provide, if requested, any reasonably available or obtainable electronic summary file(s), such as a spreadsheet, containing all of the information fields on all of the electroni-

8 CFR Ch. I (1-1-24 Edition)

cally stored Forms I-9 requested by a requesting agency of the United States.

(f) *Documentation.* (1) A person or entity who chooses to complete and/or retain Forms I-9 electronically must maintain and make available to an agency of the United States upon request documentation of the business processes that:

(i) Create the retained Forms I-9;

(ii) Modify and maintain the retained Forms I-9; and

(iii) Establish the authenticity and integrity of the Forms I-9, such as audit trails.

(2) Insufficient or incomplete documentation is a violation of section 274A(a)(1)(B) of the Act.

(3) Any officer listed in 8 CFR 287.4 may issue a subpoena to compel production of any documentation required by 8 CFR 274a.2. Nothing in this section is intended to limit the subpoena power of an agency of the United States under section 235(d)(4) of the Act.

(g) *Security.* (1) Any person or entity who elects to complete or retain Forms I-9 electronically must implement an effective records security program that:

(i) Ensures that only authorized personnel have access to electronic records;

(ii) Provides for backup and recovery of records to protect against information loss, such as power interruptions;

(iii) Ensures that employees are trained to minimize the risk of unauthorized or accidental alteration or erasure of electronic records; and

(iv) Ensure that whenever the electronic record is created, completed, updated, modified, altered, or corrected, a secure and permanent record is created that establishes the date of access, the identity of the individual who accessed the electronic record, and the particular action taken.

(2) An action or inaction resulting in the unauthorized alteration, loss, or erasure of electronic records, if it is known, or reasonably should be known, to be likely to have that effect, is a violation of section 274A(b)(3) of the Act.

(h) *Electronic signatures for employee.*

(1) If a Form I-9 is completed electronically, the attestations in Form I-9 must be completed using a system for

capturing an electronic signature that meets the standards set forth in this paragraph. The system used to capture the electronic signature must include a method to acknowledge that the attestation to be signed has been read by the signatory. The electronic signature must be attached to, or logically associated with, an electronically completed Form I-9. In addition, the system must:

- (i) Affix the electronic signature at the time of the transaction;
- (ii) Create and preserve a record verifying the identity of the person producing the signature; and
- (iii) Upon request of the employee, provide a printed confirmation of the transaction to the person providing the signature.

(2) Any person or entity who is required to ensure proper completion of a Form I-9 and who chooses electronic signature for a required attestation, but who has failed to comply with the standards set forth in this paragraph, is deemed to have not properly completed the Form I-9, in violation of section 274A(a)(1)(B) of the Act and 8 CFR 274a.2(b)(2).

(i) *Electronic signatures for employer, recruiter or referrer, or representative.* If a Form I-9 is completed electronically, the employer, the recruiter or referrer for a fee, or the representative of the employer or the recruiter or referrer, must attest to the required information in Form I-9. The system used to capture the electronic signature should include a method to acknowledge that the attestation to be signed has been read by the signatory. Any person or entity who has failed to comply with the criteria established by this regulation for electronic signatures, if used, and at the time of inspection does not present a properly completed Form I-9 for the employee, is in violation of section 274A(a)(1)(B) of the Act and 8 CFR 274a.2(b)(2).

[52 FR 16221, May 1, 1987]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 274a.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

§ 274a.3 Continuing employment of unauthorized aliens.

An employer who continues the employment of an employee hired after November 6, 1986, knowing that the employee is or has become an unauthorized alien with respect to that employment, is in violation of section 274A(a)(2) of the Act.

[52 FR 16221, May 1, 1987, as amended at 53 FR 8613, Mar. 16, 1988]

§ 274a.4 Good faith defense.

An employer or a recruiter or referrer for a fee for employment who shows good faith compliance with the employment verification requirements of § 274a.2(b) of this part shall have established a rebuttable affirmative defense that the person or entity has not violated section 274A(a)(1)(A) of the Act with respect to such hiring, recruiting, or referral.

§ 274a.5 Use of labor through contract.

Any person or entity who uses a contract, subcontract, or exchange entered into, renegotiated, or extended after November 6, 1986 (or, with respect to the Commonwealth of the Northern Mariana Islands, after the transition program effective date as defined in 8 CFR 1.1), to obtain the labor or services of an alien in the United States knowing that the alien is an unauthorized alien with respect to performing such labor or services, shall be considered to have hired the alien for employment in the United States in violation of section 274A(a)(1)(A) of the Act.

[74 FR 55739, Oct. 28, 2009]

§ 274a.6 State employment agencies.

(a) *General.* Pursuant to sections 274A(a)(5) and 274A(b) of the Act, a state employment agency as defined in § 274a.1 of this part may, but is not required to, verify identity and employment eligibility of individuals referred for employment by the agency. However, should a state employment agency choose to do so, it must:

- (1) Complete the verification process in accordance with the requirements of § 274a.2(b) of this part *provided* that the individual may not present receipts in lieu of documents in order to complete the verification process as otherwise